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THE  
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In re CROSBY et al.

PETTINGILL v. ANDERSON et al.

(Supreme Court of Washington. March 19, 1906.)

**1. APPEAL—DECISIONS REVIEWABLE—ORDER.**

An order vacating and setting aside a former order granting leave to a foreign guardian to sue is appealable.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 644, 640, 650.]

**2. GUARDIAN AND WARD—FOREIGN GUARDIAN—RIGHT TO SUE.**

Under 2 Ballinger's Ann. Codes & St. § 6419, providing that when the guardian and ward are both nonresidents, the ward's property may be removed on application of the guardian to the judge of the superior court who shall make an order, granting leave to remove the property, which order shall be authority to the guardian to sue for, and receive it in his own name for the use of the ward, the superior court has jurisdiction, in the absence of statute prohibiting it, to grant leave to a foreign guardian to sue for a debt due the ward.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, §§ 561, 570.]

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by Josiah L. Pettingill, as guardian of Margaret R. Crosby and William A. Crosby, against A. H. Anderson and another, executors of the will of Benjamin B. Healy. From an order vacating and setting aside an order granting the guardian permission to sue, he appeals. Reversed.

Wm. B. Allison and Wiley, Herr & Bayley, for appellant. Chas F. Munday, for respondents.

MOUNT, C. J. On July 31, 1905, the appellant, J. L. Pettingill, filed a petition in the superior court of King county, praying that he be appointed guardian of the estate of Margaret P. Crosby and William A. Crosby, minors, and for permission to institute an action as foreign guardian of said minors in the courts of King county, against the estate of Benjamin B. Healy, deceased, to recover an account alleged to be due from said estate to said minors. The petition alleged, in substance, that the minors were residents of the state of Wisconsin; that the petitioner was also a resident of that state, and had theretofore been regularly appointed and qual-

fied, according to the law of that state, as guardian of the persons and estate of said minors. A duly certified copy of the records of the probate court of La Crosse county, Wis., was attached to the petition. The petition further alleged, that Benjamin B. Healy, deceased, was during his lifetime indebted to the said minors in a large amount; that at the time of his death, said Benjamin B. Healy was a resident of King county in this state, and left a large estate therein; that Alfred H. Anderson and Lucy M. Healy were named, and are acting as, executors of the said estate of Benjamin B. Healy, deceased; that the petitioner duly presented a verified claim against said estate for the amount of the debt owing to his wards, and that the executors rejected said claim; that by reason thereof it is necessary for petitioner to bring an action in this state for the purpose of collecting the amount of said claim; and to remove the proceeds thereof to the state of Wisconsin for the benefit of said minors. Upon filing this petition, the court made an order fixing a time for the hearing of the petition, and 30 days' notice thereof was served upon the executors of the estate of Benjamin B. Healy, deceased, and upon their attorney. At the time fixed for the hearing, no one appeared to resist the application, and the court thereupon made an order authorizing the petitioner to remove any property of his wards found in the state, and granted authority and leave to the petitioner to sue the estate of Benjamin B. Healy, deceased, on the claim set out in the petition, and to receive and remove the proceeds thereof from this state for the benefit of said wards. Thereafter, on September 7, 1905, the said J. L. Pettingill, as guardian, brought an action against the executors of the estate of Benjamin B. Healy, deceased, to recover upon the claim which had been presented to and rejected by the executor, and which was stated in the petition. On September 12, 1905, the executors of the estate of Benjamin B. Healy, deceased, served and filed a motion and petition to vacate the order granting Mr. Pettingill a right to sue in this state. The petition and motion were based upon several grounds. The court, upon the hearing, sustained the petition and motion, and

vacated, and set aside the order. This appeal is from the last-named order.

Respondents have interposed several motions to strike the statement of facts and dismiss the appeal. There is no merit in any of the motions. The order appealed from, in effect, determines the action brought by the appellant against the executors of the estate, because if the order permitting him to sue is vacated, he has no right to further maintain the action. The order is therefore appealable. The only ground upon which the court could have vacated the order granting the foreign guardian leave to sue in this state was that the court had no jurisdiction to make the order. This is apparently the main contention of respondents. Certainly none of the others are well founded. We think the court had jurisdiction, upon the principle of comity, to make the order allowing the foreign guardian to maintain the action, because we have no statute prohibiting the same. Wharton on Conflict of Laws (volume 1; 3d Ed.), at page 592, § 265a, says: "Many of the state legislatures have, upon principles of comity, relaxed the rule, as stated by Judge Story, requiring an ancillary appointment; and have recognized the authority of foreign guardians who make due proof of their foreign appointment and authorization, and comply with such conditions as may be imposed. Thus, by local statutes in many states, foreign guardians of nonresident wards are authorized to receive and remove from the state, personal property of their wards in the hands of local guardians and others; and to this end they have been authorized to maintain suits within the state. Even in the absence of such a statute, it seems to be competent for a court possessing chancery powers to order funds belonging to the ward in the hands of a resident guardian to be transmitted to, and paid over to, the domiciliary guardian. It is discretionary, however, with the local courts, even under such statutes, to refuse permission to the foreign guardian to remove the property from the state if it is for the best interests of the ward that the property should be administered within the state." Upon the principle of comity the Legislature of this state enacted section 6419, 2 Ballinger's Ann. Codes & St. which provides as follows: "When the guardian and ward are both nonresidents, and the ward is entitled to property in this state, which may be removed to another state or territory, without conflict to any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state or territory in which such ward may reside, upon the application of the guardian to the judge of the superior court of the county in which the estate of the ward, or the principal part thereof, may be, in the manner following: The guardian so applying must produce a transcript from the records of a

court of competent jurisdiction, certified according to the laws of this state, showing his appointment as guardian of the ward in the state or territory in which he and the said ward reside; that he has qualified as such according to the laws thereof, and given bond, with sureties, for the performance of his trust; and must also give thirty days' notice to the resident executor, administrator, guardian, agent, or trustee, if there be such, of the applications. Thereupon, if no objection be made, or if no good cause be shown to the contrary, the judge of the court shall make an order granting such guardian leave to remove the property of said ward to the state or territory in which he or she may reside; which order shall be full and complete authority to said guardian to sue for and receive the same in his own name, for the use and benefit of said ward."

It is argued by respondents that this section does not apply to this case, because there is no tangible property involved here; that at most the property sought in this case is a disputed, unliquidated demand, a mere chose in action. The statute, however, uses the word "property" in its comprehensive sense, and evidently includes choses in action, because the last part of the section recites that the "order shall be full and complete authority to said guardian to sue for and receive the same in his own name for the use and benefit of said ward." This provision seems to make it clear that choses in action are included within the meaning of the word "property," as well as tangible property. It follows, therefore, that, under the statute, the court had jurisdiction to make the order. We see no good reason why it should be vacated. In fact, we are convinced that the court properly made the order permitting the foreign guardian to maintain the action in this state. If the estate of Benjamin B. Healy is indebted to the estate of the nonresident wards, there ought to be a recovery.

The judgment of the trial court vacating the order is therefore reversed.

DUNBAR, HADLEY, FULLERTON, and CROW, JJ., concur.

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WEBSTER v. SEATTLE, R. & S. RY. CO.  
(Supreme Court of Washington. March 19, 1906.)

DAMAGES—INJURIES—MEDICAL ATTENDANCE—EVIDENCE.

Where, in an action for injuries to a passenger, there was evidence that plaintiff had employed physicians; that he had been severely injured, and had not recovered at the time of the trial, and certain physicians testified that, while he would probably improve, it was problematical whether he would ever recover, two of them testifying that the injury was permanent, and that he would suffer as long as he lived, such evidence justified the recovery of the amount it was reasonably probable plaintiff

would be compelled to expend in the future for medical services.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 243.]

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Miner A. Webster against the Seattle, Renton & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Peters & Powell, for appellant. Frank H. Knapp, for respondent.

MOUNT, C. J. This action was brought to recover for personal injuries sustained by respondent when a passenger upon one of appellant's street railway cars. At the trial appellant did not contest its liability for the injuries respondent had sustained, and the only issue tried was the extent of respondent's injuries, and the amount of damages he was entitled to recover. Considerable evidence was taken upon this issue. At the close of the testimony, the court instructed the jury, among other things, that in estimating the damages they might take into consideration "any expense for medicine and care of physicians which plaintiff has necessarily been put to by reason of such injuries, or that he may, in the future, with reasonable probability be put to by reason of such injuries." The jury returned a verdict in favor of respondent for \$3,097.50, upon which a judgment was entered, and this appeal is prosecuted.

Appellant concedes that there was evidence to show medical attendance in the past, but contends that there was no evidence to show the value of physician's services prior to the trial, and no evidence that respondent would probably need such services in the future. This is the only question presented on the merits of the appeal. While there is no direct evidence in the record that respondent had paid for medical attendance in the past, yet there was abundant to show that he had employed, and was attended by, physicians, and that respondent had been severely injured and had not recovered at the time of the trial. Dr. Willis, a witness on behalf of appellant, gave as his opinion that it was doubtful if respondent would ever recover, and said: "I should say in all probability he would improve and get a good deal better, but, of course, in one of his age, I do not know whether he would get entirely over the effects of it or not. I think he should get over it enough so it really should not annoy him materially." Doctors Scudder and Bates, witnesses for the respondent, testified that the injury was permanent, and that respondent would continue to suffer as long as he lived. This evidence was sufficient to support the instruction, because when it was shown that respondent was in need of medical attendance and had employed physicians, the presumption followed that there was

some expense attached to such employment; and when it was also shown that respondent would suffer in the future, it followed that in all probability he would need medical attention for which the jury were at liberty to fix a nominal sum at least. *Feeney v. L. I. R. Co.*, 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544; *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978. It was, therefore, not error for the court to give the instruction complained of.

The judgment is affirmed.

CROW, HADLEY, and DUNBAR, JJ., concur.

ROOT, J., concurs in result.

COLE v. SEATTLE, R. & S. RY. CO.  
(Supreme Court of Washington. March 27, 1906.)

1. APPEAL.—INSTRUCTIONS.—ARGUMENTATIVE LANGUAGE.—HARMLESS ERROR.

Where, in an action for injuries to a passenger, the jury saw plaintiff, knew his exact condition, heard him testify, etc., defendant was not prejudiced by an argumentative instruction that if a corporation injures a person so as to make him an object of pity to his fellow men and an object of ridicule to the thoughtless and unfeeling, and deprives him of the comfort and companionship of his fellows, defendant should respond in damages, etc.

2. TRIAL.—INSTRUCTIONS.—WEIGHT OF EVIDENCE.

Where a complaint for injuries to a passenger alleged damages for medical services incurred in the sum of \$100 and for loss of earnings in the sum of \$450, instructions that the jury, if warranted by the evidence, might allow damages to plaintiff for medical services for which he had become liable, or had obligated himself in an amount not exceeding \$100, and, if warranted by the evidence, might allow damages for loss of time not exceeding \$450, merely limited the recovery to the amount alleged, and were not erroneous as an intimation that there was evidence sufficient to warrant a finding for the amount stated for medical services and loss of earnings.

3. DAMAGES.—PERSONAL INJURIES.—FUTURE MEDICAL TREATMENT.

Where a number if not all the physicians testified that it might be, or probably would be, necessary for plaintiff to have further medical treatment, the court was justified in permitting the jury to make an allowance to plaintiff for probable future expenses for necessary medical treatment.

4. SAME.—IMPAIRMENT OF MENTAL FACULTIES.

Where there was evidence both of a permanent impairment of plaintiff's health and also of an impairment of his mind, evidencing a lack of mental vigor and inability to give intelligent, successful, and consecutive attention to his business, which he had never experienced prior to the accident, and evidence that plaintiff might not ever fully recover, it was not error for the court to permit the jury to award damages as for the permanent impairment of plaintiff's mind.

Root, J., dissenting.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by William A. Cole against the Seat-

tle, Renton & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Peters & Powell, for appellant. Hastings & Stedman, for respondent.

CROW, J. This is an action to recover damages for personal injuries. The appellant, Seattle, Renton & Southern Railway Company, a corporation, operates a line of electric railway between Seattle and Renton in King county. On October 25, 1904, a collision occurred between two of its cars, on one of which the respondent William A. Cole was a passenger. After the collision, respondent was picked up in an unconscious condition and taken to a hospital, where he remained for two or three weeks before recovering sufficiently to return home. He alleges serious permanent injury to his general health, his mental and business capacity, and also his sense of hearing. The appellant has tendered no issue on its liability to answer in damages, the negligence of its employes not being denied. The only issues tried were the extent of respondent's injuries and the amount of his damages. The evidence tends to show that respondent received a violent blow upon the right side of his head, causing concussion of the brain and nervous shock from which he still claims to suffer; that his general health has been impaired; that he has sustained loss in business capacity, and also in mental energy and control. It appears beyond dispute that the sense of hearing in his right ear has been impaired. He also claims an injury to his eyesight, and contends that, although only 35 years old, he has aged rapidly since the accident. Although there is a sharp conflict in the evidence as to some of these claims, yet there is much testimony to sustain them. The jury returned a verdict in respondent's favor for \$7,500, and from a judgment entered thereon this appeal has been taken.

The only errors presented are based upon instructions to the jury, the first assignment being that the court erred in giving the following instruction: "If a person or a corporation negligently causes an injury to another who is without fault, which makes the latter an object of pity to his fellow men and an object of ridicule to the thoughtless and unfeeling and deprives him of the comfort and companionship of his fellows should respond in damages for the injury sustained. Therefore if you find for the plaintiff and further find that among other injuries either or both of his ears were impaired at the time so that his hearing is impaired and a considerable degree of deafness has ensued which is more or less permanent, and as a consequence the plaintiff's ability to gain remunerative employment has been lessened or decreased, then you may not only allow him such sum as damages therefor as in your sound judgment will reasonably compensate him for the difference between his lessened earning ca-

capacity on account of such deafness, if any, and what it would be if his hearing was not impaired, but also compensation for any probable distress of mind or mental suffering, if any, that he may endure by reason of having such deafness." The foregoing instruction seems to be the one most vigorously attacked, and upon the alleged error in giving it appellant seems to base its principal reliance for a reversal. It is contended by appellant that this instruction is argumentative, is not based on any evidence in the case, and is erroneous and prejudicial in the extreme. We think it subject to criticism in that it is perhaps argumentative, and includes expressions and statements not pertinent to the issues or evidence. It is true, as contended by appellant, that no direct evidence was offered sufficient to show the impairment of respondent's hearing to have been of such a character or degree as to make him an "object of pity to his fellow men," or "an object of ridicule to the thoughtless and unfeeling," or "deprive him of the comfort and companionship of his fellows," and these expressions should have been omitted by the court. There was ample and undisputed evidence showing that respondent's hearing, especially in the right ear, had been seriously and perhaps permanently impaired. The jury, however, saw respondent, heard him give his testimony in open court in response to interrogatories propounded to him by counsel, and must have observed how well he could hear. If there was anything in his condition or appearance sufficient to render him an object of pity or ridicule, or to deprive him of the comfort and companionship of his fellow men, the jury knew that fact. On the other hand, if no such conditions existed or were apparent, they likewise knew that fact. We would not be justified in assuming they were in any way misled by the wording of this instruction. The principal difficulty with the instruction is that it is based upon and quotes certain language used arguendo in *Gray v. Washington Water Power Company*, 30 Wash., at page 674, 71 Pac., at page 209, which was not a part of any instruction there approved by this court, but was employed with reference to the facts then before the court arising out of the condition of the plaintiff in that case, who was shown to have been so horribly mutilated and disfigured as to render her appearance repulsive. It is not invariably a safe or correct practice for attorneys and trial courts to formulate instructions by inserting therein exact quotations from argumentative language which an appellate court may have employed as applicable to an entirely different state of facts. Although this instruction may be correct as an abstract principle of law, it is not applicable to the evidence in this case. Yet, notwithstanding this criticism, we fail to see how it constituted prejudicial error. The jury could not have been misled, as they saw respondent and knew his exact condition. No question was

raised as to the fact of his injuries, nor as to the appellant's liability for damages. He was injured to some extent and was entitled to some compensation in damages, and we are not justified in presuming that the jury, ignoring the evidence and disregarding the appearance and condition of respondent, found he was an object of pity or contempt, or that he was liable to be deprived of the comfort and companionship of his fellows, nor can we presume they allowed him additional damages on account of any such conditions not shown to exist. This being true, the argumentative character of the instruction, as disclosed by the use of the word "therefore," while objectionable, does not seem to us to have been harmful or prejudicial to appellant.

The court, in effect, further instructed the jury that they might, if warranted by the evidence, allow damages to respondent for medical services for which he had become liable or had obligated himself in an amount not exceeding \$100; also that they could, if warranted by the evidence, allow him damages for loss of time, not exceeding \$450. Appellant complains of these instructions, contending there was no evidence of any expense incurred for medical services exceeding \$60 or \$70; also that it was for the jury to say whether the evidence as to loss of earnings amounted to \$450. As we understand the appellant's contention, it insists that these instructions were an intimation or suggestion to the jury that there was evidence sufficient to warrant a finding of \$100 for medical services and \$450 for loss of earnings. We do not think the instructions were improper or susceptible of any such construction. In his complaint respondent alleged damages for medical services incurred in the sum of \$100, and for loss of earnings in the sum of \$450, and all the court did was to limit the recovery to the amounts alleged, without any suggestion as to any sum which the evidence authorized or that should be allowed. The court properly based these instructions upon the issues presented by the pleadings.

The court also instructed the jury as follows: "If you find for the plaintiff in this action and if you find by a fair preponderance of the proofs that he will suffer pain in the future and will be subject to loss of time and expenditures because of such injuries, then you are instructed that you can, in estimating his damages, take into consideration of the probable amount of pain he will suffer, the probable loss of time and the probable amount of expenditure he will be put to in the future on account of such injuries, all of which may be in addition to the other items, if any, that may enter into your calculations, but in no event shall the amount of your verdict exceed the sum sued for by the plaintiff, to wit, \$15,650.00." Appellant complains that by this instruction the court erred in permitting the jury to assess damages for the probable amount of expenditure the respondent will incur in the future,

and contends there was no evidence to afford a basis for awarding any such damages, and that the jury was left to assess damages by mere guess, without being told the expenditures must be reasonably necessary. A number if not all the physicians called as witnesses testified that it might be, or probably would be, necessary for the respondent to have further medical treatment. While it was impossible to estimate with mathematical certainty what such treatment would cost, the jury, when awarding damages, were authorized to consider the probability of such treatment becoming necessary. This instruction, we think, is within the rule heretofore announced by this court. See *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978; *Webster v. Seattle, Renton & Southern Ry. Co.* (Wash.) 85 Pac. 2.

The last instruction complained of by the appellant reads as follows: "If, through any negligence of the carrier or its employes a passenger is injured without any fault or negligence on his part, then such carrier becomes liable for all damages that such passenger may suffer on account of any injuries so received or that are directly and proximately traceable to such injuries which would be reasonable compensation for the pain and suffering arising to him from such injuries as well as for all permanent injuries to him or to any portion of his body or the permanent impairment of any of his organs and for any injury to his mental faculties caused by such injuries, and in this connection if you find for the plaintiff in this action you may consider the evidence, if any relating to the plaintiff's mental faculties, and if you find that the plaintiff's mind or his mental faculties were injured or permanently impaired by reason of said injuries, then you may consider damages therefor, and in estimating such damages you should consider the degree of probable permanent injury to plaintiff's mind and to what extent such impairment of plaintiff's mental faculties, if any, lessens plaintiff's capacity for performing equally as remunerative employment as before such injuries; and if you find that his capacity for obtaining employment or earning a livelihood has been lessened by reason of such injuries to his mind or to his mental faculties, then you may estimate how much less the plaintiff will probably earn for the balance of his life by reason of such injuries and allow the plaintiff therefor." The principal objection urged to this instruction is, that by it the court permitted the jury to award damages for any permanent impairment of plaintiff's mind; that it was not justified by the evidence and was extremely prejudicial. Appellant also contends that, if the only issue to be tried had been whether there was any permanent impairment of plaintiff's mental faculties, the court, for want of evidence, could not have allowed such issue to go to the jury. Appellant evidently regards the evidence on this issue too lightly. The record discloses evidence tend-

ing to show not only a permanent impairment of plaintiff's health, but also that his mind was affected. By this we do not mean that he was mentally incompetent, or that his reasoning faculties were destroyed, but the evidence did tend to show a lack of mental vigor or control after the accident which did not exist before; also an inability to give intelligent, successful, and consecutive attention to his business, which he had never experienced prior to the accident. While some question arose as to whether this condition would be permanent, there was evidence tending to show that the respondent might not fully recover. If any decrease in the respondent's mental vigor and ability, impairing his capacity to earn money, was caused by his injuries, it was certainly proper for the jury to consider such condition in estimating the damages to be awarded. There was evidence tending to show a decrease in his earning capacity by reason of the lack of his former mental vigor. Without entering into a detailed statement of such evidence, we think it sufficient to warrant the giving of this instruction, which, upon the facts shown, was not erroneous.

There being no prejudicial error in the record, the judgment is affirmed.

MOUNT, C. J., and DUNBAR, and HADLEY, JJ., concur.

ROOT, J. (dissenting). A careful consideration of the record convinces me that the verdict in this case was excessive. I do not think the evidence justifies any judgment greater than \$4,500. I therefore dissent from the conclusion announced by the majority of the court.

#### SPRING HILL IRR. CO. v. LAKE IRR. CO. et al.

(Supreme Court of Washington. March 20, 1906.)

#### 1. JUDGMENT—BAR OF CAUSES—IDENTITY OF ISSUES.

The complaint in a former case alleged that plaintiffs therein were the owners in fee simple and in possession of the first right to divert the waters of a certain creek, to the extent of a certain amount of water; that defendants claimed some interest or title to said water rights adverse to plaintiffs. The prayer asked that defendants should set up their claims in and to the premises, and that such claim should be declared without foundation and clouds on plaintiffs' title. *Held* that, if defendants in that action desired to litigate the question of a prescriptive right, it should have done so, and the judgment therein for plaintiffs was a bar to a subsequent action by defendants to establish such right.

#### 2. SAME.

On a plea by defendant of former adjudication, plaintiff cannot insist that the order of the appellate court in the former action, remanding it to the lower court, prevented him from raising certain issues which it was his duty to interpose in the action.

#### 3. DISMISSAL—SUSTAINING DEMURRER.

Where an answer set up a former judgment sufficient to bar the action, and a demurrer to the reply was sustained, there were no issues remaining which called for evidence, and it was proper to dismiss the action.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Dismissal and Nonsuit, §§ 134-139.]

Appeal from Superior Court, Chelan County; R. S. Steiner, Judge.

Action by the Spring Hill Irrigation Company against the Lake Irrigation Company and others. From a judgment dismissing the action, plaintiff appeals. Affirmed.

C. Victor Martin, for appellant. W. O. Parr, for respondents Harlin, Sanders, and Mooney. Kirk Whited, for other respondents.

HADLEY, J. In this action the plaintiff claims to be the owner of the right to use all the water flowing in the two northwest branches of Stemilt creek, a perennial stream situated in Chelan county, this state. The right is alleged to have been prescriptively acquired, and the complaint states that the plaintiff and its grantors have diverted, appropriated, and used the water continuously, uninterruptedly, and adversely, claiming to be the absolute owners of such right for more than 10 years. It is alleged that the defendants claim a right to interfere with plaintiff's use of said water, and that since the year 1902, they have interfered therewith. The complaint asks that plaintiff shall be adjudged to be the owner of the right to divert and use the water; that the defendants shall be adjudged to have no rights or beneficial interest therein, and that they shall be perpetually enjoined from in any way interfering with plaintiff's use of all of said water. Separate answers were filed by defendants, denying generally the material allegations of the complaint, and pleading affirmatively as a bar a former adjudication of the same matters which plaintiff seeks to have adjudicated in this action. The former action set up in the answers is *Miller v. Lake Irrigation Company*, which was twice in this court, and is reported in 27 Wash. 447, 67 Pac. 996, and in 33 Wash. 132, 74 Pac. 61. The record of the former action is properly set up, and shows that the parties to this action or their predecessors in interest were parties to the former one; that the former action was brought for the purpose of determining the prior rights between the parties as to the waters of Stemilt creek, and that issues were joined and the rights of the parties adjudicated and determined in that action. The plaintiff replied to the answers and admitted the former action, but alleged that the only adjudication in that action was with reference to priorities of appropriation, and that the issues in the present case are not the same as those in the former case. The defendants demurred to the reply and, among other grounds set forth in the demurrers, it was stated that the reply showed affirmatively that the plaintiff's rights in said waters were fully determined in the former action. The demurrers were sustained, and the plaintiff having refused to plead further, judgment was entered dismissing the action. The plaintiff has appealed.

Respondents have interposed several mo-

tions, but as most of them pertain to the arrangement of the record and appellant's brief, and relate chiefly to the convenience of this court, we have decided to pass them without criticism of the record and without discussion. The point raised by one motion, that the record shows no service of the appeal notice, has been met by a supplemental record brought up by appellant, which shows such service. The motions are therefore denied.

It is argued by appellant that the issues in the former action related solely to priorities arising out of appropriation, whereas it is urged that the complaint in the case at bar tenders an entirely different and distinct issue, relating exclusively to rights acquired by prescription or adverse user. It is conceded that appellant might have raised the issue as to its prescriptive rights in the former action, if it had seen fit to do so; but it is argued that it was not required to do so, inasmuch as it was a defendant in that action and was only required to meet the issue of prior appropriation, which it is contended was the only one tendered by the complaint. The doctrine is invoked that not all things which might have been adjudicated in a former action shall necessarily be held to have been adjudicated, but only such as were in fact adjudicated. As a rule of general application the courts, without doubt, are lately inclined to adopt the above by way of modification of the rule which more generally obtained formerly, that what might have been adjudicated should be held to have been determined in a former action. While the former rule has been much relaxed as one of general application, yet, in considering the effect of a former case upon subsequent litigation between the same parties, the peculiar nature of such case, the subject-matter thereof, and the manner by which the complaint challenged the defendant to join issue, should in each instance be examined. In the former case, which is pleaded here as a bar, the complaint simply alleged that the plaintiffs in that action were the owners in fee simple and in possession of the first right to divert the waters of said creek, to the extent of 400 inches, miner's measure, under a six-inch pressure; that the defendants claimed some interest in, and title to, said water rights adverse to the plaintiffs, which claims were without right and constituted a cloud upon plaintiffs' title. The action was essentially one to quiet title, and whether it can be said to have related to real estate or not, it at least partook of all the characteristics of an action to quiet title to real estate, and we think was governed by the rules applicable to such case. The prayer of the complaint asked that the defendants in the action, of whom this appellant was one, should set up their claims in and to the premises, if any they had, and that upon a hearing thereof such claims should be declared to be without

foundation and clouds upon plaintiffs' title. The complaint was not upon its face based alone upon prior appropriation, but it merely alleged ownership in fee simple and possession of the first right to divert water. In other words, it alleged a good title to water rights, and it challenged the defendants to set up any claims they had against such rights. In actions to quiet title to real estate, where such general allegations of ownership are made, it is undoubtedly the duty of a defendant to set up any claim he may have of either a legal or equitable nature, and we think by analogy at least that, if appellant desired to litigate the question of a prescriptive right to these waters, it should have done so in the former action, and that it should now be estopped to raise it. Such peculiar circumstances, we think, particularly call for the application of the principles of estoppel. As respondents' counsel pertinently suggest, if appellant may now try this action on the theory of title by prescription, and if it should be defeated, what shall prevent it from again introducing future litigation, claiming title from some other source, all of which may have existed at the time of the former action? Such cannot be the policy of the law, but the policy rather is that such conflicting claims shall be raised when one is challenged to raise them so that titles may be at rest and have stability and value.

Upon appellant's own theory, we are unable to see how it can expect relief under the issues as they stand. In the former action it dated its claim of title from the year 1885, and in this action it claims that its prescriptive right was initiated at that time. The record of the former case shows that the rights which were adjudicated to respondents in that action, and which were based upon appropriation, had their inception long within the period following the year 1885 necessary for appellant's prescriptive rights to have matured. The adjudication in the former case, therefore, shows that appellant could not have been in the continuous, uninterrupted, and adverse possession of the water rights claimed by respondents for a sufficient time to have acquired them by prescription. Respondents are claiming no rights here except what were awarded to them in the former case. They expressly disclaim any further claim to the waters of said stream. The essential question raised by the complaint in this action was therefore necessarily adjudicated in the former one. That decree was necessarily based upon the establishment of facts which negative those alleged in the complaint now before us, as to continuous and uninterrupted possession and user by appellant. Such uninterrupted, continuous, adverse possession and user could not have existed as to the volume of water that was awarded to these respondents, in the face of the adjudication that the latter were using and appropriat-

ing it at the same time. No prescriptive right could have matured in behalf of appellant under the facts involved and found in the former case.

Appellant argues that, when the former case was first here on appeal, it was sent back with instructions to the trial court to merely determine priorities of appropriation. While an expression in the opinion would so indicate, yet the order remanding the case stated that the court should "determine the priority of rights of the respective claimants." If appellant believed it was by that decision prevented from raising the question of its prescriptive right, it should have called our attention to it on petition for rehearing, or it should have applied to the trial court for leave to introduce that defense. This court placed no restrictions upon the trial court in the exercise of its discretion to permit the introduction of what it should deem to be proper issues not already in the case. The case was determined here upon the issues as they were brought here on that appeal. It was plainly appellant's duty to have interposed the defense when it first appeared in the action, but upon the return of the cause to the superior court, that tribunal upon proper showing was not prevented by this court from exercising its discretion to consider and grant an application to amend the answer.

Appellant further contends that, even with the demurrer to the reply sustained, there were issues remaining which called for evidence, and that it was error to dismiss the action. We think not. The ruling upon the demurrer effectively disposed of the case. The reply admitted the former record and, as we have seen, that is sufficient to bar relief in this action.

The judgment is affirmed.

MOUNT, C. J., and FULLERTON, DUNBAR, CROW, and ROOT, JJ., concur.

O'BRIEN et al. v. ALLEN et ux.

(Supreme Court of Washington. March 20, 1906.)

# 1. JUDGMENT — CONCLUSIVENESS — MATTERS NOT IN ISSUE.

In an action to set aside a deed, a finding as to the amount remaining due on a certain prior judgment was not within the issues, and was not an adjudication, so as to render parol evidence of the amount due inadmissible in a subsequent action wherein the amount due on the judgment was an issue.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1263-1268.]

# 2. SAME—CONSTRUCTION OF JUDGMENT—SUBJECT-MATTER.

A decree merely describing a prior judgment for the sole purpose of identification and stating the amount thereof in the description is not an adjudication as to the amount due.

# 3. EXECUTION—SATISFACTION OF JUDGMENT—EFFECT.

Where the proceeds of a sale of property on execution and uncredited cash payments

made in satisfaction thereof had fully satisfied the judgment at the time a second alias execution was issued to sell the same property for the amount of the uncredited payments, no title could be acquired by the purported execution creditor by purchase at the sheriff's sale made by virtue of the second alias execution.

Appeal from Superior Court, King County; W. R. Bell, Judge.

Action by Mary O'Brien, as executrix of James Manogue, deceased, and others, against John H. Allen and wife. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Jay C. Allen, for appellants. G. M. Emory, for respondents.

CROW, J. On January 8, 1895, John H. Allen, appellant herein, recovered a personal judgment in the superior court of King county in cause No. 19,171, against Joseph McCabe and Terence O'Brien, for \$1,202, debt, \$120.20, attorney's fee, and \$23.80, costs. On January 7, 1895, Terence O'Brien, and Ellen O'Brien, his wife, had conveyed to one James Manogue certain real estate in King county, including the real estate in dispute in this action. Thereafter said Allen, having issued an execution on his judgment which was returned unsatisfied, commenced an action, No. 19,517, in the superior court of King county, to set aside said deed as having been made to hinder and delay the collection of his judgment. On October 10, 1895, findings of fact were made in said cause, upon which a decree was entered, adjudging said deed to be void as to said John H. Allen, and subjecting the property therein described to the lien of his judgment, which is described by the decree in the following language: "That certain judgment heretofore on the 8th day of January, 1895, rendered in the above court in favor of the plaintiff, John H. Allen, against the defendant, Terence O'Brien, and one Joseph McCabe, for the sum of \$1,327.20, together with the costs of said action taxed at \$23.80. No other language is used in said decree to describe said judgment or to adjudicate the amount remaining due thereon. Defendants O'Brien and wife and James Manogue, claiming said original judgment was for a debt on which McCabe was principal and O'Brien surety, afterwards filed a petition in said cause No. 19,517, to modify the findings and decree therein, for the purpose of showing that the real estate conveyed to Manogue was the community property of O'Brien and wife, and not subject to the lien of said judgment. By this petition, which was denied, no question was raised as to the amount remaining due on said judgment. Afterwards John H. Allen issued an alias execution in cause No. 19,171, and levied upon the real estate which had been subjected to his lien. All of said real estate was sold on January 10, 1896, to said John H. Allen for the total sum of \$1,310; the tracts involved in this suit selling separately for \$110. The entries on the execution docket

show that after crediting said \$1,310, proceeds of this sale, there remained on January 10, 1896, an unsatisfied deficiency judgment for \$123.25, and no other payments appear on the execution docket. In January, 1897, James Manogue redeemed from said sheriff's sale the land in dispute herein, although John H. Allen denied his right to redeem and made a futile attempt to prevent the same by applying for a writ of mandate to compel the sheriff to execute and deliver a deed to him. The redemption money was received and appropriated by Allen, who afterwards procured a second alias execution to be issued on the deficiency judgment shown on the execution docket, and caused the sheriff to again sell the land which Manogue had redeemed. At this second sale Allen again purchased said real estate for the exact amount necessary to satisfy the second alias execution, and now claims title.

It is here claimed by respondents that early in May, 1895, O'Brien and McCabe paid to Allen on said judgment the sum of \$300, which he neither credited nor caused to be entered upon the execution docket. Said payment, if made, was more than sufficient to have satisfied the deficiency judgment long before the second alias execution was issued. James Manogue died testate on January 14, 1897, leaving the respondents Francis Henry Manogue, Mary Manogue, and Eva Marie Manogue, his minor children, as his only heirs at law and legatees. Respondent Mary O'Brien was shortly thereafter appointed executrix of his last will and testament, and later was appointed guardian of his minor heirs. On April 11, 1898, the respondents Mary O'Brien, as executrix of the last will and testament of James Manogue, deceased, and Francis Henry Manogue, Mary Manogue, and Eva Marie Manogue, by their guardian, Mary O'Brien, instituted this action to quiet the title of the estate of James Manogue to the real estate which had been sold under said second alias execution. Respondents alleged that, after the entry of said original judgment in cause No. 19,171, a payment of \$200 was made on January 23, 1895, and a further payment of \$100 on May 23, 1895, by said McCabe and O'Brien to said John H. Allen, which said Allen had received but neglected to have credited on the execution docket; that said first sheriff's sale was made January 10, 1896; that by such sale and the cash payments of \$300, said judgment was more than fully satisfied; that after said Manogue had redeemed from said first sale, the said Allen caused said second alias execution to issue upon an apparent deficiency judgment shown by the execution docket, under which he again purchased said land, and now claims title; and that at the time of the commencement of this action said land was in the actual possession of no person whomsoever. Respondents prayed that their title might be quieted, and asked for other relief.

On May 23, 1900, and before any answer

was filed, a written stipulation was entered into between respondents and appellants herein, which, in substance, provided that this cause was compromised and settled upon condition that the appellants John H. Allen and Lucy A. Allen, his wife, should pay the respondents \$400 in three months, \$400 in six months and \$400 in nine months; said sums to be evidenced by their promissory notes; that this cause should be stricken from the trial calendar, and in case said promissory notes were severally paid at maturity, the appellants should be entitled to a decree of dismissal without costs to either party; but in event of nonpayment of any of said notes, respondents might proceed with said cause as though the stipulation had never been made; that any admissions made in said stipulation or which might be inferred thereby should not be used upon any trial of this cause against either party. Only one of said notes was paid. Thereafter, on April 4, 1904, no further payments being made, respondents noted this cause for further proceedings, and appellants thereupon answered, alleging that after the entry of the original judgment in said cause No. 19,171, O'Brien and wife executed said deed to Manogue; that appellants instituted said cause No. 19,517 to set the same aside; that on the trial thereof the court found the sum of \$200 had been paid on said original judgment after its rendition, and further found the amount due thereon to be \$1,327.20, and \$23.80 costs; that thereafter the court, by its decree in said cause No. 19,517, directed said real estate to be subjected to appellants' lien for said amount; that O'Brien and wife and Manogue thereafter filed their petition to modify said judgment, which petition was denied, and that the amount of said judgment as found was not questioned in said petition, but had become *res adjudicata*. Appellants also pleaded the stipulation herein above mentioned, the delivery of three notes for \$400 each to respondents, the payment of one note in full, and alleged that respondents had neither returned nor tendered to appellants the two notes which were unpaid and in default, and that by reason thereof they should be estopped from proceeding with this action.

The trial court made findings in favor of respondents, and refused those requested by appellants. From findings made, it appeared that on January 23, 1895, Terence O'Brien paid to said John H. Allen the sum of \$200, and on May 23, 1895, the further sum of \$100 on account of said judgment, neither of which payments was credited on the records in said cause No. 19,171. It was also found that, after said redemption had been made by said Manogue, and while said John H. Allen still retained said payments aggregating \$300, and after said judgment had been fully paid, he procured said second alias execution to be issued, and caused said lands to be sold; that he purchased the same for the sum of \$155.05, and received a certificate of sale;

and that he has ever since refused to recognize the rights of respondents as successors in interest to said James Manogue. It was further found that, at the time of the commencement of this action, a notice of its pendency was filed in the office of the county auditor, and that the lands in dispute were then vacant, unoccupied, and not in the possession of any person. Final judgment was entered in favor of the respondents, quieting their title, and this appeal has been taken.

Appellants first contend that the court erred in finding that any cash payments had been made on said judgment, and that by reason thereof said judgment had been fully satisfied before the issuance of the second alias execution. In support of this contention appellants rely upon their plea of *res adjudicata*. They insist that the findings of fact and final decree in said cause No. 19,517, which was brought to set aside said deed, constituted a final adjudication to the effect that the sum then remaining due on said judgment was \$1,327.20, and \$23.80 costs, and further contend that no parol evidence should have been admitted in this collateral proceeding to contradict such adjudication. The original findings of fact and decree filed and entered in said cause No. 19,517 are now before us as a part of the statement of facts, and present a very peculiar appearance. The findings were evidently prepared and submitted to the trial judge, Hon. J. W. Langley, who appeared as a witness for respondents on the trial of this action. One finding, No. 3, had been prepared for the purpose of showing that the land was the community property of Terence O'Brien and wife. This finding has been stricken by a heavy waving line, drawn through it in ink. At the close of all the findings, which are typewritten, a few words written in ink are added. Judge Langley testified that he thought the waving ink line erasing the third finding had been made by him, and testified that the added words and judge's signature were written by him in ink. The eleventh finding, as originally drawn, reads: "That since the rendition of said judgment there was paid on September 25, 1895, the sum of \$200 thereon." Lead pencil marks have been drawn through this finding, striking it, but no ink erasure has been made. Judge Langley testified that he did not think he had made these pencil erasures, nor would he state that he had authorized them. The thirteenth finding, as originally drawn, read: "There is now due upon said judgment the sum of \$—." Afterwards the blank was filled in with ink, so as to read: "\$1,327.20, and \$23.80 costs." Judge Langley said this was not in his handwriting, and the evidence fails to show who did write it. The final decree makes no allusion to said payment of \$200, nor, according to our construction, does it purport to adjudicate the amount due upon the original judgment. It simply describes the judgment in the words which we have above quoted in our state-

ment of this case. Terence O'Brien and his attorney both testified that \$300 had been paid to appellant Allen on account of the judgment. Several other witnesses stated that Allen, when a witness on the trial of cause No. 19,517, admitted \$300 had been paid him in cash upon this judgment. In his answer herein, he alleges the trial court, in cause No. 19,517, found \$200 had been paid, and this is shown by the finding which has been erased by pencil. Although he appeared as a witness in his own behalf on the trial of this action, he refrained from giving any testimony whatever tending to show either that these payments had been made or had not been made. He relies entirely upon the record in said cause No. 19,517. If there has been an adjudication therein finding the amount remaining due upon said judgment, it is binding upon the parties to this action. We do not think such an adjudication has been shown, for several reasons: (1) It was not within the issues in that action, which was not brought to determine the amount due, but only to set aside a deed; (2) although the findings may be somewhat inconsistent, we think, as originally signed by the trial judge, they found \$200 had been paid; (3) the decree does not purport to adjudicate the amount due, but describes the original judgment, for the evident and sole purpose of identification. With the record in this condition, it was not error for the trial court to admit parol evidence showing said payments to have been made; there being no adjudication of that question. We hold the trial court was authorized to try this issue of fact, and that its findings that the payments were made are fully warranted by the evidence. This being true, the first sale made by the sheriff, together with such cash payments, fully satisfied the judgment, and at the time the second alias execution was issued, appellant had no judgment whatever against O'Brien and McCabe. Hence he acquired no title under the second sheriff's sale. Freeman on Executions (3d Ed.) § 19. This not being an action to recover possession of real estate, but one to quiet title only, respondents alleged, and the trial court found, that, at the time of its commencement, said real estate was not in the possession of any person whomsoever. Appellants now contend that the court erred in making this finding; that the evidence warranted a finding, which should have been made, that appellants themselves were in possession; that the property was not vacant or unoccupied, and hence, under the authority of *Povah v. Lee*, 29 Wash. 108, 69 Pac. 639, this action should be dismissed. While there is a considerable conflict of testimony upon this issue, nevertheless we think the evidence before us is amply sufficient to sustain the finding made by the trial judge who saw and heard the witnesses.

Appellants base a further assignment of error upon the action of the trial court in

admitting as evidence certain original papers and files in said causes No. 19,171 and No. 19,517. Appellants insist that certified copies should have been offered, as otherwise the party not presenting such evidence would, if compelled to appeal, have to assume the burden and expense of substituting certified copies to be attached to a statement of facts. By stipulation subsequently made, the original files which were offered and admitted in evidence have been attached to the statement of facts, and transmitted to this court. Appellants, therefore, have incurred no additional trouble or expense, and it is unnecessary for us to pass upon this contention.

Appellants further contend that the written stipulation herein precludes the prosecution of this action. The stipulation provided that, if any of the notes given by appellants should not be paid when due, respondents might proceed with the trial in the same manner as though no stipulation had been made. This is all respondents have done. This action was already pending when the stipulation was made. Hence the return of the notes could not be a condition precedent to its commencement. The undisputed evidence shows respondents did tender the unpaid notes to appellants before the trial commenced, which is all that could be required of them, especially as the stipulation provided that neither party should make use of any of its provisions upon the trial. There is no merit in this contention now made by appellants.

We find no prejudicial error in the record. The judgment is affirmed.

MOUNT, C. J., and FULLERTON, HADLEY, and DUNBAR, JJ., concur.

(42 Wash. 370)

STATE ex rel. BARBER ASPHALT PAVING CO. v. CITY OF SEATTLE.

(Supreme Court of Washington. March 20, 1906.)

# 1. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—ASSESSMENT NOTICE.

Notice that the assessment roll for the improvement of certain streets is on file and open to inspection, and that persons interested shall appear and make objections, after hearing which, and making such corrections as it deems just, the council will approve the roll and assess the amounts thereof against each parcel shown in the roll, is not notice that the council may amend the roll, include other property therein, and assess it.

## 2. SAME.

An assessment for street improvements is void as to such property as is not given notice, as required by statute and ordinance, between the filing of the assessment roll and its confirmation.

[Ed. Note.—For cases in point, see vol. 86, Cent. Dig. Municipal Corporations, § 1085.]

## 3. SAME—ASSESSMENT INVALID IN PART.

An assessment for street improvements based on benefits, each tract being assessed only its proportionate part of the whole, though invalid as to certain tracts because of want of

notice, is valid as to tracts as to which notice was given.

## 4. SAME—REASSESSMENTS.

Where an assessment for street improvements is invalid as to certain lots because of want of notice to their owners, a reassessment may be made as to them under the authority under which the city originally proceeded.

## 5. SAME—PARTIES TO ASSESSMENT PROCEEDINGS—CONTRACTOR.

The contractor for street improvements to be paid under Act March 14, 1899 (Laws 1899, p. 234, c. 124), in bonds redeemable out of a fund created by assessment is not a party to the assessment proceeding in the sense that not having made objection to it while in progress he may not urge its invalidity when tendered the bonds.

## 6. MANDAMUS TO COMPEL NEW ASSESSMENT.

Mandamus to a city to compel it to make a new assessment of property for a street improvement, the original assessment being void for want of notice, is the proper remedy of the contractor, payable in bonds redeemable out of a fund to be created by the assessment.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Mandamus by the state, on the relation of the Barber Asphalt Paving Company, against the city of Seattle. From an adverse judgment, defendant appeals. Reversed.

Scott Calhoun, for appellant. Peters & Powell, for respondent.

FULLERTON, J. The city of Seattle, acting under its powers as a city of the first class, caused one of its principal streets (Howard avenue), together with certain connecting streets, to be graded, paved with asphalt and otherwise improved; declaring, in the preliminary resolution, that it was its intention to assess the costs thereof to the property specially benefited by the improvement. The plan adopted was that prescribed by the act of March 14, 1899 (Laws 1899, p. 234, c. 124), which provides that bonds may be issued to pay the cost of a street improvement redeemable out of a fund created by a special assessment on the property benefited payable in installments running over a period not exceeding 10 years. The contract for doing the work was let to the relator, who agreed to take bonds in payment of the contract price to the amount of any balance that might remain due after the owners of the property assessed, who might desire to do so, had redeemed their property from the lien of the assessment. Thereafter, the work was completed to the satisfaction of the city; whereupon it made an assessment upon the property benefited, gave an opportunity to the property owner to redeem, and, after the time for redemption had expired, issued bonds to an amount equal to the difference between the contract price and the amounts paid in by the redemptioners. These bonds the city tendered to the relator, who refused to accept them, contending that the assessment out of which they were to be paid was made without notice to certain of the property owners, and was for that reason illegal and void. The relator thereupon re-

quested that the city make a new assessment of the property benefited, which the city refused to do. It then applied to the superior court of King county for a writ of mandate compelling the assessment to be made. After a hearing this application was granted and a peremptory writ issued. From the order directing the writ to issue the city prosecutes this appeal.

The assessment roll, as prepared and filed by the board of public works, was made to include property back from the marginal lines of the improved streets for a distance of 120 feet only. On the filing of this roll, the following notice was given: "Notice of Assessment Roll. Notice is hereby given that the assessment roll of local improvement district No. 902, for the improvement of Harvard avenue and Harvard Avenue North, from East Roy street to Broadway; Boylston Avenue North from East Roy street to East John street; Boylston avenue from East Denny Way to East Union street; Belmont Avenue North from East Roy street to East Denny Way; East Mercer street, East Republican street, East Harrison street, East Thomas street, East John street, East Denny Way, all from the west line of Belmont Avenue North to the west line of North Broadway; East Howell street, East Olive street, East Pine street and East Pike street all from the west line of Boylston avenue to the west line of Broadway; East Union street from the east line of Bellevue avenue to the west line of Broadway; Seneca street and Spring street from the east line of Boylston avenue to Harvard avenue—all in the city of Seattle, by paving the same with asphalt, etc., under ordinance No. 10,710, has been reported by the board of public works to the city council of the city of Seattle, and is now on file in the office of the city comptroller, and ex officio city clerk, and that the same is now open for public inspection at said office and will remain open for inspection until Monday, the 22d day of August, 1904, at 5 o'clock p. m., and all persons interested are hereby requested to appear before the city council at a session thereof to be held in the council chamber in the city hall on said 22d day of August, 1904, at 8 o'clock p. m., and make objections thereto. At said time so fixed, the city council will consider any and all objections made, and will make such corrections in said roll as it deems just, and will then by ordinance approve such roll and levy and assess the amounts thereof against each parcel and lot of land and part thereof shown in said roll, and declare the same a first lien thereon. Said matter may be adjourned to a later date if so ordered, by the city council. John Riplinger, City Comptroller and Ex Officio City Clerk." At the hearing held pursuant to the notice the city council, without any further notice, amended the roll so as to make it include all property back from the improved streets for a distance of 180 feet, and passed an ordinance levying an as-

essment upon the property included within the roll as so amended. It is the relator's contention that the property included in this outer rim of 60 feet has been assessed without notice to its owners, and that this fact renders the whole assessment void. The city disputes both the fact and the conclusion drawn from the fact and these conflicting contentions constitute the principal questions to be considered.

As to the fact, it seems to us that there can be but little question that this outer rim was assessed without notice to its owners. The assessment roll as made out and filed by the board of public works did not include any part of it, and it was to this roll that the attention of the owners was directed by the published notice. This notice, it will be observed, specially recites that the city will assess the amount expended on the improvement of the street "against each parcel and lot of land shown in said roll, and declare the same a first lien thereon." If this means anything at all, it means that the property included within the roll and that property only will be assessed to create the necessary fund, and that the property holder need look no further than the roll to ascertain whether his property is liable to assessment. Any property holder, owning property in the vicinity of the improved street, was entitled to examine the roll, and, if he did not find his property described therein, to go away with the assurance that his property was not to be assessed. If this be not the meaning of the notice, then it is misleading, and worthless as notice because misleading. Whether the omission to give the notice renders the assessment void is a more serious question. It is conceded that it is necessary to the validity of every law prescribing a method for imposing a special assessment upon real property that it provide for notice to the owner of the property, and afford him an opportunity to be heard concerning the correctness of the assessment at some stage of the proceeding before the assessment becomes absolute or his property is taken to satisfy the lien of the same. But it is said that only one notice is necessary, and that this notice may be given at any stage of the proceedings; and since there can be no foreclosure of the assessment lien in this instance without a further notice to the property holder the requirements of the law are satisfied, and the assessment, though it may be voidable, is not void. It is held, however, and it seems to be the general rule, that to render the assessment valid even when made under a constitutional law it is essential that the notice be given at that stage of the proceedings the law directs that it be given, and if more than one is provided for, more than one must be given. *Wilson v. Seattle*, 2 Wash. 543, 27 Pac. 474; *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441; *Halsch v. Seattle*, 10 Wash. 435, 38 Pac. 1131; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Garvin v. Daussman*,

114 Ind. 429, 16 N. E. 826, 5 Am. St. Rep. 637; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; 25 Am. & Eng. Enc. Law, p. 1215, and cases cited. This being the rule, the assessment on this outer 60 feet is void; for both the statute and ordinance under which the city proceeded provide for notice to the property holder at that stage of the proceedings between the time of the filing of the assessment roll by the board of public works and the time of its confirmation by the city council.

As to the property within the 120-foot limit, we think the assessment valid. The only objection urged against it is that the assessment cannot be valid as to part of the property and invalid as to the remainder; that there is such an interdependent relation between the several parts that one part cannot be void without the whole being void. We cannot think, however, that these objections are sound. In an assessment based upon benefits, where each individual tract is assessed only its proportionate part of the whole, the owner of a tract justly assessed has no valid ground of complaint because his neighbor has been unjustly assessed. If he has been taxed in a lawful manner for his just proportion originally, his assessment does not become unlawful or unjust because of the fact that the assessment proves invalid as to another tract, and he cannot be heard to complain of anything except unlawful or unjust exactions. Moreover, the uncomplaining owners of the tracts lawfully assessed have rights in the matter that ought not to be thus ignored. They should not be required without just cause to appear and contest anew the proportional share of the entire charge their property should bear, nor should their property be subjected to the additional costs of a reassessment where the original assessment is just. These proceedings furthermore while pending affect injuriously the right a person has to deal with his property, as it renders it impossible for him to make as favorable contracts concerning it as he can do when his rights therein are fixed. He ought not therefore to be subjected to the loss and annoyance of a reassessment unless the absolute necessities of the case require it.

It seems to also that a proper construction of the statute requires the holding that the assessment is to be declared void only so far as the necessities require. The statute provides that a property holder who has had notice and an opportunity to contest the validity and correctness of the assessment, if dissatisfied with the order made by the city counsel must appeal therefrom to the courts within a given time, or else be forever barred from questioning the regularity, validity or correctness of the assessment. It further provides that if an appeal from the order is taken and the court finds the objection well taken, it shall correct, modify, or annul the assessment only in so far as it affects the

property of the appellant, but that the action of the council in confirming the assessment shall be conclusive in all things upon all parties not appealing. If this statute is to be given effect it must necessarily be held that an adjudication that the assessment is void as to one tract does not invalidate the entire assessment. The case of Young v. Tacoma, 31 Wash. 153, 71 Pac. 742, and kindred cases cited are not contrary to the principle here announced. The court there had in review assessments made under a statute that did not contain the provision cited. They were cases also where the assessment was declared void for fundamental errors which affected the entire assessment, and were decided on a principle that would prevent the enforcement of the assessment against any of the property included within the roll. Here the error affects only a part of the property, and no reasons exist for declaring the assessment void for anything more than the affected part. We conclude therefore that the assessment is invalid as to that property included within the so-called outer rim of 60 feet, but valid as to all of the remainder of the property.

These considerations determine the principal questions suggested by the record, but the city insists upon some minor questions that must be noticed. It contends first that the city exhausted its powers when it made the original assessment, and cannot now make a reassessment except by virtue of the act of 1893; and under that statute it cannot make a reassessment until the first assessment has been declared void by the judgment of a court, and here there has been no such judgment. But the city has power by its charter and the general statutes and ordinances under which it originally proceeded to make a valid assessment of property benefited to pay for a street improvement, and this power is not exhausted by any irregular, voidable, or void attempt at its exercise. In other words, its power to make a valid assessment does not depend on the statute of 1893. It has that power from the laws granting the power to make an assessment, and no number of voidable or void attempts at its exercise destroys the power. True, the statute of 1893 is the only one operative in a certain class of cases; for example, where lapse of time, or fundamental defects in the original law, prevents a valid assessment under such original law, but it was not intended to cut off, and does not cut off, the right of a city to make a valid assessment where no other objection intervenes save the one that the city has already made an invalid or voidable attempt at an assessment.

It is next said that the contractor was a party in interest in this assessment, and inasmuch as he made no objection to it while it was in progress, and took no appeal from the final order, he is now estopped to question its validity. But the contractor was not

a party in the sense that the proceedings in any way bound it. Under its contract the city was obligated to pay it in bonds payable out of a fund legally created. The creation of that fund was wholly the duty of the city. If the city did not legally create the fund the contractor was not obligated to take the bonds, and the contractor's first right to object to the proceeding arose when the bonds were tendered to it. It could not intervene legally in the assessment proceedings; the most it could do would be to offer friendly suggestions which the city could heed or ignore as it chose. Having no legal right to intervene in the proceedings, it had, of course, no legal right to appeal therefrom, and cannot be estopped because it did not resort to an appeal. There is nothing in the case of *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197, that is contrary to this view. There the person held estopped was the owner of the city's obligations, and the proceedings which he afterwards sought to ignore as not binding upon him were instigated for his benefit, not in pursuance of any contract obligation. He was a party to the proceedings in every sense, and, as he did not appeal, was estopped to afterwards question their validity.

Lastly, it is said that mandamus is not the proper remedy; but we think it is, on the principle that it affords the only complete and adequate remedy. *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207, and the other cases from this court there cited.

The order appealed from is reversed, and the cause remanded with instructions to enter an order directing the appellant to reassess that part of the assessment district, outside of the 120-foot limit, for the amount heretofore apportioned to such part, namely, \$2,222.29, and the accrued interest thereon. Neither party will recover costs on this appeal.

MOUNT, C. J., and HADLEY, CROW, and DUNBAR, JJ., concur.

LESTER v. CITY OF SEATTLE et al.  
(Supreme Court of Washington. April 12, 1906.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—ASSESSMENTS—INJUNCTION.

The judgment for plaintiff in a suit to enjoin collection of an assessment for a street improvement, should not enjoin the city from collecting any further amount on account of the improvement; the city being entitled to make a reassessment.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Suit by Frances E. Lester against the city of Seattle and another to enjoin collection of an assessment for a street improvement. Judgment for plaintiff. Defendants appeal. Reversed.

Scott Calhoun, for appellants. C. M. Miller and Byers & Byers, for respondent.

PER CURIAM. The main question argued on this appeal was determined adversely to the appellants by this court in the case of *State ex rel. Barber Asphalt Paving Co. v. City of Seattle*, 85 Pac. 11. The judgment entered by the trial court, however, not only canceled the void assessment on the respondent's property and enjoined its collection, but it enjoined the city from "collecting or attempting to collect any further amount on account of said improvement." Since the city has the right to reassess the respondent's property for its due proportion of the cost of the improvement remaining unprovided for, that part of the judgment quoted is plainly erroneous, and the city should not be embarrassed by it in its effort to make a reassessment.

The judgment is reversed, and the cause remanded, with instructions to modify the judgment in accordance with this opinion.

FROMAN v. AYARS et al.

(Supreme Court of Washington. March 20, 1906.)

1. PHYSICIANS AND SURGEONS—MALPRACTICE—EVIDENCE.

Evidence in an action for loss of a foot, alleged to be due to malpractice, held to support a verdict for plaintiff.

2. SAME—DAMAGES—MEASURE FOR PERSONAL INJURY—MALPRACTICE.

The measure of damages for loss of a foot through malpractice in the care of a broken bone is not different from what it is where the loss is from the original injury caused by negligence.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Physicians and Surgeons, §§ 31, 46.]

3. DAMAGES—EXCESSIVE VERDICT.

A verdict for \$5,000 for loss of the foot of a man 44 years old is not manifestly excessive, though his earning capacity is only that of a common laborer.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 380.]

Appeal from Superior Court, Lincoln County; W. T. Warren, Judge.

Action by Thomas Froman against H. E. Ayars and another. Judgment for plaintiff. Defendants appeal. Affirmed.

Graves & Graves and Wright & Wright, for appellants. Merritt & Merritt, for respondent.

HADLEY, J. This is an action to recover damages for alleged malpractice of the defendant H. E. Ayars, as a physician and surgeon. His wife, as a member of the marriage community, is also made a defendant. It is alleged that the plaintiff, while driving on July 7, 1904, was thrown from a vehicle; that he sustained a compound fracture of the bones of his left leg, about two inches above the ankle joint; that the ends of the bones protruded through the flesh and skin; that within a few hours of the accident the defendant, at plaintiff's re-

quest, commenced to treat the broken leg and wound as a physician and surgeon, for hire; that in setting the bones, the defendant did not properly cleanse and prepare the wound made by the protrusion of the bones, but left foreign substances in and about the wound which should have been removed; that he caused the leg to be placed in a wooden box and fastened to the sides thereof by means of cord or bandages; that he placed a cord bandage around plaintiff's left foot just back of the toes, and drew the cord down over the end of the box, where it was securely fastened, and that this caused the foot to be extended into an unnatural position, making the heel to rest heavily upon the bottom of the box; that soon after plaintiff suffered much pain; that the heel became sore and was injured, and that the leg was left in that condition from the 7th until the 10th of July, when it was taken from the box and placed in a plaster of paris cast; that it remained in the plaster of paris cast until July 17th when it was removed therefrom and again placed in the box and securely bandaged and fastened; that by means of adhesive plaster or cords attached to the left foot just back of the toes and extending downward over the iron rods of the bed, defendant caused a weight of about 18 pounds to be suspended; that the bandages and weight were so adjusted that the foot was drawn to an unnatural and improper position, the toes being down and extended far beyond the natural position, and the heel being drawn and held too solidly against the bottom of the box; that the leg remained in that position until July 18th with the weight so suspended, during which time plaintiff suffered great agony and pain, both with the wound of the leg and by reason of the condition in which the heel was held against the bottom of the box; that by reason of defendant's failure to properly cleanse and prepare the wound, the same within a few days after the injury became inflamed, pus formed therein, and the flesh in and around the wound began to decay; that for the same reason the ends of the bones became deadened and began to decay, and that this condition had so progressed that, on the 18th of July, the ends of the bones both above and below the fracture extended to the distance of about one-half inch, and the flesh had so decayed that it was practically in an incurable condition; that at the time the leg was placed in the box and the weight attached thereto, the defendant packed bran around the leg in such a manner that the bran was permitted to accumulate in and about the wound; that by reason of defendant's failure to exercise reasonable care and diligence in the treatment of said wound and fracture, and by reason of his failure to exercise his skill and to apply his learning to accomplish the proper treatment, the aforesaid condition was produced, and that the

same made necessary the amputation of the leg, which was effected on July 20, 1904, at the Sacred Heart Hospital in Spokane, by Doctors Setters and Thomas. Issue was joined, and the cause was tried before a jury, resulting in a verdict for the plaintiff. Judgment was entered upon the verdict, and the defendant, having been denied a new trial, has appealed.

The first error assigned is that there was not sufficient evidence to warrant any verdict and judgment against appellant. As is usual in such cases, there was much conflict in the testimony of the physicians and surgeons who were examined as expert witnesses. Differing views were expressed as to the propriety of using the "fracture box" and suspended weight in such a case. There was general concurrence of view as to the necessity of applying antiseptic remedies and methods in the treatment of the wound from the beginning. But the testimony was not in accord as to the correctness of the remedies and methods applied in this case. There was testimony in support of the more material allegations of the complaint. While it should not be said that all the averments hereinbefore set forth were sustained by testimony, yet the more material ones were. We think, without doubt, from the evidence, that at the time respondent was removed to the hospital at Spokane, the condition of the wound and bones was very serious. Witnesses testified that the appellant said, even at that time, that the patient was doing well. Dr. Setters, however, testified that, when the respondent came under his treatment at the hospital, he found the wound very septic, and that it was filled with pus and bran; that the limb was in a fracture box filled with bran, and that there was a cloth across the opening of the wound about four by six inches in dimensions; that the end of the tibia was protruding through the wound, the flesh of the wound being dead, covered with a necrotic membrane, and very foul; that amputation was then necessary, and that the same was accomplished. Whether such a result was due to the treatment administered by appellant and to his neglect to apply his learning and skill in the premises was, under the evidence, for the jury. In view of the character of the evidence that was before the jury, it is neither for the trial court nor for this court to weigh it, and say that it does not support a verdict for the respondent.

It is next urged that the amount of the verdict is excessive, and that it is manifest that the jurors were swayed by passion or prejudice. The amount is \$5,000. Appellant's counsel make an interesting argument to the effect that this case should be distinguished from one which is brought to recover for ordinary personal injuries where the injury is wholly due to the neglect of the defendant in the case. It is argued that in

the case at bar the primary cause of the result which came to respondent was the running away of the team, for which appellant was in no way responsible, and that the degree of appellant's responsible relation to the final outcome cannot be as great as that of one whose negligence laid the first foundation for the injury. The theory of the case, however, is that the final outcome to respondent, by which he was deprived of a foot for the remainder of his life, would not have resulted if appellant had properly applied his learning and skill. It is true, respondent would have suffered pain and distress from the original injury, yet if the bones had properly united and the wound had healed, the suffering would have been but temporary, while as it is he must continue to suffer humiliation, inconvenience, and loss of earning power during the remainder of his life. If such a result would not have occurred but for appellant's neglect, we are not impressed that there is force in the logic of counsel's argument. Appellant held himself out as sufficiently skilled and learned to reasonably and properly treat respondent's injury, and having undertaken to do so for a compensation, the duty was placed upon him to bring to bear upon such treatment the reasonable and ordinary skill and care recognized by the members of his profession in general, as proper and necessary in such a case. He was neither required to exercise the highest degree of skill nor the highest degree of care, but only such as are recognized as ordinary and reasonable by the standards of his profession. The issue was made before the jury that he did not do this, and that his failure in that regard was the responsible cause of the final and serious result to respondent. Respondent was 44 years of age at the time of the trial, and it was admitted that his life expectancy at the time of his injury was 26 years. He had no settled occupation, but had before been variously employed at farming, in the livery business, and as a driver of teams. The value of his earning power should probably be viewed from the standpoint of a common laborer; but viewed from that standpoint, we think we should not undertake to say that the verdict was excessive. To pass through 26 years of life without a foot is a condition that we may assume, no man, however humble his occupation, would be willing to accept for \$5,000. There is seldom a case of this kind, or even one for ordinary personal injuries, when there does not seem to be some element of hardship either way the case may be decided; but such cases are triable by a jury and, when so tried, if there is reasonable evidence to support the verdict, it should not be reduced unless it is manifestly too large when all the facts and circumstances are considered. We cannot say that such is true of this one.

No errors are assigned upon the intro-

duction of evidence, the instructions of the court, or other matters occurring at the trial. The judgment is therefore affirmed.

MOUNT, C. J., and FULLERTON, CROW, and DUNBAR, JJ., concur.

#### SEATTLE WHARF CO. v. CALLVERT et al.

(Supreme Court of Washington. March 20, 1906.)

#### NAVIGABLE WATERS—LEASE OF HARBOR AREAS —INJUNCTION.

Laws 1901, p. 98, c. 62, authorizing an appeal by an applicant to lease any of the state's granted harbor areas, or by any person whose property rights or interests will be affected by a lease, who may deem himself aggrieved by any order or decision of the state land commissioners concerning it, gives the right to appeal from an order canceling a lease of a harbor area, so that the lessee cannot maintain an action to enjoin the enforcement of the order.

Appeal from Superior Court, King County; Geo. Meade Emory, Judge.

Action by the Seattle Wharf Company against S. A. Callvert and others, as the board of state land commissioners, and Louis Feuer and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Geo. McKay, for appellant. George F. Vanderveer, for respondent Henssy. James A. Haight, for respondent state land commissioners and Louis Feuer.

DUNBAR, J. This action was instituted to enjoin the enforcement of an order made by the board of state land commissioners, canceling the plaintiff's lease of the harbor area in front of tide-land lot 167 in the city of Seattle. The lease had been issued in the ordinary form and in the regular way, and complaint had been made by the owners of the adjacent tide lands that the lessee did not improve. After various hearings, the order canceling the lease was made.

It is contended by the respondents that the court did not have jurisdiction to enjoin the enforcement of the order canceling the appellant's lease, for the reason that the appellant's remedy was by appeal from the order made by the board. The Legislature, by an act approved March 8, 1901, provided for appeals from the board of state land commissioners. Section 1 of said act, found in chapter 62, p. 98, of the Laws of 1901, is as follows: "Any person who is an applicant to purchase or lease any of the state's granted tide, shore, arid or oyster lands or harbor areas, or to purchase any timber, stone, fallen timber, hay, gravel, or other valuable materials, situate on any public lands of the state, and any person whose property rights or interests will be affected by such sale or lease, who may deem himself aggrieved by any order or decision of the board of state

land commissioners concerning the same, shall have the right to appeal from such order or decision to the superior court of the state of Washington for the county in which such lands, harbor areas or materials are situate. \* \* \* The subsequent sections provide the manner of appealing, and for an appeal from the superior court to the Supreme Court. It is contended by the appellant that the right of appeal in this act is limited to an applicant for a lease. But it seems to us that this is too narrow a construction to place upon the act, and that it was the evident intention of the Legislature to give the right of appeal from the orders of the board of state land commissioners concerning the character of property mentioned in the act. Even putting the narrow construction upon the act which is claimed by the appellant, the appellant in this case is an applicant to lease. Notwithstanding the fact that the lease had been executed when the controversy arose as to whether the lease should be revoked in such a proceeding, it stood in the position of an applicant for the lease. But the statute provides further that any person whose property rights or interests will be affected by such sale or lease, or who may deem himself aggrieved by any order or decision of the board of state land commissioners concerning the same, shall have the right to appeal. Most assuredly the property rights and interests of this appellant were affected by this lease; and that it deemed itself aggrieved by the order or decision of the board of state land commissioners concerning the same is evidenced by the fact that it brings this action to enjoin the enforcement of such order. It seems to us too plain for extended discussion that the appellants' case falls squarely within the provisions of the statute, and that the right to appeal was thereby conferred upon it. This being true, under the general rule, a court of equity will not assume jurisdiction to grant relief by the extraordinary remedy of injunction where there is an adequate remedy at law, and there is no attempt in this case to show that the remedy by appeal would not have been adequate, the whole contention of the appellant being that the remedy by appeal was not open to it. Finding that it was, and that it did not avail itself of such remedy, it is precluded from proceeding in this action.

In this connection it may not be inappropriate to say that we announce the rule of practice without regret in this particular case, for the reason that, notwithstanding our views on the question just discussed, we have examined the case on its merits and are satisfied that the court acted well within its discretion in making the order complained of.

The judgment is affirmed.

HADLEY, FULLERTON, CROW, and  
ROOT, JJ., concur.

85 P.—2

# MOON BROS. CARRIAGE CO. v. DEVENISH et al.

(Supreme Court of Washington. March 22, 1906.)

## 1. PARTNERSHIP—DISSOLUTION—DEBTS—ACCEPTANCE OF NOTE OF ONE PARTNER—EFFECT.

Where a creditor of a firm accepts notes given by a partner in the firm name after the dissolution of the partnership, merely to close up the account of the firm and not as payment of the original indebtedness, the other partner is not discharged of his liability.

## 2. PRINCIPAL AND AGENT—TRAVELING SALESMAN—KNOWLEDGE—IMPUTABILITY.

Where it is not shown that a traveling salesman was authorized to collect for goods sold to a partnership, the principal is not charged with such salesman's knowledge that on the dissolution of the partnership its liabilities were assumed by one of the partners.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 675, 680.]

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by the Moon Bros. Carriage Company against O. G. Devenish and E. E. Plough. Judgment for plaintiff, and defendant Plough appeals. Affirmed.

Wm. T. Stoll and B. B. Adams, for appellant. Thomas Neill and W. H. Winfree, for respondent.

HADLEY, J. This is an action to recover on account for goods sold and delivered. The complaint, in the usual form, alleges the amounts of sales, and the balance due and unpaid. It is also alleged that the sales were made between the 1st day of July and the 4th day of December, 1902, and that the defendants were, during all that time and until the 3d day of February, 1903, copartners doing business under the firm name of Devenish Hardware Company. The defendant Plough answered separately, and admitted the existence of the partnership at the time the goods were sold and delivered; but alleged that, after the indebtedness was contracted, to wit, on January 28, 1903, defendants dissolved partnership and that, by an instrument in writing, the defendant Devenish assumed and agreed to pay all debts of the partnership, including that held by the plaintiff, of which plaintiff had knowledge; that the plaintiff, without the knowledge or consent of defendant, accepted in payment of said indebtedness three promissory notes of the defendant Devenish, bearing date May 15, 1903, for specified amounts, and maturing, respectively, August 1, September 1, and October 20, 1903. The reply denies that plaintiff had any knowledge of any agreement on the part of defendant Devenish to assume the debts of the partnership. It is also denied that the promissory notes were accepted in payment of the debt, and it is alleged that they were accepted merely as evidence of the indebtedness and of the agreement to extend the time of its payment. On the above issues the cause was tried by the court without a jury and judgment was rendered

against both defendants for the sum of \$2,546.12 and costs. The defendant Plough has appealed.

It is assigned that the court erred in its sixth finding of fact. The finding was to the effect that, at the time the notes were given, respondent had no notice or knowledge of any agreement between the partners whereby Devenish had assumed the payment of the debts of the firm, but that it did have knowledge of the dissolution of the partnership. This finding should be considered in connection with the seventh finding upon which error is also assigned. That finding is, in substance, that the goods were sold by a traveling salesman of the name of Moore; that he had authority from respondent to fix the price and terms of sale; that in April, 1903, Moore applied to appellant at Spokane to sell said firm more goods on the part of respondent, at which time appellant informed Moore that he (appellant) was no longer a member of the firm, and that Devenish had assumed all the liabilities of the firm, including the debt owing to respondent; that this conversation was prior to the execution of the notes, but that Moore had no power to collect or settle accounts and had no authority over this account after making the sale; that Moore did not notify respondent of this conversation, or of any facts therein stated; that all the dealings between the parties concerning this account, after the goods were sold, were had directly with respondent. The court also found in its fifth finding that the notes were given as the result of a request from Devenish, made on January 30, 1903, for an extension of time, at which time he advised respondent of the dissolution, but did not advise it that he had assumed the debts of the firm; that the notes were executed by Devenish under the firm name, and were taken to close the account, but were not accepted in payment of the indebtedness. It appears by the record that an exception was originally taken to the fifth finding, but by a stipulation filed it is stated that it was the intention to except to the sixth and seventh findings and not to the fifth and seventh, as stated in the original exceptions. There is, therefore, no exception to the fifth finding, and no error is assigned thereon. By that finding it is an established fact in the case that the notes were not taken as a payment or discharge of the original indebtedness. "Where a creditor of a firm accepts for the amount of his claim the individual note of one of several partners, or of a new firm formed on the retirement of one or more members of the original debtor firm, and thereupon surrenders his original evidence of debt, such transaction will discharge the other partners if it was intended to have that effect; otherwise they will remain liable." 22 Am. & Eng. Enc. Law (2d Ed.) 184. Note, also, the following, which is found at pages 555-558 of the same volume: "According to the general doctrine, a promissory note, though negotiable, given by a debtor to his

creditor, does not operate as payment of a pre-existing indebtedness, in the absence of an agreement between the parties that it shall so operate, and an action may be still maintained on the original indebtedness. And the same is true with regard to a note given to the creditor by a part of several or joint debtors, or the note of a third person, or a note given on which both the debtor or a part of joint debtors and third persons are liable." See, also, cases there cited in support of the above. The debt, therefore, remained as before, except that the time of payment was extended until the due dates of the notes. *Dellapiazza v. Foley* (Cal.) 44 Pac. 727.

It is conceded by respondent that, if it had known at the time the notes were taken which extended the time of payment, that Devenish had agreed to pay the debt individually, then appellant would have been released from liability. It is conceded that the authorities hold that when a partner retires and the remaining partner assumes the firm debts, then the relation of principal and surety arises between them, the retiring partner sustaining the relation of surety to the remaining one. It is also conceded that a creditor of the firm, who knows of such agreement, is bound thereby, and that any act of the creditor having such knowledge which would release an ordinary surety will release the retiring partner. This case therefore really turns upon the question whether the respondent had knowledge of any such agreement between the partners. The court has found that respondent had no such knowledge, and we think we should not be justified in disturbing the finding. The mere fact that Moore, the traveling salesman, was told of the agreement between the partners at a time prior to the taking of the notes which extended the time of payment, does not establish that respondent itself was advised of it. The court found that Moore did not advise respondent of it. The burden was upon appellant to prove, by a preponderance of evidence, that respondent had such knowledge. There was no direct proof that Moore had authority over collection of the account. It cannot be presumed as a matter of law, from the mere fact that Moore was the traveling salesman who sold the goods, that the collection of the account was a matter that came within the scope of his authority and duties, and that his knowledge therefore became notice to respondent. "The scope of a commercial traveler's authority is well defined, and as a general rule extends only to the soliciting of orders for goods \* \* \*. Third parties dealing with him are bound at their peril to ascertain his real powers. \* \* \* In case of salesmen intrusted with possession of the property to be sold, it is well settled that there is an implied authority to receive payment. But where the agent is merely a drummer, not intrusted with possession of the property, one of the indicia of ownership, the great preponderance of au-

thority denies such a power, in the absence of a controlling usage to the contrary." 6 Am. & Eng. Enc. Law (2d Ed.) pp. 224-226. In *State ex rel., etc., v. Commissioners, etc.*, 10 Kan. 569, Justice Brewer, in speaking of the scope of agency, said: "Authority from a principal to an agent to do a specified act is limited to that act, and does not empower the agent to bind his principal to an act securing essentially different rights and imposing essentially different obligations." The Supreme Court of Minnesota discussed this subject in *Trentor v. Pothen*, 49 N. W. 129, 24 Am. St. Rep. 225, and said: "The rule which imputes to the principal the knowledge possessed by the agent applies only to cases where the knowledge is possessed by an agent within the scope of whose authority the subject-matter lies. In other words, the knowledge or notice must come to an agent who has authority to deal in reference to those matters which the knowledge or notice affects. The facts of which the agent had notice must be within the scope of the agency, so that it becomes his duty to act upon them or communicate them to his principal."

Having in view the above legal principles, and also the testimony as introduced, we think the evidence supports the court's findings, and that the judgment rendered was proper under the findings. It is therefore affirmed.

MOUNT, C. J., and FULLERTON, ROOT, CROW, and DUNBAR, JJ., concur.

(42 Wash. 402)

#### CADY v. CITY OF SEATTLE.

(Supreme Court of Washington. March 22, 1900.)

#### 1. MUNICIPAL CORPORATIONS — TORTS — DEFECTS IN STREETS — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In an action for injuries caused by being thrown from a wagon on account of a hole in a street, where the evidence was conflicting, it was a question for the jury whether the defect was visible in time, so that the injury might have been prevented.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Municipal Corporations, §§ 1754, 1756.]

#### 2. SAME.

The use of a particular street, when there is another safer one that might have been used, is not sufficient in itself to constitute contributory negligence.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Municipal Corporations, § 1679.]

#### 3. SAME—OPENING STREET FOR TRAVEL.

Where a street was in common use for a long time to the knowledge of the city's officers, the fact that it had never been graded, or formally opened for travel, does not relieve the city from liability for injuries caused by its defective condition.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Municipal Corporations, §§ 1595-1597.]

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by De Witt Cady against the city of

Seattle. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Scott Calhoun and Elmer E. Todd, for appellant. Benson, Hall & Higgins, for respondent.

FULLERTON, J. The respondent was injured by being thrown from his wagon while passing over one of the streets of the appellant city, and brought this action to recover therefor. The jury returned a verdict in his favor for \$3,000, which was reduced by the trial court to \$1,500, and judgment for that sum entered.

The evidence was conflicting concerning the condition of the place where the accident occurred at the time of the accident, the city's knowledge of its condition, and on the question whether or not the danger of traveling on the street where the injury occurred was so apparent that a traveler thereon must be held to have assumed the risk; and, as the jury found for the respondent, this court must assume as true that part of the evidence most favorable to his contention. This evidence tended to show that the respondent, who was a wood and coal dealer in the city of Seattle, went with one of his drivers on the day of the accident to deliver a load of coal to a customer who lived on Queen Ann hill in that city. On the return trip his driver started back on one of the principal streets, but finding it blocked lower down, because of repairs that were being made on it, turned west on a paved street called "Highland Drive" and followed it until he came to Second Avenue West into which he turned. On leaving the pavement on Highland Drive the front wheels of the wagon dropped into a hole some two feet deep, which caused the wagon to lurch forward, and throw the respondent from his seat to the ground, occasioning the injuries of which he complains. Second Avenue West had not been graded or otherwise improved by the city at the time of the accident, and at the place where the respondent turned into it was somewhat steep, although not too steep for safety when in ordinary repair. The hole was caused by the wheels of wagons passing from the hard unyielding pavement to the softer yielding earth of the street, and by the wash from the overflow of the gutters extending along Highland Drive. Neither the respondent nor his driver noticed the hole until they got almost directly over it, too late to turn back or avoid it. It did not appear that the city had actual knowledge of the condition of the street at the time of the accident, but it was shown that a hole was made at that place by the passage of teams and the action of the water shortly after the pavement was put down on Highland Drive, which was several months prior to the accident, and that it had been refilled with earth and washed out several times between its first appearance and the time of the injury, although no attempt had

been made to repair it permanently. It also appeared that by going further around the respondent could have descended the hill and reached his place of business upon graded and paved streets, without risk of accident from defects in the way.

The appellant contends that the respondent was guilty of contributory negligence, both because he ought to have noticed the defect causing the injury, and because there was another way he could have taken without subjecting himself to the chance of injury. There was evidence supporting the contention that the defect was visible from Highland Drive and could have been avoided by the exercise of ordinary care, but there was evidence to the contrary also. In such a case the question is one for the jury, and the court in this case very properly submitted the question to them. As to the other objection, it is not the rule that one must avoid a particular street because there is another and safer one that he may take. One has the right to travel upon any street of a city which the city leaves open for the purposes of travel. If the street is steep or the track rough he must use care commensurate with the conditions, and is guilty of contributory negligence if he fails to use such care, but he may rely on the presumption that there are no hidden defects in the way, or that there is nothing liable to cause him injury or mishap other than such as are plainly visible; in other words, he assumes the risk of the obvious dangers only. According to the evidence of the respondent the defect causing the injury in this case was not visible until it was too late to avoid it. The jury were warranted in believing this evidence, and if they did believe it they could not convict the respondent of contributory negligence for suffering himself to be driven into it.

The city next contends that because it had never graded this street, or formally opened it for travel, it cannot be held liable for injuries caused by its defective condition. But the evidence shows that the street was in one of the principal residence districts of the city, that it had been open for travel for a long time, and had been extensively used to the knowledge of the city's officers. When a street is suffered to remain open by the city, and is in common use by the people, it is the duty of the city to keep it in ordinary repair. This is true whether or not the street has been formally accepted, or is what may be technically called an "improved street." In his address to the jury one of the respondent's counsel used this language: "Whatever verdict you find in this case will be paid largely by taxes levied against the property of non-residents of the city of Seattle held for speculative purposes, and will not affect, to any considerable extent, the residents of the city." On objection being made, the court "Ordered said remarks stricken from the jury, and directed the jury to ignore the same."

It is now contended that the remarks of counsel were prejudicial; that the action of the trial court did not cure their effect, and that the city is entitled to a new trial because of prejudice. But we think any error that was committed was cured by the action of the court. Ordinarily an appellate court feels inclined to reverse a case where an argument such as this is used, not so much because of the prejudice engendered, as to punish counsel for resorting to it. There are in the record, however, certain other matters which makes us think this would be too harsh a remedy to apply in this case.

Lastly it is claimed that the verdict, even as modified by the trial court, is excessive. But a careful examination of the evidence on this point convinces us that the judgment as entered is not so disproportionate to the injury suffered as to require further reduction.

The judgment is affirmed.

MOUNT, C. J., and HADLEY, ROOT, CROW, and DUNBAR, JJ., concur.

#### STATE v. WEISENBURGER.

(Supreme Court of Washington. March 22, 1906.)

##### 1. CRIMINAL LAW—APPEAL—HARMLESS ERROR.

On prosecution for attempt to murder P., his testimony as to the length of time he was under the doctor's care from the wound received, was not harmful.

##### 2. SAME—PARTY ENTITLED TO COMPLAIN—INVITING ERROR.

On prosecution for attempt to kill P., his wife having testified that defendant was trying to shoot P., defendant's counsel asked her why she made that statement, and she replied, "Because my daughter told me he said he would shoot." *Held*, that defendant was not in position to complain of the answer.

##### 3. HOMICIDE—MOTIVE—EVIDENCE.

To show motive for an attempt to kill P., it was competent to prove that defendant had insulted P.'s daughter the night before, and had threatened to shoot in case she reported the matter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 321-323.]

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

B. A. Weisenburger was convicted of assault with intent to commit murder, and appeals. Affirmed.

W. H. Abel, for appellant. E. E. Boner, for the State.

ROOT, J. For some time prior to the occurrences hereinafter stated, appellant was a roomer at the hotel of Mr. and Mrs. Parkhurst, in the city of Aberdeen. One evening, a daughter of Mrs. Parkhurst accompanied the appellant to Hoquiam, a few miles distant, and while there was requested by appellant to go with him to a room over a saloon. She resented this suggestion, and, upon arrival home, related what had occur-

red to her mother, who in turn informed her husband. On the next morning Mr. Parkhurst, for the purpose, as he says, of requesting appellant to leave the hotel, called the latter from the hotel sitting room, where he was in company with several other persons, into the hallway. Before he had spoken to him, however, his wife entered the hallway from a different room, and immediately asked appellant why he had insulted her daughter. Thereupon appellant drew a revolver, and made a motion as if to shoot Parkhurst. Mrs. Parkhurst grappled with him, and struggled to prevent him from using the revolver. However, he managed to throw her to one side and fired, the shot taking effect in Mr. Parkhurst's head, causing a serious injury. Appellant then fled, but was soon thereafter apprehended. He was subsequently prosecuted upon the charge of an assault with intent to commit murder, and was convicted and sentenced to a term of six years in the penitentiary. From this judgment and sentence an appeal is prosecuted.

Appellant assigns as error the action of the trial court in permitting Mr. Parkhurst to state upon the witness stand how long he was under the doctor's care. Respondent claims that this evidence was competent and material, as showing the character and extent of the wound, and had a bearing upon the question of appellant's intent in producing such a wound. While its materiality is open to serious doubt, we are of the opinion that the reception of this evidence was in no wise prejudicial to appellant. In the course of her evidence, Mrs. Parkhurst stated that appellant was trying to shoot her husband. Appellant's attorney asked her why she made that statement. She answered, "Because my daughter told me he said he would shoot." Appellant's counsel moved to strike this answer, as being hearsay evidence, which motion was denied. This ruling is assigned as error. We do not think it was error. The evidence shows that appellant had drawn a revolver, and was in a struggle evidently attempting to shoot Mr. Parkhurst, and this, together with what her daughter had told her of a threat of appellant, made the night before, "to shoot," induced her to believe that he was trying to shoot her husband, and the question of appellant's counsel having brought out this answer, we do not think he is in a position to complain.

It is also urged by appellant that it was error to permit testimony tending to show that appellant had insulted Mrs. Parkhurst's daughter the night before. It was incumbent upon the state to prove an intention on the part of appellant to commit murder. For this purpose it was competent to show a motive on the part of appellant to commit such crime. The fact that he had insulted the daughter the night before, and had

threatened to shoot in case she reported the matter, was material and competent as bearing upon the question of his intention in drawing the revolver and shooting as he did. Error is also assigned upon the omission of the court to instruct upon the hypothesis of the revolver being accidentally discharged. No request for an instruction of this kind was made by appellant. The instructions given by the trial court appear to have covered the issues involved and to have been fair and comprehensive, and we do not think this assignment is well taken.

From the record we think it satisfactorily appears that the appellant had a fair trial, was well defended, and that the judgment of the superior court was abundantly justified by the evidence and the law of the case.

It is therefore affirmed.

MOUNT, C. J., and DUNBAR, CROW, HADLEY, and FULLERTON, JJ., concur.

KNIGHT et ux. v. GALLAWAY et ux.  
(Supreme Court of Washington. March 22, 1906.)

1. ADOPTION—ADOPTING PARENTS—QUALIFICATIONS—STATUTES.

Under Ballinger's Ann. Codes & St. § 6480, providing that any inhabitant of the state not married, or any husband and wife jointly, may petition the superior court of their proper county for leave to adopt a child, etc., persons who are nonresidents of the state are disqualified from maintaining a petition for adoption.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adoption, § 3.]

2. SAME—WELFARE OF CHILD.

In determining whether leave to adopt a child should be granted, the welfare of the child is the primary, if not the sole, consideration.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adoption, § 28.]

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Proceeding for adoption of Nettie Beatrice Walsh on petition of William Gallaway and another, to which Ronald T. Knight and another filed objections and prayed that they be permitted to adopt the same child. From an order granting the petition, objectors appeal. Reversed.

W. D. Scott, for appellants. Richardson, Roche & Onstine, for respondents.

FULLERTON, J. This is an appeal from an order of adoption. From the record it appears that Nettie Beatrice Walsh is an orphan female child of the age of seven years; her father having died in her infancy, and her mother on February 18, 1905. Since her infancy, she has been in the custody of the respondents, although her mother while she lived kept control over her and contributed to her support. In April following the death of the mother the respondents filed a petition in the superior court of Spokane county, that

being the county of their residence, praying for leave to adopt the minor as their own child. While this petition was pending, the appellants appeared and filed an answer thereto and a counter petition, in which they controverted the allegations of the respondents' petition, and asked that an order of adoption be made in their favor. It appeared from the appellants' petition that they were residents of the state of Montana, and on the hearing the superior court held that it had no jurisdiction to entertain their petition because of their nonresidence. It then examined the evidence and held that the respondents were suitable and proper persons to have the care and custody of the child, and entered the order, from which this appeal is taken.

In deciding that the appellants were not entitled to petition in this state for the adoption of the child, we think the trial court ruled correctly. The statute on that subject reads in part as follows: "Any inhabitant of this state not married, or any husband and wife jointly, may petition the superior court of their proper county for leave to adopt a child under the age of twenty-one years, not theirs by birth, and for a change of name of said child. \* \* \*." Ballinger's Ann. Codes & St. § 6480.

While this clause is somewhat awkward both in expression and phraseology, we think its meaning plain. We think the Legislature intended by it to limit the right to petition the courts of this state for leave to adopt a child to inhabitants of the state, and to require married persons to join in any petition presented on their behalf; and that it was an effort to express these different ideas by the use of too few words that gives rise to such uncertainty as appears in the language used. That this is the proper construction of the statute is borne out by the further clause requiring the petitioners to present their petition to the court of "their proper county." The phrase "their proper county" must mean the county in which the petitioners reside, if it has any meaning at all, and to give it this meaning precludes the idea that a nonresident of the state has the right to petition.

But, while we are of the opinion that the court did not err in holding that it was without jurisdiction to grant the petition of the appellants, we are equally of the opinion that it erred in granting the petition of the respondents. In determining whether leave to adopt a child should be granted by the court, the welfare of the child is the primary, if not the sole, consideration, and we are convinced that it is not to the welfare of this child that the respondents be permitted to adopt her. Without quoting from the record the evidence that has driven us to the conclusion, we feel that so far from promoting her welfare it would be a positive wrong to her to permit the order to stand.

The order appealed from will be reversed, and the cause remanded, with instructions to deny to each of the applicants the right of adoption.

MOUNT, C. J., and HADLEY, ROOT, CROW, and DUNBAR, JJ., concur.

#### STATE ex rel. WHITE et al. v. POINT ROBERTS REEF FISH CO. et al.

(Supreme Court of Washington. March 22, 1906.)

#### QUO WARRANTO—WHO MAY BE RELATOR.

Under Code 1881, § 703 (Ballinger's Ann. Codes & St. § 5781), providing that an information in the nature of quo warranto may be filed by the prosecuting attorney or by any other person on his own relation whenever he claims an interest in the office, franchise, or corporation which is the subject of the information, quo warranto to forfeit the charter of the corporation cannot be brought on the information of a private individual claiming no interest in the corporation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 77-80; vol. 41, Cent. Dig. Quo Warranto, § 41.]

Appeal from Superior Court, Whatcom County; Jeremiah Neterer, Judge.

Quo warranto by the state of Washington, on relation of E. J. White and others against Point Roberts Reef Fish Company and others. From a judgment sustaining a demurrer to the complaint, relators appeal. Affirmed.

Dudley G. Wooten and James B. Reavis, for appellants. Kerr & McCord, for respondents.

PER CURIAM. This was an action in the nature of a quo warranto proceeding, brought in the name of the state, to enjoin the corporate acts of the defendant companies, and to declare void their charters and all fish licenses and locations claimed by them or by any one holding by or under them, for various unlawful and wrongful acts and omissions complained of, which with the view we take of the law it is not necessary to particularly specify here. In addition to the various allegations aforesaid, which included the allegation that the defendants had fraudulently possessed themselves of more fishing locations than they were entitled to under the law, to the detriment of the relators, who had taken out fishing licenses, it was alleged that on or about the 17th day of November, 1904, the relators, through their attorneys, presented the facts which are set out in the information to the prosecuting attorney of Whatcom county, Wash., wherein the principal office of the aforesaid defendant companies purported to be located, and likewise presented to him an information in the nature of a quo warranto in the name of the state of Washington on relation of said prosecuting attorney, as relator, against the above-named defendants, seeking substantially the same.

relief upon the part of the state through its said public officer that is now and here sought by the said relators on their own relation, and that the said prosecuting attorney was requested to file and prosecute the said information in the name of the state; that thereupon the said prosecuting attorney duly signed, verified, and filed said information; that the same was presented to the court, and an order was entered setting down for hearing the prayer for temporary injunction contained in said information; that thereafter, in the absence of the attorneys for the relators, who were associate counsel in said action, and without intimation or notice to them or any knowledge on their part, and without notice to the relators or to any person similarly situated, the said prosecuting attorney on November 22, 1904, filed in the court a written motion dismissing said information and action without assigning any reason or ground therefor, and said cause was by order of the court dismissed; that thereafter the attorneys for the relators appeared, in accordance with the previous order of the court above mentioned, on Tuesday, November 29, 1904, for the purpose of attending the hearing set by the court theretofore, and to present to the court facts and authorities in support of the prayer for temporary injunction contained in the said information filed by the said prosecuting attorney, and then and there, for the first time, became advised of the nature and extent of the said prosecuting attorney's action in dismissing and disposing of said cause, and presented to the court a motion supported by affidavits, setting forth the facts hereinbefore referred to, and praying the court that the said relators be permitted, in their own right and upon their own relation, to prosecute the said information in the name and by the authority of the state of Washington, for their own relief and protection, and the relief and protection of all other persons belonging to their class, and who were similarly situated and interested; that the prosecuting attorney protested against and resisted said motion and the relief therein prayed for, and that the court declined to grant the motion of relators' attorneys.

Certain portions of the complaint were stricken on motion of the defendants' attorneys, and a demurrer was then interposed to the information, which was sustained by the court. The demurrer was to the effect that the court had no jurisdiction either of the defendants or of the subject-matter of the action; that the plaintiffs had no legal capacity to sue; that there was a defect of parties plaintiff; that the complaint did not state facts sufficient to constitute a cause of action; that there was a defect of parties defendant. The record is silent as to what ground the demurrer was sustained upon. It was presumably upon the ground that the court had no jurisdiction for the reason that

the action was not brought by the prosecuting attorney.

We will not enter into a discussion of the many questions raised in the respective briefs of counsel, for the reason that no interest is alleged by the relators in the franchises or corporation which is the subject of the information, and the action for the revoking of the franchises of the corporation should have been brought on the relation of the prosecuting attorney. This court has decided this question in the case of *Mills v. State ex rel. Smith*, 2 Wash. St. 566, 27 Pac. 560, where it was held that the Legislature had looked out for the interest of the public by providing that the information should be filed by the prosecuting attorney, and that the private interests were provided for in the latter part of Code 1331, § 703; Ballinger's Ann. Codes & St. § 5781, in the clause: "Or by any other person, on his own relation, whenever he claims an interest in the office, franchise or corporation which is the subject of the information." We also held in *State ex rel. Attorney General v. Seattle Gas, etc., Co.*, 28 Wash. 488, 68 Pac. 946, 70 Pac. 114, that informations of this kind should be brought by the prosecuting attorneys of the different counties. Section 5781, Ballinger's Ann. Codes & St., provides that the information may be filed by the prosecuting attorney in the superior court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority. It must not be understood that it is within the power of the prosecuting attorney of any county to capriciously or fraudulently prevent the state or its citizens from compelling corporations to obey the laws, or to deprive the state or its citizens of a judicial investigation of alleged violations of the law on the part of the corporations. But, instead of proceeding upon their own relation as the appellants did in this case, they had a right to ask the court to direct the prosecuting attorney to proceed with the case upon the showing made in their complaint, and, if the court refused to do this, an appeal would lie to this court, and the question of the sufficiency of the complaint would be determined on such appeal.

But, as there is no provision of the law for the procedure suggested by the appellants, the judgment of the court in sustaining a demurrer to the complaint must be affirmed.

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WOODMAN et al. v. SEATTLE ELECTRIC CO.

(Supreme Court of Washington. March 22, 1906.)

CARRIERS — INJURIES TO PASSENGER — NEGLIGENCE.

Where a person reached the rear platform of a street car, and attempted to board it after the signal to start had been given, and, failing to board, received the injuries complained of,

the company was not guilty of negligence, where the conductor was at his proper station, and did not see before the car was started that the person intended to board it.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1154-1160.]

Appeal from Superior Court, King County; George E. Morris, Judge.

Action by Josephine A. Woodman and others, against the Seattle Electric Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Baxter & Wilson for appellants. Hughes, McMicken, Dovell & Ramsey, for respondent.

MOUNT, C. J. This is an action for damages on account of personal injuries, which are alleged to have resulted in the death of W. H. Woodman. The action was brought by the widow and minor children of the deceased. The complaint alleged negligence as follows: "That on or about the 2d day of September, 1904, the said W. H. Woodman presented himself as a passenger on one of defendant's cars upon C street in the city of Ballard; that near the intersection of said C street and Main street, the said W. H. Woodman signaled to the conductor and driver in charge of said car to stop the same for the purpose of allowing the said Woodman to enter thereon: that said car was thereupon stopped, and the said Woodman thereupon attempted to board the same, but that, through the negligence and carelessness of the driver or conductor of said car, or both of them, said car was started while he was part way upon said car, and before he had obtained a secure footing thereon." At the close of plaintiffs' evidence, the trial court dismissed the action, for the reason that the evidence failed to show any negligence on the part of the defendant company, and for further reason that the injuries received by the deceased were caused by his own careless and negligent acts.

There was but one witness who testified to the accident. The facts are not disputed, and are substantially as follows: The defendant company operated an electric street car line between Ballard and Seattle. On November 2, 1904, a car bound for Seattle was going east on C street in the city of Ballard. When the car came to Main street, which crosses C street at right angles, two ladies were waiting there to board the car. The car stopped for these ladies at the east side of Main street. The ladies immediately boarded the rear platform of the car. When the car stopped Mr. Woodman was somewhere between the rear of the car and the southwest corner of the intersection of Main and C streets, walking very fast to catch the car. He reached the car about the time it started, and took hold of it and attempted to board it. As he did so his foot slipped from the bottom step, and he landed on the board pavement, still holding to the car with his hands. He again attempted to get his feet on the step,

but failed and, holding on to the car, was dragged about 50 or 60 feet, when the car was stopped. When he attempted to get on the car the second time, the conductor caught him by the arm and attempted to assist him, but without success. When the car stopped, he got up from the ground, brushed himself, and boarded the car, and rode to his destination. He died on January 5, 1905. The evidence in the record does not show the character of the injuries. No negligence of the respondent company is shown in this case. The only possible claim of negligence which could be made is the one which is attempted to be made, viz., that the conductor of the car saw, or should have seen, that Mr. Woodman intended to board the car before the car was started. There is no evidence that the conductor actually saw him until after he had attempted to board the car and slipped off. The car was then in motion. Nor is there any evidence that the conductor in the exercise of reasonable care should have seen that Mr. Woodman was intending to board the car before it started, or before the signal to start was given by the conductor to the motorman. Mr. Woodman was not with the ladies when the car stopped for them, nor was he at the entrance of the car when it was stopped, but was to the rear thereof, and it does not appear that he was in sight of the conductor. He did not reach the car until it was in motion or about to start, and evidently after the signal to start had been given by the conductor. Unless it was shown that the conductor should have seen the deceased, or that the latter was intending to board the car before the signal to go ahead was given or before the car started, the conductor was not negligent, and, of course, the respondent was not negligent. *Foster v. Seattle Electric Co.*, 35 Wash. 177, 76 Pac. 995. The evidence does not show that the conductor was not at his station, nor does it show any facts from which the jury might reasonably conclude that the company was negligent.

The judgment is therefore affirmed.

ROOT, FULLERTON, HADLEY, CROW, and DUNBAR, JJ., concur.

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HENRY et al. v. CITY OF SEATTLE.  
(Supreme Court of Washington. March 22, 1906.)

#### 1. PUBLIC LANDS—TIDE LANDS—PLATS.

Where a plat of tide lands was made by the owners of the adjoining upland, but a subsequent plat was made by the local board of tide-land appraisers, which was ratified by the state Legislature (Laws 1895, p. 527, §§ 54, 64), the former plat was vacated in so far as it conflicted with the latter.

#### 2. SAME—LEASE—CANCELLATION.

Laws 1897, p. 30, c. 27, directing the board of state land commissioners to cancel all deeds and contracts covering tide land lots which were legally established street projections and extensions, where such streets or extensions

had not been duly vacated, and authorizing a refunding of the money paid on such contracts, did not apply to streets shown by a former plat which was vacated by a later plat ratified by the Legislature prior to the sale of the lots affected thereby.

3. SAME—ESTOPPEL.

The owner of tide land lots constituting a part of a street, as shown by an original plat, which had been vacated by a subsequent plat ratified by the Legislature, was not estopped to deny the existence of the street because his grantors were permitted to purchase the lots by reason of having purchased lots in a part of the original plat not changed by the new plat, since there was no attempt to question the plats under which the lots were purchased.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by James Henry and others against the city of Seattle. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Scott Calhoun and O. B. Thorgrimson, for appellant. Metcalfe & Jurey, for respondents.

MOUNT, C. J. Plaintiffs brought this action to remove a cloud from the title to certain lots in the city of Seattle. The question in the case was whether or not a certain street, known as "Hill" street, extended across the plaintiffs' lots. The trial court found that it did not, and entered a decree accordingly. The city appeals.

The facts are as follows: The lots in question are tide lands in block 243 of the Seattle tide lands, as platted by the board of tide land appraisers under the act of March 26, 1890 (Laws, p. 431). In the year 1870 one T. I. McKenny platted into streets, lots, and blocks what is known as "Central Seattle," which comprised a tract of land lying east of Elliott Bay and extending up to the line of ordinary high tide on the east shore of Elliott Bay. One of the streets in this addition was known as "Hill" street, which extended east and west through the said addition. From the date of the plat to the present time Hill street has been, and now is, one of the upland streets of said city. On February 28, 1884, during territorial days, the owners of the upland adjoining the tide lands of Elliott Bay platted into streets, lots, and blocks the tide lands lying immediately to the west of their upland possessions, and in such plat extended Hill street, as laid out in the plat of Central Seattle, in a direct line west over and across the tide lands. This plat was designated and known as "City Front Addition." All the street, lots, and blocks in this addition were covered with water. In 1895 the local board of tide land appraisers, appointed under the act of 1890, examined, certified, and platted all of the Seattle tide lands into streets, lots, and blocks, designating the same as "Plat of Seattle Tide Lands." Thereafter, on March 26, 1895, the plat so made and the acts of the said board in reference thereto

were ratified by the state Legislature. Laws 1895, p. 527, §§ 54, 64. The plat made by the board of tide land appraisers in 1895 covered the greater part of the tide lands formerly platted, as stated above, under the name of City Front addition. A street running northerly and southerly near the shore line was designated as "Seattle Boulevard." The streets, lots, and blocks to the east of this boulevard were changed in the new plat, but the lands lying to the west of this boulevard were entirely replatted without reference to the old plat; so that the streets on the plat of City Front addition lying to the east of Seattle Boulevard extended only to said boulevard, while to the west an entire new plat was made. The blocks were platted much larger and the streets much wider, so that the streets running east and west on the east side of Seattle Boulevard did not coincide with the streets on the opposite side. All the streets in this plat were water streets existing only on paper. Block 243, plat of Seattle tide lands, in which respondents' lots are located, lies on the west side of Seattle Boulevard. Before the Seattle tide land plat was made Hill street, as platted by City Front addition, extended across this block and covered a part of the land now owned by respondents. In 1895, after the plat of Seattle tide lands, the Seattle Transfer Company applied to the state to purchase the lots in question, according to the plat of Seattle tide lands, and in January, 1897, a contract was entered into by the state with the transfer company, and in 1901 a deed was issued therefor. Respondents, by mesne conveyances, have acquired the title. In 1896 the city of Seattle applied to the board of state land commissioners to change the plat of Seattle tide lands so as to make an extension on Hill street and other streets one block further west, which would extend said street across block 243, Seattle tide lands, where appellant maintains that it now is. The board of state land commissioners refused to act upon this petition, and thereupon an action in mandamus was brought to compel them to do so. The action was dismissed and an appeal was taken to this court, and the judgment of the lower court was affirmed. *City of Seattle v. Forrest*, 14 Wash. 423, 44 Pac. 883. In 1897, after the contract had been entered into between the state and the Seattle Transfer Company, who purchased the lots in question, the Legislature passed an act directing the board of state land commissioners to cancel all deeds and contracts covering tide land lots which were legally established street projections and extensions, where such streets or extensions had not been duly vacated, and authorized a refunding of the money paid on such contracts. Laws 1897, p. 30, c. 27. Thereafter, on June 18, 1897, without notice to any one, the board of state land commissioners entered an order on their minutes canceling

certain contracts, and among them the contract for the lots now owned by respondents; but no money was ever refunded, and subsequently a deed was issued by the state therefor.

During all the time up to the time of the filing of the plat by the board of tide land appraisers in 1895, the fee of the tide lands was in the state. There was no adverse claim against this fee. Assuming that the plat made and filed by the upland owners in 1884 was authorized by law then in force, still the state by its constituted authorities had power to abandon or vacate the plat and the streets and blocks theretofore made, and make another plat if it saw fit to do so. especially where private rights had not intervened, and were not interfered with. The rule is thus stated by Mr. Dillon, in his work on Municipal Corporations, vol. 2 (2d Ed.) § 666: "The plenary power of the Legislature over streets and highways is such that it may, in the absence of special constitutional restriction, vacate or discontinue the public easement in them, or invest municipal corporations with this authority." To the same effect, see sections 651 and 651a, same volume; Elliott on Roads and Streets (2d Ed.) § 857; 27 Enc. of Law (2d Ed.) p. 113; San Francisco v. Burr, 108 Cal. 460, 41 Pac. 482; Brook v. Horton, 68 Cal. 554, 10 Pac. 204. In the case of San Francisco v. Burr, supra, the court said, quoting from Polack v. San Francisco Orphan Asylum, 48 Cal. 492: "That the Legislature possesses competent power to vacate a street in a city; that the Legislature may delegate or commit such power to the municipal authorities of the city; that its exercise by the municipal authorities is dependent on the will and subject to the control of the Legislature; and that after such power has thus been committed to the municipal authorities the Legislature may revoke it in part, as well as in whole, or, without any express revocation, may itself exercise it in any particular instance—are propositions about which there can be no controversy in this state. The plenary power of the Legislature over the whole domain of streets is well illustrated by the decisions of this court in the litigation respecting Kearney, Second, and Beale streets, in the city of San Francisco."

There are no constitutional restrictions upon the Legislature in regard to the vacation of streets in cities in this state. Its power is therefore supreme. When the last plat was made and filed and approved by the Legislature of the state, which had full authority over its own lands, such plat necessarily vacated the former plat, including all streets and lots and blocks which were in conflict with the latter plat. Otherwise there would be two conflicting plats existing upon the same land at the same time, which would lead to utter confusion. For this rea-

son, it follows conclusively that the Legislature intended by the approval of the second plat to vacate the former plat, in so far as the latter plat covered ground occupied by the former. Brook v. Horton, supra. The only legal streets to the west of Seattle Boulevard are the streets as designated on the plat of Seattle tide lands. Hill street, therefore, terminates at the east line of Seattle Boulevard, and does not extend across respondents' lots. The act of 1897, purporting to authorize the cancellation of contracts for tide land lots which were street projections or extensions, had no application to the respondents' lots, because that part of Hill street which had formerly extended over the lots had been legally vacated long prior to the passage of that act.

Appellant argues that respondents are estopped to say that Hill street does not extend across their lots on the west side of Seattle Boulevard, because their grantors were permitted to purchase the said lots by reason of having purchased lots in City Front addition on the east side of said boulevard, and several cases are cited from this court to the effect that, where one purchases lots according to a certain plat, he is bound by this plat. If this rule is applicable to this case at all, it is favorable to respondents, because respondents did not, nor did their predecessors in interest, purchase the lots in blocks 243, Seattle tide lands, as platted in City Front addition. Those lots were purchased after City Front addition to the west of Seattle Boulevard had been vacated. That part of City Front addition to the east of Seattle Boulevard was adopted by the plat of Seattle tide lands, and therefore became a part of Seattle tide lands. Respondents are not attempting to question the plats by which they purchased their lots, but are maintaining, and have a right to maintain, that they purchased according to the plat legally existing at the time of the purchase, and that prior plats had theretofore been vacated.

The judgment of the lower court is right, and is therefore affirmed.

ROOT, FULLERTON, HADLEY, CROW, and DUNBAR, JJ., concur.

ALLEN v. BAXTER et al.

(Supreme Court of Washington. March 23, 1906.)

1. APPEAL—RECORD—NECESSITY FOR BILL OF EXCEPTIONS OR STATEMENT OF FACTS.

The Supreme Court will not review questions of fact presented to the lower court, where all the material facts presented to the trial court are not brought up by bill of exceptions or statement of facts properly certified by the trial judge.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2416.]

## 2. PLEADING—DEMURRER—MODE OF OBJECTION TO PLEADING.

Objections to a complaint by a receiver, on the ground that it does not allege that plaintiff was the duly qualified and acting receiver at the time the action was begun, that the mere allegation that he was appointed and qualified is not sufficient, and that the complaint fails to show in what case or court the plaintiff was appointed receiver, are not such as can be raised by demurrer under the Code, though they might have been raised by a proper motion.

## 3. RECEIVERS—ACTIONS—PLEADING.

A complaint by a receiver need not allege that the receiver has leave of court to bring the action.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, § 362.]

## 4. SAME.

The complaint, in an action by the receiver of a corporation to have a claim against the corporation declared a general claim, and a levy of attachment sued out thereunder dissolved on the ground of the company's insolvency, was not subject to general demurrer, on the ground that it did not allege that defendants knew that the corporation was insolvent at the time the attachment was sued out, but such knowledge would be presumed as against the general demurrer.

Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by Clay Allen, as receiver of the De Soto Placer Mining Company, against Marion B. Baxter and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

I. D. McCutcheon, for appellants. Byers & Byers and Clay Allen, for respondent.

MOUNT, C. J. This action was brought in Snohomish county. The complaint, omitting formal parts, is as follows: "(1) That the De Soto Placer Mining Company is a foreign corporation, organized under the laws of the state of West Virginia, and authorized to transact business in the state of Washington. (2) That during all the times hereinafter mentioned and until the appointment of a receiver, the said corporation was maintaining an office in the city of Seattle, King county, Wash., where service could be had upon said corporation. (3) That on the 29th day of March, 1904, the said Marion B. Baxter filed her complaint in this court against the De Soto Placer Mining Company as defendant, which said action is docketed and numbered as No. 42,347, wherein she sought to recover from the said defendant for services rendered the sum of \$3,000. (4) That afterwards, to wit, on March 30, 1904, a writ of attachment against the certain property of the De Soto Placer Mining Company hereinafter described was sued out, issued and directed to the said Frank P. Brewer, sheriff of Snohomish county, Wash., for service; that the said Frank P. Brewer, as sheriff of Snohomish county, made service of said writ of attachment by filing the same with the auditor of said county; that the said De Soto Placer Mining Company entered its appearance by general denial in said action. (5) That afterwards, to wit, on the 20th day of October, 1904, judgment

was rendered in favor of the said Marion B. Baxter and against said De Soto Placer Mining Company in the sum of \$3,000, with interest. (6) That on the 20th day of October, 1904, a writ of execution against the property hereinafter described was issued out of this court, and directed to the said Frank P. Brewer, as sheriff of Snohomish county, for execution, and service of said writ was made by filing the same with the auditor of said county. (7) That on the 23d day of July, 1904, one Arthur G. Mather was regularly appointed as receiver for all the property and assets of the De Soto Placer Mining Company, in an action wherein one Louis L. Lang was plaintiff and the De Soto Placer Mining Company defendant. (8) That afterwards, to wit, on the — day of November, 1904, the said Arthur G. Mather was, at his own request, removed as said receiver, and the plaintiff herein was, on the 16th day of November, 1904, by order of the Hon. George E. Morris, judge of the said superior court of King county, Wash., appointed as receiver of the property and assets of the De Soto Placer Mining Company. (9) That the said receiver before bringing his action in this court has filed his oath and been regularly qualified as such receiver. (10) That at the time of the filing of the suit of the said Marion B. Baxter against the De Soto Placer Mining Company, and at the time of the issue and service of the writ of attachment thereunder, and at the time of the issue and service of the writ of execution, and the judgment obtained in said suit, the De Soto Placer Mining Company was wholly insolvent. (11) That prior to all the dates hereinbefore mentioned, to wit, on or about the month of November, in the year 1903, practically all of the real estate and personal property of the said company had been conveyed, transferred, and leased to the said company. (12) That the debts and liabilities due from said company to its creditors, at the time of the filing of the said Marion B. Baxter's complaint, aggregated approximately the sum of \$90,000, and the property and assets at that time belonging to the said company did not exceed in value, and does not now exceed in value, the sum of \$10,000, including the property hereinafter described. [Then follows a long list of real property and mining claims located in Snohomish county, Wash.] (13) That the said Frank P. Brewer, as sheriff of Snohomish county, is authorized to sell the property hereinbefore described in said writ of attachment under said execution. (14) That there is little or no property of said company available to pay the debts due the creditors of the company; that said Marion B. Baxter and the other defendant herein, should sale be made of the property hereinbefore described and proceeds thereof appropriated, the said Marion B. Baxter will receive approximately the full amount of her claim against the said company, while the other creditors herein will take nothing: Wherefore the plaintiff

prays that the claim of said Marlon B. Baxter be declared a general claim against said corporation; that the levy under the writ of attachment and the levy of the writ of execution sued out by these defendants be dissolved and set aside; that the property herein be given into the control of the receiver as an asset of said corporation." The defendants appeared in the action and filed a general demurrer to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. At the same time, the defendant demanded a change of venue to King county, upon the ground that the principal defendant resided in King county, and that all of the defendants' witnesses resided in King county. This motion was heard and denied on January 31, 1905. Thereafter the demurrer was heard and on June 22, 1905, was overruled. Defendants elected to stand on their demurrer, and a judgment was entered as prayed for in the complaint. The defendants appeal, alleging (1) that the court erred in denying the demand for a change of the place of trial; (2) in overruling the demurrer.

No statement of facts or bill of exceptions is brought here under certificate of the trial judge. Several affidavits for and against the demand for a change of the place of trial are embodied in the transcript, which is certified by the clerk as being "a full, true and correct copy of so much of the records and files as the appellant deems material to a review of the matters embraced in this appeal." Respondent moves to strike all these affidavits, for the reason that they have not been incorporated in the record by a statement of facts or bill of exceptions. This motion must be sustained. We have often and uniformly held that we will not review questions of fact presented to the lower court, unless all the material facts presented to the trial are brought here by bill of exceptions or statement of facts properly certified by the trial judge. *State v. Humason*, 5 Wash. 499, 32 Pac. 111; *Clay v. Selah Valley Irrigation Co.*, 14 Wash. 543, 45 Pac. 141; *Jacobson v. Lunn*, 16 Wash. 487, 48 Pac. 237; *Chevaller v. Wilson*, 30 Wash. 227, 70 Pac. 487; *Soder v. Adams Hardware Co.*, 38 Wash. 607, 80 Pac. 775.

Appellant argues that the complaint is not sufficient, because it does not allege that the respondent was the duly qualified and acting receiver at the time the action was begun; that the mere allegation that he was appointed and qualified is not sufficient; that the complaint fails to show in what case or court the respondent was appointed receiver. It is sufficient to say of these objections that they are not such as can be raised by demurrer under our Code practice. They might have been raised by a proper motion, but not by demurrer. In *Isaacs v. Holland*, 4 Wash. 54, 29 Pac. 976, this court, quoting from an earlier territorial case, said: "A snitor is no longer to be turned out of court, if by

making all reasonable intendments in his favor enough can be seized hold of in his pleadings to show that he has rights which ought to be enforced. He may be required on motion to conform his statement to the rules of good pleading, and, if he refuse, may be turned out of court; but, as against a demurrer, the office of which is to raise a substantial issue on the law of the case, and not on the law of practice and pleading, evidentiary facts, and even inferences from averments amounting to mere conclusions of law will be considered in his favor.

Appellants contend further that the complaint is insufficient, because it does not show that the receiver has obtained leave of court to bring the action. This court held otherwise in *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138, and *Compton v. Schwabacher Bros.*, 15 Wash. 306, 46 Pac. 338. Appellants also contend that the complaint is insufficient, because it contains no allegation that the appellants knew that the corporation was insolvent at the time the attachment was sued out. We think this is not necessary. If, as a matter of fact, the corporation was insolvent at the time of the levy of the writ, the funds of the corporation were trust funds for the benefit of the creditors thereof. *Compton v. Schwabacher Bros.*, supra; *Washington Liquor Co. v. Alladio Cafe Co.*, 28 Wash. 176, 68 Pac. 444; *State ex rel. v. Superior Court*, 36 Wash. 91, 78 Pac. 461. As against a general demurrer, it will be presumed that appellants had knowledge of the fact.

The court properly overruled the demurrer, and the judgment is therefore affirmed.

ROOT, DUNBAR, CROW, FULLERTON,  
and HADLEY, JJ., concur.

#### ARTHUR v. WASHINGTON WATER POWER CO.

(Supreme Court of Washington. March 23, 1906.)

#### 1. COSTS—PAYMENT—STAY OF SUBSEQUENT ACTION UNTIL PAYMENT—ORDER—EFFECT.

An action was voluntarily dismissed and plaintiff instituted a second suit against the same defendant involving the same matter. Defendant moved for an order requiring the payment of the costs of the first action as a condition precedent to the prosecution of the second. The order made stated that the motion was granted, and added that the proceedings should be stayed until the costs were paid. *Held*, that the order was in effect one, requiring the payment of the costs before plaintiff could prosecute the second action.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 1048-1058.]

#### 2. SAME—TIME WITHIN WHICH TO PAY COSTS.

An order requiring plaintiff to pay the costs of a prior action before he could prosecute a second action, which did not fix the time within which payment should be made, at least required plaintiff to pay the costs within a reasonable time if he desired to prosecute the second action.

#### 3. DISMISSAL AND NONSUIT—GROUNDS—FAILURE TO PROSECUTE.

A complaint and summons were served in July, 1902. In the same month defendant filed

a motion requiring plaintiff to pay the costs in a prior suit involving the same matter. In March, 1905, defendant caused the motion to be noted for hearing, and the court sustained it and ordered that the proceedings should be stayed until the costs were paid. Subsequently defendant moved for the dismissal of the action for failure to prosecute. It was not shown that plaintiff could not have paid the costs, or that the time between the order to pay costs and the motion to dismiss was insufficient. *Held*, that the court in the exercise of its discretion properly dismissed the action for failure to prosecute.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by J. W. Arthur against the Washington Water Power Company. From a judgment dismissing the action for failure to prosecute, plaintiff appeals. *Affirmed*.

C. S. Voorhees and Reese H. Voorhees, for appellant. H. M. Stephens, for respondent.

**HADLEY, J.** This appeal is from a judgment dismissing the action for failure to diligently prosecute it. The complaint and summons were served upon the defendant on July 8, 1902. On the 25th day of the same month certain motions were served and filed by the defendant, among which was a motion for an order requiring the plaintiff to pay the costs of an action theretofore instituted by the plaintiff against the defendant, such payment to be required as a condition precedent to the prosecution of this action. The motion stated that the former action was for the same cause as that set forth in this complaint. The motion was supported by affidavit which stated that the former action was voluntarily dismissed by the plaintiff, and that costs were taxed in favor of the defendant, against the plaintiff, in the sum of \$73, no part of which had been paid. The action remained in that condition from July, 1902, until March 1, 1905, when the defendant caused the motion to be noted for hearing on March 4th. On the last-named date, after a hearing, the court entered an order sustaining the motion, and also ordering that further proceedings in behalf of plaintiff be stayed until he should pay said judgment for costs. Following the above order, the defendant moved the court for an order dismissing the cause, for the reason that the plaintiff had failed to diligently prosecute the action. The motion was supported by affidavit reviewing the history of the cause as above set forth, and stating that the said judgment for costs, and no part thereof, had been paid. On the 18th day of March, after a hearing of the motion, it was granted, and judgment entered dismissing the action. The plaintiff has appealed.

It is first assigned that the court erred in causing the order to be entered staying proceedings until the costs of the former action should be paid, in the absence of an order requiring the payment of such costs. The motion upon which the order was based asked for an order requiring the payment of the costs as a condition precedent to the prosecu-

tion of the second action. The order stated that the motion was granted, and it also added that proceedings should be stayed until the costs were paid. The order was, therefore, in effect, one requiring the payment of the costs. It is true no time was fixed within which payment should be made, but the motion to require the payment had been pending in the cause for more than 2½ years, and the order could have been no surprise to appellant in view of the decisions of this court in similar cases. *Schwede v. Hemrich*, 29 Wash. 124, 69 Pac. 643; *Plumley v. Simpson*, 31 Wash. 147, 71 Pac. 710.

If, therefore, appellant could not pay the costs at once, he was at least under obligations to pay within a reasonable time if he desired to further prosecute the second action. He assigns as error that on the fourteenth day after the order staying proceedings the court dismissed the action for want of diligent prosecution. The record does not disclose that any showing was made to the court that appellant could not have paid the costs or that for any reason the time that had elapsed was insufficient. The motion to dismiss also reached to failure in all matters of diligence to prosecute, and not alone to failure to pay the costs. The court was advised that this, a second action, had been pending for more than 2½ years, and that appellant had of his own initiative taken no steps within all that time to forward the prosecution of the case. Such facts were proper to consider in connection with the failure to pay costs, and upon all the facts taken together we think the court was justified in dismissing the action. While it is true the respondent could have taken steps to forward the action, yet, the suit having been brought by appellant, the duty was particularly upon him to see that diligence was exercised. In *Langford v. Murphy*, 30 Wash. 499, 70 Pac. 1112, we said: "Nor do we think that the fact that the statute permits the defendant to bring a case on to hearing deprives the court of its unquestioned common-law, if not inherent, power to clear its dockets of abandoned or stale actions." See, also, *First National Bank, etc., v. Hunt* (Wash.) 82 Pac. 285. We shall, therefore, not interfere with the discretion of the trial court in dismissing the action under all the circumstances.

The judgment is affirmed.

**MOUNT, C. J., and FULLERTON, CROW, ROOT, and DUNBAR, JJ., concur.**

STATE ex rel. SMITH v. ROSS, Public Lands Com'r.

(Supreme Court of Washington. March 24, 1906.)

1. MANDAMUS—SCOPE OF RELIEF—REMEDY BY APPEAL.

Laws 1901, p. 98, c. 62, § 1, authorizing an appeal from orders or decisions of the board of state land commissioners, does not authorize

such an appeal from an order of the commissioner of public lands canceling a lease of tide lands, and therefore did not deprive the lessee of the right to maintain mandamus to compel the reinstatement of the lease.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 9.]

**2. PUBLIC LANDS — LANDS OF STATE — TIDE LANDS — LEASES — FORFEITURE — NOTICE — SERVICE.**

Ballinger's Ann. Codes & St. § 2155, requiring the commissioner of public lands to keep a full and complete record of all leases thereof, and on the first of each and every month to cause notice of delinquency to be served on lessees of such lands, etc., having been construed for more than ten years not to require personal service of such notice, in order to authorize a forfeiture the service of a delinquency notice thereunder by mail constituted a sufficient compliance with such provision.

**3. SAME — FORFEITURE.**

Ballinger's Ann. Codes & St. § 2155, requires the commissioner of public lands to cause notice to be served on lessees of public lands, who may become delinquent on annual payment within 60 days, and therefore subject to forfeiture, and that he shall forthwith, if no response be had, declare a forfeiture of the lease. *Held* that, where such a notice attempted to be served on the lessee by mail was not received by her, but was returned to the state land commissioner, and the amount of rent due was tendered before the expiration of 60 days from the date of the service of a second notice, the commissioner had no power to cancel the lease.

Mandamus by the state, on relation of Marguerite H. Smith, against E. W. Ross, as commissioner of state public lands. Writ granted.

Harold Preston and E. H. Gule, for plaintiff. A. J. Falknor, for defendant.

**CROW, J.** This is an original application made to this court for a writ of mandamus to compel the defendant, as state land commissioner, to reinstate a certain lease of tide lands and accept the rent due thereon. The relator alleges that on November 1, 1899, the state of Washington, by and through its then duly qualified and acting commissioner of public lands, executed and delivered to one V. Hugo Smith, the husband of relator, lease No. 311 for the period of 30 years for certain tide lands of the first class in Seattle, King county, Wash.; that on November 1, 1899, said V. Hugo Smith paid the sum of \$24 rent on said lease for first year of the term thereof, and paid the further sum of \$24 each year in advance for the years commencing November 1, 1900, November 1, 1901, November 1, 1902, November 1, 1903; that on the 10th day of February, 1903, said V. Hugo Smith assigned said lease to the relator; that said assignment was approved by the commissioner of public lands, and that the relator is now the owner of said lease as her separate property; that the relator believed the rent due on November 1, 1904, had been paid; that no notice as required by law was ever served upon her notifying her that said rent was due or would become delinquent, or that said lease would be forfeited for nonpayment, nor was any notice sent to the relator until November 10, 1905, when the defendant mailed a

statement to the relator that rent was due for the years beginning November 1, 1904, and November 1, 1905; that said notice was received by the relator on November 15, 1905, who immediately caused said V. Hugo Smith to pay the defendant, as such commissioner, on November 17, 1905, the rent for said two years, amounting to \$48, which said commissioner received; that on or about November 24, 1905, the relator for the first time learned said lease was marked canceled under date of November 9, 1905, on the records of defendant's office; that at all times the relator has been acting in good faith, and that, if the rent due on November 1, 1904, was not paid until November 17, 1905, it was through inadvertence and for want of the notice required by law; that on December 6, 1905, the defendant attempted to return said rental, which the relator refused to receive; that on December 8, 1905, the relator demanded that said lease be reinstated, but that defendant then refused, and still refuses, to reinstate the same. The defendant, E. W. Ross, successor of said S. A. Callvert, and the present commissioner of public lands, has demurred to said affidavit, and has also filed an answer, in which he alleges that on November 16, 1904, there was mailed to said lessee by the defendant's predecessor in office a notice that \$24 rent had become due on said lease on November 1, 1904, and that, if the same was not paid within 60 days after due, said lease would be canceled; that said notice was inclosed in an envelope, postage prepaid, addressed to Marguerite H. Smith, Colonial Block, Seattle, Wash., care of V. H. Smith, and was deposited in the United States post office at Olympia, Wash.; that on or about said date said Marguerite H. Smith left the city of Seattle to visit the St. Louis exposition, leaving instructions for her mail to be forwarded to the Inside Inn at St. Louis, Mo.; that said letter was so forwarded; that she failed to call for the same at the inn; that said letter was returned unopened to said S. A. Callvert, land commissioner, and was filed away and preserved in the records of his office; that afterwards, and while defendant was preparing his answer herein, an investigation of the files of his office disclosed that said letter containing said notice had been returned, and said original notice and envelope are attached to the answer herein; that said notice of November 10, 1905, mentioned in the affidavit as having been sent out by defendant, was sent through inadvertence and without authority, by a clerk in defendant's office, and after the cancellation of said lease had actually been ordered; that prior thereto, about November 1, 1905, defendant had directed the clerks in his office to prepare a list of all tide land leases upon which rentals were then due and unpaid; that about November 7, 1905, said list was completed and included said lease No. 311, showing two years' rent past due; that on the morning of November 9, 1905, and not at any other time,

the defendant, as commissioner of public lands, entered upon said list in his own handwriting the words, "Ordered canceled, November 9th, 1905, E. W. Ross, Com.;" that thereafter defendant, as such commissioner, executed and entered in the records of his office an additional formal order canceling said lease and many other leases; that afterwards, during the absence of the defendant from the city of Olympia, said V. Hugo Smith, on or about November 17, 1905, appeared at defendant's office and tendered \$104 in attempted payment of rental on certain tide land leases including said lease No. 311; that said money was not received by defendant's clerks in payment of rental, nor was the retention thereof so considered, as said lease had been canceled, but said money was held awaiting the defendant's return and his order as to its disposition; that on December 6, 1905, defendant promptly addressed a letter to said V. Hugo Smith, and, inclosing a draft for \$104, returned said deposit and notified him of the cancellation of said lease; that said Smith returned said draft, which is now in the defendant's possession, but is not held for payment of rentals.

By his demurrer the defendant contends this court has no jurisdiction of this proceeding, as the relator has a remedy by appealing to the superior court from the decision or action of the commissioner of public lands, citing section 1, c. 62, p. 98, Laws 1901. Said section provides for an appeal from orders or decisions of the board of state land commissioners, but makes no reference to orders made by the commissioner of public lands. The defendant contends that, in drawing this appeal act of 1901, the Legislature must have inadvertently overlooked the fact that in some instances actions therein contemplated are taken by the commissioner of public lands alone, instead of the board; that it must have intended to allow an appeal to any one who was an applicant for a lease or who was aggrieved by any action upon his lease; and that, unless the statute be so construed as to give the right of appeal in such matters whether the board or the commissioner made the order, the statute itself would become meaningless, and not as broad as the Legislature intended. We do not think this contention can be sustained. At the time the act of 1901 was passed, section 2149-2155, Ballinger's Ann. Codes & St., provided for the leasing of lands and the forfeiture of leases by the commissioner of public lands, and section 2180, Ballinger's Ann. Codes & St., provided that tide and shore lands might be leased in the same manner. The Legislature, when providing for an appeal by the act of 1901, must be presumed to have known that the commissioner of public lands had authority to make and forfeit leases. If it intended to provide for an appeal from his order or decision, it would certainly have so stated. For us to hold such a right of appeal to have been given

would be judicial legislation, as we would, without authority or necessity, be reading into the act words which were not placed there or intended by the Legislature. The relator having no right of appeal, this court has jurisdiction, as mandamus will lie to compel the commissioner of public lands to reinstate a lease and accept rent. *State ex rel. Bussell v. Callvert*, 33 Wash. 380, 74 Pac. 573.

The relator, citing section 2155, Ballinger's Ann. Codes & St., contends: (1) That, before a lease can be forfeited, notice of delinquency must be personally served upon a lessee, and that said notice cannot be served by mail; (2) that no notice of default of the rent due November 1, 1904, having been served upon the relator either personally or by mail, the defendant had no authority to cancel her lease. Section 2155, Ballinger's Ann. Codes & St., reads as follows: "The commissioner of public lands shall keep a full and complete record of all leases so issued and payments made thereon, and on the first of each and every month the commissioner of public lands shall cause notice to be served on lessees of public lands who may become delinquent on annual payment within sixty days, and therefore subject to forfeiture, and the commissioner shall forthwith, if no response be had, declare a forfeiture of the lease, and may eject the lessee therefrom." This section is somewhat ambiguous, and its construction is not without difficulty; but, after careful consideration, we have concluded that it imposes a duty upon the commissioner of public lands to make an examination of the records of leases in his office on the first of each month for the purpose of ascertaining all leases upon which annual installments of rent will become due within the next succeeding 60 days, and to immediately give written notice thereof to the holders of all such leases. According to this construction it would be his duty to give such notice before any default could occur, and without regard to the probability or improbability that one might or might not occur. This being true, we cannot hold that such notices must be served personally. The office of the state land commissioner is one of the most important departments of the state government, and it is common knowledge that it has issued thousands of leases for various classes of state lands. To hold that the Legislature intended to impose upon the land commissioner the burdensome duty of causing a written notice to be personally served upon each and every lessee at least once a year would be unreasonable. We think the notice mentioned is intended to be in the nature of a reminder to the lessee, calling his attention to the installment of rent about to mature, and the liability of his lease to forfeiture, so that no default may occur, and that no other notice is required as a condition precedent to such forfeiture in the event of nonpayment of the rent within the time contemplat-

ed by the statute and fixed by the lease. Ordinarily, where a statute requires the giving of notice, and there is nothing in the context of the law or in the circumstances of the case to show that any other notice was intended, the courts hold that personal notice must be given. 21 Am. & Eng. Ency. of Law, p. 583; Wade on the Law of Notice (2d Ed.) § 1334. We think, however, that the peculiar character of this statute, its context, its use of the word "response," and all the circumstances show it not to have been the intention of the Legislature to require personal service on all of these lessees, whether in default or not. It inferentially appears, both from the affidavit of the relator and the answer of the defendant, and in fact may be taken as conceded, that for years the universal practice of the commissioners of public lands has been to serve these notices by mail. It is common knowledge that this custom has prevailed ever since said section was originally enacted, in 1895 (Sess. Laws 1895, p. 546, c. 178). It was amended and re-enacted, without any substantial change in the matter of notice in 1897 (Sess. Laws 1897, p. 244, c. 89). Sutherland, in the second edition of his work on Statutory Construction, at section 474, says: "The practical construction given to a doubtful statute by the department or officers whose duty it is to carry it into execution is entitled to great weight, and will not be disregarded or overturned, except for cogent reasons, and unless it is clear that such construction is erroneous. Says the Supreme Court of Oregon: 'In all cases where those persons whose duty it is to execute a law have uniformly given it a particular construction, and that construction has been acquiesced in and acted upon for a long time, it is a contemporary exposition of the statute, which always commands the attention of the courts, and will be followed, unless it clearly and manifestly appears to be wrong.' The Legislature is presumed to be cognizant of such construction, and after long continuance, without any legislation evincing its dissent, courts will consider themselves warranted in adopting that construction. And, where the statute is re-enacted without change, the presumption is strong that the Legislature intended it to bear the same construction that had previously been given it." We think service of notice by mail is a sufficient compliance with said section, for the further reason that, where it has been addressed to the lessee in a sealed envelope, postage prepaid, with a return direction, and has been deposited in the United States post office and not returned to the sender, a strong presumption arises that it actually reached the person to whom it was addressed and gave the notice intended. The relator's lease contains the following stipulation: "The payment of the above-mentioned annual rent to the commissioner of public lands of the state of Washington yearly in advance

is of the essence of this contract, and the same shall be, and is, a condition precedent to the execution and continuance of this lease or any rights thereunder, and, if said annual rent shall not be paid within sixty days from the date due upon notice served by the commissioner of public lands, this lease shall be null and void." It will be noticed that, under the provisions of section 2154, Ballinger's Ann. Codes & St., all leases are to be drawn on a form prescribed by the attorney general. The form of this lease, the uniform practice of the land commissioner's office, the universal acquiescence on the part of the lessees all over the state, and the above history of legislation, all appear consistent with our interpretation of said section 2155, Ballinger's Ann. Codes & St. We therefore hold that the notice mentioned therein may be served by mail, and that, under the provisions of said section, and the terms of the lease, if the annual rent be not paid after the service of such notice and within 60 days after due, the commissioner of public lands is authorized to declare a forfeiture without further notice.

Relator further contends that, even though notice served by mail be a sufficient compliance with the provisions of said section 2155, nevertheless the commissioner of public lands had no authority to forfeit her lease, for the reason that no such service was made giving notice of the installment of rent falling due November 1, 1904. If by oversight or inadvertence the commissioner of public lands should fail or neglect to mail the notice contemplated by said section in accordance with our interpretation, it would, upon discovery of such neglect, become his duty to mail the notice as soon thereafter as possible or practicable as a condition precedent to a forfeiture. In this instance, it is shown that a notice was mailed in November, 1904, but it also affirmatively appears from the defendant's answer that this notice did not reach the relator, but was returned unopened, and that it was not discovered by the present commissioner until after the commencement of this proceeding. The facts here disclosed show that the attempt to give notice by mail resulted in failure. The relator therefore is placed in the same position she would have occupied had no such notice been given or attempted. This being true, the defendant had no authority to forfeit her lease; payment having been actually made within 60 days after the mailing of the second notice in November, 1905. The relator having immediately proceeded by mandamus is entitled to have her lease reinstated and her rent received by the defendant. The defendant in good faith, relying upon the records of his office, which showed notice to have been given in November, 1904, attempted the cancellation of this lease, and did so before the rent was paid in 1905. When he made this attempted cancellation he seemed to be justified in his belief that

the notice required had been given in 1904. The fact that the first notice mailed by his predecessor in office did not reach the relator did not come to his actual knowledge until the time for the preparation of his answer had arrived. Thereupon he fairly and honestly presented in his answer a full, complete, and exact history of this case to this court. Upon the conceded facts, we think he was without authority to cancel the lease.

It is therefore ordered that the writ prayed for be issued.

MOUNT, C. J., and ROOT, DUNBAR, and HADLEY, JJ., concur.

### STATE v. BUTTS.

(Supreme Court of Washington. March 26, 1906.)

#### INFORMATION—DUPLICITY.

An information for larceny, which alleges that accused on a specified date, in a county designated, "then and there being, did then and there" steal 350 fence posts, 250 posts being the chattels of a person named, and 100 being the chattels of another, states but one offense; all the posts being stolen at the same time, and constituting but one transaction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 335, 336.]

Appeal from Superior Court, Okanogan County; R. S. Steiner, Judge.

Joe Butts was convicted of larceny, and he appeals. Affirmed.

E. K. Pendergast and Perry D. Smith, for appellant. Alvin W. Barry, for the State.

ROOT, J. Appellant was prosecuted jointly with one Cossalman upon an information charging grand larceny alleged to have been committed as follows: "The said William Cossalman and Joe Butts, on or about the 15th day of March, 1905, in the county of Okanogan aforesaid, then and there being, did then and there feloniously steal, take, and carry away three hundred and fifty fence posts, each of said posts of the value of twelve cents, and of the aggregate value of forty-two dollars, 250 of said posts of the goods and chattels of one J. D. Boone, and 100 or thereabouts of said posts of the goods and chattels of one A. M. Polk, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of Washington." To this information appellant interposed a demurrer on the following three grounds, to wit: "First, that said information does not substantially conform to the requirements of the Code of the state of Washington, and does not substantially conform to the laws of the state of Washington; second, that the facts charged in said information do not constitute a crime; third, that the facts charged in said

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information do not constitute a crime, misdemeanor, nor any offense against the laws of the state of Washington." Said demurrer was overruled. A trial resulted in the acquittal of Cossalman, and a conviction of appellant. The latter prosecutes this appeal. He urges that his demurrer should have been sustained for the reason that the information charges two offenses, inasmuch as the stolen posts are alleged to have belonged partly to one J. D. Boone and the other part to one A. M. Polk, and that it does not appear that they were taken at the same time. Respondent urges that the demurrer does not raise this question.

Section 6896, Ballinger's Ann. Codes & St., states the grounds upon which a demurrer may be interposed to an indictment or information. The first three grounds are as follows: "(1) That it does not substantially conform to the requirements of this Code; (2) that more than one crime is charged; (3) that the facts charged do not constitute a crime." Respondent maintains that the objection here urged by appellant could be raised only upon a demurrer expressly assigning the ground of the second subdivision of said statute, to wit: "That more than one crime is charged." We will not pass upon this question for the reason that we do not believe that the information is subject to the charge of duplicity. The offense is alleged therein to have been committed on a certain day. It is charged that the defendants "then and there being, did then and there feloniously steal, take, and carry away," etc. We think the natural and legitimate inference to be drawn from this language is that all of these posts were so stolen and carried away at the same time, constituting but one transaction. This being true, it would constitute but one offense, even though the ownership of the posts might have been in different persons. The demurrer was properly overruled. *State v. Clark* (Or.) 80 Pac. 101; *Rapalje on Larceny*, § 117; *People v. Johnson*, 81 Mich. 573, 45 N. W. 1119; *State v. Nelson*, 29 Me. 329; *Fulmer v. Commonwealth*, 97 Pa. 503; *State v. Hennessy*, 23 Ohio St. 339, 13 Am. Rep. 253; *Ben v. State*, 22 Ala. 9, 58 Am. Dec. 234.

The judgment of the superior court is affirmed.

MOUNT, C. J., and CROW, HADLEY, FULLERTON, and DUNBAR, JJ., concur.

### SERVICE v. McMAHON et al.

(Supreme Court of Washington. March 26, 1906.)

#### 1. MECHANICS' LIENS—LIMITATIONS.

Ballinger's Ann. Codes & St. § 5908, provides that no lien for materials furnished in the construction of a building shall bind the property longer than eight months after the filing of the claim, unless an action be commenced within that time. Section 4869 pro-

vides that an action may be commenced by the service of summons, but section 4807, in relation to limitations, provides that an action shall be deemed commenced when the complaint is filed. *Held*, that an action was barred where the complaint was not filed within the required eight months, although summons was served on some of the defendants within that time.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, 456-468.]

## 2. APPEAL—INVITED ERROR.

Where, in an action to enforce a mechanics' lien, plaintiff requested a judgment of dismissal in order that he might appeal, and he did not request that his rights to a personal judgment be preserved, he could not ask a reversal on appeal in order that he might have a personal judgment in the action.

Appeal from Superior Court, Spokane County; Henry L. Kellam, Judge.

Action by John Service against A. F. McMahon and others. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Pence & Rhodes, for appellant. Barnhart, Laughon & Pugh, for respondents.

**HADLEY, J.** This action was brought to foreclose a lien for lumber and material furnished in the construction of a building. The complaint alleges that the lien notice was filed for record on May 25, 1904. The complaint was not filed until January 30, 1905. Demurrer to the complaint was interposed on several grounds, and among them that the action was not commenced within the time limited by law. The demurrer was sustained, and, the plaintiff having refused to plead further, judgment was entered dismissing the action. The plaintiff has appealed.

Several questions are discussed as being involved in the ruling on the demurrer. But we think that the question raised as to the statute of limitations is decisive of the case. An affidavit in the record shows service of the complaint and summons upon some of the defendants within eight months of the filing of the lien notice; but the complaint was not filed until after eight months had expired. Section 5908, Ballinger's Ann. Codes & St., provides that no lien of the class sought to be enforced here shall bind the property subject to the lien for a longer period than eight calendar months after the claim has been filed, unless an action be commenced in the proper court within that time to enforce such lien. Appellant contends that the service of the summons and complaint upon some of the defendants was a commencement of the action within the meaning of the statute. Reference is made to the general practice act (section 4809, Ballinger's Ann. Codes & St.) in support of appellant's view that service of the summons was a commencement of the action as is contemplated by the lien limitation statute. Turning, however, to the statute on the general subject of limitations, we find that section 4807, Ballinger's Ann. Codes & St., provides that "an action shall be deemed commenced when the complaint is filed." It was held in *Cresswell v. Spokane County*, 30

Wash. 620, 71 Pac. 195, that under said statute, no matter how or when actions may be commenced for other purposes, yet, in order to escape the statute of limitations, the complaint must be filed within the prescribed limitation period. Appellant argues that the case cited dealt only with the general statute of limitations, and that the section from which we have quoted is a part of the chapter on that general subject, but that the provision as to limitation of actions to foreclose liens is found in another chapter pertaining to another subject. While that is true, yet we are unable to distinguish the cited case in principle from the one at bar. Section 4796, Ballinger's Ann. Codes & St., is also a part of the chapter on the general subject of limitations, and that section provides that actions can only be commenced within the periods in said chapter prescribed, "except when in special cases a different limitation is prescribed by statute." It is thus recognized that there may be special limitations provided other than those prescribed in that chapter, and that the same rules of practice shall apply to them. Such special cases are thus brought under the general scheme of limitation procedure. Section 5908, *supra*, provides such a special limitation of eight months. It is essentially a statute of limitations, and must, therefore, be controlled by the same rules of practice with reference to the commencement of actions as though it were included in the general chapter on that subject. *Cresswell v. Spokane County*, *supra*, is therefore decisive against appellant's contention.

It is further urged that, even though the right to enforce the lien is barred, the court nevertheless erred in dismissing the action, for the reason that appellant is at least entitled to a personal judgment as prayed in the complaint. The record is in a peculiar condition as bearing upon the action of the court in that regard. An order was entered sustaining the demurrer, and afterwards appellant himself filed the following motion in the case: "Comes now the plaintiff herein and respectfully shows this honorable court that heretofore in this cause this court sustained defendants' demurrer to plaintiff's complaint, and since that time no further order has been made in said cause, and the defendants have not filed their judgment. That, in order for plaintiff to perfect his appeal, it will be necessary for this court to make an order dismissing said cause. Wherefore plaintiff moves this court for an order dismissing said above-entitled cause without prejudice to plaintiff's right to appeal herein." The above motion appears to have been filed July 30th, but the judgment of dismissal as shown by the record was filed July 29th. We are unable to account for this inconsistency. It is possible that appellant was not advised that the judgment had been filed when he filed his motion asking for the dismissal. The fact is, however, that appellant's written re-

quest was filed, asking for the judgment that was rendered, in order that he might appeal. It nowhere appears that he requested the court to preserve his right to have a personal judgment, notwithstanding the failure of the lien, but he unconditionally invited the general judgment of dismissal. He is therefore not in position to ask a reversal in order that he may now have a personal judgment in this action.

The judgment is affirmed.

MOUNT, C. J., and ROOT, FULLERTON, CROW, and DUNBAR, JJ., concur.

# HAMMIEL v. FIDELITY MUT. AID ASS'N. (Supreme Court of Washington. March 26, 1906.)

## 1. CORPORATIONS — ACTIONS AGAINST FOREIGN CORPORATIONS — PROCESS — SERVICE.

Under Ballinger's Ann. Codes & St. § 4854, providing that an action against a corporation may be brought in the county where any person resides on whom process may be served, a court has no jurisdiction of an action against a foreign corporation, where the summons was served on its statutory agent residing in another county.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2622.]

## 2. SAME — JURISDICTION OF COURT.

Under Ballinger's Ann. Codes & St. § 4854, providing that an action against a foreign corporation may be brought in any county where it has an office, or any person resides on whom process may be served, an action against a foreign corporation can only be brought in the county in which it has an office, or in which a person resides on whom process may be served, and a court in another county has no jurisdiction of the subject-matter thereof.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2601.]

Appeal from Superior Court, Snohomish County; John C. Denney, Judge.

Action by J. E. Hammiel against the Fidelity Mutual Aid Association. From a judgment for plaintiff, defendant appeals. Reversed.

H. T. Granger, for appellant. Coleman & Fogarty, for respondent.

HADLEY, J. This action was brought upon an accident insurance policy, and the suit was instituted in Snohomish county. The defendant is a foreign corporation, organized under the laws of the state of California. The summons was personally served upon C. G. Helfner, the statutory agent of the defendant, and was served in King county. The defendant interposed a motion to dismiss the cause on the ground that it is a foreign corporation, duly authorized to do business in this state; that, at the time of the service of the summons, it had no office for the transaction of business in Snohomish county; that no person resided in said county upon whom process against defendant might be served; and that the court was therefore without jurisdiction. The motion was supported by

affidavit, which stated that, at the time of the service upon Mr. Helfner, a statutory agent of defendant, he was, and for a long time prior thereto had been, continuously a resident of Seattle, King county, and that he was then such resident. The grounds stated in the motion were otherwise fully sustained by affidavit, and the facts so stated were not controverted. The motion to dismiss was overruled, and, the defendant having answered, a trial was had before the court without a jury, resulting in a judgment for plaintiff. The defendant has appealed.

It is assigned that the court erred in overruling appellant's motion to dismiss the action on the ground that the court was without jurisdiction. It is not disputed that appellant had no office in Snohomish county for the transaction of business, and that there was no person in that county upon whom process against appellant could be served. It is also conceded that the service which was made was made upon appellant's statutory agent, who at all times resided in King county. Under the decision in *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 760, the trial court was without jurisdiction to determine the cause and render judgment upon the merits. In the case cited the service was upon the statutory agent of a foreign corporation; the agent residing in Clarke county, in which county the service was made. The suit was brought and tried in Garfield county. After a discussion of the statutes, it was held by this court that the court in Garfield county was without jurisdiction to pronounce judgment, and that the judgment and all the proceedings in that court were without authority and void. It was held that the Legislature has provided that actions against corporations shall be brought in a county where the corporation has an office for the transaction of business, or where some person resides upon whom process may be served against such corporation. Section 4854, Ballinger's Ann. Codes & St. In the case at bar the appellant had no office for the transaction of business in Snohomish county, and there was no soliciting agent of appellant or other person residing in that county upon whom process might be served against appellant. Respondent concedes that the cited case supports appellant's contention, but argues that this court has modified the doctrine of that case.

State ex rel. Insurance Co. v. Superior Court, 14 Wash. 203, 44 Pac. 131, is cited. In that case the action was brought in Pierce county, and service of summons was made upon the statutory agent who resided in Thurston county. Reference was made to our statute, which authorizes service of summons in actions against insurance companies to be made upon any agent authorized by such company to solicit insurance within this state. Section 4875, Ballinger's Ann. Codes & St. It was then stated that, if the relator in the case had an agent authorized to solicit

insurance, residing in Pierce county, the superior court of that county had jurisdiction, by virtue of the statute which authorizes an action to be brought against a corporation in any county where any person resides upon whom service of process may be served. As there was nothing in the record to negative the fact that such an agent did reside in Pierce county, it was presumed in favor of the regularity of the proceedings that the necessary facts existed which authorized the court to assert its jurisdiction. We find nothing in that case which modifies the doctrine of *McMaster v. Thresher Co.*, supra. In the case at bar it is affirmatively shown that there was neither an office of appellant for the transaction of business in Snohomish county, nor any agent or person residing in that county upon whom service against the appellant could be made. Therefore no presumption to the contrary can be indulged, as was properly done in *State ex rel. Insurance Co. v. Superior Court*, supra. Respondent also cites *Sievers v. Dalles*, etc., *Navigation Co.*, 24 Wash. 302, 64 Pac. 539. It was simply held in that case that service against a corporation was sufficient, when made upon a purser who also had charge of a wharf of the corporation; the maintenance of the wharf being held to be an office for the transaction of business. *Zindorf v. Western Construction Co.*, 26 Wash. 695, 67 Pac. 355, is also cited by respondent, but we find nothing therein which modifies the doctrine of the *McMaster Case*. It is true the opinion states that we do not care to extend the doctrine of the *McMaster Case*, but the rule was not modified, and it stands as the rule at this time. We see no reason for modifying or limiting the rule of that case, since we think it clearly announces just what the Legislature has declared shall be the rule. That rule is that a corporation can be sued only in a county where it has an office for the transaction of business, or where some person resides upon whom process may be served against the corporation.

Respondent, however, contends that appellant has waived the matter of jurisdiction by not limiting its appearance to a special one. Under the statute, the court had no jurisdiction of the subject-matter. The conditions which the statute says are necessary to confer jurisdiction of such a suit in any county did not exist in Snohomish county. The action is by the statute made a local one, to be brought only in counties where certain specified conditions exist. The court therefore had no more jurisdiction of the subject-matter of the action than it would have of an action to foreclose a mortgage upon real estate wholly situate in another county. It is an elementary principle that neither an appearance nor consent of the parties will confer jurisdiction of the subject-matter, but such jurisdiction is derived wholly from the statutes. The court was therefore without power to determine the action upon its merits,

notwithstanding the appearance was general in form.

The judgment is reversed, and the cause remanded, with instructions to vacate the judgment and dismiss the action.

MOUNT, C. J., and ROOT, FULLERTON, CROW, and DUNBAR, JJ., concur.

GRAVELLE et al. v. CANADIAN &  
AMERICAN MORTGAGE &  
TRUST CO., Limited.

(Supreme Court of Washington. March 27, 1906.)

1. PROCESS—DEFECTS.

The summons and complaint in a mortgage foreclosure suit referred to an infant defendant, without stating her Christian name. In the record of the foreclosure proceedings there was but one infant defendant, and she was regularly served. *Held*, that she could not after judgment avoid the service by reason of the omission of her Christian name.

2. INFANTS—JUDGMENT—GUARDIAN AD LITEM—DEFENSE—FAILURE TO MAKE.

Where in a mortgage foreclosure suit the guardian ad litem of an infant defendant appeared and filed his acceptance of the appointment, and there were sufficient facts admitted to show that the mortgagee was entitled to a decree, in the absence of an affirmative defense, the failure of the guardian to answer did not render the decree of foreclosure void as against the infant, in the absence of fraud or collusion.

3. MORTGAGES—COSTS—ATTORNEY'S FEES.

An infant not made a party to a suit to foreclose a mortgage brought an action against the mortgagee, who purchased the premises at the foreclosure sale, praying for the possession of the property and for partition. The mortgagee alleged that it was a mortgagee in possession, and prayed for a foreclosure against the infant. *Held*, that the mortgagee on obtaining a judgment in its favor was entitled to a reasonable allowance for attorney's fees, as provided in the mortgage.

4. SAME—REDEMPTION—TIME TO REDEEM.

Where an infant, not made a party to a foreclosure suit, brought an action for possession and partition, alleging ownership of an undivided interest in the premises, and the mortgagee having bought the premises at the foreclosure alleged that it was a mortgagee in possession, a judgment for the mortgagee with the right of the infant to redeem from the mortgage was not erroneous, because it required the redemption to be made within 90 days.

Appeal from Superior Court, Lincoln County; Henry L. Kennan, Judge.

Action by Edna Gravelle and another, by Alfred Gravelle, their guardian ad litem, against the Canadian & American Mortgage & Trust Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

H. A. P. Myers, for appellants. L. Davies and Tolman & Kimball, for respondent.

MOUNT, C. J. The appellants are minors. They brought this action, claiming to be the owners each of an undivided one-third interest in the northwest quarter of section 34, township 25 N., range 38 E., W. M. in Lincoln county, this state. The prayer of the complaint was for the possession of the prop-

erty for a partition thereof, and for an accounting for rents. There is no dispute in the facts, which are as follows: Joseph Gravelle, the father of the plaintiffs, owned the land in question during his lifetime. The land was his separate property. On March 7, 1890, while he was unmarried, he executed a mortgage on the land for \$1,500. On May 23, 1894, the said Joseph Gravelle died intestate, leaving a wife and an infant daughter. In December, 1894, a son was born to the widow. These two children are the appellants herein. In 1895, the Canadian & American Mortgage & Trust Company, being the owner and holder of the mortgage above referred to, brought an action to foreclose the said mortgage against the administrator of the estate, the widow and "—— Gravelle," alleging that the widow and minor daughter were the only heirs at law of Joseph Gravelle, deceased. Thereafter the guardian ad litem for —— Gravelle was appointed by the court, and service of the summons and complaint was duly made upon the defendants in that action. The guardian ad litem accepted the appointment by filing a written statement to that effect, but made no other appearance in the action. None of the defendants appeared in the action, and the trial court found that the defendants had been duly and legally served with personal service and made default, and heard evidence of the facts alleged in the complaint, and a decree of foreclosure was thereupon entered. Subsequently the mortgaged property was sold and bid in by the plaintiffs in that action, and the sale was afterwards confirmed. The mortgage company went into possession of the premises, and thereafter sold the same to defendant in this action, Casper Helstab. Upon these facts the trial court found that Edna Gravelle was a party to the foreclosure action; and concluded thereby; but that the minor Joseph Gravelle was not a party thereto. The court also found that as to the minor Joseph's one-third interest the defendants were mortgagees in possession; that there was still due on that interest the sum of \$1,328.01, after deducting the rents and profits; and that said minor could redeem his interest by paying that sum within 90 days. In making up the amount due, the court allowed an attorney's fee of \$83.33, for the foreclosure of the mortgage as against the minor. A decree was entered according to these findings, and the minors by their guardian prosecute this appeal.

Appellants contend that the finding that Edna Gravelle was served in the foreclosure suit, and that the decree was valid as to her, was error (1) because she was served as "—— Gravelle"; and (2) because her guardian ad litem made no defense to the action. It is true the summons and complaint in the original foreclosure action referred to the infant daughter as "—— Gravelle." Her Christian name was not

stated. Counsel says we are therefore left in the dark as to which of the minors was served, or intended to be served. It appears, however, in the record of the foreclosure proceedings that there was but one minor heir, a daughter, —— Gravelle. She appears to have been regularly served, and there is no contention that she was not served, or even that there was another daughter. On the other hand, the record in this case discloses that there was but one daughter. The service is the important fact, and when it is shown that the proper person was served, that person cannot afterwards say that her Christian name was not stated, and thereby avoid the service. The court was therefore justified in finding that Edna Gravelle was served in the original action. It is also true that the guardian ad litem filed no answer for his ward, but he appeared in the action by filing his acceptance of the appointment. The court appears to have had jurisdiction both of the person of the infant and of the property, and the infant appears to have been represented. Proof of the allegations of the complaint appears to have been made, and findings and a decree were subsequently entered. It was, no doubt, the duty of the guardian ad litem to have filed an answer denying generally the allegations of the complaint. But if he had done so in this case there were sufficient facts admitted to show that the mortgage company was entitled to a decree, in the absence of an affirmative defense. Under these circumstances the decree is not void, and, in the absence of fraud or collusion, the decree is binding upon the ward. *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779. No contention is made that there was any defense to the foreclosure action, or that the ward's interests were not as fully protected as though the answer had been filed by the guardian ad litem. The decree of foreclosure is therefore valid as to her.

Counsel for appellants further contend that as to the appellant Joseph Gravelle, the court erred in allowing an attorney's fee in foreclosure, in calculating the amount due, and in limiting the time for redemption to 90 days. It is conceded that the minor Joseph Gravelle was not made a party to the original foreclosure proceeding. That proceeding was therefore not effective as to him. The respondent, in answer to the complaint, set up the mortgage and the proceedings had thereunder, and alleged that it was a mortgagee in possession, and prayed for a foreclosure against the said minor. This proceeding was proper under the rule announced in the cases of *Investment Securities Company v. Adams*, 37 Wash. 211, 79 Pac. 625; *Sloane v. Lucas*, 37 Wash. 348, 79 Pac. 949; and *Sawyer v. Vermont Loan & Trust Co.*, (Wash.) 84 Pac. 8. The mortgage provided for a reasonable attorney's fee in case of foreclosure. The plaintiffs did not recognize the mortgage in their complaint, and seek

to redeem their portion of the land covered by it; but brought the action for possession and for partition, alleging that they were the owners of two-thirds thereof, without reference to the mortgage. The respondents were required, therefore, to set up the mortgage, and asked for its foreclosure as a defense to this action. Under these circumstances we think they were entitled to a reasonable allowance for attorney's fees, as provided in the mortgage, which was made in this case. As we understand from the briefs, there is no claim that the court adopted an erroneous method of computing the amount due from appellant Joseph Gravelle's interest in the land, but it is insisted that an erroneous result was reached. We are satisfied that the result reached by the trial court is sufficiently accurate for all practical purposes, and that there are no material inaccuracies sufficient to warrant the modification. Appellant concedes that in *Sloane v. Lucas*, supra, this court permitted a decree allowing 90 days within which to pay the mortgage debt in a case of this kind, but contends that a different rule should be applied in this case because the appellant is a minor. No other reason is offered. We think the mere fact that the appellant is a minor is not sufficient reason in itself for a different rule.

There appears to be no error in the record. The judgment is therefore affirmed, with leave to redeem the interest of the minor Joseph Gravelle within 90 days from the date of the filing of this opinion in this court.

DUNBAR, ROOT, CROW, and HADLEY, JJ., concur.

# FISHBURNE v. MERCHANTS' BANK OF PORT TOWNSEND.

(Supreme Court of Washington. March 29, 1906.)

## 1. PLEADING — MOTIONS — JUDGMENT ON PLEADINGS—ADMISSIONS.

A defendant moving for judgment on the pleadings admits the allegations of the complaint and of the affirmative averments of the reply considered together, and therefore, in determining plaintiff's right to recover, there is no necessity for proof.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1073.]

## 2. APPEAL — PRESUMPTIONS — PLEADINGS — AMENDMENT.

Where, on a motion for judgment on the pleadings, no application to amend is disclosed, it must be presumed on appeal that the party stood on his pleadings as originally filed.

## 3. EXECUTORS AND ADMINISTRATORS—ACTIONS —SET-OFF.

Pierce's Code, § 1093, providing that in an action by an administrator a demand against the intestate may be set off as if the action had been brought by him, authorizes a defendant sued by an administrator to plead by way of set-off in extinguishment of the claim sued on a demand against the intestate, though it has not been presented to the administrator

within the time fixed by law for creditors to present their claims.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1700.]

## 4. SAME—JUDGMENT.

Where a defendant sued by an administrator filed by way of set-off a claim against the intestate, which claim had not been presented to the administrator within the statutory period, the claim was limited to the extinguishment of the demand sued on, and a judgment over against the estate for any excess could not be rendered.

## 5. SAME.

Under Pierce's Code, § 380, subd. 2 (Balingier's Ann. Codes & St. § 4913, subd. 2), providing that in an action on contract any other cause of action arising on contract and existing at the commencement of the action may be set up as a counterclaim, section 1091 authorizing a defendant in a civil action on contract to set off any demand of a like nature existing at the commencement of the suit, and section 1093 providing that a defendant sued by an administrator may set up by way of set-off a demand against the intestate in the same manner as if the suit had been brought by the intestate, a defendant sued by an administrator for a deposit may set up as a counterclaim a note held by it which matured after intestate's death and before the commencement of the action.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1702.]

Appeal from Superior Court, Jefferson County; George C. Hatch, Judge.

Action by George P. Fishburne, substituted for Eric Edw. Rosling, administrator with the will annexed of William H. Fiske, deceased, against the Merchants' Bank of Port Townsend. From a judgment of dismissal, plaintiff appeals. Affirmed.

Eric Edw. Rosling and George P. Fishburne, for appellant. A. W. Buddress, for respondent.

HADLEY, J. The plaintiff and appellant, administrator in this cause, having died pending the appeal, and it having been made to appear to this court that George P. Fishburne has been appointed to succeed the deceased administrator, it is now, on stipulation of the parties, ordered that said George P. Fishburne, as such administrator, shall be, and he is hereby, substituted as party plaintiff and appellant herein. The action was brought to recover the balance of a deposit in the defendant bank alleged to have been due and owing to William H. Fiske, now deceased, at the time of his death. The complaint alleges that said Fiske died September 26, 1901, and facts concerning the appointment and qualification of the original plaintiff as administrator are also alleged. It is also averred that at the time of his death the said Fiske had on deposit with the defendant, a banking corporation, the sum of \$312.55, which amount was placed to his credit upon the defendant's books, and that the defendant refuses to pay said sum or any part thereof, although demand has been made therefor. Judgment is demanded for the full amount with interest. The defend-

ant answered the complaint, and interposed certain affirmative defenses, among which were averments charging the deceased with having fraudulently sold to the defendant 53 certain negotiable instruments for the payment of money; that the deceased was in possession of said instruments before their maturity, and that they were payable to the order of F. Chevalier & Co., whose indorsement was unlawfully forged upon the instruments by the deceased, for the purpose of deceiving and defrauding the defendant; that thereby the defendant was induced to purchase said negotiable instruments for the aggregate sum of \$13,094.26, and gave the deceased credit upon its books for said sum, but that by reason of the premises the credit so given was false and untrue, and that there is not now, and never has been, any money due or owing to the deceased from the defendant; that before the deceased departed this life he drew out of defendant's bank, by reason of said fraudulent acts and credit, the sum of \$12,781.71, leaving a balance of \$312.55 of said false and fraudulent credit; that plaintiff's complaint is wholly founded upon, and is brought to recover upon, said false credit, and not otherwise; that immediately after the deceased departed this life, and not before that time, the defendant discovered said false and fraudulent acts and representations; that the true owner of said instruments reclaimed and recovered them from the defendant, the defendant being obliged to surrender them all, and that it thereby lost the use and value thereof. The plaintiff replied with denials, and affirmatively alleged, among other things, that on or about September 18, 1901, the said deceased borrowed from the defendant, upon his personal note of that date and maturing November 17, 1901, the sum of \$333.31, which amount was by defendant placed to the credit of the deceased upon its books, that said note at the time of the death of Fiske had not matured, and that thereafter, about March 31, 1902, the defendant wrongfully, and without the knowledge or authority of plaintiff, applied upon said note the balance due the deceased at the time of his death, to wit, \$312.55. With the pleadings standing thus, but containing, also, other averments which we have not thought it is material to mention, the defendant moved for judgment upon the pleadings in its favor. The motion was granted, and judgment was entered dismissing the action and awarding costs to the defendant. The plaintiff has appealed.

It is assigned that the court erred in entering judgment for respondent upon the pleadings. It is argued that the denials in the pleadings of the respective parties made issues which should have been tried. The motion of respondent, however, had the effect of admitting all the allegations of the complaint and of the affirmative averments of the reply considered together. With such

admission, there was no necessity for any proof upon the part of appellant, since, if a challenge to the sufficiency of his allegations developed that he was not entitled to recover, a challenge to the evidence in support thereof would have led to the same result. The record does not disclose any application on the part of appellant for leave to amend his pleadings. The Supreme Court of California, in *Kelley v. Kriess*, 9 Pac. 129, pertinently said: "If plaintiff has a good cause of action which by accident or mistake he has failed to set out in his complaint, the court, on motion for judgment on the pleadings, should, on his application so to do, permit him to amend. But failing to make such application, there can be no good reason for proceeding to trial in a cause where, admitting all the facts charged as true, the plaintiff is still not entitled to a judgment." No application to amend being disclosed, it must be presumed here that the appellant stood on his pleadings as they were originally filed. *Carstens v. Milo* (Wash.) 82 Pac. 410; *Noerdlinger v. Huff*, 31 Wash. 360, 72 Pac. 73.

Since all the allegations of the complaint and all those of the affirmative reply are admitted to be true, the question is, does appellant show thereby that he is entitled to recover? He sues to recover an alleged balance of \$312.55 deposit in respondent's bank which he says was due the deceased. The respondent sets up a counterclaim by way of 50 drafts and 3 promissory notes, amounting to \$13,094.26. Appellant then replies, in one breath denying everything, and in the next breath admitting that there is due and owing to the bank the sum of \$333.31, which the deceased borrowed from the bank on its personal note, and which is described in respondent's answer. It being thus admitted by appellant that the deceased was indebted to the bank in a sum greater than the amount of the alleged credit sued upon, it remains to be determined if the debt can be offset to the extent of the credit. Under appellant's allegations the money which he seeks to recover is the same which the deceased borrowed on his personal note, and which was, by reason of the note, placed to his credit in the bank. He first urges that respondent is not entitled to interpose the note to the extent of extinguishing the credit sued upon, for the reason that he did not present to the administrator any claim founded upon the note within one year from the publication of notice to creditors. This is, however, an action brought by an administrator, asserting a demand in favor of an estate. In such case section 1093, *Pierce's Code*, provides as follows: "In actions brought by executors and administrators, demands against their testators and intestates, and belonging to defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased."

It will be seen that the above statute expressly authorizes a set-off to be interposed by the defendant in an action brought by an executor or administrator, and it does not require that such set-off claim shall be first presented to the executor or administrator. We do not think that other provisions of the Code, when considered in connection with the above, can be said to contemplate such presentation when the set-off is merely pleaded to the extent of extinguishing the amount sought to be recovered by the executor or administrator. Speaking of the special statutes of limitation requiring the presentation of claims to executors or administrators, Wood on Limitations (3d Ed.) § 188, concludes as follows: "These special statutes of limitation do not apply to an offset set up by a person who is sued by an administrator to recover a debt due from him to the estate." The only case cited under the above text is *Lay v. Mechanics' Bank*, 61 Mo. 72. The case is directly in point. It has, however, been frequently so held, and to the general effect that, while under such special statutes one must present his claim within the prescribed time before he may assert his right to recover in an action brought by him against the estate, yet he is not required to so present it before interposing it as a set-off or counterclaim in an action brought against him by the administrator upon a money demand. He is, however, limited to the extinguishment of the demand made against him, and is not entitled to judgment over against the estate for any excess. *Ware v. Howley*, 68 Iowa, 633, 27 N. W. 789; *Mitchell v. Rucker*, 22 Tex. 67; *Murphy v. Colton* (Okla.) 44 Pac. 208; *Millet v. Watkins' Adm'r*, 67 Ky. 642; *Talty v. Torling*, 79 Minn. 386, 82 N. W. 632. Some decisions are to the contrary effect, but some of them are based upon statutes which expressly provide that claims may not be interposed by way of set-off or counterclaim, unless presented within the statutory limit. But whatever may be the reasoning of such decisions, we think, under our statute, that this court should follow the decisions above cited.

It is next contended by appellant that respondent is not entitled to interpose the note as a set-off or counterclaim, for the reason that it did not mature until after the death of Fiske, the maker. It had matured, however, before appellant brought his action. Under our statute a counterclaim may be interposed as follows: "In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action." Subdivision 2, § 380, *Pierce's Code* (*Ballinger's Ann. Codes & St.* § 4913, subd. 2). Again, section 1091, *Pierce's Code*, provides as follows: "The defendant in a civil action upon a contract express or implied may set off any demand of a like nature against the plaintiff in interest which existed and belonged to

him at the time of the commencement of the suit." Section 1093, *Pierce's Code*, hereinbefore quoted in full, we have also seen provides that in actions brought by executors or administrators a set-off may be interposed by the defendant "in the same manner as if the action had been brought by and in the name of the deceased"; it being expressly stated that the set-off may be so interposed if the demand belonged to the defendant at the time of the death of the testator or intestate. Considering all these provisions together, we think the respondent had the right to interpose the note as a set-off, inasmuch as it had matured before the commencement of the action. It was so held under similar statutes in *Ainsworth v. Bank of California*, 119 Cal. 470, 51 Pac. 952, 39 L. R. A. 686, 63 Am. St. Rep. 135. That case is directly in point, and the facts involved were almost identical with those at bar. The defendant bank held the note of the deceased for a sum greater than the amount to his credit on deposit at the time of his death. The note matured after the death, and after its maturity the executrix brought suit against the bank to recover the amount of the balance of the deposit. In a well-considered opinion it was held that the bank could interpose the note by way of counterclaim, inasmuch as it was due before the commencement of the action. The California statute quoted in the opinion is exactly the same as our own. Subdivision 2, § 380, *supra*. We think the decision was manifestly correct, and, our statute being the same, it should be so held here. We therefore find it unnecessary to discuss the decisions cited by appellant, some of which at least are based upon somewhat different statutes.

For the foregoing reasons, we think appellant's pleadings, the complaint, and reply taken together do not state a ground for recovery, and that the judgment for respondent upon the pleadings was proper. It is, therefore, affirmed.

MOUNT, C. J., and FULLERTON, CROW, ROOT, and DUNBAR, JJ., concur.

DUSENBERRY et al. v. McDOLLE et al.  
(Supreme Court of Washington. March 29, 1906.)

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—PAYMENT.

Plaintiffs, who were nonresidents, loaned money to defendants secured by a mortgage on defendants' land, through S., who was plaintiffs' general agent for that purpose, and held general powers of attorney authorizing him to collect money due plaintiffs, and to satisfy mortgages. It was agreed between defendant and S. that the notes might be paid in grain. Thereafter, for 10 years, defendants delivered more grain than was sufficient to pay the notes, but S. testified that defendants drew ahead for so many other purposes that the amount credited on the notes was all that was left to apply thereon. If the credits on the notes from the pro-

ceeds of the grain were unauthorized the notes were barred by limitations. *Held*, that S. was the agent of plaintiffs for all purposes connected with the notes and mortgage, and that his receipt of payment in grain instead of cash was binding on them.

Appeal from Superior Court, Columbia County; Chester F. Miller, Judge.

Action by Lewis Dusenberry and another against William McDole and another. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Miller & Fouts, for appellants. M. M. Godman, Hardy E. Hamm, and M. F. Gose, for respondents.

MOUNT, C. J. This action was brought to foreclose a mortgage upon certain real estate in Columbia county. The complaint is in the usual form in foreclosure. The answer of the mortgagor, after denying among other allegations the amount alleged to be due, affirmatively pleaded payment, and also that the action is barred by the statute of limitations. At the trial of the case the lower court sustained the plea of payment and dismissed the action. The facts are, in substance, as follows: In the year 1890, the respondent Jacob Stencel was the owner of the land in question. In March of that year he sold the same to respondent McDole, and gave him a bond for a deed. In December of the same year Mr. Stencel agreed to deed the land to Mr. McDole and take a purchase money mortgage for the amount due, and that Mr. McDole might pay the notes by delivering grain each year. At that time Mr. Stencel was agent for the appellants, who were then, and are now, residents of California, loaning money in Columbia county. Mr. Stencel held general powers of attorney for collecting money due the appellants, and satisfying mortgages in said county. The appellants furnished the money in this case, and Mr. Stencel executed a deed to Mr. McDole; whereupon the latter, on December 23, 1890, executed his three promissory notes, one for \$1,000, due November 1, 1891, one for \$1,000, due November 1, 1893, and one for \$1,350, due November 1, 1894, payable to the appellants, and on the same day executed and delivered to Mr. Stencel the mortgage sued upon, which was given to secure the payment of the notes above named. Thereafter, until the year 1890, respondent McDole delivered large quantities of grain to Mr. Stencel to be applied in payment of the notes, and it appears to be conceded that more than enough grain was delivered to pay the notes; but Mr. Stencel testified that Mr. McDole drew ahead for so many other purposes that the amount credited upon the notes was all that was left to apply thereon. After the crop for the year 1890 had been delivered to Mr. Stencel, while he then had the notes in his pos-

session at Dayton in Columbia county, a settlement was had between Mr. Stencel and Mr. McDole, and it was then agreed between them that the notes had been fully paid. Mr. Stencel agreed to deliver the notes to Mr. McDole on the next day. This, however, was never done. It appears to be a conceded fact that all payments made by Mr. McDole upon the notes were made by the delivery of grain to Mr. Stencel; that Mr. Stencel received the grain, and sold it, and retained the proceeds to be credited upon the notes. Appellants claim that Mr. Stencel was the agent of Mr. McDole for the purpose of selling the grain, and that if he was agent for appellants, he was authorized to receive payment only in money. The trial court found against both these contentions.

We think the evidence is conclusive that Mr. Stencel was the agent of appellants for all purposes connected with the notes and mortgage. He made the loan for the appellants, and it appears that Mr. McDole had no knowledge of the fact that the notes and mortgage were made out to the appellants until about the time the action was brought to foreclose. Mr. Stencel was the only person that respondent knew in the transaction, and respondent dealt with him as the principal. It was agreed when the notes were given that payments should be made in grain, and payments were so made for nearly 10 years. No money payments at all were made. All payments were made in grain. While it is true that an agent authorized to receive payment is ordinarily deemed intrusted with power to receive it in money only, yet when there has been a long course of dealing, and payments are received by the agent according to such course, if the agent alone is known, and he is supposed to be the principal, and the debtor has no notice of any claim by the real principal, the latter will be bound. Story on Agency (9th Ed.) §§ 429, 430. Furthermore, the appellants must be held to have ratified the payments in grain, or they must be held to have disaffirmed such payments. In the latter event the notes were long since barred by the statute of limitations. In the former event the notes have been paid. Under the facts in the case, we are convinced that Mr. Stencel had authority to receive the grain as payment of the notes, and that he was the agent of appellants for that purpose, and not the agent of Mr. McDole.

The questions of fact presented in the case are based upon conflicting evidence, which we have examined, and we conclude that the findings of the lower court are in accordance with the weight thereof.

The judgment is therefore affirmed.

ROOT, CROW, DUNBAR, FULLERTON, and HADLEY, JJ., concur.

**MORRIS v. WARWICK.**

(Supreme Court of Washington. March 29, 1906.)

**1. TRIAL—QUESTION FOR COURT AND JURY—DIRECTION OF VERDICT.**

Ballinger's Ann. Codes & St. § 4994, provides that in all cases tried in the superior court with a jury, in which the legal sufficiency of the evidence shall be challenged, and the court shall decide as a matter of law what verdict should be found, the court shall thereupon discharge the jury from further consideration of the case, and direct judgment to be entered in accordance with its decision. *Held*, that such section had reference alone to the legal sufficiency of the evidence, and did not justify a court on an application for a directed verdict to pass on the probative sufficiency of the evidence.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 332, 333.]

**2. HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—EVIDENCE.**

In an action for alienation of the affections of plaintiff's wife, evidence concerning the conduct of defendant and the wife after her separation from plaintiff, but during the existence of the marital relation, was admissible.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 1124.]

**3. SAME—WANT OF AFFECTION—MITIGATION OF DAMAGES.**

In an action for alienation of affections of plaintiff's wife, evidence that no affection existed between plaintiff and his wife is admissible only in mitigation of damages, and not as a bar to the action.

Appeal from Superior Court, Lincoln County; W. T. Warren, Judge.

Action by Joseph N. Morris against Maynard Warwick. From a judgment for defendant, plaintiff appeals. Reversed.

H. N. Martin, J. T. Mulligan, and N. T. Caton, for appellant. Merritt & Merritt, for respondent.

**DUNBAR, J.** This is an action brought by the appellant against the respondent for damages for alienating the affections of his wife. At the close of plaintiff's testimony defendant's motion for a nonsuit was denied, and at the close of the case the defendant challenged the legal sufficiency of the testimony, and also moved the court for an instructed verdict. The court was of the opinion that the proper procedure would be to discharge the jury and enter judgment, which it proceeded to do, entering judgment in favor of the defendant.

In speaking of the case of *Clark v. Great Northern Ry. Co.*, 37 Wash. 537, 79 Pac. 1108, the court intimated that it was its duty to discharge the jury in this case and decide the case on the weight of the testimony, making the following statement: "I wish you would read that *Clark Case* all through. I do not know as I exactly understand it yet myself. If it means what it says, as I understand it, the jury would be simply an ornament." The court, then proceeding, said: "In this case the duty devolves upon the court under the law laid down to take the case from the jury and render a verdict in accordance with

the court's opinion, and in view of the fact that the court in this case has listened to the testimony and is satisfied that a verdict in this case must be in favor of defendant, that the plaintiff has failed entirely to make out a case, and that the facts in this case, as applied to the law, would compel a verdict of that kind, and in view of the fact that you, gentlemen, not understanding the law, probably might bring in a verdict some other way, which I would be compelled to set aside, I think the proper thing to do would be to discharge the jury and render a verdict myself. So you are excused from any further duty in this case, and judgment will go for the defendant in this case." The court evidently misinterpreted the *Clark Case*, for it was not the intention of this court in that case to subjugate the discretion of the jury in passing upon questions of fact to the will of the court, or to go beyond the provisions of the statute. In that case it appeared from statements made by the court that he thought a new trial ought to be granted for insufficiency of the evidence, but that the court did not have the legal authority to grant such new trial; and it was held by this court that the court erred in its construction of the law, for the statute (subdivision 7, § 5071, Ballinger's Ann. Codes & St.) especially makes insufficiency of the evidence to justify the verdict a ground for granting a new trial. But it will be observed that it does not authorize the court to take the case from the jury and make a final determination of the issues itself; but that, acting on the supposition that substantial justice has not been done by reason of some mistake or inadvertence of the jury, simply gives the parties another trial.

As to how often the court would be justified in granting a new trial on the same testimony in the same case is a question to be determined by the appellate court in passing upon the proper exercise of such discretion on the part of the trial court. Under the theory of the law, however, the ultimate decision upon the question of fact involved is the province of the jury. Section 4994, Ballinger's Ann. Codes & St., provides that "in all cases tried in the superior court with a jury in which the legal sufficiency of the evidence shall be challenged, and the court shall decide as a matter of law what verdict should be found, the court shall thereupon discharge the jury from further consideration of the case, and direct judgment to be entered in accordance with its decision." This section, it will be observed, deals alone with the legal sufficiency of the evidence; not taking into account at all its probative sufficiency. That is to say, if the evidence offered, if admitted to be true, is not legally sufficient to sustain a verdict, there is nothing for the jury to pass upon, and it becomes the duty of the court to discharge the jury and render the judgment which the law prescribes. So that it will be seen that there was no justification under the law for the action of the court in discharging

the jury and rendering judgment for the defendant in this case, unless it appears that there was not sufficient legal testimony offered by the plaintiff to sustain a judgment. In fact, it is candidly stated by the attorney for respondent in his brief that, if it could be maintained that there was evidence legally sufficient to support a verdict, then it cannot be doubted that the jury should have passed upon the facts.

But it is contended that there was not sufficient evidence in the case. With this conclusion of learned counsel we cannot agree. It seemed to be the view of the trial court that the conduct of the defendant and the plaintiff's wife at any time after the separation of plaintiff and his wife was not pertinent nor material, on the theory, as indicated by the court, that there could be no alienation of affection where none existed. But it does not necessarily follow that affection does not survive a separation. No arbitrary standard of action can be erected by which conjugal affection can be tested or measured. It differs in intensity and constancy with the different temperaments and characters of the individuals. It may be so superficial that slight provocation would be sufficient to destroy it, or it may be so deeply rooted that it will survive neglect, disgrace, brutal treatment, and desertion. It sometimes even outlives legal separation, as is proven by many authenticated instances of men and women remarrying after divorce has been obtained. Husbands and wives in the heat of passion, engendered by wrongs, real or imaginary, may, and frequently do, separate from each other, and yet, when time gives opportunity for reflection and self-examination, it is frequently discovered by both parties that the actual cause of dissension was really trifling, that affection was not annihilated, but simply for the time being forced into the background, and reconciliation is devoutly desired by both. And it is this right to a reconciliation that a stranger has no right to interfere with, or deprive a husband or wife of. They are legally husband and wife until they are divorced, and legal responsibility still attaches to the husband to support the wife. It is well-established law in this country that evidence offered by the defendant to show a state of facts indicating that no affection existed between the plaintiff and his wife will not be heard as a bar to action for alienation of affection, but will simply be heard in mitigation of damages. Some of the authorities go so far as to hold that, where it was admitted that the wife had no affection for the plaintiff, a third party had no right to interfere cut off any chance of an affection springing up in the future, and that it is not in the interest of good order and public morals to permit one who has no right to interfere to set up a disagreement, or even separation, as a complete defense to an action by the latter for the wrong. Elliott on Evidence, § 1650; 15 Am. & Eng. Enc. of Law (2d Ed.) p. 862;

Sutherland on Damages (3d Ed.) p. 3771; Cooley on Torts (2d Ed.) p. 263, and cases cited by the above authorities which fully sustain the text. Without specifically analyzing the testimony, it is sufficient to say that there is ample evidence, if the jury believed it, to sustain a judgment against the defendant.

The judgment of the court will therefore be reversed, and a new trial had.

MOUNT, C. J., and ROOT, CROW, FULLERTON and HADLEY, JJ., concur.

#### KUEHN v. DIX.

(Supreme Court of Washington. April 11, 1906.)

#### NEGLIGENCE — USE OF LAND — SETTING OF FIRE.

In an action under Ballinger's Ann. Codes & St. § 3138, making any one liable for damages done by a fire kindled upon his land and negligently allowed to spread to land of another, evidence held sufficient to show defendant guilty of negligence.

Appeal from Superior Court, Stevens County; D. H. Carey, Judge.

Action by M. A. Kuehn against Fred Dix. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Lewis C. Jesseph, for appellant. W. H. Jackson and S. & J. W. Douglas, for respondent.

CROW, J. This action was commenced in the superior court of Stevens county by the respondent, M. A. Kuehn, against the appellant, Fred Dix, to recover damages sustained by the destruction of her crops and injury to her land by fire. Respondent's land lies immediately north of, and contiguous to, that of appellant. A large portion of the appellant's and respondent's ranches consists of low bottom land; the soil being formed from decomposed roots, willows, grass, tules, and other vegetation. During a portion of the year these lands are under water, which runs off during the summer months and harvesting season, leaving the surface dry. The soil, by reason of its composition, is combustible, and, when once ignited during a dry season, is liable to burn below the surface, smoldering and extending from one point to another. Often it will continue to burn until it reaches water level, some distance below the surface. The burning of this soil causes permanent injury to the land. Some time near the latter part of August, or early in September, 1904, appellant started a fire upon his own land for the purpose of burning brush. Respondent contended that appellant negligently allowed this fire to continue throughout the month of September; that about the 3d day of October a heavy wind caused it to rapidly spread over respondent's place and destroy a large amount of hay, and also injure her land; that the appellant had negligently set

out said fire and had also negligently failed to take proper precautions to prevent its spreading and damaging the respondent's land and crops. The appellant conceded that he started the brush fire about the 1st of September, and that during that month certain other fires were upon his land. He contended, however, that the brush fire had entirely subsided; that he had successfully used all necessary precautions to prevent the spread of any other fires from his land; that all of said fires had ceased to exist prior to October; and that the fire which had spread over respondent's land came from the place of one Jarvis, and not from appellant's. The court, upon trial without a jury, made findings of fact, from which it appears that the appellant was not originally negligent in setting out the fire upon his own land, but that he was afterwards negligent in not taking proper precautions to prevent its spreading upon the respondent's land; that by reason of such negligence it did spread over her land; and that she had sustained damages. From a judgment in favor of respondent, this appeal has been taken.

The appellant contends that the court erred in denying his motion for a nonsuit, and in rendering judgment for respondent. The appellant has presented a very exhaustive and well-prepared brief, raising numerous legal questions on the law of fires, which we think it unnecessary to consider, as the controlling questions before us arise entirely on issues of fact under the provisions of section 3138, Ballinger's Ann. Codes & St., which reads as follows: "If any person shall for any lawful purpose kindle a fire upon his own land, he shall do it at such time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other persons' property, as a prudent and careful man would do, and if he fail so to do he shall be liable in an action to any person suffering damage thereby to the full amount of such damage." Although the trial court found appellant was not negligent in starting a fire upon his own land, still he would be liable if he did not take such care of his fires as a prudent and careful man would, to prevent them from spreading and doing damage to respondent's property. He contends that he did take all such necessary precautions, but upon this question the evidence is conflicting. The court found him to have been negligent in this regard. From an examination of the evidence, we think this finding correct, and will not disturb it. It appears that the appellant built his fires at a time of the year when the land contained the very least moisture, and during a season that was especially dry. There was evidence tending to show that during the month of September, while fires were burning upon his land, he frequently left none leaving no one to guard them, or prevent them from spreading; that, on the morning of the very day when the fire spread most rapidly and actually damaged respondent's

property, appellant endeavored to divert the waters from a small stream for the purpose of flooding the land and quenching the fire, but that he again left home without leaving any one in charge or waiting to ascertain whether his efforts had been successful, and remained away until the damage was done. There is an abundance of other evidence to sustain all the findings made.

The only questions in this case calling for any serious consideration on this appeal being issues of fact, which the court properly determine in favor of respondent, the judgment will be affirmed.

MOUNT, C. J., and DUNBAR, HADLEY, FULLERTON, and ROOT, JJ., concur.

#### SHEEHAN v. BAILEY BLDG. CO.

(Supreme Court of Washington. April 11, 1906.)

##### 1. APPEAL—NOTICE AND STATEMENT OF FACTS —NOTICE—PERSONS ENTITLED.

On plaintiff's appeal, it is not necessary to serve the proposed statement of facts, nor the notice of appeal, upon a defendant as to whom plaintiff has voluntarily dismissed.

##### 2. NUISANCE—STAIRWAY NEAR STREET.

Where defendant maintained a stairway leading to a basement, the top of the stairs being over 4½ feet from the sidewalk and in a private alley, the stairway was not a nuisance, and defendant was not liable to a person who, while walking on the sidewalk and in attempting to avoid a runaway horse, fell down the stairs.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 52, 53; vol. 37, Cent. Dig. Nuisance, § 143.]

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Action by James Sheehan against the Bailey Building Company. From a judgment for defendant, plaintiff appeals. Affirmed.

John Arthur, T. D. Page, and Reavis, Thorp & Wheeler, for appellant. Peters & Powell, for respondent.

ROOT, J. The respondent is the owner of a large brick and stone office building situated on the west side of Second avenue in the city of Seattle. Just south of this building, with a narrow private alleyway between, is the Butler block, a large brick and stone hotel building. In the basement of the Bailey building is a restaurant, which is reached from Second avenue by means of a stairway about 4 feet 6 inches wide and situated in the alleyway between said buildings. The top of this stairway is 4 feet and 7 inches from the line of the front (east side) of said buildings, which line is the west side of the sidewalk. From the said west line of the sidewalk to the top of the stairway there is a gradual slope of about five or six inches, and the sidewalk there, as well as the cement walk between it and the stairway, slopes slightly and gradually toward the south. The stairway leading to the basement is protected on the north and south sides by the walls

of the two buildings mentioned, and on the west side by an iron or steel railing. It is open and unguarded only on the east side, where it opens into the area of the alleyway leading to the street. On the 14th day of April, 1904, appellant, while walking along the sidewalk in front of said Bailey building, had his attention attracted to a runaway horse coming along on the sidewalk, and, in attempting to avoid being run over, he in some manner, the evidence does not show how, entered said alleyway and fell down the stairway hereinbefore referred to, sustaining severe injuries. The case was brought on for trial before the court and a jury. At the close of plaintiff's case, a challenge was interposed to the sufficiency of the evidence, and a motion for nonsuit made, both of which were sustained, and the action dismissed. From the judgment of dismissal an appeal is taken.

The action was originally commenced against respondent and the city of Seattle, and both defendants appeared. Upon the day of the trial the case was dismissed as to the city, upon the motion of this appellant. Respondent here moves to strike the statement of facts and to dismiss the appeal, for the reason that neither the proposed statement of facts nor the notice of appeal was served upon the city. We do not believe the requirement of the statutes with reference to service of a proposed statement of facts and notice of appeal is applicable to a case where, as here, one of the defendants upon the motion of the plaintiff is dismissed from the action prior to or during the trial. *McEachern v. Brackett*, 8 Wash. 652, 657, 36 Pac. 690, 40 Am. St. Rep. 922; *Watson v. Sawyer*, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43; *Smalley v. Laugenour*, 30 Wash. 307, 70 Pac. 786; *First Nat. Bank of Seattle v. Gordon Hardware Company*, 30 Wash. 127, 70 Pac. 251. Both motions will be denied.

Upon the merits, it is claimed by appellant that the respondent, in keeping an open stairway so near a much traveled street, was guilty of maintaining a nuisance, which was the proximate cause of the injury sustained by the respondent in falling, as hereinbefore stated. It is doubtless the law that the owner of premises adjoining a street shall not permit thereupon conditions calculated to occasion or permit injury to travelers using the street in the usual and ordinary manner, and such owner is liable for such injuries as are occasioned, by improper condition of his premises, to such travelers while making such usual and proper use of the street. But this record does not present a case of that kind. This stairway was used to reach the basement of the building where a legitimate business was being carried on, and to which it was proper that there should be access from the public street. The top of the stairs was 4 feet and 7 inches away from the sidewalk. The open area between the head of the stairs and the sidewalk was not a public thorough-

fare, but was a private way furnishing access to those desiring to enter the basement of said building. That a pedestrian should stumble and fall from the sidewalk, or be hurled in any manner therefrom, in such a way as to fall or be precipitated down said stairway, would be an accident or circumstance not to be anticipated as naturally or necessarily incident to the use of said sidewalk and street. In other words, it would be an unusual and extraordinary occurrence, such as could scarcely be expected to happen other than through the fault or negligence of the person so falling or precipitated, or of some third person or agency. The owner of premises adjacent to a street is not required to anticipate or guard against such unusual and extraordinary occurrences. *Teater v. Seattle*, 10 Wash. 327, 38 Pac. 1006; *Lorenzo v. Wirth*, 170 Mass. 596, 49 N. E. 1010, 40 L. R. A. 347; *McIntire v. Roberts*, 149 Mass. 450, 22 N. E. 13, 4 L. R. A. 519, 14 Am. St. Rep. 432; *Ray, Negligence of Imposed Duties*, p. 116; *Alline v. City of Le Mars*, 71 Iowa, 654, 33 N. W. 160. We do not think the record in this case reveals any negligence on the part of the respondent.

The judgment of the superior court is therefore affirmed.

MOUNT, C. J., and DUNBAR, CROW, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

#### In re CITY OF SEATTLE.

(Supreme Court of Washington. April 14, 1906.)

#### 1. EMINENT DOMAIN—PROCEEDINGS—CONSTITUTIONALITY.

The fact that a city, after taking a portion of lots for widening a street, awarded compensation therefor, and then assessed the remainder for benefits accruing by reason of the improvement, did not constitute a taking of property without just compensation nor without due process of law.

#### 2. APPEAL—HARMLESS ERROR—RULINGS ON PLEADINGS.

It was not prejudicial error for the court on a petition for the widening of a street to strike a property owner's answer, where he was given an opportunity to introduce evidence concerning all the matters alleged in the answer.

#### 3. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR IMPROVEMENTS.

In proceedings by a city for the widening of a street, at the time the assessment roll was before the court for consideration a property owner offered evidence to show that buildings upon his lots had been damaged by the widening of the street. *Held*, that it was not error to exclude the testimony, as the question was one necessary to be tried by the jury in assessing damages to be awarded, and either was or should have been tried at that hearing.

#### 4. SAME—CHANGE OF ASSESSMENT.

Inasmuch as the statute gives the court power to modify, change, alter, or annul an assessment of benefits on the widening of a street, the court had authority to order a per centum to be deducted from the amount originally assessed against property and make it a general charge against the municipality.

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Petition by the city of Seattle for the opening and widening of a street. From an order confirming an assessment against property owners, H. M. Peters appeals. Affirmed.

H. E. Foster, for appellant. Scott Calhoun and Elmer E. Todd, for respondent.

FULLERTON, J. In September, 1903, the city of Seattle by ordinance directed that all that portion of Pike street lying between Fourth avenue on the west and Melrose and Minor avenues on the east be widened and altered by including therein a strip 10 feet in width on each side to be taken from the abutting property. The ordinance directed the corporation counsel to commence a proceeding to ascertain the just compensation to be paid the owners whose property would be taken by the proposed improvement, and also for the damages, if any, caused the property not taken. The ordinance also provided that the expense of the improvement should be paid by an assessment upon the property specially benefited. The appellant H. M. Peters owned certain lots abutting upon Pike street, and by the terms of the ordinance 10 feet off of the end of each of them was authorized to be taken for the use of the street. The corporation counsel began the proceedings as directed causing summons to be served upon the appellant as provided by law. The appellant appeared and filed an answer in which he put in issue the allegations of the petition, and claimed that his property would be damaged by the proposed improvement to the amount of \$60,000. On motion of the city this answer was stricken by the court on the ground that an answer was neither necessary nor proper in such a proceeding. Thereafter a trial was had before a jury on the allegations of the petition, the court deeming them denied by operation of law. In this trial the appellant appeared and participated, and was awarded damages by the verdict of the jury in the sum of \$10,000 for the part taken; the jury finding, however, that the remainder of his property would not be damaged by the improvement. Thereupon pursuant to the statute the city filed a supplemental petition praying for the appointment of commissioners to make an assessment of the property benefited for the purpose of paying the awards made to those whose property was to be taken and damaged. Commissioners were appointed who made out and returned into court an assessment roll in which the remaining property of the appellant was assessed as receiving benefits in the sum of \$7,176. The appellant filed exceptions to the assessment, and after a hearing the court modified the roll by deducting therefrom 10 per centum of the amount assessed directing that the amount so deducted be a general charge against the city. The roll as modified was thereafter approved and confirmed, and the several

amounts assessed against the several lots, the appellant's as well as the others, declared a first lien thereon. This appeal is from the order confirming the assessment.

The principal contention of the appellant is based upon the fact that the city after taking a portion of his lots for the purpose of widening the street and awarding him compensation therefor, assessed the remainder for benefits accruing to it by reason of the improvement. This he says is taking his property without just compensation, and consequently without due process of law. But this precise question on a similar state of facts was before this court in *Quirk v. Seattle* (Wash.) 80 Pac. 207, and we there held that the proceeding violated no provision of the Constitution or laws of this state. This case is conclusive of the question in so far as the state Constitution and laws are concerned, and obviates the necessity of further discussing it. It is suggested, however, that the assessment violates the federal constitution, but we think that the Supreme Court of the United States decided to the contrary in *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270. The discussion in that case is able and exhaustive, and we do not feel that anything could be added to the reasoning by which the conclusion is reached.

As to the remaining assignments of error, it is complained that the court erred in striking out the answer filed to the original petition, and in refusing to hear evidence at the time the assessment roll was before the court for consideration to the effect that the buildings upon the appellant's lots were damaged by the widening of the street. But these exceptions are without merit on this appeal. The ruling of the court with reference to the pleading if error at all was without prejudice, as the appellant was given opportunity to introduce evidence at the hearing concerning all of the matters alleged in his answer, and he could have had no further privilege had his answer been permitted to remain in the case. The refusal to admit the testimony offered was not error because that question was one of the questions necessary to be tried by the jury in assessing the damages to be awarded the appellant, and either was or should have been tried out at that hearing.

Finally, it is contended that the assessment is illegal and voidable because the court ordered 10 per centum to be deducted from the amount originally assessed against the property and made a charge against the general fund of the city. But we think there was no error in this. The statute gives the court power to modify, change, alter, or annul the assessment, and we think it may lawfully find that an improvement is of sufficient general benefit to make a proportion of the cost a general charge against the municipality. If, however, it be intended by the objection to assert that the assess-

ment was confined to an arbitrary district which did not include all of the property specially benefited by the improvement, then the answer is that there is no evidence in the record that such is the case. In so far as we can discover by the record all of the property specially benefited by the improvement is included in the assessment roll, and the court will not presume the contrary merely because the city council fixed a district for assessment prior to making the improvement.

The judgment appealed from is affirmed.

MOUNT, C. J., and HADLEY, DUNBAR, ROOT, and CROW, JJ., concur.

# LEWISTON WATER & POWER CO. v. BROWN et al.

(Supreme Court of Washington. April 14, 1906.)

## 1. DEEDS—CONDITION SUBSEQUENT—BREACH—ENFORCEMENT OF FORFEITURE—ACTION—DEMAND OF POSSESSION.

Under Ballinger's Ann. Codes & St. § 5500, providing that any person having a valid subsisting interest in real property and a right to the possession thereof may recover the same by action against the person claiming the title or an interest therein, a grantor in a deed is entitled to recover possession for breach of a condition subsequent, without having made a demand for possession prior to the commencement of the action.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 531.]

## 2. CORPORATIONS—ESTOPPEL—ACTS OF PRESIDENT.

A corporation could not be estopped to enforce a condition subsequent in a deed executed by it barring the maintenance of any barroom, saloon, or brewery on the premises, by a mere ex parte statement by its president, without any action whatever on the part of its board of directors.

Appeal from Superior Court, Asotin County; Chester F. Miller, Judge.

Action by the Lewiston Water & Power Company against E. S. Brown and others. From a judgment for plaintiff, defendants appeal. Affirmed.

R. E. McFarland and Graves & Graves, for appellants. Sturdevant & Bailey, for respondent.

FULLERTON, J. The respondent being the owner of a tract of land in Asotin county in this state platted the same into lots and blocks as a townsite under the name of the town of Lewiston; the name being afterwards changed by legislative enactment to Clarkston. These lots it put upon the market for sale, giving to the purchasers warranty deeds subject to a proviso in the following or similar language: "Provided, however, that in case the premises hereby conveyed should be used in any way for the purposes of any barroom, saloon, or brewery, that this instrument shall become void and the title to said premises and water right shall at once revert to, and revest in, said grantor, or its as-

signs; this provision in no way relating to the manufacture of pure wine, syrups, etc., from the juices of the fruit." On October 30, 1897, the respondent conveyed by deed containing the foregoing proviso one of such lots to Frank Maruska from whom it passed by regular mesne conveyances to the appellant E. S. Brown. Brown leased the same to the appellants Reed and Wilson who fitted up a saloon thereon and engaged in the sale of intoxicating liquors. This action was thereupon brought by the respondent who prayed for a judgment and decree, declaring the appellant's title forfeited, that it have restitution of the premises, and that its title to the same be quieted. A general demurrer was interposed to the complaint and overruled, whereupon the appellants answered setting up affirmative matter thought to estop the respondent from claiming a forfeiture. After a trial, which was had before the court without a jury, judgment was entered for the respondent in accordance with the prayer of its complaint, and this appeal was taken therefrom.

The appellants first contend that the respondent cannot maintain this action for the reason that it neither alleged nor proved that it entered upon the lot, or made a demand for possession, prior to its commencement. A number of cases are cited which sustain the contention, and such undoubtedly was the rule at common law. But we think the rule has been done away with in this state by statute. By section 5500 of Ballinger's Ann. Codes & St. it is provided that any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county against the tenant in possession, or, if there be no tenant in possession, then against the person claiming the title or claiming an interest therein. Neither demand nor re-entry is made a condition precedent to the right to maintain the action, and, since this section was intended to supersede the common-law remedies for the recovery of real property, it must be held to contain in itself all of the limitations on the right to maintain such an action. That this is the correct rule under the statute is abundantly sustained by authority. Thus in *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215, it was said: "To entitle the devisee to maintain this action, it would, by the principles of the common law, have been necessary for her to have made an actual entry before instituting her suit, but by the provisions of the Revised Statutes great and important changes have been introduced into our system in relation to real actions, both in the form of the pleading and in the proof necessary to sustain such an action. The demandant is no longer required to prove an actual entry under his title, in those cases where such entry was necessary at common law, but if he shows that he is entitled to such an estate as he claims in the premises,

whether as heir at law, devisee, or otherwise, and that he has a right of entry therein, this is sufficient proof of his seisin. Rev. St. 1836, c. 101, §§ 4, 8." So in *Cowell v. Springs Co.*, 100 U. S. 55, 25 L. Ed. 547, a case where this precise question was involved, it was said: "We have no doubt that the condition in the deed to the defendant here is valid and not repugnant to the estate conveyed. It is a condition subsequent, and upon its breach the company had a right to treat the estate as having reverted to it, and bring ejectment for the premises. A previous entry upon the premises, or a demand for their possession, was not necessary. By statute in Colorado it is sufficient for the plaintiff in ejectment to show a right to the possession of the demanded premises at the commencement of the action as heir, devisee, purchaser, or otherwise. The commencement of the action there stands in lieu of entry and demand of possession." And in *Cornelius v. Ivins*, 26 N. J. Law, 376, it was said: "As a general rule, it is not necessary to make an actual entry upon land in order to maintain the action of ejectment. The right to enter, not an actual entry, is requisite to sustain the action"; and that, "as an actual entry on the land is but a formal and unmeaning ceremony, devoid of any practical meaning, and unattended by any real advantage, there can be no utility in enforcing it, however strong the technical reasons in its support." See also: *Ruch v. Rock Island*, 97 U. S. 693, 24 L. Ed. 1101; *Atlantic and Pacific Railroad v. Minnigus*, 165 U. S. 413, 17 Sup. Ct. 348, 41 L. Ed. 770; *Ellis v. Kyger*, 90 Mo. 600, 3 S. W. 23; *Kirk v. Mattier*, 140 Mo. 23, 41 S. W. 252; *Sioux City & St. Paul R. Co. v. Singer*, 49 Minn. 301, 51 N. W. 905, 15 L. R. A. 751, 32 Am. St. Rep. 554; *Plumb v. Tubbs*, 41 N. Y. 442.

The claim of estoppel is based on a statement made by the president of the respondent corporation. It appears that after the population of the town of Clarkston had reached a considerable number, the people began agitating the question of incorporation. The president of the respondent was in favor of that policy and gave to one of the local papers a statement in the form of an interview in which he undertook to set forth the advantages that would accrue to them by an incorporation over their present condition. Among the statements made was the following: "And how will the expense of police and fire protection be met? That answers itself. First, the city would have all the road taxes of some \$1,500 per year. A wise city government would require any party enjoying special privileges to pay a reasonable license for the same. These would include a dog license of, say \$2 or \$4 per year; a business license of \$5 to \$10 each per year, as in Lewiston, for example. And further, when the town is incorporated we propose to let the people themselves decide the saloon question. If the people shall vote to keep in

Clarkston the money now spent for beer and other drinks in Lewiston, and to have the drink money spent under local supervision and control, then the Lewiston Water & Power Company will not attempt to further control these matters. We prefer to have the people decide and control all local government and themselves, as is their undoubted right. In case they do permit one or two saloons under proper restrictions then the license money of say \$500 for a saloon would greatly help to pay expenses." It is this statement that is claimed to have estopped the corporation from insisting upon a forfeiture for a breach of the condition contained in the appellant's title deeds. But, without attempting to follow in detail the argument of the appellants, we are clearly of the opinion that no estoppel can be predicated upon this statement. While conditions subsequent contained in deeds may be waived by parol, such waiver must be made by the grantor or his successor in interest. Where the grantor is a corporation, as it is in this case, controlled and managed by a board of directors, informal statements published in the papers by its president cannot be held to govern its policy, or waive solemn reservations in its deeds of conveyance. "The president of a private corporation is as the term implies, the presiding officer of its board of directors and of its shareholders when convened in general meeting. The office itself, however, confers no power to bind the corporation or control its property. The president's power as an agent must be sought in the organic law of the corporation in a delegation of authority from it, directly through its board of directors, formally expressed or implied from its habit or custom of doing business." 10 Cyc. 903.

It is further assigned that the court committed error in the admission of evidence, and in refusing to make certain findings of fact. Inasmuch, however, as the action was tried by the court without a jury the admission of improper evidence could not be prejudicial. Nor was there error in refusing to make the findings requested. In so far as they were supported by the evidence they were immaterial, and, on the main questions, we are clear that the weight of the evidence is with the findings made.

No substantial error appearing in the record, the judgment appealed from will stand affirmed.

MOUNT. C. J., and HADLEY, DUNBAR, ROOT, and CROW, JJ., concur.

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CHEZUM v. CAMPBELL et al.  
(Supreme Court of Washington. April 16, 1906.)

FORCIBLE ENTRY AND DETAINER—SCOPE OF REMEDY.

Under Ballinger's Ann. Codes & St. § 5526, subd. 2, providing that forcible detainer involves

an entry during the absence of the "occupant," a demand for surrender by the party dispossessed, and a refusal to surrender to the former "occupant," an owner of land in actual possession of a tenant cannot maintain forcible detainer against a person dispossessing the tenant.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forcible Entry and Detainer, § 50.]

Fullerton, J., dissenting.

Appeal from Superior Court, King County; Feneley Bryan, Judge pro tem.

Action by Lydia E. Chezum against Edwin A. Campbell and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. W. A. Nichols, for appellant. Peters & Powell and Marion Edwards, for respondents.

CROW, J. This is an action of forcible detainer. Upon trial without a jury, the court made findings of fact from which it appears that the lands in question are fenced in two parcels with a traveled road running north and south between them; that on the eastern parcel is a small frame house which, during all the times in the findings mentioned, and until the commencement of this action, was vacant; that for the calendar years of 1902, 1903, and 1904, one James Markwell held a lease of said lands from the appellant, Lydia E. Chezum; that said Markwell at no time resided thereon, but that he exercised acts of dominion over said land by cutting hay in the summers of 1902 and 1903, and from time to time going thereon to repair fences; that in 1902 he permitted one Hyde to cultivate a garden on the eastern tract; that in 1903 he gave a like privilege to one Price; that on May 7, 1904, the respondent John Smart, while said Markwell was in the occupancy of said lands under his lease, and during his temporary absence therefrom, entered upon and began to plow said lands, under an agreement with the respondent Edwin A. Campbell, to cultivate the same on shares; that such entry was made without fraud, intimidation, stealth, violence, or any circumstance of terror, and without the knowledge or consent of the appellant, Lydia E. Chezum; that before said entry by Smart, he told Markwell of his intention to shortly begin plowing the land under his arrangement with Campbell, to which Markwell replied that he, Smart, would get into trouble if he did so; that at the time Smart entered and began plowing, Markwell was about 100 yards away, but not on the land; that he saw Smart drive upon the land and begin plowing, but made no remonstrance or effort to prevent him from so doing; that he did not afterwards endeavor to regain possession, nor did he make any demand on Smart or any of the respondents for possession; that on May 12, 1904, said Markwell voluntarily and in writing surrendered his leasehold interest to the appellant, Lydia E. Chezum, who on May 20, 1904, made due demand upon the respondents for the surrender of said

lands to her, which demand has never been complied with. Upon these findings, conclusions of law were made favorable to respondents, and a final judgment of dismissal was entered, from which this appeal has been taken.

The appellant contends that the conclusions of law and judgment were not warranted by said findings, to which she took no exception. She insists that the findings made require the entry of a judgment in her favor. It will be observed that at the time appellant's tenant Markwell was dispossessed by the respondent Smart, he, Markwell, was not only entitled to, but was in possession of, the land; also that his lease from the appellant was not voluntarily surrendered for several days thereafter. This being an action for forcible detainer under subdivision 2 of section 5526, Ballinger's Ann. Codes & St., appellant's right to recover depends upon the meaning of the word "occupant," as used in said subdivision. The trial court held that it meant only the person in actual possession or occupation. In other words, that in this case it meant the tenant, Markwell, and not his landlord, the appellant. Appellant contends that this is too narrow a construction; that the term "occupant" is not limited to one who is in actual personal possession, but also includes one in constructive possession, which she says any owner of land has when there is no actual adverse possession. She further insists that the possession of her tenant is her possession to such an extent as to constitute her an "occupant" in contemplation of the statute. We think the trial court properly construed said section, and that appellant's contention cannot be sustained.

Forcible detainer, as defined in subdivision 2 of section 5526, Ballinger's Ann. Codes & St., involves, (1) an entry during the absence of the occupant; (2) a demand for surrender by the party dispossessed; and (3) a refusal for three days to surrender to the former occupant. The findings show that an entry was made by Smart during the absence of appellant's tenant, Markwell, who was thus deprived of his previous peaceable possession; but they show that Markwell never afterwards made any demand of Smart for a surrender, and that Smart, therefore, never refused to surrender possession to the former "occupant," who is identified by the statute as the "one who, for five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property." We do not think this description can be applied to appellant, who at the time of the entry by Smart was the lessor of Markwell, her tenant. An occupant is defined by Webster as "one who occupies, or takes possession; one who has the actual use or possession, or is in possession, of a thing." Bouvier, in his Law Dictionary, defines occupant as "one who has the actual use or possession of a thing." Shumaker & Long-

dorf, in their Law Dictionary, in defining "occupant," say: "One who has the actual use or possession of a thing. Occupancy implies the exclusion of every one else from enjoyment. Tenant in possession." See, also, *People v. Ambrecht*, 11 Abb. Prac. (N. Y.) 97; *Redfield v. Utica & Syracuse R. R. Co.*, 25 Barb. (N. Y.) 54; *Lechler v. Chaplin*, 12 Nev. 45.

Appellant was not an "occupant," as defined in subdivision 2 of said section 5526, nor was she in the peaceable and undisturbed possession of the real property as contemplated by said section. As suggested by respondents in their brief, peaceable and undisturbed possession means actual and immediate possession, such possession as a man has of the house in which he lives, or the field he tills, or the land whereon he pastures his cattle. It is not essential that there be a continuous personal presence on the land, but there must be exercised at least some actual physical control with the intent and apparent purpose of asserting dominion. The words "peaceable" and "undisturbed," when applied to such possession, convey a clear meaning. The true intent of the statute by these words and by the five-day limitation is to exclude a momentary or scrambling actual possession; not to describe a constructive possession. "An action of forcible entry and detainer is strictly possessory in its nature, and, unless otherwise expressly provided by the statute, a person who has never been in possession of land cannot maintain the action to obtain possession. If he has any interest in the land, he must seek to establish it in some other form of action. Generally speaking, plaintiff, in order to maintain this form of action, must allege and prove that he was in peaceful and exclusive possession of the premises in controversy, and that he has been forcibly ousted, or that possession was peaceably obtained and forcibly withheld by defendant." 19 Cyc. 1128.

In *Gore v. Altice*, 33 Wash. 335, 336, 74 Pac. 556, this court, in commenting upon the action of forcible detainer, said: "The forcible entry and detainer law has always been recognized, ever since its enactment, as a law in the interest of peace, or to prevent violations of the peace and acts of violence in contentions over the possession of real property. It is a provision for a speedy determination, not of any title to the real estate, or of the right of possession, but of the question of who was in actual possession, and if such actual possession was disturbed; and the only question is, was the occupant in the actual and peaceable possession of the property at the time the possession was wrested from him? The statute provides that the occupant of real property, within the meaning of the law, is one who, for five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property." By reason of the fact that the appellant was the landlord, and that her tenant, Markwell, was

in possession, and that she therefore was not the occupant of the land, she was not entitled to prosecute this action, not being the real party in interest. "When the premises in question are occupied by a tenant, such tenant must bring this action if the premises are forcibly entered upon or detained by third persons. The landlord cannot bring the action; and even though the term of the tenant has expired and he has left the premises, the landlord cannot maintain a forcible entry and detainer, if the entry complained of was made during the tenant's term." 13 Am. & Eng. Enc. of Law (2d Ed.) 752.

In *Treat v. Stuart*, 5 Cal. 113, 114, the Supreme Court of California said: "The plaintiff in an action of forcible entry and unlawful detainer, must show an actual peaceable possession in himself at the time of the entry. A landlord cannot sue in this form in his own name for an unlawful entry upon the possession of his tenant. The remedy is a summary one given by statute to protect the possession, and cannot be extended by implication to any others than the real occupants."

In *McKeen v. Nelms*, 9 Ala. 507, the first syllabus reads as follows: "A landlord who becomes entitled to the possession of premises by the determination of a lease under an arrangement with his tenant, cannot maintain a proceeding for a forcible entry and detainer for an entry made while the tenant was in possession." In this case it was shown that in December, 1893, one Carlos Reece went into possession of the premises as lessee of the plaintiff McKeen; that while he was in possession as such lessee the defendant Nelms wrongfully dispossessed him. The tenant Reece thereafter surrendered his lease to his landlord, and received back certain notes which he had given for rent. Under the facts shown it further appeared that the tenancy of Reece had not been entirely terminated at the time the defendant seized possession, although he had then conceived the purpose of surrendering the premises to his landlord, and had even commenced to remove his goods. The court held that he was the actual occupant of the land and continued to be such until he yielded up the possession by removing himself, his family and all his goods from the premises. After stating these facts the court, in the body of the opinion, says: "The facts shown at this trial do not warrant the inference that the tenancy of Reece had ceased at the time the defendant's goods were deposited in the house; such a conclusion is even repelled by the testimony. The tenant, it is true, had conceived the purpose to give up the premises to his landlord, and thus put an end to the lease. He had even begun to remove his effects, but the house was still occupied by him—his family and part of his movables were there; and this was quite sufficient to make him the actual occupant until he yielded up the possession by removing himself, family and his property from the premises. There is noth-

ing in the terms of the lease, which reinvested the plaintiff with the possession, upon the determination of the tenant to abandon it, or the removal of a part of his goods in furtherance of his intention. And there is no principle of law which will authorize us, to give to a possession subsequently acquired a retrospective effect, so as to permit the occupant to maintain a complaint for a previous forcible entry. It results from this view, that the plaintiffs did not show such a state of facts as entitled them to recover in the present proceeding. [See *Brown v. Kite*, 2 Overt. (Tenn.) 233; *Dennison v. Read*, 3 Dana (Ky.) 586]."

In *Emsley v. Bennett*, 37 Iowa, 15, the Supreme Court of Iowa said: "The facts of actual possession by the plaintiff, and an entry by force, fraud, or stealth, or an unlawful detainer by the defendant are the only ones to be determined, and they alone are the matters in issue irrespective of the ownership or right of possession. It is immaterial, also, in what capacity or relation the plaintiff is in possession, whether as owner, tenant, agent, or as a mere trespasser. It is the fact of possession alone that it material."

In *Hudgen v. Temple*, 12 B. Mon. (Ky.) 193, the Supreme Court of Kentucky said: "If Temple [the defendant] entered after the 2d of October, and before the 25th of December, 1849, it was upon the possession in fact, of the tenants of the plaintiff, whose term had not expired, and who alone could maintain this proceeding for such forcible entry. So likewise, if Temple entered after the expiration of the term of the said tenants, but whilst they still continued upon the plaintiff's land, and before they delivered back the possession to the plaintiff, it would still be but a forcible entry upon them or upon their actual possession, and they alone, and not the plaintiff, in such case, could maintain this proceeding for a forcible entry. Although the tenants by holding over their term, are guilty of a forcible detainer of the possession from their landlord, and might by this proceeding, at his instance, be compelled to restore the possession to him, yet a forcible entry in the meantime, upon the premises in the actual possession of the tenants, though after the expiration of their term, is a forcible entry upon them, and not upon the landlord, who has not yet regained the possession in fact from his tenants."

In *Hyde v. Fraher*, 25 Mo. App. 414, the syllabus reads as follows: "In an action of forcible entry and detainer, the question is not who is entitled to the possession of the premises; the object of the action is to restore things to the state in which they were before the forcible entry was made. The gist of the action is the forcible entry, and the object is restitution to the one dispossessed. If a landlord, after the expiration of a lease, forcibly enters upon premises still in the possession of his tenant, the latter can maintain

an action of forcible entry and detainer against the former. Held, that the landlord in this case, cannot maintain an action of forcible entry and detainer for the dispossession of his tenant during the term of his lease, after the expiration thereof. Where a tenant is turned out of possession, he alone, and not the landlord, can maintain an action of forcible entry and detainer." See, also, *Hammel v. Zobelein*, 51 Cal. 532; *Polack v. Shafer*, 46 Cal. 270; *Barlow v. Burns*, 40 Cal. 351; *Conroy v. Duane*, 45 Cal. 598; *Dills v. Justice* (Ky.) 9 S. W. 291.

When Smart wrongfully dispossessed the appellant's tenant, Markwell, the right of Markwell to an action of forcible detainer was in no way dependent upon the further fact that he, Markwell, was the appellant's tenant. His right of action arose for the reason that for five days preceding the act of Smart he had been in the peaceable and undisturbed possession of the property. He could have maintained an action against Smart irrespective of the question as to whether he himself had during such five days been entitled to possession. His cause of action did not accrue by reason of his right to possession, but from the mere fact that he, having theretofore enjoyed an actual, peaceable possession for five days was wrongfully dispossessed by Smart. If he had been holding possession wrongfully as against appellant, that fact would not have deprived him of his cause of action against Smart, nor would it have conferred any right of action upon appellant to proceed against Smart. The statute was not enacted for the purpose of either trying title or the right to possession, but for the sole purpose of protecting one's peaceable and undisturbed possession against any other party who, by taking the law into his own hands, might wrest such possession from him. For the reasons above stated, we think the appellant was not entitled to prosecute this action.

The judgment is affirmed.

MOUNT, C. J., and DUNBAR and HADLEY, JJ., concur.

FULLERTON, J. I am unable to agree with the conclusion reached in the foregoing opinion. In my judgment it takes too narrow a view of the acts of forcible entry and detainer. Those acts were intended as much to operate against one who wrongfully intrudes upon lands, as they were to furnish a summary remedy in favor of one whose possession has been intended upon. The purposes of all such acts are beneficial in their nature; they are intended to prevent the forcible or deceitful and tricky entry upon lands held by a doubtful title; tending thereby to preserve the peace and prevent fraud and injustice by compelling one who asserts the right to possession to show in the courts a better right than the one who has posses-

sion. They ought, therefore, to receive a liberal construction so as to promote the objects for which they were enacted; and hence, when it is made to appear, as it was in this case, that a tenant holding land under lease refuses to prosecute under the acts one who wrongfully enters upon and wrongfully detains the leased land, and surrenders his right to so prosecute to his landlord, the landlord ought to be permitted to exercise that right.

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**WHITE PINE LUMBER CO., Limited, v.  
ÆTNA INDEMNITY CO.**

(Supreme Court of Washington. April 18, 1906.)

**1. INJUNCTION—TEMPORARY RESTRAINING ORDER—ACTION ON BOND—LIABILITY OF SURETY.**

A surety on a bond to make effective a temporary restraining order enjoining a party from trespassing on land is not liable for damages, where the party restrained had no right to go on the premises.

**2. SAME.**

A surety on a bond to make effective a temporary restraining order enjoining a party from trespassing on land is not liable for the expense incurred by the party restrained in employing attorneys to resist applications for injunctions pendente lite, and to have the proceedings quashed and the action defeated.

**3. SAME.**

A surety on a bond to make effective a restraining order enjoining a party from trespassing on land is not liable for the fee the party restrained was required to pay as an appearance fee for the expense, being one that would be occasioned by the bringing of any action regardless of the suing out of a restraining order.

Appeal from Superior Court, Spokane County; George E. Morris, Judge.

Action by the White Pine Lumber Company, Limited, against the Ætna Indemnity Company. From a judgment for defendant, plaintiff appeals. Affirmed.

O. C. Moore, for appellant. P. C. Shine and W. L. Husbands, for respondent.

**ROOT, J.** On the 6th of June, 1903, in an action then pending in the superior court in Spokane county, wherein one Howard Gumaer and wife were plaintiffs and this appellant was defendant, a temporary restraining order was issued, enjoining appellant from cutting or removing timber from certain lands described in the complaint therein. Said restraining order directed this appellant to appear before said superior court on the 23d day of June, 1903, to show cause why an injunction pendente lite should not be issued by the court. On said return day, appellant appeared by counsel, and the application for the injunction pendente lite was denied, and the proceedings quashed, it appearing that service had not been made upon any authorized officer or person. Thereupon said Gumaer and wife applied for, and secured, the issuance of a second restraining order, similar

to that previously issued, and requiring this appellant to appear before said court on the 1st day of July, 1903, to show cause why an injunction pendente lite should not be issued. Upon the return day appellant appeared and demurred to the complaint in the action, which demurrer was subsequently by the court sustained, and the action dismissed. Each of the two restraining orders provided that said Gumaer and wife should give a bond before said orders should be effective. They gave, in each instance, such a bond with this respondent as surety thereupon. The present action is to recover against respondent upon said bonds for damages alleged to have been suffered by reason of the issuance of said restraining orders, said alleged damages consisting of attorney's fees, court costs, and losses arising from enforced idleness of teams, men, machinery, etc., during the time said restraining orders were in force. The cause came on for trial before a court and a jury. At the close of plaintiff's case, the defendant challenged the sufficiency of the evidence, and moved for a judgment dismissing plaintiff's action, which challenge and motion were sustained by the court. From the judgment thus entered this appeal is taken.

Appellant's complaint in this action contained the following allegation: "That on the 6th day of June, 1903, and for some time prior thereto, this plaintiff had been engaged, as it lawfully might, in cutting and removing timber from lots 5 and 6, of section 27, in township 56 north, of range 5 west of the Boise meridian." Respondent expressly denied that appellant was at said time, or any time, lawfully engaged in cutting and removing timber from said lands, or that it could be lawfully engaged in so doing. Appellant offered no evidence whatever to establish this allegation of its right to cut and remove said timber. It appears from certain things occurring in the course of the trial that the timber and land in question were claimed by said Gumaer and wife. It was the opinion of the trial court that any interference with teams, men, machinery, etc., employed in cutting this timber would not constitute damages for which it could recover as against this bond, unless some right of appellant was interfered with. If the company had no right to cut this timber or go upon these premises, it could not be said to have been damaged by being prevented from so doing. We think this position is tenable, and must be sustained.

Appellant urges that it is entitled to recover attorney's fees expended in having the restraining orders dissolved. The record, however, fails to show that any such services were rendered. No motion was made to dissolve either of the restraining orders. On the return day of each, appellant by counsel appeared and resisted the application for the granting of an injunction pendente lite, and upon the first occasion the proceed-

ing was quashed for the reason that there had been no service, and upon the second return day a demurrer was sustained to the complaint, and the action dismissed. The result in each case was to terminate the restraining order; but in each case said order became functus officio. The restraining order was effective merely to the time of the hearing. It would then be superseded by the injunction pendente lite if the court saw fit to grant such. No motion to dissolve was directed against either of the restraining orders, and no order was made dissolving either. Consequently it cannot be said that any attorney's fees were occasioned on account of said orders. Attorneys were employed to resist the applications for the injunctions pendente lite, and to have the proceedings quashed and the action defeated. The expense incurred in employing attorneys for such purposes would not be a charge against the sureties upon the bonds given to render the restraining orders effective. *Donahue v. Johnson*, 9 Wash. 187, 37 Pac. 322; *Thompson v. Benson* (Wash.) 82 Pac. 1040.

As to the court costs, what has already been said would in a measure apply to the question of their allowance. When the defendant appeared, he was required to pay the usual appearance fee of \$2. The restraining orders had nothing to do with this expense, which was one that would be occasioned by the bringing of any action regardless of the suing out of restraining orders.

Finding no error in the record, the judgment of the lower court is affirmed.

MOUNT, C. J., and CROW, DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

## ROY & ROY v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington. April 19, 1906.)

### CARRIERS—BILLS OF LADING—NEGOTIABILITY—BONA FIDE PURCHASERS.

The act of a carrier's agent in delivering a bill of lading for goods which he knew were not delivered to the carrier, being beyond his authority, does not bind the carrier, even as to an innocent transferee or pledgee, notwithstanding Ballinger's Ann. Codes & St. § 3598, making bills of lading negotiable by indorsement for certain purposes.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 146, 171, 176.]

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Action by Roy & Roy, a corporation, against the Northern Pacific Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Wright & Kelleher, for appellant. Carroll B. Graves, for respondent.

CROW, J. This action was instituted by the appellant, Roy & Roy, a corporation, against respondent, Northern Pacific Railway Company, a corporation, upon two certain bills of lading claimed to have been issued by said respondent for two car loads of shingles. The complaint contains two causes of action; but, as the questions raised thereby are identical, we will state the first cause only. The complaint, for the first cause of action, alleges that on November 23, 1903, the respondent, through its agent at Ravensdale, Wash., issued and delivered to one W. J. Doucett a certain bill of lading, acknowledging the receipt of 231½ M. 16 5x2 clear shingles, shipped from Covington, Wash., on said date, to Eaton Prairie, Minn., billed from the Allen Shingle Company to Roy & Roy, the appellant; that in truth said respondent had not received from said Allen Shingle Company, or said Doucett, or any other person, said shingles, or any shingles, at the time of the issuance of said bill of lading, and that there were no shingles loaded on the car named therein; that said Doucett was not the agent of the said Allen Shingle Company, had no authority to bill or ship any shingles for said company, and was not the owner or in control of any shingles for said company, all of which facts were at the time well known to respondent, or could have been learned by the most casual inquiry; that on November 21, 1903, said Doucett presented said bill of lading to the appellant, Roy & Roy, who, relying upon the representations therein contained, and believing respondent had said shingles in its possession, paid to said Doucett the sum of \$326.34, the value of said shingles; that by reason of the negligence of the respondent in issuing said bill of lading to said Doucett he was enabled to defraud appellant out of said sum of \$326.34; that said Doucett is wholly insolvent; and that prior to the commencement of this action appellant demanded that respondent repay the said sum of \$326.34, or deliver said shingles to it, which the said respondent refused to do. To each cause of action of the complaint the respondent interposed a general demurrer, which being sustained, the appellant refused to plead further. Thereupon judgment was entered dismissing the action, and this appeal has been taken.

The principal question to be determined on this appeal is whether the respondent railway company is liable to appellant for the value of said shingles. The appellant has affirmatively pleaded that no shingles were ever received by respondent, thus showing the false and fraudulent character of the recitals contained in the bill of lading. But, as it was issued by one H. S. McIntyre, respondent's agent at Ravensdale, who was authorized to issue bills of lading for merchandise actually received for shipment, appellant contends that the respondent is estopped

from relying upon the defense that it received no shingles, not only because it held out McIntyre, its agent, as having full authority to issue such bill of lading, but for the further reason that said bill of lading as executed is negotiable and transferable by indorsement and delivery, under the laws of this state and the usages and customs of merchants and shippers generally, and that appellant, relying upon said bill of lading and on the truth of its recitals and believing the shingles had been actually delivered to respondent, paid to said Doucett the value of said shingles, and thereby became an innocent purchaser for value. Appellant, in support of its contention, has cited numerous authorities, including *Sioux City & P. R. Co. v. First Nat. Bank*, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488; *Brooke v. New York, etc., R. Co.*, 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235; *Armour v. Mich. Cent. Ry. Co.*, 65 N. Y. 111, 22 Am. Rep. 603; *Dickerson v. Seelye*, 12 Barb. (N. Y.) 99; *Wichita Savings Bank v. Atchison, etc., R. Co.*, 20 Kan. 519; *Watson v. M. & C. R. Co.*, 56 Tenn. 255; *Bank of Batavia v. N. Y., L. E. & N. R. Co.*, 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; *St. Louis & Iron Mountain R. R. Co. v. Larned*, 103 Ill. 293; *Smith v. Missouri R. R. Co.*, 74 Mo. App. 48. These cases are cited here upon the theory that, as the agent, McIntyre, was employed by respondent to receive goods for shipment and to issue bills of lading therefor, and as he as such agent actually issued the bill of lading in question, containing a recital of the receipt of the shingles, as between respondent and appellant, an innocent third party, who has acted in good faith while relying upon said recital, the respondent should be estopped from denying the truth of its statements, and from making the defense that the shingles had not been actually received. It is true that the authorities above cited sustain appellant's position. Still we find that the English courts, the Supreme Court of the United States, the federal courts generally, and many of the state courts have in numerous well-considered cases announced an entirely opposite doctrine, which we will now announce as the law of this state. Where a transportation company shows that merchandise was not actually received by it, and that a bill of lading has been issued by its agent, either through fraud or mistake, the Supreme Court of the United States, since followed by other courts, has held that, as the receipt of the goods lies at the foundation of the contract to carry and deliver, there can be no such contract, unless the goods have actually been received, and that an agent of the carrier has no authority to issue a bill of lading without actual receipt of the goods, and cannot bind the carrier, even as to an innocent transferee or pledgee of the bill of lading. 6 Cyc. 419; *Grant v. Norway*, 10 C. B. 664; *Uessel v. Bath*, 2 Exch. 207; *Meyer v. Dress-*

*er*, 16 C. B. (N. S.) 646; *Brown v. Powell Coal Co.*, L. R. 10 C. P. 562; *Cox v. Bruce*, 18 Q. B. Div. 147; *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998; *Friedlander v. Texas, etc., Ry. Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991; *Lazard v. Merchants', etc., Trans. Co.*, 78 Md. 1, 26 Atl. 897; *The Loon*, 7 Blatchford, 244, Fed. Cas. No. 8499; *Robinson v. Memphis & C. K. Co. (C. C.)* 9 Fed. 129; *Id.*, 16 Fed. 57; *Martin v. Railway Co.*, 55 Ark. 524, 19 S. W. 314; *Sears v. Wingate*, 3 Allen (Mass.) 103; *Hunt v. Miss. Cent. Co.*, 29 La. Ann. 446; *Louisiana Ntl. Bank v. Lavellie*, 52 Mo. 380; *Ntl. Bank of Commerce v. R. R. Co.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566; *Black v. Wilmington, etc., R. Co.*, 92 N. C. 42, 53 Am. Rep. 450; *Hazard v. Ill. Cent. R. R. Co.*, 67 Miss. 32, 7 South. 280; *Dean v. King*, 22 Ohio St. 118.

The appellant, however, not only relies upon the doctrine of estoppel, but also contends that the bill of lading was negotiable, and that it, as an innocent purchaser for value, should be protected, citing *First Ntl. Bank of Pullman v. N. P. Ry. Co.*, 28 Wash. 439, 68 Pac. 965. While our statute (*Ballinger's Ann. Codes & St. § 3598*) makes a bill of lading negotiable by indorsement for certain purposes, it is not negotiable in the same sense as promissory notes, bills of exchange, or other commercial paper. In *First Ntl. Bank v. N. P. Ry. Co.*, supra, we only held that a carrier issuing a bill of lading is bound to make delivery of the goods represented thereby to the holder thereof; in other words, that the assignment of the bill of lading confers upon the assignee such title to the goods as may have been held by the party to whom the bill of lading was originally issued. In *Yarwood v. Happy*, 18 Wash. 246, 51 Pac. 461, we in substance held that our statute was only declaratory of the previous common-law rule concerning bills of lading, and should not be construed as making an indorsement effective for any purpose other than to transfer the property represented, citing with approval *Shaw v. Merchants' Nat. Bank of St. Louis*, 101 U. S. 537, 25 L. Ed. 892, in which the Supreme Court of the United States said: "Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes." The nego-

liable character of a bill of lading is discussed in *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998, where Justice Miller says: "A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of bona fide purchasers only applies to it in a limited sense. It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver." In *Lazard v. Merchants', etc., Co.*, 78 Md. 13, 26 Atl. 897, the Court of Appeals of Maryland said: "No principle is better settled by the commercial law than that neither the master of the ship nor the agent of a transportation company has the right to sign bills of lading until they have been actually put on board of the ship or delivered into the possession of the company. And, if a master or agent signs a bill of lading for goods which have not been delivered to the carrier, the owner of the ship or other means of transportation is not liable either to the shipper or to one dealing with or making advances in good faith upon the bill of lading. It is hardly necessary to say that bills of lading are not by the commercial law negotiable in the same sense as bills of exchange and promissory notes. They are merely the evidence of ownership, general or special, of the property mentioned in them, and the right to receive said property at the place of delivery; and one making advances of money upon them does so at his own risk, and with notice of the limitation as to the power or rights of the master or agent to sign the same." In *The Carlos F. Roses*, 177 U. S. 665, 20 Sup. Ct. 807, 44 L. Ed. 929, Chief Justice Fuller said: "Bills of lading stand as the substitute and representative of the goods described therein, and, while quasi negotiable instruments, are not negotiable in the full sense in which that term is applied to bills and notes. The transfer of the bill passes to the transferee the transferor's title to the goods described,

and the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it." See, also, *Friedlander v. Texas & Pac. Ry. Co.*, 130 U. S. 424, 9 Sup. Ct. 570, 32 L. Ed. 991; *Anderson v. Portland Flouring Mills (Or.)* 60 Pac. 839, 50 L. R. A. 235, 82 Am. St. Rep. 771.

We cannot adopt the doctrine of estoppel as contended for by the appellant. Respondent's agent only had authority to issue bills of lading for goods actually received for transportation, but had no authority to issue any such bills for goods not received. The railroad company was not a broker dealing in bills of lading, but was only engaged in the business of transporting goods and merchandise. This fact was well known to the shipping public. Those who dealt with the respondent knew that its business was that of transportation only. When a bill of lading issued by it is assigned to a third party, who purchases the same or makes advances thereon, such third party is presumed to have knowledge of these conditions. One who purchases a bill of lading does it at his own risk, and must know that the company will be permitted to show that the goods were never received by it, if such be the fact. If, therefore, a transportation company is able to show that a certain bill of lading has been fraudulently or erroneously issued, no goods having been actually received for shipment, such showing will constitute a complete defense against any liability upon its part to a bona fide purchaser or holder. It was not necessary for respondent to plead such defense in this case, as all the essential facts appear upon the face of the complaint. In *Friedlander v. Texas & Pac. Ry. Co.*, 130 U. S. 424, 9 Sup. Ct. 572, 32 L. Ed. 991, Chief Justice Fuller says: "It has been frequently held by this court that the master of a vessel has no authority to sign a bill of lading for goods not actually put on board the vessel, and, if he does so, his act does not bind the owner of the ship even in favor of an innocent purchaser. *The Freeman v. Buckingham*, 18 How. (U. S.) 182, 191, 15 L. Ed. 341; *The Lady Franklin*, 8 Wall. (U. S.) 325, 19 L. Ed. 455; *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998. And this agrees with the rule laid down by the English courts. *Lickbarrow v. Mason*, 2 T. R. 77; *Grant v. Norway*, 10 C. B. 665; *Cox v. Bruce*, 18 Q. B. D. 147. 'The receipt of the goods' said Mr. Justice Miller, in *Pollard v. Vinton*, *supra*, 'lies at the foundation of the contract to carry and deliver. If no goods

are actually received, there can be no valid contract to carry or to deliver.' 'And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea,' as was said by Mr. Justice Matthews in *St. Louis, I. M. & S. R. Co. v. Knight*, 122 U. S. 79, 87, 7 Sup. Ct. 1132, 30 L. Ed. 1077; he adding also: 'If Potter (the agent) had never delivered to the plaintiff in error any cotton at all to make good the 525 bales called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the deficiency. This is well established by the cases of *The Schooner Freeman v. Buckingham*, 18 How. (U. S.) 182, 15 L. Ed. 341, and *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998.' It is a familiar principle of law that, where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud; but nothing that the railroad company did or omitted to do can be properly said to have enabled Lahnstein to impose upon Friedlander & Co. The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for there was nothing upon which the agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading. They are carriers only, and held to rigid responsibility as such."

While there is some conflict on the question of the respondent's liability in the decisions of the various state courts, we find no such conflict in the decisions of the federal courts, which uniformly hold respondent not liable. We not only think the current of authority sustains the position assumed by the respondent here, but also feel that in announcing our opinion we should act in harmony with the federal courts. This was the view taken by the Supreme Court of Minnesota in the case of *National Bank of Commerce v. R. R. Co.*, supra, where it said: "But on questions of commercial law it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted. Moreover, on questions of general commercial law, the federal courts refuse to follow the decisions of the state courts, and determine the law according to their own views of what it is. It is therefore very desirable that on such questions the state courts should conform to the doctrine of the federal courts. The inconvenience and confusion that would follow from having two conflicting rules on the same question in the same state, one in the federal courts and another in the state courts, is of itself almost a sufficient reason why we should adopt the doctrine of the federal courts on this question. To do other-

wise, so long as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against our own citizens." We think the complaint failed to state a cause of action, and that the trial court committed no error in sustaining the demurrer.

The judgment is affirmed.

MOUNT, C. J. and FULLERTON, HADLEY, ROOT, and DUNBAR, JJ., concur.

#### MANN v. PROVIDENT LIFE & TRUST CO. et al.

(Supreme Court of Washington. April 28, 1906.)

##### 1. TRIAL—FINDINGS BY COURT—EXCEPTIONS—STATEMENT OF FACTS—TIME FOR FILING.

Where appellant filed exceptions to the findings of fact and a statement of facts within five days of the service of the findings on him, though not within five days of the filing of the findings, the exceptions and statement will not be stricken out.

##### 2. MORTGAGES—REDEMPTION—EXTENSION OF TIME—AGREEMENT—INSTRUCTIONS.

Where there was an agreement for an extension of time to redeem a mortgage, but no time was fixed, the extension must be held to have been for a reasonable period only.

##### 3. SAME—REASONABLE TIME.

Where a mortgagor was given a reasonable time beyond the statutory period for redemption, an attempt to redeem 5½ years after the foreclosure, and after a large amount had been expended for permanent improvements of the property, was not within a reasonable time within the agreement.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1739.]

##### 4. SAME—EVIDENCE—SUFFICIENCY.

In an action by a mortgagor for an accounting and to compel a redemption, evidence held insufficient to show an agreement for the extension of the period of redemption beyond the time allowed by statute.

##### 5. JUDGMENT—COLLATERAL ATTACK—TIME OF COMMENCEMENT OF SUIT.

That suit for the foreclosure of a mortgage was prematurely commenced cannot be considered in an action by the mortgagor for an accounting and to redeem.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 959.]

Root and Dunbar, JJ., dissenting.

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by Jacob C. Mann against the Provident Life & Trust Company and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Allyn & Allyn and F. Campbell, for appellant. E. R. York, for respondents.

CROW, J. On June 20, 1892, appellant obtained a loan of \$50,000 from the respondent the Provident Life & Trust Company, and to secure the same gave a mortgage on certain real estate in the city of Tacoma. The interest on said note for the years 1894 to 1897 inclusive was not paid when due. In 1894, appellant, being unable to meet the tax-

es, interest, and insurance, had a conversation with Henry Longstreth, the western agent of said mortgagee, pursuant to which appellant deposited with him Valentine scrip sufficient to locate 160 acres of land. Appellant claims that this scrip was given to secure a year's extension upon the note and mortgage. Respondent denies this, but it is an admitted fact that the time was extended, in that no effort was made to foreclose or otherwise enforce payment during the succeeding year. In 1895 another transaction of the same kind took place; the appellant again depositing Valentine scrip. On January 17, 1898, appellant deposited with respondent more scrip, being all that he owned, which, together with that already deposited, was sufficient to locate 664 acres. Appellant claims that, when this last deposit was made, the respondents agreed to extend the time upon said note and mortgage for another year. This is disputed by respondents. On June 27, 1898, respondent company began a foreclosure suit on the note and mortgage. Appellant defaulted and on September 12, 1898, a judgment was entered in the sum of \$84,035.95. A day or two after the entry of the foreclosure decree, the appellant called upon respondent Longstreth for the purpose of making a sale of his interest in the Valentine scrip already deposited, and securing to himself the right to redeem. When first on the witness stand he gave his version of this interview with Longstreth, but, upon being recalled afterwards, explained his former statements, testifying as follows: "I said to Mr. Longstreth, two days before the contract was made, when I called on him, 'Let me sell you the scrip for a nominal sum, giving me your contract to sell it back to me for a nominal sum, bidding the whole amount on the property, keeping it together, giving me time to redeem it.' Now, I don't know how I answered that question, but that is how I should have answered it." Mr. Longstreth asked a day or two to think the matter over. Appellant called on him again, on September 15, 1898, at which time the following written instruments, drawn by Mr. Longstreth, were signed and delivered:

"Received Tacoma, Wash., Sept. 15, 1898, of Henry Longstreth one dollar in full payment for all my right, title and interest in eighteen pieces of Valentine scrip, as follows: Nos. E57, E169, E214, E222, E224, E289, E291, E275, E300, E244, E273, E290, E124, E241, E274, E271, E114, and E111. [Signed] Jacob C. Mann."

"Tacoma, Sept. 15, 1898. For value received I hereby agree to transfer all my right, title and interest in certificates of Valentine scrip Nos. E57, E169, E214, E222, E224, E289, E291, E275, E300, E244, E273, E290, E124, E241, E274, E271, E114 and E111, being eighteen pieces in all, to Jacob C. Mann on payment of one dollar, provided lots one (1), two (2), seven (7), eight (8), nine (9) and ten (10) in block nine hundred and three (903), Tacoma,

have been previously redeemed from the lien of the mortgage which we are foreclosing. [Signed] Henry Longstreth. Witness: A. L. Andrews."

On October 15, 1898, the mortgaged real estate was sold under a special execution, and was purchased by the respondent company for the full amount of the judgment and costs, to wit, \$84,970.35. This sale was confirmed on November 23, 1898. Respondent company, as purchaser, entered into possession of said real estate on said 15th day of October, 1898, without objection on the part of appellant. Such possession has been maintained by it or its successors ever since, and permanent improvements to the value of \$170,000, in the shape of a six-story and basement brick store and office building, were made upon said real estate during the year 1903 by respondent, or by one David G. Alsop, who, it is claimed, was a successor in interest to the respondent company. In April, 1904, appellant asked respondents for an accounting, and in September, 1904, made and served upon them a written demand that he be permitted to redeem both said scrip and the above-described lots; that respondents furnish the appellant a statement of the amount necessary to make said redemption; and that respondents account for the rents collected. Respondents refused to comply with any of said demands. The lots involved herein were, at the time of the sheriff's sale, of the probable value of \$60,000. The scrip was then of the probable value of \$15,000. Appellant began this action on September 12, 1904, as a proceeding in equity to compel respondents to make an accounting, and for permission to redeem the real estate and scrip upon ascertaining the amount due over and above the rents and profits collected by respondents. The trial judge made findings of fact and conclusions of law favorable to respondents. One of said conclusions recites: "No extension or agreement for extension, beyond the statutory period, of a right to redemption of the real property involved herein before the mortgaged foreclosure sale was made by the defendants to plaintiffs." And another of said conclusions is as follows: "That plaintiff has failed to establish any right to equitable relief herein." And another recites that the defendants are entitled to a judgment and decree "that plaintiff recover nothing in this cause." A judgment and decree were accordingly made and entered, from which this appeal is taken.

Respondents have moved this court to strike the exceptions to the findings of fact, upon the ground that said exceptions were not filed within five days from the time said findings were filed. A motion to strike the statement of facts is also made on the same ground. From the affidavits of appellant's attorney on file herein, which affidavits are undisputed, it appears that the findings of fact were signed by the trial judge, and filed at a time when appellant and his at-

torneys were not in court, and that the same were not served until after the five days had expired; that appellant's attorneys prepared and submitted to the trial judge and filed their exceptions to said findings within five days from the time the same were called to their attention and served upon them. Under these circumstances the motion to strike the exceptions and statement of facts must be denied.

It will be noticed that, in the bill of sale made by appellant to Longstreth, no consideration is mentioned excepting the nominal one of \$1, and that in the agreement to resell, made at the same time by Longstreth, the same consideration was mentioned, with the proviso that, as a condition precedent to redemption of the scrip, the mortgaged lots should have been previously redeemed from the lien of the mortgage then being foreclosed. Appellant claims that he made this bill of sale in consideration of an understanding and agreement with Longstreth that the period of redemption should be extended for a reasonable time beyond the statutory period of one year, and that he should now be permitted to pay up and redeem both the real estate and the scrip. This contention is disputed by respondents, who claim that the consideration for the bill of sale was the agreement of Longstreth, as agent of the trust company, to bid the full amount of the judgment for the real estate at the sale thereof, and to hold the scrip without selling it until the statutory period of one year for redeeming had expired, and permit it to be redeemed with the real estate, as one transaction, within the statutory period. The trial court in part made findings as follows: "That plaintiff was at said various time unable to pay said moneys then due, and desired to secure further time for payment of same and to delay suit on said note and mortgage, and plaintiff at various times prior to, and on January 17, 1898, assigned, transferred and delivered to Henry Longstreth, as agent of said company, certain certificates of Valentine scrip, to be held as further and additional security for the payment of said note and mortgage, and in consideration thereof said company from time to time delayed suit on said note and mortgage. That thereafter, on October 15, 1898, the mortgaged property above described was duly sold by the sheriff of said Pierce county, under writ of special execution issued upon said judgment and decree, and said mortgaged property was bid in and purchased by said company at said sale for the sum of \$84,970.35, being the full amount of said judgment and costs; and thereafter on November 23, 1898, said sale was duly confirmed by order of said court entered in said cause. That on September 15, 1898, after the entry of said judgment and decree, said Jacob C. Mann sold, and, by an instrument in writing bearing said date, transferred absolutely to Henry Longstreth all of

said certificates of Valentine scrip which had been theretofore pledged as additional security to said mortgage debt, and in consideration thereof said Henry Longstreth, by an instrument in writing bearing same date, agreed to retransfer all of said certificates of Valentine scrip to said Jacob C. Mann, provided the real property described in said mortgage had been previously redeemed from the lien of said mortgage; but no agreement was made by or between the plaintiff and defendants of either of them to extend the time for the redemption of said real property from said mortgage debt beyond the statutory period, or for any time or at all." We think these findings fully warranted by the evidence. If, however, appellant's contention that he gave the bill of sale in order to get an extension of time to redeem be accepted as correct, still the limit of that extension was not agreed upon, and such alleged extension would necessarily be held to have been for a reasonable period only. The question would then be presented as to whether appellant sought to redeem within a reasonable period. In determining this question, we would have to take into consideration the character of the indebtedness and of the property, and all the circumstances surrounding it and the parties. Upon so doing, we could not hold that appellant commenced this action to redeem within a reasonable time. He waited 5½ years before making any demand for an accounting, or indicating any intention to redeem, and he did not commence this action for an accounting and for permission to redeem until nearly six years after the sale of the property. In the meantime real estate had greatly increased in value, and respondents, relying upon the absolute title claimed by them, had in good faith expended \$170,000 for permanent improvements. Were we to accept appellant's contention as to there being an extension of the time to redeem, even then the facts shown by the evidence would not be sufficient to entitle him to redeem or to have an accounting as demanded in his complaint. After making a careful examination of all the evidence, we fail to see how the trial court could have found any contract for an extension of the period of redemption for either a certain or an indefinite time. The written instruments above quoted fail to state any such agreement, and the appellant has failed to produce any clear or convincing evidence showing it to have been made by parol. While a right of redemption or an extension thereof may be founded on a parol agreement, and is not within the statute of frauds, still it should never be enforced, unless clearly and satisfactorily proven. *Clark v. Renaker* (Ky.) 20 S. W. 534. "When the period for redemption is either created or extended by contract, the owner of the land or other redemptioner must comply with the terms of the contract or lose his right to redeem. If the time for redemp-

tion is not fixed and certain, the right must be asserted within a reasonable time, or it will be considered waived." Turple v. Lowe, 158 Ind. 314, 62 N. E. 487, 92 Am. St. Rep. 310.

It cannot be successfully contended that the appellant has asserted his alleged right within a reasonable time, yet the only theory upon which he can possibly recover in this action is that by the terms of the receipt and contract of sale above set forth, and the terms of some further simultaneous parol agreement claimed to have been made between himself and Longstreth, he was given a reasonable extension of time running beyond the statutory period, within which to redeem not only the real estate, but also the Valentine scrip. We think this theory cannot be sustained, and that it was rightfully rejected by the trial court; there being no evidence to show any such oral agreement. The written instruments alone cannot be intelligently construed as conferring any such rights upon appellant. We have above quoted a portion of his testimony, given after he returned to the witness stand, and was permitted to explain. Prior to that time on cross-examination he had testified in part as follows: "Q. You had no contract with Mr. Longstreth or with his company with regard to the redemption of this property other than shown in this agreement there, dated September 15th? A. No, sir. Q. That is the only agreement in regard to it? A. Yes, sir." On re-examination, conducted by his own attorney, he testified as follows: "Q. Now, you were asked, Mr. Mann, whether you had any other agreement with Mr. Longstreth than this plaintiff's Exhibit C, dated September, 15, 1898, in relation to the extension of time? A. Nothing. Q. That is, you mean you had no other written agreement? A. I had no other agreement. Q. Had no other agreement? A. None whatever. Q. When you say you had no other agreement, Mr. Mann, this contract, which you received here, and this bill of sale which you made, was made by him and you in conformity to the request that you had made two days prior to that? A. Yes. Q. That was part of the same contract, wasn't it? A. Yes, sir. Q. There was a consideration for the making of this contract? A. Well, they explain themselves. Q. They do? A. Yes. Q. Isn't it a fact that you stated that there was no other agreement than that written agreement? A. Sure, I so stated." From this evidence, given by appellant himself, it appears that the only agreement between the parties was contained in the two written instruments. We are therefore now called upon to determine his rights by construing these instruments in the light of the surrounding circumstances and facts which are not questioned. There is no dispute that, prior to the commencement of the foreclosure action, all of the Valentine scrip had been assigned to the respondent company as

collateral security. At the time of the foreclosure sale, the real estate as shown by the evidence was not worth more than \$60,000. Although appellant placed a very high valuation upon the Valentine scrip, based upon prices which he had paid for it in the years 1888-1889, when he and many others erroneously supposed it could be used for securing title to tide lands, the undisputed evidence shows that, at the time of the sheriff's sale in 1898, it could not have been worth, at the highest estimate, more than \$15,000. From this it follows that the combined market value of the real estate and scrip which the respondent company held as security at the date of its judgment and sale did not exceed \$75,000, while its judgment was entered for more than \$84,000. Appellant must have known that the respondent could issue an execution upon its foreclosure judgment and decree and first sell the real estate, even at its full value, for less than the face of its judgment, and could thereafter issue an alias execution upon its deficiency judgment and sell the Valentine scrip. After an execution sale of the Valentine scrip, which was personal property, there would have been no right of redemption whatever as to such scrip. If, however, appellant could succeed in effecting an arrangement with the respondents, by which they would make their entire bid for the real estate and would also give him the privilege of redeeming the scrip within the statutory period of one year, on condition that he also redeemed the real estate, he might thereby be enabled to recover back not only the real estate, but also the scrip. In the event of finding himself able to redeem within the statutory period, which he hoped to do and evidently anticipated that he might do. With this object in view, nothing would be more natural than for the parties to enter into just such an agreement as the one evidenced by the written receipt and bill of sale. Had the appellant then redeemed the real estate within the statutory period, he would also have been entitled to a return of the Valentine scrip not otherwise redeemable. This opportunity to recover the Valentine scrip, in the event of redemption of the real estate, was a right not guaranteed him by any existing statute, and constituted a valuable consideration for his agreement to sell the scrip. Having failed to redeem the real estate within the statutory period, he not only lost all interest in the real estate, but also in the scrip.

It seems to be conceded, and is a fact disclosed by evidence, that at the time of the foreclosure and sale, a period of intense financial distress, causing a marked depression in property values, prevailed in this country. Although there is some evidence tending to show that during this period it was customary for the respondent company to bid the full amount of its judgment at its foreclosure sales, we would not be justified in assuming that, in the absence of the

above written agreements, it would have done so in this case, where it not only held the real estate, but also the scrip as security, and where their combined market value was considerably less than the face of its judgment. On the contrary, the most natural and business-like course for it to have adopted under existing conditions would have been to first bid in the real estate for a portion of its claim, and the scrip for the remainder, thus protecting itself as much as possible by acquiring title to all the property, both real and personal, which it held as security. The evident intention of the parties was not to extend the period of redemption indefinitely, but to relieve the respondent company from the necessity of proceeding in this manner for its protection, and at the same time to enable it to concede to appellant the right to redeem both the real estate and the scrip within one year, on the basis of the price bid for the real estate at the sheriff's sale. Any other theory would compel us to assume that the respondent company would, in the absence of any agreement, have necessarily bid the full amount of its judgment for the real estate alone, being \$24,000 more than its market value, and, by thus fully satisfying its judgment, place itself in a position where it would be compelled to release the scrip.

There is some contention made by appellant to the effect that the foreclosure suit was prematurely commenced. That question should have been raised and adjudicated in that cause. It cannot be considered in this collateral proceeding. It is also contended by the appellant that he was not properly served with summons in the foreclosure suit. We have carefully examined the record of the foreclosure action, which is before us, and are of the opinion that a valid personal service was made upon him.

We find no error in the record, and the judgment of the superior court is affirmed.

MOUNT, C. J., and HADLEY, FULLERTON, and RUDKIN, JJ., concur.

ROOT, J. (dissenting). I am unable to fully agree with the conclusion reached by the majority of the court. I think that appellant is entitled to relief in the matter of the Valentine scrip. This scrip was placed with respondents as additional security. Appellant was obliged to put it up as such collateral in order to prevent the foreclosure of the mortgage upon his real estate. He at length placed the last that he had of this scrip. According to the evidence, with the last scrip he had furnished the respondents with all the property he had in the world as security for this indebtedness; and he contends that the last deposit made was upon the understanding and agreement that the mortgage should not be foreclosed within a year from that time. Respondents claim that there was no such agreement and un-

derstanding. We think the condition and surrounding of the parties lend strong corroboration to the contention of the appellant in this particular. But respondent company begins this suit about five months after this last deposit of scrip was made, instead of waiting twelve months. After the decree of foreclosure had been entered, the bill of sale from appellant and the agreement to resell by Longstreth were executed. The oral testimony as to the purchase and consideration of this transaction is flatly contradictory; appellant giving his version, and Longstreth giving that of himself and the company. Their oral negotiations having terminated in the written bill of sale and written agreement for resale, it follows that these documents must constitute the best evidence of the intention of the parties. By an examination of said written agreement to resell, we find that it opens with the recital "for value received, I hereby agree to transfer \* \* \* on payment of \$1.00; provided lots one (and the other mortgaged real estate) have been previously redeemed of the lien of the mortgage which we are foreclosing." An examination of the sixth finding of fact made by the trial court shows that the court found that appellant made the bill of sale of the Valentine scrip "and in consideration thereof said Henry Longstreth, by an instrument in writing bearing same date, agreed to retransfer all of said certificate of Valentine scrip to said Jacob C. Mann, provided the real property described in said mortgage had been previously redeemed from the lien of said mortgage"; but also found that no agreement of extension of the time for redeeming the real estate was made. Looking at these written instruments and the finding of the trial court, which respondents are not in a position to question, we are unable to see any valid or valuable consideration for the bill of sale of this scrip made by appellant to Longstreth. The latter merely agreed to resell the scrip upon the doing by appellant of a certain act which would have entitled him to a return of this scrip regardless of any agreement. The value of this scrip is and was uncertain. It was shown to have cost appellant something over \$100 per acre, and was at one time probably of the value of \$150 per acre. At the time of the trial it was probably worth at least \$20 an acre, and perhaps much more. Appellant claims that, at the time of the first deposit made, it was accepted by the respondent upon the basis of \$100 per acre. Appellant claims that this scrip was worth \$75,000 at the time of these deposits, while respondents claim that it was not worth more than from \$12,000 to \$15,000. In view of the situation of these parties, having in mind the advantage which respondents had over appellant, I am not disposed to draw the lines closely against him. As the trust company, re-

spondent, insists upon a strict compliance with its legal rights in the premises, it cannot complain if appellant is given the benefit of the same measure of construction. If the consideration for the bill of sale of this scrip and of the contract for resale was as contended for by respondents, it should have been expressed in those instruments. Instead of that, we find something entirely different. These two instruments constitute one transaction, and the purpose and intention of the parties thereto must be gathered from the written language employed in the light of surrounding undisputed circumstances. Courts, and especially courts of equity, should not apply a rigid rule of construction in favor of one party and against the other under like conditions. Neither should the rigor of the law be visited with severity upon the helpless debtor and palliated in favor of the creditor in a case where, at best, the debtor suffers great hardship, while the creditor reaps a rich and abundant harvest in addition to the recovery of its loan, interest, and costs.

Viewing the transaction regarding this bill of sale and contract for resale with the critical eye of the law or by the comprehensive vision of equity, I cannot find justification for the retention of this scrip by respondents. I think substantial justice would be done as between these parties if appellant receive the Valentine scrip which he deposited.

DUNBAR, J. I concur in what is said by Judge ROOT.

#### HILLMAN v. HILLMAN et al.

(Supreme Court of Washington. April 28, 1906.)

#### ATTORNEY AND CLIENT — COMPENSATION OF ATTORNEY—RIGHT OF ATTORNEYS TO INTERVENE.

Under Ballinger's Ann. Codes & St. § 5722, providing that the court in an action for divorce brought by the wife may require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the action when such divorce is granted or refused and give judgment therefor, and section 5165, providing that compensation of attorneys shall be left to the agreement of the parties, attorneys for the wife in a suit for divorce, which has been compromised and dismissed, cannot intervene for the purpose of obtaining judgment against both husband and wife for their fees.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Bessie Olive Hillman against Clarence D. Hillman and another. The suit was voluntarily dismissed by plaintiff, and S. H. Steele and another, as attorneys for plaintiff, intervened and were awarded judgment against both plaintiff and defendant for their fees, from which judgment both plaintiff and defendants in the original proceeding appeal. Reversed, with instructions to dismiss the action.

Fred'k R. Burch, for appellants. Blaine, Tucker & Hyland and Wm. Hickman Moore, for respondents.

FULLERTON, J. The appellants Bessie Olive Hillman and Clarence D. Hillman are husband and wife, and the appellant Homer L. Hillman is the brother and business partner of Clarence D. Hillman. The respondents, Steele & Brown, are attorneys at law. On March 21, 1904, the appellant Bessie Olive Hillman began an action for divorce and for a partition of the community property against her husband, joining her husband's brother as a party defendant because of the business relations existing between him and her husband. The respondents, Steele & Brown, appeared as attorneys for Mrs. Hillman. A preliminary restraining order was applied for and issued, and an application made for temporary alimony and suit money, including attorney's fees. Pending this latter application the Hillmans condoned their differences, and a stipulation was entered into for a dismissal of the action. This stipulation was signed by Mrs. Hillman, but not by her attorneys, and, when presented to the court, was opposed by them on the ground that they had an interest in the action to the extent of their attorney's fees, and that the parties were without power to dismiss the action without their consent. The court took this view of the case, allowed the attorneys to file a petition in intervention for their fees and the costs they had advanced, and ordered a hearing thereon, at the conclusion of which it entered a judgment against the appellants Bessie Olive and Clarence D. Hillman in favor of the attorneys for \$1,000 as attorney's fees and \$9 they had advanced as costs, together with the costs of the proceedings.

The warrant for this judgment is thought to be found in section 5722 of the Code (Ballinger's Ann. Codes & St.) which provides that the court in an action for divorce brought by the wife may "require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the action, when such divorce is granted or refused, and give judgment therefor." But this section contemplates a judgment in favor of the wife, one running in her name, and is not authority for the intervention in the suit by the wife's attorneys and the entry of a judgment against the husband and wife in their favor. The measure and mode of compensation of attorneys and counselors are, under our statute, a matter for private agreement between client and attorney (Ballinger's Ann. Codes & St. § 5165), and controversies between them over such fees have no place in actions where the relation of attorney and client exists. Claims for attorney's fees where adjusted by actions must be in actions brought for their adjustment, as claims of all other kinds are adjusted. True, the Code in all cases makes an allowance for

attorney's fees called "costs," and in certain classes of cases makes allowances for attorney's fees as such. But these do not belong to the attorney by mere operation of law, nor is he entitled to judgment for them. They are awarded to the prevailing party, and judgment for them is entered in the name of such party. There are cases which maintain the doctrine contended for by the respondents, but we think they are not founded in better reason. It is the policy of the law to encourage husband and wife to compromise and settle between themselves their domestic troubles, and to discourage actions for divorce. Actions for divorce, therefore, which both parties desire dismissed, should not be kept alive merely to settle the claims of counsel for attorney's fees. Cases supporting the conclusion we have reached are the following: *Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480; *Sims v. Davis*, 48 Neb. 720, 67 N. W. 765; *Stover v. Stover*, 7 Idaho, 185, 61 Pac. 462; *Thompson v. Thompson*, 40 Tenn. 527; *McCulloch v. Murphy*, 45 Ill. 256.

The judgment appealed from is reversed, and the cause remanded, with instructions to dismiss the action.

MOUNT. C. J., and HADLEY, DUNBAR, RUDKIN, and CROW, JJ., concur.

#### KIRBY v. WHEELER-OSGOOD CO.

(Supreme Court of Washington. April 28, 1906.)

##### 1. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK—MINOR.

In an action for injuries to a minor, 16 years of age, employed in a sawmill, whether he assumed the risk of injuries from being cut by a saw, the danger of which was open and apparent, was a question for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1081.]

##### 2. DAMAGES—MEASURE—PERSONAL INJURIES.

In an action for personal injuries, where the plaintiff lost the ends of the first three fingers of his right hand, and his thumb was split, and the joints left stiff, leaving him the full use of the little finger only, a verdict for \$5,000 damages is excessive, and will be reduced to \$3,500.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 379, 384, 390, 393.]

Appeal from Superior Court, Pierce County; O. V. Linn, Judge.

Action by William Kirby, an infant, by his guardian ad litem, Thomas Armstrong, against the Wheeler-Osgood Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed on condition.

Chas. Bedford and G. M. Emory, for appellant. Walter Christian and P. C. Sullivan, for respondent.

FULLERTON, J. This is an appeal from a judgment entered in favor of the respondent, and against the appellant for personal injuries. The record discloses that the ap-

pellant was operating a sash and door factory, and that the respondent was one of its employees. At the time of receiving the injury the respondent was a minor, having just entered upon his sixteenth year. He had then worked for the appellant something over three weeks, doing various duties, such as cleaning up and shoveling sawdust, bearing away lumber from the planer and other machines; one of such machines being the resaw, a machine used to rip inch lumber to lumber of smaller dimensions. He was put at work at the resaw at about the beginning of the third week of his employment and worked there as he says for a week or so, when he was directed to do other work. After a few days, he was again told to go to work at the resaw. He commenced at 7 o'clock in the morning and had worked until about 10 o'clock when he brought his hand in contact with the saw and received the injuries for which he sues. When the appellant was first employed at the resaw the lumber being ripped was of considerable length, most of it being from 12 to 24 feet. Lumber of that length after passing through the machine would fall on rollers where it would remain until taken away, giving the off-bearer no trouble to keep up with the machine. When he went back the second time, however, the pieces being put through were only about four feet in length. These, the respondent says, proved to be more difficult to handle than the longer pieces, as they would fall between the rollers and pile up during the time he was changing the loaded truck for an empty one. He further says that he found that he could work more rapidly from the side of the machine than from the end, and changed his position to the side, and that after he had worked there some 20 minutes, or long enough at least to load one truck, and part of another, his hand came into contact with the saw. He was not able to give any very clear description as to the manner in which he was hurt; saying that he did not know any more than that he "was reaching right near the saw and taking the stuff out and piling it on the truck" when the accident happened. The appellant's foreman testified that his hand must have come in contact with the top of the saw as the board that was then in the saw was bloody, and showed the indentations of his finger where the saw had pressed them against the board at the time they were cut off.

The respondent bases his right to recover on the contention that the appellant exposed him to a danger which he did not understand or appreciate, and with respect to which he was not suitably warned and instructed. The evidence on the question of warning and instruction was conflicting. The respondent testified that he was not instructed at all how best to perform his duties or warned as to the dangers of particular methods; testifying in this connection that he took his place behind the machine in the first instance

because he had seen others stand there, and that he changed afterwards because he thought he could best perform his duties from the position last taken. The appellant's testimony was to the effect that he had been fully warned and instructed as to all matters essential to his safety. But since the jury found for the respondent we must assume that his version of the matter is the correct one. The appellant, however, argues, and this is its main contention, that the dangers to which the respondent was subjected were so open and apparent that he must be held to have understood and appreciated them, and assumed the risk of injury therefrom even though he was not specially warned concerning them. Had the respondent been a man of mature years and possessed of ordinary intelligence and discretion, we would have no hesitancy in saying that the rule invoked should be applied to his case and a recovery denied him. But, as we have often said, the same rule cannot be applied to the young that is applied to adults. The well-known characteristics of those of immature years, however intelligent they may be, to act quickly and rashly upon impulse, makes it hazardous to their lives and limbs to employ them around exposed and dangerous machinery under any circumstances, but extremely so when they have not been instructed as to the safe manner of performing their duties, and warned against the dangers of adopting other and unsafe ways. Therefore with respect to the children who are not likely by reason of their immature years and lack of experience to fully understand and appreciate the dangers to which they are exposed it is made the duty of the employer, contrary to the rule with respect to adults, to warn them even against open and apparent dangers. But while the rules themselves are well understood difficulties arise in their application. There is a time when a child is so young that the court can say as a matter of law that to employ him around dangerous machinery without fully instructing him as to the open and apparent dangers would be the grossest kind of negligence. So there comes a time in this same child's life when the court can say as a matter of law that a failure to warn him of the open and apparent dangers is not negligence. Between these two extremes, however, there is, and from the nature of things there must be, a debatable ground, a time when the inferences to be drawn from the fact are disputable, when the court cannot say as a matter of law that the omission to warn is or is not negligence. In such cases it is the province of the jury to draw the inference, and either party has the right to have the question submitted to them.

Applying these principles to the case at bar we are of the opinion that the court did not err in submitting the facts to the jury. As we say, the respondent had just entered upon his sixteenth year, and the experience

he gathered in the few weeks he was in the appellant's employ was the only experience he had had with machinery. Although he had worked at this particular machine before his injury, his experience did not aid him on his return for the reason that the conditions were entirely different. When first at the machine long pieces were being ripped, and he had abundant time to take care of them, for they would fall naturally upon the rollers. On his return the pieces being ripped were short. Some of these would fall between the rollers and block the way of others, causing the pieces to pile up and fall back towards the machine. The pieces on top and the ones he must reach first would be next to the machine, and naturally he took that position where he could work the more rapidly. Whether or not in doing so he assumed the risk of injury we think under all the circumstances was a question for the jury.

It is assigned that the court erred in giving certain instructions, and in refusing to give certain others. These we have examined, but find no error in the rulings made. The respondent lost the ends of the first three fingers of his right hand, and his thumb was split and the joints left stiff, leaving him the full use of the little finger only. The verdict was for \$5,000, and the appellant complains that it is excessive. Damages of this character are the most difficult of all damages to measure in money, and are peculiarly within the province of the jury. For this reason courts allow many of such verdicts to stand notwithstanding they may feel as individuals that the sum allowed is greater than they would have consented to had the question been submitted to them primarily. In this instance, however, we feel that the verdict is larger than can be justified even taking the most liberal view of the evidence, and have concluded that it ought not to be permitted to stand for a greater sum than \$3,500.

The cause will be remanded to the superior court, with instructions to allow the respondent 30 days after notice to him that the remittitur has reached that court in which to remit from the judgment \$1,500. If the remission be made the judgment will stand affirmed, but if not made a new trial will be granted.

HADLEY, DUNBAR, and CROW, JJ., concur.

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STATE v. HILLMAN et al.

(Supreme Court of Washington. April 28, 1906.)

1. CONSPIRACY—INDICTMENT—SUFFICIENCY.

An indictment for conspiracy to defraud, which, after formally accusing defendants of that crime, alleged that on a certain date they, with intention to cheat and defraud a named person of his money and property, did then and

there unlawfully, willfully, and fraudulently combine, conspire, and agree together to get and obtain falsely, fraudulently, and by means of false pretenses a certain sum of money, the property of the person named, with intent to cheat him of the same, was sufficient.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, §§ 79, 96.]

## 2. CRIMINAL LAW—CHANGE OF VENUE—LOCAL PREJUDICE.

Where, in a prosecution for conspiracy to defraud, it was uncontroverted that sensational articles prejudicial to defendants and calculated to inflame the public mind were printed in newspapers of general circulation in the county in which the offense was committed, and that a number of people had associated themselves together for the purpose of creating sentiment against defendants, a change of venue because of local prejudice should have been granted.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 243.]

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Clarence D. Hillman and another were convicted of conspiracy to defraud, and appeal. Reversed and remanded, with instructions to enter an order for a change of venue.

G. M. Emory and Graves, Palmer, Brown & Murphy, for appellants. Kenneth Mackintosh and John F. Miller, for respondent.

**PER CURIAM.** Appellants were informed against upon the charge of the crime of conspiracy to defraud. They were convicted, and a judgment and sentence entered against them, from which this appeal was taken.

It appears that appellant Hillman was engaged in platting land into small tracts, in the vicinity of the city of Seattle and particularly at one place designated as the "Garden of Eden." It was claimed by the state that, in order to make sales of his property, he, by means of newspaper advertisements and other representations, misled, defrauded, and cheated various people, and particularly the complaining witness herein, one J. H. Cann. The appellants intend that the information does not state facts sufficient to constitute a crime. This instrument, after formally accusing the appellants, and each of them, of the crime of conspiracy to defraud, states that the offense was committed as follows: "They, the said C. D. Hillman and Lawrence S. Forrest, in King county, Washington, on the 12th day of October, 1904, then and there wickedly and injuriously devising, designing and intending to cheat, wrong and defraud one J. H. Cann of his money and property, did then and there, and theretofore unlawfully, wilfully and fraudulently combine, conspire, confederate and agree together with a unity of mind and common purpose and aim to get and obtain, knowingly, designedly, falsely, fraudulently and unlawfully by means of false pretenses, subtle means, fraud, cheat, subterfuge and devise, the sum of one hundred and fifty

dollars of the value of one hundred and fifty dollars in lawful money, the money and property of the said J. H. Cann, with intent then and there to cheat, wrong and defraud the said J. H. Cann of his said money. \* \* \*

This is followed by a long and circumstantial statement of the various acts and things done by said appellants in carrying out the said conspiracy to defraud, all of which things so done are alleged in the information to have been done pursuant to said conspiracy to defraud. Under the liberal rule of interpretation enjoined by the Code, we think this information was sufficient.

It is strenuously urged that the evidence adduced on the part of the state at the trial is fatally at variance with the allegations of the information, for the reason that the latter charges the appellants with having conspired to defraud one J. H. Cann, whereas the evidence shows that the appellants did not know said Cann at the time they made the conspiracy, and does not show that he was in their minds as an intended victim at that time, but merely shows that their conspiracy was to defraud such persons as might be entrapped thereafter, without reference to any particular individual or person. Appellants have cited some authorities which support their argument, but we are convinced that the later decisions and the greater weight of the authorities are contrary to their contention, and we do not think their position can be sustained upon principle. Where persons conspire to defraud whomsoever may be entrapped in the meshes of their schemes, and are subsequently prosecuted at the instance of a victim thus ensnared, we think it may be said in contemplation of law that their conspiracy was to defraud that victim; and we do not think that such conspirators so charged should be permitted to escape by saying that, when they plotted to cheat and defraud whomsoever might fall a prey to their machinations, they did not have in mind the particular individual who was subsequently defrauded. To allow this would be to sanction a rule inconsistent with the spirit of our laws and obnoxious to the best interests and welfare of the public. *People v. Arnold*, 46 Mich. 268, 9 N. W. 406; *People v. Gilman*, 121 Mich. 187, 80 N. W. 4, 46 L. R. A. 218, 80 Am. St. Rep. 490; *Commonwealth v. Rogers*, 181 Mass. 184, 63 N. E. 421.

A motion was made on the part of appellants for a change of venue from King county, where the offense is alleged to have been committed and where the trial subsequently occurred. Affidavits are set forth in support of said motion, which allege that the public press of the city of Seattle, for a long time prior to this prosecution, had contained a large number of articles reflecting upon the business integrity and honesty of affiants; that said articles purported to deal with alleged facts regarding the matters referred to in the information and with the testimony

given in the justice's court; that by far the greater part of said published statements and insinuations assumed the guilt of the defendants; that said statements were grossly untrue and contained such perversions and omissions as to make the facts appear very unfavorable to these defendants and to create a deep-seated prejudice against them in the mind of the public throughout King county; that said newspapers had a very large circulation within said county and were read by almost every family therein, and had the effect of creating the general belief that these defendants were guilty of the matters charged against them. It was further alleged that there was an organization known as the "Hillman Victim Association," composed of a large number of people, organized for the purpose of creating public sentiment against appellants and particularly against appellant Hillman, which said association, by means of public meetings and individual efforts, and by mailing postal cards reflecting upon the character of said Hillman, had done much to arouse prejudice against these appellants; and that it was impossible by reason of the intense feeling against these appellants for them to have a fair trial in said King county. A large number of newspaper clippings were attached to these affidavits. A large part of these extracts were of an inflammatory and sensational character, often with flaring headlines, and calculated to attract much attention. There was one affidavit signed by something over 30 residents of King county wherein the affiants stated that they had read the unfavorable comments in the newspapers, and had heard them discussed by large numbers of people; that said articles and discussion dealt with the innocence or guilt of the defendants, and that the same were most always unfavorable to defendants; that the comments caused by said publications had been so widely spread that the public mind, in their opinion, was prejudiced to such an extent that a fair trial could not be had in the county; that they had heard of the organization formed for the purpose of harassing said Hillman in the courts and elsewhere, and that the efforts of said association were reported to be very injurious to said Hillman. Upon their voir dire, nearly all of the jurymen stated that they had read more or less of these newspaper articles, although the accepted jurors believed that they were not so affected as to prevent them from acting fairly and impartially as jurymen. The affidavits referred to were not controverted, and we must accept the statements therein, so far as they are consistent with themselves, as the truth. An examination of the newspaper articles complained of shows that there were large numbers of them that were very prejudicial to the defendants. Numerous sensational articles are shown, and there could be no doubt of their being well calculated

to inflame the public mind. These facts being true, and it appearing that these papers were widely circulated throughout the county, and that large numbers of people were involved or affected by Hillman's transactions, and the examination of the jurors showing that nearly all of them had read more or less of these articles, we cannot escape the conclusion that a showing was made of a condition of the public mind not permissive of a fair trial. The law contemplates and guaranties to every defendant a fair and impartial trial according to the usual and ordinary forms of law; and it is incumbent upon the courts to see that this purpose and guaranty are made effectual. The repeated and continuous publications, hereinbefore referred to, seconded by the efforts of the Hillman Victim Club, as set forth in the affidavits, were well calculated to arouse in the public mind that prejudice and antagonism which the affidavits alleged to have existed against these appellants. We do not think the defendants in a criminal case should be forced to trial in such an environment. The refusal of the court to grant the motion for a change of venue was error.

Several other errors are assigned, two or three of which we regard as serious; but it will be unnecessary to discuss them here, for the reason that the matters complained of will doubtless not arise upon a new trial.

The judgment of the superior court is reversed, and the cause is remanded, with instructions to enter an order for a change of venue, unless said motion shall be waived by appellants.

(48 Or. 69)

#### JENNINGS v. JENNINGS.\*

(Supreme Court of Oregon. May 22, 1906.)

##### 1. CANCELLATION OF INSTRUMENTS — BILL — AMENDMENT — SUBSEQUENT FACTS.

A bill by a husband against his wife to set aside a deed to her averred that, prior to the execution of the deed, their relations were strained, without setting out the particulars thereof or the reasons therefor. It alleged that the deed was executed pursuant to defendant's promise that in such event she would resume marital relations with plaintiff, which she had no intention of doing, and which she absolutely refused to do as soon as the deed was made. Before answer plaintiff filed an amended bill in which he alleged defendant's relations with another and her unlawful association with him, and alleged an act of adultery committed after the filing of the original bill. *Held*, that the matters so alleged, being germane to the original cause of suit and admissible under the original bill, were properly introduced by amendment.

##### 2. DEEDS — FRAUD — FAILURE OF CONSIDERATION — CANCELLATION.

Where a wife, while estranged from her husband and in love with another, induced the husband to convey property to her on her representation that if he did so she would resume marital relations with him, which she had no intention of doing, and, on the execution of the deed, refused to keep her promise and abandoned her husband, with the purpose of continuing

\*Rehearing denied July 17, 1906.

her unlawful relations with her paramour, the husband was entitled to a decree canceling the deed.

Appeal from Circuit Court, Multnomah County; Arthur L. Frazer, Judge.

Action by O. O. Jennings against Helen C. Jennings. From a decree in favor of plaintiff, defendant appeals. Affirmed.

This is a suit to cancel and set aside a deed from the plaintiff to the defendant for lot 6, block 16, King's Second addition to Portland. The original complaint was filed May 14, 1903, and alleged that plaintiff and defendant were husband and wife and had been since February, 1894; that in May, 1903, plaintiff was and for many years prior thereto had been a locomotive engineer and it was necessary for the proper transactions of his business that he should live and reside at Roseburg; that for more than a year prior to May 7th, the domestic relations between him and the defendant had been greatly strained yet he had maintained a home in Portland, where his wife resided; that on the day named the defendant, for the purpose of cheating, wronging, and defrauding him, promised and agreed that if he would deed to her the property in question which he owned at the time of his marriage, that she would remove from Portland to Roseburg and there live with him as his wife; that she had no intention of keeping such promise but purposed thereby to wrong and defraud him out of the property; that relying upon the good faith of the defendant, he went to great expense in preparing a home in Roseburg, and deeded to her the property in dispute, but that immediately upon the delivery of the deed she absolutely refused to go to Roseburg and live with him and now asserts that she will never do so nor in any way keep or perform her promise and agreement, and refuses to redeem the property to the plaintiff; that in so inducing the plaintiff to deed her the property and in so refusing to go to Roseburg, the consideration for the deed failed, and the defendant has committed a fraud against the rights of the plaintiff. Service was had upon the defendant but no appearance was made by her nor further proceedings had in the suit until June 11, 1904, when plaintiff, by leave of court, filed what he denominated an amended complaint, in which it is alleged that the domestic relations between plaintiff and defendant had been greatly strained "because of certain rumors which had come to plaintiff to the effect that the defendant, his wife, had been seen in the company of one J. S. Seed, a man of a notoriously bad moral reputation, yet, nevertheless, upon the said defendant protesting and asserting that her relations with said Seed were only those which any honorable woman and faithful wife might maintain, this plaintiff believing said protestation and assertions, and having confidence in the truth, chastity, and loyalty of said defendant, had maintained and was maintaining a home in

the said city of Portland; that on said 7th day of May, 1903, the said defendant for the purpose of cheating, wronging, and defrauding this plaintiff, and protesting her love, affection, and devotion for him, and avowing her acts to have always been honorable, and especially her relations with the said Seed to have been ever proper and above reproach, promised the said plaintiff that if he would deed to her the above-described property she would immediately move to Roseburg and there keep and maintain the home and family relation with the plaintiff; that the defendant when she made said promise did not have, nor did she ever at any time have, any intention of keeping the same, but at said time, notwithstanding her said protestations and avowals, cherished a guilty love and affection for the said Seed, and had theretofore, together with said Seed, been caught at Second and Ash streets coming out of a lodging house at a late hour of the night by the wife of the said Seed, and was at said time severely beaten by the said wife of said Seed; intended and purposed by her said false promises and false protestations of love for plaintiff and her false assertions of honor, to cheat, wrong, and defraud the plaintiff into executing said deed; that the plaintiff relying solely upon the good faith of his said wife in making said promise and agreement, and relying upon the truth of her said protestations and avowals, went to a great expense in securing a home in the city of Roseburg, Or., where the plaintiff and defendant and their son should reside, and depending solely and entirely upon the truth of said protestations and avowals and upon said promise to go to Roseburg and there keep a home for the plaintiff, the plaintiff made, executed, and delivered to the defendant his certain deed to said property above described, which deed the said defendant then and there received and immediately caused the same to be placed of record in the proper office of said county. (4) That immediately upon receiving said deed and placing the same upon record the defendant absolutely refused to go to said city of Roseburg as she had so agreed, and said she would never go there, notwithstanding that upon that consideration and no other, except as herein stated, said deed was given, and thereupon plaintiff demanded that said deed be surrendered and given up to plaintiff, which demand was refused. (5) That at the time of making said protestations and avowals the said defendant was in love with the said Seed, and was lewdly associating with him, and has continued so to do in an open manner, and particularly on June 8, 1904, committed the crime of adultery with said Seed in the private lodgings of said Seed in Portland, Or. (6) That said defendant in so inducing said plaintiff to deed said property to her, and in so refusing to go to Roseburg with plaintiff as aforesaid and in so refusing to deed said property back to plaintiff, committed a gross fraud

against the rights of plaintiff. (7) That by reason of the premises there has been a total failure of consideration of said deed and the same fraudulently secured from plaintiff; that had the plaintiff known the things done and purposed by the said defendant as aforesaid he would never have executed said deed. Wherefore plaintiff prays for a decree of this court that the said defendant shall reconvey to this plaintiff said property, and for a decree cancelling and holding for naught said deed from plaintiff to defendant, and that in the event of the refusal of said defendant to so redeed said property, that the decree entered herein may stand as and for said deed, and for such other and further relief as seems just and equitable to the court, and for his costs and disbursements."

The defendant moved to strike from the amended complaint the averment that she had committed adultery with said Seed in June, 1904, for the reason that such act occurred after the filing of the original complaint, and to strike out other allegations because they were sham, frivolous, and irrelevant. This motion was overruled and the defendant answered, denying the material averments of the amended complaint and alleging affirmatively that she received the deed in good faith, intending to keep and perform her promise to go to Roseburg and live with the plaintiff as his wife, but that he refused to procure transportation for herself and son. The testimony was taken, and a decree rendered in favor of plaintiff, from which the defendant appeals.

C. A. Dolph and J. C. Moreland, for appellant. Jerry E. Bronaugh, for respondent.

BEAN, C. J. (after stating the facts). It is argued that the court erred in overruling the motion to strike from the amended complaint the averment of matters happening after the filing of the original, for the reason that such matters, if proper at all, could have been presented only by supplemental complaint. As a general rule, facts occurring after the filing of the original bill should be presented, when proper at all, by supplemental bill and cannot be introduced by amendment. 16 Cyc. 340. But this rule seems to be subject to the exception that if no answer has been filed at the time leave is granted, and amendment made. It is proper to allow matters, arising after the original bill was filed, to be added by way of amendment: Story, Eq. (9th Ed.) § 885; 1 Daniel, Ch. Pl. & Pr. \*407. But, whatever the true rule may be, is unimportant in this case. The amended bill does not substantially change the cause of suit or introduce any matter arising after the filing of the original complaint, except the averment that defendant committed adultery with Seed in June, 1904, and this would have been competent as testimony under the averments of the complaint for the purpose of throwing light upon the method and purpose of defendant in secur-

ing the deed in question from the plaintiff. The original bill averred that the relations of plaintiff and defendant were strained at the time the deed was made, without setting out the particulars thereof or the reasons therefor. The amended bill, however, sets out these matters more in detail by alleging the relations of the defendant and Seed and her unlawful association with him and guilty love and affection for him. These were matters germane to the original cause of suit and were properly introduced by amendment.

The facts in the case require but a brief notice. No useful purpose would be served by embodying them in an opinion and thus making a public record of the details of the unfortunate estrangement and disagreement between plaintiff and defendant, and the cause thereof or of the circumstances under which the deed in question was made. It is sufficient that we have examined the record and are all of the opinion that the deed was obtained through fraud and deceit with no intent on the part of the defendant to keep and perform her promise, but with the design of abandoning the plaintiff after obtaining his property, and continuing her unlawful relations with her paramour, and that, under such circumstances, plaintiff is entitled to a decree as prayed for. Dickerson v. Dickerson, 24 Neb. 530, 39 N. W. 429, 8 Am. St. Rep. 213; Meldrum v. Meldrum (Colo. Sup.) 24 Pac. 1083, 11 L. R. A. 65; Evans v. Carrington, 2 De G., F. & J. \*481; Evans v. Edmonds, 76 E. C. L. 775.

The decree is therefore affirmed.

#### COLES v. MESKIMEN.

(Supreme Court of Oregon. April 17, 1906.)

##### 1. EJECTMENT—RIGHT OF POSSESSION.

Plaintiff in ejectment being required to show, not only title, but a right of possession, a vendor cannot maintain the action against a vendee in possession under an executory contract of sale and not in default.

##### 2. VENDOR AND PURCHASER — DEFAULT OF PURCHASER—RIGHT OF POSSESSION.

A purchaser is not in default, so as to lose his right of possession entered into under the contract of purchase, time not being of the essence of the contract, because of mere failure to make the final payment, till the vendor tenders a deed, as well as makes demand for payment.

Appeal from Circuit Court, Baker County; Samuel White, Judge.

Action by Elizabeth S. Coles against Stephen Meskimen. Judgment for defendant. Plaintiff appeals. Affirmed.

This is an action of ejectment. The plaintiff alleges that she is the owner in fee and entitled to the immediate possession of the property, and that the defendant wrongfully and unlawfully withholds the same from her. The answer admits the plaintiff's legal title, denies her right to the possession and the wrongful withholding by the defendant, and affirmatively alleges that on or about

the 1st day of May, 1904, the plaintiff and defendant entered into an executory contract for the sale by the former and the purchase by the latter of the premises in controversy, together with a water right appurtenant thereto, for the sum of \$100, to be paid within one year; that by the consent of the plaintiff, and in pursuance of the contract, and in accordance with its terms, the defendant immediately entered upon the premises, and has ever since remained in possession thereof, making valuable and permanent improvements, of the reasonable value of \$300; that on or about the 1st day of April, 1905, defendant tendered to plaintiff the full purchase price and demanded a deed, but plaintiff refused to execute or deliver such deed, and has never performed, or offered to perform, the contract on her part, although the defendant has been and now is able, ready, and willing to pay the purchase price. The reply admits the making of the contract as alleged, except that it denies that a water right was to be conveyed with the land, and alleges that the purchase price was to be paid not later than September 1, 1904, and was not so paid or tendered by the defendant; that on April 5, 1905, the plaintiff offered in writing to convey the premises to the defendant upon the payment of the purchase price, and demanded such payment of him, but it was refused. The cause was tried to a jury. The plaintiff gave evidence of her legal title, waived her claim for damages, and rested. Thereupon defendant, to sustain his defense, gave evidence tending to prove the contract of purchase as alleged in his answer, his possession of the premises under such agreement, and the making of valuable and permanent improvements thereon of the reasonable value of \$300; that he offered to pay plaintiff the purchase price, but she refused to accept it, because she had no water right which she could convey; that plaintiff never offered or tendered defendant a deed as agreed upon, but on April 4, 1905, made him a written offer to deliver a deed, whereupon he again verbally offered to pay the purchase price pursuant to the terms of the contract, but that plaintiff refused to accept the same, because she said there might be \$30 or \$40 costs; that defendant did not have the money with him at the time these offers were made and refused, but he could and would have produced it if plaintiff had accepted such offers. The jury found from the testimony that plaintiff was not entitled to the possession of the premises, but that defendant was entitled to the same by reason of the contract set out in the answer. The plaintiff thereupon moved for judgment in her favor notwithstanding the verdict, on the ground that the matter set up in the answer did not constitute a defense. This motion was overruled, and judgment entered on the verdict, from which she appeals, assigning as error (1) the overruling of her motion for judgment, notwithstanding the verdict, and (2)

the refusal to instruct the jury that "in order for the vendee to make a good and valid tender of the purchase price, the money sufficient to meet such purchase price must be actually present; in other words, the vendee must have had the money actually present with him at the time and place he claims to have made such tender."

J. B. Messick, for appellant. Wm. Smith, for respondent.

BEAN, C. J. (after stating the facts). The contention of the plaintiff is that under the facts set up in the answer the defendant's interest in the property in controversy is a mere equitable right and unavailing in an action at law. The well-established rule in this jurisdiction is that an equitable defense cannot be pleaded in an action at law, unless, perhaps, that right is given by B. & C. Comp. § 392, in actions to recover possession of real property—a question we need not now consider. An action of ejectment involves both the right of possession and the right of property. The plaintiff in such an action must recover if at all, upon the strength of his own title. He must show not only that he has a legal estate in the property, but also a present right to the possession. B. & C. Comp. § 326. Any matter, therefore, which goes to disprove the fact of wrongful withholding is a legal defense, whether it shows the defendant's interest in the premises to be legal or equitable. *Newell, Ejectment*, 678; *Cofer v. Schenning*, 98 Ala. 338, 13 South. 123. Thus a mortgage in this state is a mere lien and does not convey the legal title, but possession of the mortgaged premises obtained by the mortgagee with the assent of the mortgagor is a good defense to an action of ejectment by the latter, so long as the mortgage debt remains unpaid. *Roberts v. Sutherland*, 4 Or. 219; *Cooke v. Cooper*, 18 Or. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709. In the federal courts the common-law rule that the defendant cannot set up as a defense in an action matters purely cognizable in equity is adhered to, but facts which estop the plaintiff from claiming possession of the premises as against the defendant are held to be a good defense to an action of ejectment. *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79; *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. Ed. 246. Upon the same principle the rule seems established that a vendor of real estate cannot maintain an action of ejectment against a vendee in possession under an executory contract of sale who is not in default. *Warvelle, Ejectment*, § 146; *Prentice v. Wilson*, 14 Ill. 91; *Hutchinson v. Coonley*, 209 Ill. 437, 70 N. E. 686; *Whittier v. Stege*, 61 Cal. 238; *Crary v. Goodman*, 12 N. Y. 266, 64 Am. Dec. 506; *Bigler v. Baker* (Neb.) 58 N. W. 1026, 24 L. R. A. 255. The answer, therefore, stated a good defense.

Error is also assigned on the refusal of the court to instruct the jury that the alleged

tender or offer of performance by the defendant was unavailing, because he did not have the money actually present at the time. Under an executory contract for the sale of real estate, the vendor is the holder of the legal title as trustee for the vendee (*Burkhart v. Howard*, 14 Or. 39, 12 Pac. 79), and when the vendee has entered into possession under and in pursuance of the terms of the contract, the vendor cannot oust him so long as he is not in default; and when time is not made of the essence of the contract, he is not in default for failure to make the final payment until the vendor tenders a deed and demands such payment (*Knott v. Stephens*, 5 Or. 235; *Sayre v. Mohney*, 35 Or. 141, 53 Pac. 526). The question in this case, therefore, was whether the plaintiff, who is claiming a forfeiture of the contract, had herself performed, or tendered performance, and not whether the defendant had made a technical tender of the amount due. The delivery of the deed and the payment of the consideration were concurrent acts, and neither party could put the other in default without an offer to perform on his part. *Guthrie v. Thompson*, 1 Or. 333.

The judgment is therefore affirmed.

(48 Or. 1)

#### SAVAGE v. SALEM MILLS CO.

(Supreme Court of Oregon. Feb. 27, 1906.  
On Rehearing, April 12, 1906.)

#### 1. ACTIONS—MISJOINDER OF CAUSES OF ACTION.

A complaint alleging that defendant operated a flouring mill having connected therewith a storage house for wheat; that it was the custom of defendant to receive wheat from farmers, to issue receipts therefor, to mix wheat received, and to sell the same or to grind it into flour at its own pleasure; that in delivering wheat and in issuing the receipt the parties contracted with reference to such custom; that plaintiff accordingly delivered to defendant a certain amount of wheat; that defendant sold and disposed of the same and applied the proceeds to its own use; that plaintiff demanded the wheat or the payment of the value thereof and that defendant refused to give either—stated a single cause of action for breach of contract, and was not subject to the objection of joining a cause of action for conversion.

#### 2. EVIDENCE—PAROL EVIDENCE—AMBIGUOUS INSTRUMENTS.

Where a receipt is issued by a warehouseman and accepted by the owner of goods stored as containing the terms and conditions upon which the commodity is delivered and received, it becomes a contract between the parties, and cannot be contradicted or varied by parol testimony, but where it is silent as to the terms of the contract, or when its language is ambiguous or uncertain, its terms or its meaning may be shown by parol, and it may be interpreted in the light of surrounding circumstances.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1838, 2071.]

#### 3. CUSTOMS AND USAGES—ENTRY INTO CONTRACT.

In the absence of an agreement to the contrary, the usage or custom of a particular business will enter into and form a part of a contract made by a person engaged in that business

and other persons dealing with him with knowledge of that custom, but proof of custom or usage is never admissible to give an interpretation to a contract inconsistent with its language.

#### 4. APPEAL—REVIEW OF FACTS—CONCLUSIVENESS OF FINDINGS.

Findings of the court have the force and effect of a verdict, and cannot be disturbed if supported by any evidence.

#### 5. SALES—BAILMENT OR SALE—DEPOSITS OF GRAIN.

Where one delivers grain to another under an agreement that the identical grain or grain of a similar kind and quality shall be returned from the common mass into which it is placed, there is a bailment of the grain and not a sale, and the right of property and the risk of loss remain in the bailor.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 7-11.]

#### 6. SAME.

Where wheat was delivered by plaintiff to defendant to be mixed with defendant's consumable stock of wheat, and defendant was given the right to make such use of the wheat as he saw fit and either to sell the same or manufacture it into flour, being liable to pay to plaintiff the market price of the wheat either in money or in other wheat of the same grade and quality, there was a sale of the wheat to defendant and not a mere bailment thereof although the receipts issued by defendant provided for the payment of storage charges and for sacks, and exempted defendant from liability for damages caused by the elements.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 7-11.]

#### On Rehearing.

#### 7. CUSTOMS AND USAGES—EFFECT AS TO CONTRACT.

Where wheat was delivered to and received by a milling company in pursuance of a custom known to both parties and with reference to which they contracted for the company to mix all wheat delivered to it with that belonging to it in one common mass, first refusal of the wheat being reserved by the company, and thereafter at its own convenience and pleasure and without any written authority to ship out any of the common mass or grind it into flour and other mill products, the custom entered into and became a part of the contract between the parties.

#### 8. INTEREST—COMPUTATION—TIME.

Under a contract for the sale of wheat under which the value became due on demand, interest is recoverable from that time under B. & C. Comp. § 4593, providing for interest on the moneys after they became due.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Interest, § 25.]

Appeal from Circuit Court, Marion County; George H. Burnett, Judge.

Action by George O. Savage against Salem Mills Company. From a judgment for plaintiff, defendant appeals. Modified.

This is an action to recover for wheat delivered to the defendant company by plaintiff and his assignors. The complaint contains 11 causes of action, but as they are all substantially the same, it will be necessary to refer to the pleadings only as they affect the first. It is alleged that the defendant is a corporation doing a general milling business; that at all the times mentioned in the complaint, and for many years prior thereto, it had owned and operated a flouring mill, hav-

ing in conjunction therewith and connected thereto by stationary mechanical wheat conveyors a storage house, to hold and retain wheat received by it until such wheat should be sold or manufactured into flour or other mill products; that it was the custom and usage of the defendant to receive wheat from the farmers, giving load checks therefor, showing the name of the person from whom received, the date and number of bushels, and thereafter, at the convenience of the parties, to issue a receipt to the holders of such load checks, a copy of which receipt is set out; that it was the custom and usage of the defendant, known and agreed to by parties delivering wheat to it, to mix the wheat received with its consumable stock and to sell the same or grind it into flour and sell the flour at its pleasure and to retain the proceeds thereof; that the party delivering wheat, by paying 2½ cents per bushel for storage and 3½ cents per bushel for sacks could demand payment for the wheat so delivered in merchantable wheat at any time before the 1st day of July next following the delivery, subject, however, to the defendant's preferred right to purchase, but in case such demand should not be made prior to the date stated, it should be optional with the defendant, either to pay the market price of wheat of the kind and quality delivered at the date of the demand, or deliver an equal quantity of merchantable wheat upon the payment of storage and for sacks; that such custom and usage were known and agreed to by all parties doing business with the defendant, and in delivering wheat and in issuing the receipt mentioned, the parties contracted with reference to such usage and custom, and such receipt was based upon and controlled thereby; that on the — day of August, 1899, the plaintiff delivered to the defendant at its mill 2,092 bushels and 12 pounds of merchantable wheat and received from it the customary load checks therefor; that such wheat was delivered to and accepted by the defendant under and in accordance with such usage and custom and not otherwise, and the same constituted and was the contract in reference thereto; that no part of the wheat so delivered was ever returned to the plaintiff or paid for in money or in kind, except 55 bushels and 12 pounds, paid in mill feed and flour, leaving a balance of 2,037 bushels due the plaintiff; that soon after receiving the wheat the defendant sold and disposed of the same and applied the proceeds to its own use; that on August 17, 1901, the plaintiff tendered to defendant the requisite amount for storage and for sacks and demanded the delivery to him of 2,037 bushels of merchantable wheat or the payment of 50 cents a bushel, the value thereof, but defendant refused to do either. The plaintiff therefore demanded judgment against it for the value of the wheat with interest thereon from the date of the demand. A demurrer to the complaint on the ground of a misjoinder of causes of action (one in

contract and the other in tort) being overruled, the defendant answered, admitting the receipt by it from the plaintiff of 2,092 bushels and 12 pounds of wheat in August, 1899, and that it issued and delivered to its customers load checks and final receipts as set out in the complaint, but denying the other material allegations. For an affirmative defense it averred that for 25 years it had been engaged in the business of receiving grain for hire in store, charging and collecting storage thereon, and issuing checks and receipts therefor as provided by statute; that in such business it had acquired and operated warehouses and equipped them in the manner usual for storing and handling grain; that on September 21, 1899, the plaintiff had in store with it 2,037 bushels of wheat which had been previously deposited by him and received by it upon the terms and conditions and in accordance with the receipts set out in the complaint; that of the wheat so stored by plaintiff, 1,391 bushels and 50 pounds was white wheat No. 1, and 645 bushels and 10 pounds was white wheat No. 2; that on September 22, 1899, the grain then in store with the defendant, including that belonging to the plaintiff, was either consumed or damaged by fire; that at the time of such fire there was deposited with the defendant by 254 storers 122,534 bushels and 54 pounds of wheat of five different grades and values; that of such wheat 17,162 bushels and 22 pounds was not destroyed; the plaintiff's portion thereof being 23 bushels and 16 pounds, which the defendant has on hand. The reply put in issue the material allegations of the answer. The cause was, by agreement of the parties, tried by the court without the intervention of a jury, and the findings and conclusions of law, omitting those giving the dates and amounts of wheat deposited by plaintiff's assignors, are as follows:

"(1) At all the dates and times mentioned in the pleadings in this action, the defendant was and now is duly incorporated by and organized under the laws of the state of Oregon, and authorized by its charter to conduct a general milling and manufacturing business, and at all said times and dates was engaged in the business of buying and selling wheat and grinding wheat into flour and other mill products, and doing a general milling business at Salem, Or., at which place was and is situated its principal office and place of business.

"(2) At all the dates and times mentioned in the pleadings in this action the defendant, for the purpose of carrying on its business, owned and operated a flouring mill at Salem, Or., by means of which it ground wheat into flour and other mill products, and also for the purposes of its business owned and operated in connection with its said flouring mill two other buildings at Salem, Or., in which were various bins, suitable for and used by the defendant for the purpose of holding and containing wheat. One of said buildings was

joined and connected immediately to the said flouring mill, under the same roof, but with a covered passageway between them, into which wagons could be driven for the purpose of unloading wheat into said mill and said building so immediately connected with said flouring mill. The other of said buildings was distant from said flouring mill about 100 feet, but both of said buildings were so connected with said flouring mill by proper appliances, such as conveyors and the like, that wheat could be and was readily conveyed from the bins in said buildings to and into the grinding machinery in said flouring mill, and said flouring mill and two buildings were operated by defendant at all times as one plant or manufacturing establishment.

"(3) At all the dates and times mentioned in the pleadings in this action it was the usage, custom, and usual course of business between the defendant and all persons delivering wheat to the defendant in said flouring mill and buildings of defendant at Salem, Or., well known to and habitually acted upon by both the defendant and all such persons, for the defendant to issue and deliver to each person delivering wheat to the defendant at Salem, Or., for each wagon load of wheat so delivered a load check having the blanks therein filled according to the number of load check, the date of delivery, the amount in bushels and pounds of wheat delivered, and by and for whom delivered, in blank form as follows: 'No. ———. S. F. M. Co., Salem, ———, 189—. Received from ———, ——— bushels. Sacks returned, ———. Sacks returned empty, ———, ———, Welgher. Not transferable.' Which load checks were always signed by some duly authorized agent or employé of defendant, for and on its behalf, and if so desired by such person for the defendant afterward to issue to such person, in lieu of such load checks, a receipt having the blanks filled therein, according to the date and number of issue, for whose account and order, the number of cents per bushel for sacks, and the amount of wheat delivered, in bushels and pounds, in blank form as follows: 'No. ———. Salem Flouring Mills Co., Salem, Oregon, ———, 189—. Received in store for account of ———, ——— bushels of merchantable wheat in bulk, subject to ——— order (damage by the elements excepted), on or before the first day of July next, on payment of two and one-half cents per bushel storage and ——— cents per bushel for sacks and the return of this receipt properly endorsed, the wheat being deliverable on boat or cars sacked. It is understood and agreed that the Salem Flouring Mills Co. are to have the first refusal of said wheat. Bushels, ———. Salem Flouring Mills Co., per ———.' Such receipts being always signed by the defendant by one of its duly authorized agents.

"(4) At all the dates and times mentioned in the pleadings in this action, it was also

the usage, custom, and usual course of business between the defendant and all persons delivering wheat to the defendant in said flouring mills and buildings of defendant at Salem, Or., well known to and habitually acted upon by both the defendant and all such persons, for the defendant to mix all the wheat so delivered to the defendant with wheat of the defendant in one common mass in the bins in said flouring mills and buildings of the defendant at Salem, Or., the first refusal of such wheat so delivered to defendant being reserved by and conceded to defendant by such persons, and thereafter for the defendant, at its own convenience and pleasure, without any written authority from such persons, to ship out any of such common mass of wheat in said flouring mill and buildings, or to grind the same, or any part thereof, in its said flouring mill into flour and other mill products, and the same to sell for the account and benefit of the defendant; but at all such times the defendant had merchantable wheat of its own, either in said flouring mill and buildings of defendant at Salem, Or., or at other places in the state of Oregon outside of said Salem, equal in quantity and quality to the wheat of such persons, so mixed as aforesaid in such common mass, and ground up or shipped out by the defendant.

"(5) Generally in settlement of the claims arising out of the delivery of wheat to the defendant under the customs, usages, and the general course of business set forth in the third and fourth findings of fact, the defendant's course of business was to pay by bank check or in money to the person delivering wheat the market value at Salem, Or., on the date of settlement, of merchantable wheat of the quantity delivered, but in some instances, instead of payment by bank check or money, the defendant would, in settlement of such claims, deliver to the owner of such claims merchantable wheat equal in quantity to the wheat theretofore delivered to the defendant, on payment by such owner of 2½ cents per bushel for storage and 3½ cents per bushel for sacks.

"(6) During the crop season of the year 1899, and prior to September 22, 1899, the plaintiff, Geo. O. Savage, delivered to the defendant in its flouring mill and buildings aforesaid, at Salem, Or., 2,037 bushels of merchantable wheat, for all of which the defendant then and there delivered to him load checks in the form hereinbefore set out.

"(16) All the wheat mentioned in the foregoing findings of fact was delivered to the defendant and received and treated by the defendant in pursuance of and according to the usage, custom, and regular course of business set forth in the third and fourth findings of fact, and in all the transactions hereinbefore set forth both the defendant and the persons hereinbefore named contracted

with reference to and relied upon the said usage, custom, and regular course of business.

"(17) On September 22, 1899, a fire occurred which, commencing in said flouring mill of defendant, spread and totally consumed said flouring mill and two buildings of the defendant, mentioned and described in the second finding of fact, and all the wheat then in said flouring mill and buildings of the defendant was either destroyed or rendered unmerchantable by reason of the occurrence of said fire.

"(18) At the time of said fire there was no lightning or storm in or about the place where said flouring mill and buildings of the defendant were situated, or in or near Salem, Or.

"(19) At and prior to the time of said fire the defendant had in its said flouring mill city water from the waterworks supplying the inhabitants of the city of Salem with water, which water was introduced into said flouring mill by means of a 3½-inch standpipe, extending from the basement to the top floor of said flouring mill, and on each floor thereof the defendant kept and maintained a barrel of salt water, together with a hydrant and 50 feet of inch and a half hose, connected with said standpipe. There were also in said flouring mill six Babcock fire extinguishers, and the mill was swept and cleaned thoroughly twice a day, and there were dust collectors on all the machinery in said mill.

"(20) On or about August 17, 1901, at Salem, Or., George O. Savage, plaintiff herein, and Lewis Savage, H. C. Fletcher, J. M. Munkers, George G. Ferrell, F. M. Smith, Tilmon Ford, and J. O. Estes, being the persons named in findings of fact numbered from 6 to 15, both inclusive, and hereinbefore set forth, each tendered to the defendant in gold and silver coin of the United States 2½ cents per bushel as storage and 3½ cents per bushel for sacks for the several amounts of wheat delivered to the defendant by each of them, and said F. E. Commons, as hereinbefore set forth in said findings of fact numbered from 6 to 15, both inclusive, and each then and there offered to return to the defendant the load checks and receipts issued as aforesaid by the defendant, and each of them then and there demanded of defendant that it deliver to him the several and respective amounts of merchantable wheat so delivered to defendant as aforesaid. or, in case the defendant would not deliver said amounts of merchantable wheat as demanded, that it, the defendant, pay to each of them the reasonable market value thereof on that day at Salem, Or., but the defendant then and there refused and still refuses to either deliver said amounts of wheat or to pay the market value thereof.

"(21) The reasonable market value of merchantable wheat at Salem, Or., on August 17, 1901, was 50 cents per bushel.

"(22) After making the tenders and demands set forth and hereinbefore mentioned in the twentieth finding of fact, and prior to the commencement of this action, the following persons named in said twentieth finding of fact, to wit, Lewis Savage, H. C. Fletcher, J. M. Munkers, George G. Ferrell, F. M. Smith, Tilmon Ford, and J. O. Estes, each sold, assigned, and transferred to the plaintiff, George O. Savage, all of his claim and demand against the defendant on account of the several amounts of wheat delivered to the defendant by each of them, and said F. E. Commons, as hereinbefore set forth in findings of fact numbered from 6 to 15, both inclusive, and plaintiff has ever since then been, and now is, the owner and holder of each of such claims and demands."

As conclusions of law the court finds:

"(1) In the transactions mentioned and described in the pleadings in this action, the defendant was not a warehouseman within the meaning and intent of the statutes of the state of Oregon made and provided for the regulation of warehouses and warehousemen.

"(2) The legal effect of the transactions described in the foregoing findings of fact, taken in connection with the usage, custom, and regular course of business also described in said findings of fact, was and is to vest in the defendant the right and to impose upon it the duty in any view of the pleadings and testimony to fulfill its obligation to any and all of the persons delivering wheat to it as set forth in the foregoing findings of fact, either by paying the market value of merchantable wheat at the time of demand made for same, or by delivering an equal quantity of merchantable wheat to the person or his assignor theretofore delivering wheat to the defendant.

"(3) The further legal effect of the transactions described in the foregoing findings of fact, taken in connection with said usage, custom, and regular course of business, was to pass the title of wheat so delivered to the defendant as aforesaid from the persons delivering the same to the defendant, and to make those transactions sales, and not bailments, of such wheat.

"(4) Even granting that the allegations of the defendant's answer about the fire mentioned in said answer, and in the seventeenth finding of fact, are true as alleged, such allegations are not sufficient to enable the court to determine that the damage resulting from said fire was damage by the elements.

"(5) The testimony given at the trial of this action does not prove that the damage to the wheat in said flouring mill and buildings of the defendant at Salem, Or., at the time of said fire, was 'damage by the elements' within the meaning of the phrase 'damage by the elements excepted,' as used in the form of receipt set forth in the third finding of fact.

"(6) The precautions taken by the defend-

ant to prevent fire in said flouring mill, as described in the nineteenth finding of fact. constitute, in respect to said flouring mill, at least ordinary care to prevent fire in said mill, but in view of the conclusion that the title to the wheat in question was vested in the defendant at the time of the said fire, it is not material to form any conclusion in this action about the origin or effect of said fire.

"(7) The following objections of the defendant, urged against testimony offered by the plaintiff at the trial of this cause, and reserved by the court for further consideration, should be and the same are each hereby overruled, to wit: \* \* \*

"(8) The plaintiff is entitled to judgment against the defendant for the sum of \$3,980.54, and for the costs and disbursements of this action."

The defendants excepted to findings 4 and 16, on the ground that they were not supported by the testimony, and moved the court for some additional findings, which motion being overruled, judgment was entered in favor of the plaintiff in accordance with the findings and conclusions of law. From this judgment the defendant appeals.

Sanderson Reed, for appellant. W. T. Slater and W. M. Kaiser, for respondent.

BEAN, C. J. (after stating the facts). The defendant contends that the complaint states a cause of action for breach of the contract under which the wheat was delivered by plaintiff and his assignors and received by it and also for a conversion of such wheat; hence the demurrer to the complaint, or the motion made at the trial to require the plaintiff to elect upon which cause of action he would proceed, should have been sustained. But, as we read the complaint, it states but one cause of action, and that on contract. It sets out in detail the terms of the agreement under which the wheat was delivered and received, and alleges a breach thereof. There is no charge that the wheat was wrongfully or unlawfully converted by the defendant to its own use, but, on the contrary, the allegation is that under the contract the defendant was entitled to use the wheat as part of its consumable stock and to sell or manufacture it into flour at its pleasure, discharging its liability to the plaintiff and his assignors by either delivering to them other wheat of the same grade and quality, or by paying the market price of such wheat when demanded. A demand and refusal were necessary under the contract in order to fix the defendant's liability, for it was not required to pay for the wheat delivered, either in kind or in money, until requested to do so.

It is also urged that all the testimony tending to show the custom, usage, and regular course of business of the defendant and persons dealing with it in regard to receiving,

handling, disposing of and paying for wheat delivered, was incompetent, because the contract under which the wheat was delivered and received was embodied in a wheat receipt and could not be contradicted or varied by parol. When a receipt is issued by a warehouseman and accepted by the owner of goods stored as containing the terms and conditions upon which the commodity was delivered and received, it becomes the contract between the parties, and cannot be contradicted or varied by parol testimony, but when the receipt is silent as to the terms of the contract, they may be shown by parol, or, when the language of the receipt is ambiguous or uncertain, it must, like any other contract, be interpreted in the light of the surrounding circumstances. *Hirsch v. Salem Flouring Mills Co.*, 40 Or. 601, 67 Pac. 940, 68 Pac. 733, and authorities cited. And, in the absence of an agreement to the contrary, the usage or custom of a particular business will enter into and form a part of a contract made by a person engaged in such business and those dealing with him with knowledge of such custom and usage (*Morning Star v. Cunningham*, 110 Ind. 328, 11 N. E. 593, 59 Am. Rep. 211), although proof of custom or usage is never admissible to give interpretation to a contract inconsistent with its language (*McCulsky v. Klosterman*, 20 Or. 108, 25 Pac. 306, 10 L. R. A. 785; *Holmes v. Whitaker*, 23 Or. 319, 31 Pac. 705). The receipt which defendant was accustomed to issue to persons delivering wheat to it is ambiguous, uncertain, and indefinite on its face. It does not contain the name of the person from whom the wheat was received, nor truly state the quality of such wheat, nor all terms and conditions upon which it was received. It recites that the wheat was received in store "for the account" of a named person, but not "from" such person as the statute requires. B. & C. Comp. § 4602. It merely relates that the wheat received was merchantable, while the pleadings and evidence show that defendant had received and had on storage at the time of the fire five different kinds and grades of wheat of different values, and that two different grades were received from plaintiff. It does not state that the wheat would be returned or redelivered, but that it would be subject to the order of the person for whose account it was received on or before a certain date upon the payment of charges, and is silent as to the terms of the contract under which it was to be held and disposed of after the time stated. Moreover, the right of the person for whose account it was received is limited and restricted by the provision that the defendant "is to have the first refusal of such wheat." The meaning of this latter clause is doubtful, but was probably intended to give the defendant a preferred right to purchase at all times, and to limit the right of the holder of the

receipt to receive grain in return therefor to cases in which the defendant did not care to purchase. It is manifest, therefore, that the load checks and receipts do not alone express the contract. They are but part of the transaction. Their importance is only made apparent upon proof of the custom and usual course of business of the defendant, known and acquiesced in by the depositors, and the purpose for which they were issued. The entire contract between the defendant and the persons delivering wheat to it was not embodied in the written memoranda, and it is not from a consideration of the writings alone that we are to determine the character of the transaction or the respective rights and obligations of the parties. The entire contract must be ascertained from the custom and usage of the business and the general understanding of the parties in connection with such load checks and receipts. The words "in store," used in the receipt, are not controlling as to the nature of the transaction, as appears from the authorities referred to hereafter.

A contention is made that some of the findings of fact are erroneous. The findings have the force and effect of a verdict of a jury, and cannot be disturbed if there is any evidence to support them. Without undertaking to refer to the evidence in particular or to recite it in detail, it is sufficient that the record discloses that there was much testimony given and received on the trial to support the findings as made, and they must, therefore, for the purposes of this appeal, be taken as true. Nor do we think the matters upon which additional findings were requested and refused material to the determination of any question arising on this appeal.

We come, then, to the merits of the controversy. The facts, as they appear from the pleadings and findings, are that on September 22, 1899, and for many years prior thereto, the defendant had owned and operated a flouring mill at Salem, in this state. Connected with the mill by means of mechanical wheat conveyors were storage houses or bins in which wheat purchased by the defendant to be manufactured into flour and such as it received from the neighboring farmers were mixed and commingled. According to the usual course of its business, when wheat was received from a farmer it was weighed by the defendant's weigher and a load check therefor was delivered to the farmer, showing the date and quantity of wheat delivered, which check could, if desired by the holder, be exchanged for a receipt in the form heretofore alluded to. No such receipt, however, was ever issued to the plaintiff and to but two of his assignors. After the wheat was received and weighed, it was, with the knowledge and by the consent of the farmer, conveyed into the warehouse and mixed and commingled with wheat belonging to the defendant, and

thus became a part of the consumable stock of the mill, and thereafter, at its own convenience and pleasure and without further authority from the farmer, the defendant sold and shipped the wheat or ground it into flour or other mill products and disposed of the same for its own account and benefit. The farmer had a right at any time to demand the return of an equal quantity of wheat of like kind with that delivered or the market price of such wheat at the time of the demand, and the defendant had the right to and generally did settle the transaction by paying the market value of wheat of like quality as that delivered, but in some instances settlements were made by delivering to the holder of the receipt wheat, equal in quality and quantity with that delivered, on payment of a certain sum per bushel for storage and for sacks. On September 22, 1899, the mill and warehouse were, with their contents, either totally destroyed by fire or so damaged as to be worthless. At the time of the fire there was due from the defendant to the farmers, including the plaintiff and his assignors, 122,534 bushels and 54 pounds of wheat, but of this amount only 105,372 bushels and 32 pounds were in the warehouse.

Upon this state of facts, the question for decision is whether the transaction between the plaintiff and his assignors and the defendant constituted a bailment or a sale. If the former, the title remained with the bailors and the loss must fall upon them, but if the latter, the title passed to the defendant at the time of the delivery, and thereafter the grain was held at its risk. It is often difficult to determine whether a particular transaction is a sale or a bailment, and especially so when it involves grain delivered to a person and by him mixed and mingled in a common mass with grain belonging to himself or other parties. If a specific amount of grain is delivered by the owner to be returned, either in its original or in an altered form, when called for, there is of course a plain case of bailment, but, when the grain of different owners is mixed and mingled in a common mass by their consent, a different and more difficult question arises. The original idea of a bailment contemplated the return of the identical article delivered as soon as the purpose of the bailment was accomplished. 2 Kent, Lect. 40; Story, Bailment, §§ 1, 2. But the business of storing, transporting, and handling grain has grown to such proportions in recent years as necessarily to have wrought a change or modification in the doctrine requiring the subject of bailment to be returned to the bailor. The delivery to public warehouses or elevators of thousands of bushels of grain for storage and safe-keeping by hundreds of owners, renders it impracticable, if not impossible, to keep that of the several owners separate so as to return the identical grain delivered, and this is no longer expected or required.

The only separation now called for by law is to keep grain of the same class in bins by itself so the owner may have returned to him grain of the kind and quality delivered, and therefore upon the deposit of grain with a warehouseman to be mixed with the grain of other persons, the depositor becomes the owner of his pro rata share of the entire mass, and the transaction is a bailment, and not a sale. *Brown v. Northcutt*, 14 Or. 529, 13 Pac. 485; *McBee v. Caesar*, 15 Or. 62, 13 Pac. 652; *Hamilton v. Blair*, 23 Or. 64, 31 Pac. 197. But the warehouseman is not authorized to use, sell, or dispose of the grain stored with him or any part thereof without the consent of the owners. He may, from time to time, take from the common mass, upon the order or at the request of an owner, grain in amount equal to that stored for or by such owner, but he is required always to retain of the grain so stored sufficient to supply the other storers, and cannot use or dispose of any part thereof for his own benefit. He is a mere custodian of the grain, with no right to use it in any way, and herein lies the essential difference between a bailment and a sale. In the one case the title to the property remains in the depositor and the bailee is but a mere custodian, while in the other he may use and treat the grain as his own; the depositor relying upon his personal credit for the value thereof either in kind or in money. Where one delivers grain to another under an agreement that the identical grain or grain of similar kind and quality from the common mass into which it was placed shall be returned, there is a bailment, and the right of property remains in the bailor, but when, either from the express agreement of the parties or from the general course of business, the party receiving the grain has a right to use it in his business and as a part of his consumable stock and is not obliged to return the identical grain nor grain of similar grade and quality from the common mass, but may discharge his obligation to the storer by paying the market price when demanded, or by returning other grain of the same kind and quality, there is no bailment, but a sale or exchange, and the title of the property and the risk are transferred to him.

To determine who shall bear the risk and enjoy dominion over grain which has been by common consent mixed and mingled with that belonging to other parties, we must therefore have recourse to the nature of the transaction, for the rights and liabilities go according to the legal title. "If the nature of the bargain be such," says Mr. Schouler, "as to make the several proprietors owners in common of the mass, any loss should be born by them in proportion to their several interests; and such an ownership, we have said, is usually presumed. But if one throws his goods into the common mass, on the understanding that the party receiving them

may take from the mass at pleasure and appropriate to himself on the condition that he shall restore other goods of the same sort in their stead—and so, too, in stipulations for pecuniary compensation—the dominion over the property passes to the receiver; and on this principle are some of our grain cases decided; the party owning the elevator or warehouse being treated as a purchaser, and not as a depository." 2 Schouler, *Per. Property*, § 46. This is the doctrine applied by this court in *State v. Stockman*, 30 Or. 36, 46 Pac. 851, and finds support in the authorities generally. 3 *Am. Law Reg.* (N. S.) 321; 6 *Am. Law. Reg.* 455; *Richardson v. Olmstead*, 74 Ill. 213; *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311; *Barnes v. McCrea*, 75 Iowa, 267, 39 N. W. 392, 9 *Am. St. Rep.* 473; *Weiland v. Sunwall*, 63 Minn. 320, 65 N. W. 628; *O'Neal v. Stone*, 70 Mo. App. 279; *Andrews v. Richmond*, 34 Hun (N. Y.) 20; *Chase v. Washburn*, 1 Ohio St. 244, 59 *Am. Dec.* 623; *Rahilly v. Wilson*, 3 Dillon, 420. *Fed. Cas. No. 11532*; *Insurance Co. v. Randall*, L. R. 3 P. C. 101.

In *Chase v. Washburn*, *supra*, which is probably the earliest leading case on the subject, the warehouse receipts were in the following form: "Milan, Ohio, Nov. 5, 1847. Received in store from J. C. Washburn (by son) the following articles, to wit: Thirty bushels of wheat. H. Chase & Co." In an action of assumpsit to recover the value of the wheat, Chase offered to show that his warehouse and sufficient wheat therein to cover all the outstanding receipts had been consumed by fire; that the custom of the warehouse was to store the wheat in a common mass and ship the same as occasion required, and, on presentation of a receipt, to pay either the highest market price of grain of like grade and quality or deliver other wheat. The court held that if, when Washburn's wheat was delivered to Chase, it became subject to his disposal either to retain or ship on his own account, the property passed and the risk of loss by accident followed dominion over it; that the transaction would not be a bailment, but the legal effect would be to create a debt which could be discharged by the warehouseman paying in wheat of like grade and amount or in money at the market price at the time of the presentation of the receipt; and that in either case the title to the wheat passed to the warehouseman, and he must bear the loss.

In *O'Neal v. Stone*, *supra*, Stone owned and operated a flouring mill having in connection therewith an elevator. All wheat purchased to be ground and such as was received by him on deposit was mixed and commingled in the elevator, and the general bulk was drawn upon to supply the mill when in operation. The elevator and contents were destroyed by fire, after which Stone denied all liability under any of the

receipts issued by him and outstanding. The wheat receipt stated that the party to whom it was issued had deposited with Stone a certain quantity of wheat of a certain grade and quality, for which he agreed to pay a certain rate per bushel for storage, and to assume all damage by fire, etc. The wheat was to be delivered to the party at the warehouse on demand, less a certain amount for shrinkage, and should Stone at the time of such demand not have the amount of wheat called for of equal grade and amount as that received, then he was to have the privilege of substituting an amount equal in value of a grade next above or below that received, and he was also to have the privilege of buying the wheat at the market price at the time of the demand. The court held the transaction to be a sale and not a bailment and that the loss must be borne by the warehouseman, adopting the distinction between a sale and a bailment as pointed out by Sir William Jones in his *Law of Bailment*, in this wise: "If the goods delivered are to be returned, although in a changed form, it is a bailment, but if the intention is that either money or goods are to be received in exchange for them, there is a transmutation of property, and the obligation created is a debt and not a bailment." Jones, *Bailments*, § 105. And, in discussing the question, Bland, P. J., said: "The term 'bailment' implies that the owner of property has placed it in the hands of another who is at some time to redeliver it to the owner in its integrity or in an altered form agreed upon. If, therefore, the person to whom the property is delivered has the option to pay for it in money or in some other property or to restore it, such option is inconsistent with the character of bailment and the transaction is, in law, a sale, regardless of what the parties to the transaction may have called it or thought it to be."

In *Rahilly v. Wilson*, supra, a warehouseman issued a receipt in the following form: "Received in store of P. H. Rahilly \* \* \* bushels of No. \* \* \* wheat. Geo. Atkinson & Co." The litigation was between depositors of wheat receiving such receipts and the trustee in bankruptcy of the insolvent firm, and the court, Dillon, C. J., held that "where grain is stored in an elevator warehouse with the understanding, implied from the known and invariable course of business, that it may be sold by the warehouseman, and that when the depositor shall be ready to surrender the receipt of the warehouseman therefor, the latter will give the highest market price or the same amount of grain of like quality, but not the identical grain deposited, nor grain from any specific mass, the transaction is a sale, and not a bailment."

In *Andrews v. Richmond*, supra, the plaintiff delivered to the defendants, who were millers, wheat and took back a receipt as follows: "Canandaigua, November 14, 1878.

Received of Harris Andrews 490 bushels of wheat in store. The same is subject to him or option to take price on or before the first of May next. Richmond & Smith." The wheat was placed by Richmond & Smith in a bin containing some two or three hundred bushels of the same kind and quality of which they were the owners and from which they were drawing every day for the purpose of grinding, and when they received the wheat from the plaintiff they informed him that they intended to mix it with their own and manufacture it into flour. The mill was burned without the fault of the defendants. During all the time and up to the time of the fire there was more wheat on storage in the bins than was delivered by the plaintiff. After the fire plaintiff informed the defendants that he had elected to sell the wheat to them at the then market price. In an action brought to recover such price, it was held that if the receipt alone was considered, the contract was one of bailment, but if it was agreed verbally, at the time the wheat was delivered, that it might be mixed by the defendants with their own wheat and be ground into flour at their pleasure, the transaction was, in law, a sale, and the title passed to defendants, who became liable to the plaintiff to pay him the market price of the wheat delivered or to return other wheat of the same grade and quality, as plaintiff might elect, and that plaintiff was entitled to recover. In the course of the opinion it is said: "The mere consent of the plaintiff that his wheat might be mixed with the wheat of the defendants of the same kind and quality was not inconsistent with a bailment simpliciter. Owners of the same kind of property and of equal value, like cereal grains or wines, may consent that they be mixed together in mass, and each, in law, will retain title to his aliquot part, and may maintain replevin for his share as against a wrongdoer who acquires possession of the same. By force of this rule the owner of grain in store may sell a certain quantity of the same, less than the whole, and pass title thereto, without separating the part so sold from the whole." But "an agreement that the particular article which the owner places in the hands of another may be by him consumed or sold in the course of trade is utterly inconsistent with the principles on which the law of bailment is founded. The very term 'bailment' implies that the owner of an article has placed it in the hands of another, who is at some time to redeliver the same to the owner. If the owner consents that the person to whom he delivers the thing may consume or destroy it, it is not a bailment, whatever else the transaction may be in the law."

A very interesting and apt case, illustrative of the principles which should govern in the decision of the case at bar, is that of *the Insurance Co. v. Randall*, supra. It was

an action on a policy of insurance which stipulated that "goods held in trust or on commission must be insured as such, otherwise the policy will not extend to cover them." The plaintiffs were millers in South Australia. According to their custom and course of business, wheat was received by them from farmers to whom such course of business and dealing was known, and, on receipt, shot out of bags, in the presence of the farmer who brought it, into large butches, where it became mixed with other wheat which had been received in like manner and thus became the common stock of the mill, which, according to the custom of business known to the farmer, was either sold by the plaintiffs or ground in their mill and disposed of for their benefit. On the delivery of the wheat to the plaintiffs they gave the farmers receipts in this form: "Received," etc., "in store." The farmer could at any time demand an equal quantity of grain of like quality and grade as that delivered by him to the plaintiffs, or the market price of an equal quantity, fixing the price as of the day on which he made his demand, and the plaintiffs had the option of delivering wheat of like quantity or paying the market price. The mill and its contents were destroyed by fire, and a claim was made by the plaintiffs to the insurance company for the loss, but the amount being in dispute, an action was brought by them to recover the value of the stock consumed. The plaintiffs declared on the policy, and the defendant pleaded that the wheat taken in storage by the plaintiffs from the farmers was held by them upon trust and therefore not covered by the policy. Issue was joined on the plea and the action tried before the chief justice and a jury. No evidence was adduced by the defendant, but its counsel applied for a nonsuit on the ground that the evidence showed that the wheat was held in trust and was not the property of the plaintiffs. The chief justice declined to grant a nonsuit, and by consent a verdict was rendered in favor of plaintiffs with leave to the defendant to move for a verdict for it if the court should be of the opinion that the wheat was taken on storage and was in fact held in trust by the plaintiffs. A rule nisi was granted, calling on the plaintiffs to show cause why the verdict entered should not be set aside and one rendered for the defendant on the following grounds: First, the grain stored had not been insured by the defendant; and second, the wheat taken on storage by the plaintiffs was held upon trust, and was not within the terms of the policy. Upon argument, the judges being equally divided in opinion, the rule was discharged. From this judgment an appeal was taken to the Privy Counsel, where the case was affirmed after an elaborate and extensive argument on both sides, on the ground that the transaction between the plaintiffs and the farmers who delivered wheat to them

was, in law, a sale, and not a bailment, and that the property of the wheat was so vested in the plaintiffs that they would have been compelled to bear the loss by fire if not indemnified by insurance, and, therefore, could recover from the defendant company.

From these decisions and the principles announced in them, it seems incontrovertible that, under the facts as disclosed by the record, the contract and agreement between the plaintiff and his assignors and the defendant, under which the wheat in question was delivered and received cannot be construed to be a mere bailment, but it was, in law, a sale or exchange, and the liability for loss by fire was with the defendant. The wheat was not received by defendant to be stored for safe-keeping until called for by the owner, nor was it delivered with the understanding that it or other wheat of the same grade and quality from the common mass was to be returned. By consent of all parties it was mixed with and became a part of the consumable stock of the mill, and the defendant had a right to and did make such use of it as it saw fit, being liable to pay therefor, when demanded, either in money at the market price of grain of like grade and quality, or in other wheat of the same grade and quality. The effect of the transaction was, therefore, to create a debt from the defendant to the depositors, which it could pay either in money or in kind. The provisions in the wheat receipts as issued by the defendant, "damages by the elements excepted," and for the payment of storage charges and sacks, did not vary the nature of the transaction or change what would otherwise be a sale or exchange into a mere bailment. The contract must be ascertained from the general course of dealing and the entire transaction, and not from a single provision or provisions which defendant has seen proper to include in its wheat receipts. It cannot, by inserting into its receipt some clause or clauses which, standing alone, are inconsistent with a sale, change the entire nature of the transaction, and make a bailment out of what, in law and in fact, was a sale or exchange.

We are cited to a number of cases which are supposed to support the defendant's argument that, although the identical wheat delivered was consumed by defendant, the case is nevertheless one of bailment, as there was all the time wheat in the mill and warehouse or elsewhere in the state, belonging to the defendant, equal in amount to that delivered and of the same grade and quality. *Moses v. Tectors*, 64 Kan. 149, 67 Pac. 526, 57 L. R. A. 267; *National Bank v. Langan*, 28 Ill. App. 401; *McGrew v. Thayer*, 24 Ind. App. 578, 57 N. E. 262; *State v. Rieger*, 59 Minn. 154, 60 N. W. 1087. *State v. Rieger*, supra, was under a special statute, and the other cases cited were those of warehousemen who did not have the right to use the grain stored with them as a part of their consumable stocks and for their own use and benefit.

We conclude, therefore, that for the reasons given the judgment of the lower court was right, and must be affirmed. There is, however, another view of the case which is worthy of consideration, although not specially relied upon by plaintiff. It appears from the answer of defendant, as we understand it, that prior to the fire it had used or shipped from the warehouse and mill a part of the wheat which it claims was stored with it, and, at the time, there was a shortage of about 17,000 bushels. It, therefore, did not have on hand wheat sufficient to satisfy in full the claims of the parties who had deposited wheat with it. If the original contract was a mere bailment with the right in the defendant to ship or use the wheat deposited, there are authorities holding that the character of the transaction and the relation of the parties were changed when any part of the wheat was so used or shipped, and it could thereafter, at the election of the bailor, be treated as a completed sale. *Cloke v. Shafroth*, 137 Ill. 393, 27 N. E. 702; *Nelson v. Brown*, 44 Iowa, 455; *Bucher v. Commonwealth*, 103 Pa. 528.

The judgment of the court below will be affirmed.

#### On Rehearing.

There is no finding that it was specifically agreed that the defendant should have the option to pay for the wheat in controversy either in money or in kind. The court, however, in its findings sets out in detail the facts constituting the contract between the parties, from which it conclusively appears that neither the wheat delivered by the plaintiff and his assignors nor wheat from the common mass into which it was put was to be returned, but that the wheat was to be mixed with and become a part of the consumable stock of the mill, to be sold and disposed of by the defendant on its own account. Findings 4 and 5, in substance, are that at the time the wheat was delivered and received, it was the custom and usual course of business of the defendant, known to and acted upon by persons dealing with it, for it to mix all wheat delivered with that belonging to it in one common mass; the first refusal of such wheat being reserved by and conceded to the defendant; and thereafter, "at its own convenience and pleasure" and "without any written authority," to "ship out any of such common mass \* \* \* or grind the same into flour and other mill products and the same to sell for the account and benefit of the defendant," and, generally, in settlement of the claims arising out of such delivery to "pay by bank check or in money to the person delivering the wheat the market value at Salem, Or., on the day of settlement, of merchantable wheat of the quantity delivered, less warehouse charges," although, in some instances, settlements were made by delivery of wheat equal in quality and quantity to that received. And finding 16 is that the wheat of the plaintiff and his assignors was delivered and received in

pursuance of and according to such usage, custom, and regular course of business, and that the parties "contracted with reference to and relied upon" the same. The custom and general course of business, therefore, entered into and became a part of the contract between them, and the legal effect of the transaction is that the wheat was delivered and received under an agreement that it should be mixed with wheat belonging to the defendant and that the latter could, at its own convenience and pleasure, and without any further authority from the persons delivering it, sell and dispose of the wheat or grind it into flour and other mill products and sell the same for its own account and benefit; and this, as we have endeavored to point out, constitutes a sale, and not a bailment. The fact that there was no special or distinct agreement that defendant should have the option to pay for the wheat either in money or in kind is unimportant. If, as the findings show, neither the wheat delivered nor wheat from the common mass with which it was mixed was to be returned to the farmers, but it was understood that it should become a part of the consumable stock of the mill to be sold and disposed of by the defendant as its own, it necessarily follows that the title passed. The defendant could only discharge its obligation by paying for the wheat in some way, and whether it was required to make such payment in money, or had the option to pay in money or in kind, cannot change the legal effect of the transaction.

The petition for rehearing is therefore denied.

There is, however, a cross-appeal by the plaintiff, which was not referred to in the opinion heretofore filed. The court below denied the plaintiff interest on the value of the wheat from the time of the demand in August, 1901, and from this ruling he appeals. As we have seen, this is an action on a contract to recover the value of the wheat delivered by the plaintiff and his assignors to the defendant. The value of such wheat became due and payable on demand according to the contract, and should, therefore, bear interest from that time. B. & C. Comp. § 4595.

The judgment will be modified accordingly, and the cause remanded to the court below, with directions to enter a judgment on the findings of fact in favor of the plaintiff for the value of the wheat delivered by him and his assignors to the defendant, together with legal interest thereon from the date of the demand.

#### MULTNOMAH COUNTY v. WHITE.

(Supreme Court of Oregon. April 3, 1906.)

#### 1. APPEAL—RIGHT TO ALLEGE ERROR—MEASURE OF RELIEF OBTAINED.

A county sued to invalidate an exchange of certain void warrants for tax certificates, to have defendants declared trustees of the certificates, to restrain their transfer, and to recover

the proceeds derived by defendants from the sale thereof and the amount of the taxes, costs, and penalties for which the properties were bought by the county, on the theory that the certificates were still outstanding. It was proved, however, that all the certificates had been returned to the county for cancellation, except a few which were returned at the trial. Whereupon the court decreed that the transfer was void. *Held*, that such decree did not afford complainant the full relief to which it deemed itself entitled, and therefore did not preclude it from appealing therefrom.

## 2. JUDGMENT—COLLUSIVE SUIT—EFFECT.

Where a county induced M. to bring a suit against it and a bank to have certain county warrants declared invalid, and to enjoin the county from paying them, and the bank from receiving payment, the suit was collusive, so that the bank was not estopped by the injunction obtained, nor liable to the county for funds collected by its assignee on such certificates, unless such assignee in fact represented the bank.

## 3. ESTOPPEL—TAX CERTIFICATES—INVALIDITY.

Where an assignee of certain tax certificates, wrongfully transferred to his assignor without consideration, collected a large sum from the delinquent taxpayers thereon, such assignee was estopped as against the county, in a suit to recover the amount so collected, to claim that the tax certificates were void.

## 4. COUNTIES—TAX CERTIFICATES—EXECUTED TRANSFER—CONSIDERATION—INVALIDITY.

Where tax certificates belonging to a county were wrongfully transferred in exchange for certain void county warrants, the fact that the transfer was voluntary and with full knowledge of the facts was no defense against the county's right to recover money collected by the assignees of such certificates from the delinquent taxpayers.

On rehearing. Reversed and remanded.

For former opinion, see 82 Pac. 23.

Charles H. Carey and L. R. Webster, for appellant. Joseph Simon, for respondent bank. Martin L. Pipes, for respondent White.

**MOORE, J.** At a rehearing of this cause plaintiff's counsel insisted that we erred in assuming in our former opinion that the averments of Meagly's employment by Multnomah county, to bring a suit against it, to have certain of its warrants declared invalid and the collection thereof enjoined, as alleged in the separate answers, were proved, because demurrers thereto had been sustained. If, on an appeal in equity, the sustaining of a demurrer be considered erroneous, and the truth of the pleading thus challenged thereby established, it would be unnecessary to "assume" the existence of the facts alleged, because they would have been already substantiated in the manner indicated. It seemed to be conceded at the former hearing in this court that Meagly was so employed and paid, and, accepting this supposed admission as being true, a conclusion of law was based thereon to the effect that the decree enjoining Multnomah county was not binding upon it. This deduction was not predicated on any acknowledgment of the facts alleged as new matter in the answers, because demurrers thereto had been sustained, but on the supposed a fortiori, though it is stated in the opinion

heretofore announced that sustaining the demurrers was an implied admission of the facts alleged. This was adverted to as corroborative of what we understood to be the solemn acknowledgment of counsel respecting a material fact.

The decision heretofore reached is reviewed on discovering that a mistake of fact was made in declaring that a valid part of a few of the county warrants formed a consideration for the exchange of the whole thereof for the tax certificates. In the former opinion it is said: "The complaint herein states that the decree in the Meagly Case determined that the county warrants were valid to the extent of \$509.37, and, after setting out a list of them, contains the following averment: 'All of which said warrants herein mentioned and referred to are now held and owned by the defendant, the First National Bank of Portland, Oregon.'" It is maintained by plaintiff's counsel that this excerpt refers to a statement of the substance of the decree in the Meagly Case, and not to any averment of fact in the case at bar. A re-examination of that pleading seems to warrant the construction thus placed upon the language used. The mistake of fact in this respect necessarily avoids the conclusion heretofore reached, requiring an examination of the entire cause as upon its original submission. This brings up for consideration the defendants' motion to dismiss the appeal, which question was reserved until the cause could be heard on its merits. *Multnomah County v. White* (Or.) 81 Pac. 388. It is argued that, as the plaintiff secured in the lower court the full measure of alternative relief sought, it cannot appeal from the decree rendered in its favor. The prayer of the complaint is, in effect, that the order of the county court of Multnomah county, whereby the tax certificates were exchanged, be declared void, and that the defendants received and held the certificates as trustees for plaintiff's use; that they be enjoined from transferring or collecting any of the certificates remaining in their possession and required to show by answer to whom they sold or assigned any of them and the consideration received therefor; "and that upon such showing a decree be made and entered allowing the plaintiff as relief herein either: (1) A judgment against the defendants, jointly and severally, for the proceeds derived by them and each of them from selling, assigning or collecting the said certificates of sale, and each thereof; (2) a judgment against the defendants, jointly and severally, for the amount of the tax, costs and penalties for which the said several properties were bought by the county of Multnomah at the public tax sale; or (3) decreeing that the county of Multnomah is still the owner and holder of each and all of the said certificates of sale assigned and transferred to the defendants, or either of them, and that neither the said defendants, or any other person to whom the

said defendants, or either of them, may have attempted to assign or transfer them, or any of them, have acquired any right, title or interest therein." The court, having made findings of fact and of law, decreed, in substance, that the transfers of the certificates to the defendants was illegal, and, notwithstanding such attempted assignment, the plaintiff herein had been and was the owner of the certificates and of the real property described therein; that neither the defendants nor any person to whom they undertook to assign any of the certificates acquired any right, title, or interest therein, or to the lands affected thereby; and that the records of Multnomah county, so far as they purported to show an assignment or transfer of the certificates, be canceled.

A party to a suit will not be permitted on appeal to assume a position inconsistent with that taken by him at the trial below, and, if he there obtains the full measure of relief which he asks, he cannot assign as error the action of the court which he invited. *Hume v. Turner*, 42 Or. 402, 70 Pac. 611. It is evident, we think, that plaintiff's counsel supposed, when the complaint was prepared, that the defendants and the persons to whom they assigned the tax certificates were the owners and holders thereof. The transcript shows, however, that nearly all the delinquent taxpayers named in the certificates had paid a part of the sum for which their real property had been sold, whereupon the certificates were returned to the county clerk and canceled, thereby apparently releasing the premises from the effect of the tax sales. In framing the prayer for relief, plaintiff's counsel must have thought that the tax certificates were outstanding, as upon a sale thereof by the county, when in fact they were all canceled, except a few which were returned at the trial. The prayer of the complaint thus assumes a condition which did not exist, and, from this evident mistake of fact, we do not think the plaintiff secured the full measure of the alternative relief which its counsel expected could be obtained. The tax certificates having been returned to the county clerk and canceled, the defendants could not be declared to be the holders thereof as trustees for the use and benefit of the plaintiff, which preliminary decree was a condition precedent to the granting of either form of the alternative relief desired. The evident mistake of fact of plaintiff's counsel, on which the prayer for relief is based, shows that the position taken by them in this court is not inconsistent with that chosen in the court below, where the plaintiff did not secure the full measure of the alternative relief which its counsel reasonably supposed could have been obtained, and hence the appeal should not be dismissed.

Considering the case on its merits, little need be said at this time, for, as an error was committed in sustaining the demurrers to the separate answers, the decree must be revers-

ed, and the cause remanded for trial upon the issue as to whether or not Meagly was employed by Multnomah county and received a compensation from it for bringing the suit to have the county warrants declared invalid and the collection thereof enjoined. If he was so employed and paid, the county, by him as plaintiff, in effect, was attempting to maintain a suit against itself as defendant, and, as a party cannot be permitted to assume such dual positions, any decree rendered therein was invalid, and, this being so, the defendant the First National Bank of Portland, Oregon, is not estopped by the injunction or liable to the plaintiff herein, unless the defendant White was its agent in negotiating the assignment of the certificates or in collecting any part of the tax thus represented as delinquent.

The defendants offered evidence at the trial tending to show that many of the tax certificates in question were void for various reasons. The trial court, disposing of this matter, held that, as \$4,300 was secured by White from the delinquent taxpayers, the parties receiving the money were estopped to assert the invalidity of the certificates by means of which the sum was collected, and with its finding of facts filed an opinion, a part of which is adopted as the rule applicable to this branch of the case, to wit: "It is a well-settled principle of law that the assignee or licensee of any right, accepted and acted under, is estopped to deny the authority from which the right proceeds. When money has been received either by an agent or joint owner under a contract that is illegal, the agent or joint owner cannot protect himself from accounting for what was so received by setting up the illegality of the transaction in which it was paid to him. Thus an agent for the collection of a promissory note cannot defend in an action brought by his principal for the amount collected upon the note, either upon the ground that the note was for any reason illegal or that the debt was not justly due. And a licensee of a patent, who has acted under it and received profits from the sale of the patented article, will be estopped to deny the validity of the patent in an action by the patentee to recover royalties or to obtain an account. *Bigelow on Estop.* 552, 553. Applying these principles to this case, it would seem clear that defendants should not be heard to say that the certificates were illegal, as a defense to plaintiff's claim for an accounting for the money collected thereon." The principle thus announced is opposed to the doctrine asserted by defendants' counsel that, though a contract is without consideration, yet, if it is voluntarily and with full knowledge of the facts executed, the property in the thing, whether money or chattel, is transferred and cannot be recovered, so that a consideration is not an essential part of an executed contract. The rule invoked may be controlling as between private parties, but it can have no application to a

municipal corporation which holds its property in trust for the public and is represented by officers, and, if such property is unlawfully sequestered, it may be recovered. If the county warrants in question were wholly valueless, so that no consideration was given for the tax certificates, the parties responsible for collecting the sum received from the taxpayers must account therefor to the plaintiff.

The decree rendered in this court, dismissing the complaint, will therefore be set aside, the cause remanded, with directions to overrule the demurrers, to take further evidence upon the issues involved, and to render a decree as hereinbefore indicated.

### STATE v. MILLER.

(Supreme Court of Oregon. April 3, 1906.)

#### 1. BANKS AND BANKING — CHECKS — CERTIFICATION—VALIDITY.

Where an agent of a bank certifies a check which he issues, whereby the funds of the bank may be withdrawn for his benefit, the person receiving the check, in order to give it validity, is bound to make inquiry from other officers of the bank in respect to its validity.

#### 2. FALSE PRETENSES — EVIDENCE — PRESUMPTION.

In a prosecution against a bank cashier for drawing and certifying a personal check when he did not have the money on deposit, where the person receiving the check is a banker, he is presumed to know the law relating to that business, and hence could not have depended on the primary liability of the bank as giving validity to the check.

#### 3. SAME—ELEMENTS OF OFFENSE — RELIANCE ON REPRESENTATIONS.

Under B. & C. Comp. § 1812, providing that if any person shall by any privy or false token, and with intent to defraud, obtain from any other person any money or property, he shall be punished, a cashier of a bank, issuing his personal check and certifying it when he had no money on deposit in the bank, could not be convicted of a violation of this section, where the person receiving the check knew that he had no money on deposit.

Appeal from Circuit Court, Baker County; Sam White, Judge.

Roy H. Miller was convicted of obtaining money by false pretenses, and appeals. Reversed.

C. A. Johns and Wm. P. Lord, for appellant. A. M. Crawford, Atty. Gen., for the State.

**MOORE, J.** The defendant, Roy H. Miller, was convicted of the crime of obtaining money by false pretenses, and appeals from the judgment which followed, assigning as error, *inter alia*, the action of the court in refusing to instruct the jury, as requested, to return a verdict of not guilty.

It is argued by his counsel that the testimony shows that there was no intent on the part of the defendant to defraud the person from whom the money and property were obtained, and that such person never relied upon any alleged false pretense as a

means inducing him to part with any of his property and hence an error was committed as stated. The bill of exceptions discloses that on February 23, 1904, one A. P. Goss entered into a written contract with Miller whereby he stipulated to convey to the latter certain real property in Sumpter, Or., with the buildings thereon, and also to transfer to him a business, known as the Bank of Sumpter, for \$15,000, which sum, except \$1,000 thereof, was to be retained by Miller, together with all the promissory notes and overdrafts of the bank, as a trust fund with which to pay its creditors whose debts were to have been discharged within two years, when the remainder of the uncollected notes and credits assigned to him, together with any part of the \$14,000 unused, were to be returned to Goss. The testimony shows that Goss performed his part of the agreement by transferring the property of the Bank of Sumpter, the value of which was at least \$10,000 less than its liabilities, receiving therefor Miller's personal check for \$15,000, drawn on the First National Bank of Sumpter, of which he was then the cashier, and as such certified the order for the payment of the money. Goss immediately assigned the check to the Bank of Sumpter, of which Miller had taken charge, receiving credit for \$1,000, which was subject to check, and a certificate of deposit for \$14,000, which specified that it was "payable as per contract of this date." The testimony further shows that Miller operated the Bank of Sumpter until July 28, 1904, when he executed a deed and a bill of sale of all its property to one C. H. McCulloch, in trust for the creditors, and in a few days thereafter this bank suspended payment, thereby terminating its business.

The court certifies to the following statement contained in the bill of exceptions, to wit: "There is no testimony which shows, or tends to show, that the defendant ever violated any terms or conditions of said contract in the collection of, or in the failure to, collect the assets of the bank, or that he failed or neglected to pay out and disburse any moneys or funds so collected according to the terms of the contract, or that he made any profit out of the transaction, or that he used a single dollar of any of the moneys of the bank, or the proceeds of any notes or other evidences of debt by him collected, or that he failed or neglected to account for and pay over any and all money which was turned over to him or which was by him collected according to the terms and conditions of the contract." Goss, appearing as a witness for the state was asked: "Q. You may state to the jury whether or not the sale and transaction between you and the defendant Miller was a cash sale or transaction?" And he answered: "It was. Q. And why did you accept it (referring to the check) as such, and why did you believe it to be genuine at that time, what if any circumstance led

you to believe that? A. It being attested by him as cashier, I thought it better. \* \* \* Q. Now, Mr. Goss, you may state if you turned over to the defendant Roy Miller, the property of the bank, believing that and relying upon the fact of the \$15,000 check which you testified to, being a good, genuine and valid check? A. I did. Q. And upon what bank was it (referring to the check) given? A. The first National Bank of Sumpter, Oregon. Q. Where is the First National Bank of Sumpter, Oregon, with reference to the Bank of Sumpter? A. About two blocks distant. Q. Did you ever present that check for payment? A. I deposited it in the Bank of Sumpter. Q. Please answer the question, did you ever present that check for payment to the First National Bank of Sumpter? A. I did not. Q. And why didn't you do it? A. Because it was the same as cash coming through there and was entirely unnecessary. They didn't have the cash to pay it, if I had called for it. Q. Didn't you know, Mr. Goss, at the time you accepted that check that you couldn't go over to the First National Bank of Sumpter there and get the money on it? A. That is right. Q. You knew the money was not there with which to cash the check? A. I was told it was not. Q. Who told you? A. Mr. Miller." The bill of exceptions does not purport to contain all the evidence, but as the court instructed the jury that if they should find that Miller told Goss that there was not sufficient funds in the First National Bank of Sumpter to pay the \$15,000 check, whereupon the latter insisted that it should be certified by Miller, who, "by reason of such insistence," complied therewith, and Goss thereupon accepted the check, believing that the attestation validated it, etc., it may be taken as granted that testimony to that effect was introduced at the trial. In the ordinary course of business of a bank, the certifying of a check imports that the drawee has funds of the drawer at the time, of which a sufficient sum shall be retained to meet the payment of the paper on presentation. *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 28 N. Y. 425. The certifying of a check is equivalent to an acceptance of a bill of exchange, payable on demand, whereby the sum so specified is immediately transferred from the drawer's account, thereby making the bank primarily liable to a bona fide holder of the check for value. *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank* (N. Y.) 69 Am. Dec. 678; *Meads v. Merchants' Bank* (N. Y.) 82 Am. Dec. 331; *Bleford v. First National Bank* (Ill.) 89 Am. Dec. 436; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 14 N. Y. 623; *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008. An agent of a bank cannot bind it by false representations, of which it had no actual knowledge, when he was acting for himself. *National Bank v. Carper* (Tex. Civ. App.) 67 S. W. 188. "It is ele-

mentary," says Mr. Justice Ladd, in *German Savings Bank v. Des Moines National Bank* (Iowa) 98 N. W. 606, "that an agent cannot bind his principal, even in matters touching his agency, where he is known to be acting for himself, or to have an adverse interest." The private participation of a cashier in a transaction, which may affect his principal, is sufficient to put the other party upon inquiry as to the extent of the agent's authority, for a cashier has no implied power to dispose of the funds of a bank in payment of his own obligations. *Hier v. Miller* (Kan. Sup.) 75 Pac. 77, 63 L. R. A. 952; *Rankin v. Bush* (Sup.) 87 N. Y. Supp. 539. Thus a person cannot deal with a cashier of a bank as an individual in securing a draft, and after it has been delivered claim that its issuance has become the transaction of the bank. *Campbell v. Manufacturers' National Bank*, 67 N. J. Law, 301, 51 Atl. 497, 91 Am. St. Rep. 438. So, too, where a cashier issues a draft to himself and delivers it to a broker, to be used in speculating, the latter is placed on inquiry as to the nature and ownership of the fund. *Mendel v. Boyd* (Neb.) 91 N. W. 860.

To give validity to negotiable paper, so as to facilitate its circulation, the rules of law impose upon a bank primary liability for certified checks drawn upon it by a depositor or a customer, because such a transaction is the ordinary mode of doing business. Where, however, an agent of a bank draws a draft, payable to himself, or certifies a check which he issues whereby the funds of the bank are or may be withdrawn for his benefit, the transaction is extraordinary, and before the bank can be rendered liable thereon, the person receiving such draft or check is bound to make inquiry from other officers of the bank in respect to the validity of the paper. Goss was a banker, and is presumed to know the law and customs applicable to the business in which he was engaged, and, this being so, he could not have depended upon any primary liability of the First National Bank of Sumpter as giving validity to the check which he knew was issued and certified by Miller, and hence his reliance must rest, if at all, upon the defendant's representations, express or implied, in respect to such paper.

The crime alleged to have been committed by Miller consists in his drawing a personal check on the First National Bank of Sumpter in favor of Goss for the sum of \$15,000, and certifying thereto as cashier of that bank, when he did not have the money on deposit therein. Our statute prohibiting such transactions is, so far as deemed involved herein, as follows: "if any person shall \* \* \* by any privy or false token, and with intent to defraud, obtain \* \* \* from any other person, any money or property whatever, \* \* \* such person, upon conviction thereof, shall be punished," etc. R. & C. Comp. § 1312. An examina-

tion of this section will show that the phrase "any false pretense," as denounced in the statute, has been omitted from the excerpt quoted, because the specification of the particulars of the crime charged is limited to the issuance of a check as a privy token. Such token, however, is of the same class and subject to the same penalties as are prescribed for the use of a false pretense as a means of obtaining the money or personal property of another, and to all intents and purposes is a false pretense. In defining the latter term, the editors of the *Encyclopedia of Pleading and Practice* (volume 8, p. 857), say: "A false pretense is a false and fraudulent representation or statement of a past or existing fact, made with knowledge of its falsity and with the intent to deceive and defraud, by reliance upon which representation or statement another is induced to part with money or property of value." An analysis of this definition will show that in order to sustain the conviction herein, Miller must have issued the false privy token with intent to deceive and defraud Goss, who, relying upon the apparent validity of the check, which its issuance purported, he was thereby induced to part with his money and property. Mr. Wharton, in his work on *Criminal Law* (9th Ed., vol. 2, § 1183), in commenting upon one of the necessary elements of false pretenses, says: "It is an essential ingredient of the offense that the party alleged to have been defrauded should have believed the false representations to be true, for if he knew them to be false, he cannot claim that he was influenced by them." McClain in his work on *Criminal Law* (section 684), in discussing this question says: "It must be shown both by the allegations and the proof that the false pretense was relied upon by the person parting with his money or property as the inducement thereto." Further in the same section this author observes: "And it must appear that the person to whom the pretenses were made believed them to be true, otherwise he would not be defrauded thereby." To the same effect see 12 Am. & Eng. Enc. Law (2d Ed.) 820; 3 Cur. Law. 1419; 19 Cyc. 406; 2 Bishop. Crim. Law (7th Ed.) § 462; Clark & Marshall, Crimes (2d Ed.) § 365; Underhill, Crim. Ev. § 442.

The legal principle thus announced in these text books is amply supported by the adjudged cases. Thus, in *People v. Stetson*, 4 Barb. (N. Y.) 151. It was held to be an indispensable constituent of the crime of false pretenses that the party, alleged to have been defrauded, should have believed the false representations to be true, otherwise he could not claim that he was influenced by them. In *State v. Evers*, 49 Mo. 542. It was ruled that a conviction for obtaining money by false pretenses could not be upheld unless the indictment charged that the prosecutor believed the false pretense was true and that, confiding in the verity thereof,

he parted with his money or property. So, too, in *People v. Bough* (Sup.) 1 N. Y. Supp. 298, it was decided that a conviction of larceny by false pretenses could not be sustained when there was no proof that any reliance was placed upon the representations made by the defendant, or that any credit was given to him because of them. See, also, *State v. Bloodsworth*, 25 Or. 83, 34 Pac. 1023; and *Hunter v. State* (Tex. Cr. App.) 81 S. W. 730. It will be remembered that Goss testified that he delivered the property of the Bank of Sumpter to Miller, relying upon the check for \$15,000 as being good, genuine, and valid. Goss's statement in this respect is immediately disproved by his subsequent declaration under oath that the check was not presented for payment because the First National Bank of Sumpter did not have the money with which to discharge it, if he had called for it, and that at the time he accepted the check he knew he could not get the money on it, for Miller told him so. Reliance by a person upon the representations of another implies a belief in the accuracy of the declarations that inspired the confidence reposed. In the absence of faith in the truth of the statements thus made, a dependence thereon is an impossibility. It is absurd to say that Goss relied upon the validity of the check when he was told by Miller that there was no money in the bank on which it was drawn to meet the payment thereof. The testimony of Goss having disclosed this uncontradicted fact, the question to be considered is, what duty devolved upon the court when its attention was called to the defect in the proof?

In *Commonwealth v. Davidson*, 1 Cush. (Mass.) 33, the defendant being tried for obtaining property by false pretenses, the proof showed that he gave a false name, and the prosecuting witness having testified that this misrepresentation had no influence in inducing him to part with his goods, it was held that the trial court, upon such showing, should have instructed the jury that the misrepresentation was not established as an inducing motive to the obtaining of the goods by the defendant. In *State v. Crane*, 54 Kan. 251, 38 Pac. 270, it appeared upon appeal that, as the prosecuting witness had testified that he could not say he relied upon the defendant's false statement as an inducement to execute a promissory note, it was ruled that the evidence was insufficient to sustain the conviction. In *Thorpe v. State*, 40 Tex. Cr. R. 346, 50 S. W. 383, the plaintiff in error was convicted of the crime of obtaining money by false pretenses, and appealed. The testimony of the prosecuting witness showed that Thorpe was indebted to him in the sum of \$5, and that, desiring to secure another loan of an equal sum, he offered to give a check upon a specified bank for \$10. The person from whom the loan was thus sought replied that he did not believe the applicant had any money in the bank men-

tioned, but that he would give \$5 to catch him, and if such statement was false, he would prosecute him, whereupon he gave the sum desired, receiving the check promised. The teller of the bank on which the check was drawn testified that Thorpe never had any money on deposit therein. The court, in reversing the judgment, referring to the testimony given, says: "If the prosecuting witness had relied upon the statements of appellant that he had money in the bank, we cannot see why he should have made the threat against appellant indicated by the evidence; and when he expressly states that he did not believe appellant, and did not believe that appellant had the money, surely this statement precludes the idea that the prosecuting witness was induced to part with his money by the false representations of the appellant. The indictment must allege, in every case of swindling, and the evidence must show, that the injured party was induced to part with his property by means of the false pretenses; otherwise, it is not swindling. We do not think the evidence supports the conviction." In *Regina v. Mills, Dearsly & Bell's Crown Cases*, 205, the defendant was convicted for obtaining money by false pretenses, in representing that he had cut 63 fans of chaff when he had cut only 45 fans. The evidence showed that he was employed to cut chaff at 2d per fan, and that based on the alleged false pretense he demanded 10s 6d. The prosecuting witness had previously seen him remove 18 fans from an adjoining place and add them to the heap which he pretended to have cut, but, notwithstanding such knowledge, he paid the defendant the sum demanded. It was held that on the testimony given, the conviction was wrong, as the money was not obtained by the false pretense. In *People v. Baker*, 96 N. Y. 340, a like conclusion was reached upon similar evidence, and in deciding the case, Mr. Justice Earl, speaking for the court, says: "We do not sit here to square the conduct of the defendant by any code of morality, or any standard of integrity. The sole question is whether the proof was sufficient to show that he had committed the crime with which he stood charged, and we are of the opinion that it utterly failed."

Applying the rule thus announced to the case at bar, the testimony conclusively shows that Goss was correctly informed respecting all the facts relating to the transaction in question, and, as a conclusion of law based thereon, we are satisfied that he did not rely on any false representation made by Miller. In criminal actions for false pretenses it must appear from the testimony given at the trial that the party charged intended to defraud the person from whom the money or property was wrongfully obtained. The fraud in such cases depends upon the deception practiced by the

defendant or his agent. In the case at bar, Miller having told Goss that there was no money in the First National Bank of Sumpter with which to pay the check, there was no deceit, and hence there was no intent on Miller's part to defraud Goss.

There having been an entire absence of testimony necessary to prove a material averment of the indictment, the court should have instructed the jury to acquit the defendant; but, having failed to do so, the judgment is reversed, and the cause remanded for such proceedings as may be necessary, not inconsistent with this opinion.

#### WHITNEY et al. v. HANINGTON et al.

(Supreme Court of Colorado. March 5, 1906.)

##### 1. WILLS—PROBATE—PROCESS—AFFIDAVIT FOR PUBLICATION.

Wills Act 1903, § 25, provides that if, on an application for probate, it shall appear that any heir of the testator resides or has gone "out of this state" or that any such heir on diligent inquiry cannot be found, the judge of the county court shall cause notice to him to be published in a newspaper. *Held*, that an affidavit for publication under such section, alleging that certain heirs of the deceased could not, after due diligence and inquiry, be found "in this state," was sufficient, though it also stated on information and belief that they resided in California, which statement was surplusage.

##### 2. SAME—CITATION—PREVIOUS ISSUANCE AND RETURN.

Wills Act 1903, § 24, provides that on the production of any last will for probate the court shall ascertain the names and places of residence of the heirs, etc., and thereupon a citation shall issue requiring them to attend the probate of the will, and section 25 declares that if any heir resides or hath gone out of the state, or on diligent inquiry cannot be found, publication may be made. *Held*, that the previous issuance and return of citation not found is not a prerequisite to an order for publication under such sections.

##### 3. SAME—SEPARATE INSTRUMENTS.

A will may consist of separate instruments executed at different times, each purporting to be the last will of the decedent, provided they are not inconsistent and disclose an intent that they should both stand together as the testator's will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 232, 233.]

##### 4. SAME—REVOCATION.

Testator devised his estate to trustees to hold for a time in trust for the legatee, with provisions for a succession, remainder to others in the event of the death of such legatee, and thereafter executed another will by which he gave to the same legatee all his "earthly possessions according to the conditions of a will now in existence." The former will was found in the hands of one of the executors, and no other will except the last was found. *Held*, that the second will did not operate as a revocation of the former one, but that the two were properly admitted to probate as a single will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 232, 233, 456.]

##### 5. SAME—TESTATOR'S INTENTION—EVIDENCE.

On an issue concerning testator's intention to revoke a prior will by the execution of a subsequent one, parol evidence concerning a conversation that took place at the time the sec-

and will was executed with reference to the former will was admissible

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 674, 690.]

Appeal from County Court, City and County of Denver; Ben B. Lindsey, Judge.

Petition by Henry Hanington for the probate of the will of James W. Westlake, deceased, to which Carrie Westlake Whitney and others filed objections. From an order admitting two certain instruments to probate as the will of said testator, objectors appeal. Affirmed.

Yeaman & Gove and Henry B. Babb, for appellants. William L. Dayton, Wilbur F. Denions, and Cass E. Herrington, for appellees.

BAILEY, J. On September 5, 1903, an instrument appearing to be the last will and testament of James W. Westlake, deceased, was offered in the county court of the city and county of Denver for probate. This instrument purports to give, devise, and bequeath unto Lydia Moudy, Henry Hanington, Jr., and to Julius Rodman, and to the survivors of them, the entire estate of which decedent should die seised and possessed, "in trust, nevertheless, for Helen Celestine Westlake, a girl now in her ninth year of age, and now living with me and who was raised by myself and my wife. Nellie Westlake, lately deceased, until said Helen Celestine Westlake shall attain the age of thirty years, at which time all of said property and the income thereof which shall then remain on hand shall by said trustees, their survivors and the survivor of them, be turned over and delivered and conveyed to said Helen Celestine Westlake." There are appropriate provisions for the settlement and distribution of the estate in the event of the death of Helen Celestine Westlake before reaching the age of 30 years. This document was executed on the 18th day of April, 1898. On September 5, 1903, the petition of Henry Hanington was filed in the county court; said petition calling attention to the death of decedent, the leaving of this last will and testament, and other essential matters, and praying that the will might be admitted to probate. On the same date the court entered an order reciting the presentation to the court of the document and ordering the issuance of citations to the legatees and heirs at law.

On September 16, 1903, the following document was offered for probate: "In the name of God, Amen! I, James W. Westlake, being of sound mind and memory, but knowing the uncertainty of human life, do now make and publish this my last will and testament, that is to say: That I do hereby give and bequeath to my daughter Celestine Helen Westlake, all my earthly possessions according to condition of a will now in existence, and unless otherwise bequeathed later. James W. Westlake. [Seal.]" Dated the 30th day of October, A. D. 1899, and prop-

erly witnessed. On the same day a supplemental petition was filed, with a copy of this last instrument attached, reciting the finding of this instrument after the filing of the original petition, and praying that the two instruments might be admitted to probate together as constituting the last will and testament of said deceased. Hanington also filed a statement under oath, wherein it is recited, after mentioning the issuance of the citation hereinbefore mentioned, "that of the parties to whom such citation was issued, Carrie Whitney, the sister of the defendant, resides in the city of Kansas City, in the state of Missouri, and cannot be found in the state of Colorado; that Gladys Talmage and Benjamin Talmage, minor heirs at law of said deceased, cannot, after due diligence and inquiry, be found in this state, and petitioner is informed and believes, and so states the fact to be, that said minors reside at present in the state of California," and praying that an order be entered authorizing the citation of these parties by publication, in accordance with section 25, c. 181, of the Act of 1903. On the same day an order authorizing the publication as prayed for in the petition was made.

On October 8th William L. Dayton was appointed guardian ad litem of Gladys and Benjamin Talmage, Henry B. Babb as guardian ad litem for Helen Celestine Westlake, and citations were issued to said guardians ad litem and duly served. On October 9th affidavit of publication was made. On February 1, 1904, Carrie W. Whitney and Harry Westlake filed their caveat and objections to the probate of the will, alleging, among other things, that the court did not have jurisdiction of the minor heirs; that the will first presented was revoked by the one last presented, and that the last will was so incomplete, indefinite, and uncertain that "it is not possible to ascertain the intention of the deceased therefrom." February 1, 1904, Gladys Talmage and Benjamin Talmage, by their guardian ad litem filed a caveat and objections practically identical with those filed by Carrie Whitney and Harry Westlake. These objections were traversed. On the 17th of March an order was entered finding that the publication of notice had been made and that the several parties had been duly summoned according to law. On April 12, 1904, the county court made a decree admitting to probate the two instruments as together constituting the last will and testament of James W. Westlake, and appointing the trustees named in the first instrument as executors. The matter was brought here upon appeal by the heirs at law.

The first alleged errors discussed by appellants are to the effect that the court did not have jurisdiction of the minor heirs, for the reason that sections 24 and 25 of the Wills Act of 1903 was not complied with. Sections 24 and 25 provide:

"Sec. 24. Upon the production of any last will for probate, the court shall ascertain from the will and from such other satisfactory evidence as may be produced, the names and places of residence of the \* \* \* heirs at law of the testator, and who of such heirs at law, \* \* \* if any, are minors, and the names and places of residence of the guardians of such minors, if any there be; and thereupon a citation shall issue to such \* \* \* heirs at law, or in the case of any minor, to such minor and to his or her guardian, \* \* \* requiring them and each of them to attend the probate of such will before the court.

"Sec. 25. If it shall appear that any such \* \* \* heir at law of such testator resides or hath gone out of this state, or that any such \* \* \* heir at law, upon diligent inquiry, cannot be found, the judge of the county court shall cause to be published \* \* \* in some newspaper \* \* \* a notice addressed to such nonresident, \* \* \* setting forth the presentation of such will for probate, \* \* \* and requiring such heirs at law to attend the probate of such will."

The contention of appellants seems to be that the order for publication could not be made until after the issuance and return of the citation, and that no citation was issued and returned until October 8th; the order for publication having been made September 16th. It is also asserted that the affidavit of the nonresidence of the minor heirs is defective, because it is stated upon information and belief that they resided in California. The words of the statute are: "If it shall appear that any such \* \* \* heir at law \* \* \* resides or hath gone out of this state \* \* \* or \* \* \* upon diligent inquiry cannot be found," then publication may be made. The affidavit is sufficient. It alleges that the minor heirs cannot, after due diligence and inquiry, be found in this state. That is all that is required. The allegation, made upon information and belief, that they resided in the state of California, is unnecessary to give the court jurisdiction to issue the order of publication. A careful scrutiny of the two sections will demonstrate that the order for publication is in no way dependent upon the previous issuance and return of the citation. When it is shown to the court at any stage of the proceedings that either of the heirs at law, "upon diligent inquiry, cannot be found," the court has the power to issue the order of publication. Consequently, we find that there was no error in this respect.

Having thus disposed of the question of jurisdiction, the next one presented is as to whether or not two instruments, each purporting to be the last will of a decedent, may be admitted to probate as forming together one last will and testament. While it is generally conceded by the authorities that under certain circumstances this may be done, there is much nice distinction in the

reported cases, and in the reasoning of law writers as to what peculiar conditions and circumstances must exist in order that the two instruments may be admitted.

It is unnecessary in this case to analyze the various authorities for the purpose of determining the great variety of circumstances under which two such instruments have been admitted to probate. The rule, as announced in *Williams on Executors* (7th Am. Ed.) 212, appears to be the consensus of opinion upon this subject: "The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says, that 'no man can die with two testaments,' yet any number of instruments, whatever be their relative dates, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper, whether in form a will or a codicil, be partially inconsistent with one of an earlier date, then such later instrument will revoke the former as to those parts only where they are inconsistent." See, also, the authorities cited in notes "o" and "p" at page 212 of the work cited.

We now come to the determination of the question as to whether or not the court erred in admitting to probate these two particular instruments together as constituting the last will and testament of decedent. In this connection we may say that while it is not the policy of the courts to strain to admit wills to probate, neither is it the policy of the courts to strain in order to refuse the probate of a will. If the testator has testamentary capacity, and the mind is free from improper influences, and the will is intelligible, it should be admitted to probate. Every effort is to be made to execute the intention of the testator, and captious or specious reasoning shall not be indulged in for the purpose of creating a doubt where none exists, or rendering that unintelligible which is intelligible. Otherwise, the statute of wills becomes a mockery, and the learning expended upon it becomes as salt which has lost its savor, fit only for the rubbish heap.

The last will provides: "I do hereby give and bequeath to my daughter Celestine Helen Westlake all my earthly possessions, according to the condition of a will now in existence." This clearly refers to some other will which is not to be construed as being revoked, but the provisions of which are to be considered in determining the character of the estate which the testator desires to vest in the legatee. In order to determine the character of such estate, it is necessary to find "a will now in existence" which makes provision as to the character of such estate. The earlier will which was admitted to probate is found in the hands of one of the executors,

and it makes full and complete provision for the manner in which this estate is finally to become vested in the legatee. No other will is found. No other will is proven or attempted to be proven as having been in existence at the time of the making of this will. Therefore, we are driven to the conclusion that the will which was found is the one referred to by the testator. *Maddock v. Allen, Deane & Swabey, 332; 1 Redfield on Wills, 262.* The two are to be taken together as forming one will, unless the circumstances under which the last will was made prohibit such a condition, or the conditions of the two wills are so repugnant and inconsistent that they may not stand together. In this connection we will say that the court erred in striking out the testimony concerning the conversation that took place at the time of the execution of the last will, and the testimony of witness Hanington. The conversation was a part of the subject-matter, and was admissible for the purpose of determining the intention of the testator in relation to the will which was then in existence and of the facts and circumstances attending the execution of the wills. 1 *Underhill on Wills, 39.*

This last will is spoken of as a "Masonic" will. What is meant by that term is not shown, but it was apparent that the making of the will was in some way connected with the rites and ceremonies of the Masonic Order, and in this connection the witnesses testified that they were joking the testator about the length of time it took to write the will, to which he replied that he had made a former will and he desired this to agree with it.

This brings us to the consideration of the proposition, so earnestly contended for by appellants, that the later will revoked the former. The conversation referred to and the terms of the will itself clearly negative such an intention. The terms of the two wills are not inconsistent. The first devises the estate to trustees to hold for a time in trust for the legatee, with provisions for succession and remainder in the event of the death of the legatee. The second will devises the same property to the same party as the one named as beneficiary in the former will, but the estate devised is not an absolute one in fee simple, but is qualified: the qualification being that she takes it according to the condition of a previous will. So, instead of being inconsistent, the previous will is a necessary adjunct to the later one, for the purpose of determining the character of the estate to be vested in the legatee and the condition upon which it would have become absolute. In the case of *Newcomb v. Webster, 118 N. Y. 196, 21 N. E. 77*, after stating that it was a well-settled rule that a will and a codicil are to be construed together; that the codicil is no revocation of the will further than is so expressed, but if it is found to contain repugnant bequests, one or the other must fail, it is then said:

"The same principle applies with greater force where there are two distinct instruments relating to the same subject-matter. In such a case an inconsistent devise or bequest in the second or last instrument is a complete revocation of the former. But if part is inconsistent and part is consistent, the first will is deemed to be revoked only to the extent of the discordant dispositions, and so far as may be necessary to give effect to the one last made." Citing *Nelson v. McGiffert, 3 Barb. Ch. (N. Y.) 158, 49 Am. Dec. 170.* It is not the province of the court in this proceeding to construe the two instruments except so far as may be necessary to determine whether or not the court erred in admitting them to probate, and for this purpose we may examine them to determine whether or not they are so repugnant and inconsistent as to prevent their probate. No such inconsistency exists. It is therefore apparent that the court had jurisdiction; that the will of 1898 was the one mentioned in the will of 1899; that the will of 1899 does not revoke, but on the contrary ratifies and reaffirms, the will of 1898; that the two are not so inconsistent or repugnant as to prohibit their standing together; it necessarily follows that the court committed no error in admitting them to probate, and that a discussion of the other matters referred to in appellant's brief will serve no useful purpose. The judgment is therefore affirmed.

Affirmed.

GABBERT, C. J., and GODDARD, J., concur.

(36 Colo. 35)

# ADAMS v. SLATTERY et al.

(Supreme Court of Colorado. March 5, 1906.)

## 1. DESCENT AND DISTRIBUTION—DESCENT OF REAL ESTATE.

The real property of an intestate descends directly to his heirs, subject to the payment of his debts.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, §§ 243-251, 457.]

## 2. ADMINISTRATORS—REAL ESTATE—INTEREST.

The administrator of a deceased person has no title or interest in his real estate, except the rents thereof, unless it becomes necessary to have recourse to the realty to pay decedent's debts.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 533.]

## 3. DESCENT AND DISTRIBUTION—INJURY TO LAND—CAUSE OF ACTION FOR TRESPASS.

A cause of action for trespass or injury to land occurring after the death of the former owner does not pass to his executor or administrator, but to the heir or devisee.

## 4. WASTE—INJUNCTION—POSSESSION.

Where complainant in a suit to restrain waste is not in possession, he must establish a valid and subsisting title to the premises in himself.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waste, §§ 14, 21-23.]

### 5. ADMINISTRATORS — RIGHTS OF ACTION — WASTE.

An administrator, having no estate in the premises except the right to lease the same, cannot maintain an action for waste.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 535.]

### 6. SAME—INJUNCTION—NOTICE.

Where petitioner had acquired title to certain real estate previously owned by a deceased person subject only to the widow's life estate, he was not entitled to a summary order restraining a tenant in possession from committing waste in proceedings for the administration of decedent's estate, but could only obtain such relief in an original action on notice or on a showing and on the filing of a bond for preliminary injunction.

Error to Cheyenne County Court; Joseph Robinson, Judge.

Petition by George B. Slattery and others for an injunction against W. J. Adams, filed in a proceeding for the settlement of the estate of Orlando J. Greer. From an order denying a motion to set aside the injunction granted, Adams brings error. Reversed.

Fred A. Williams, for plaintiff in error.  
Thomas Ward, for defendants in error.

BAILEY, J. Sarah M. Greer was the administratrix of the estate of Orlando J. Greer, deceased. The petition of defendant in error in this case is as follows: "In the Matter of the Estate of Orlando J. Greer, deceased. Petition. Comes now George B. Slattery and respectfully shows to the court: That he holds and owns by proper conveyance, all the interest of the heirs at law of Orlando J. Greer, deceased, in and to the real estate belonging to said estate, to wit, the S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  and the E.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of section 26, township 14 south, of range 50 west, in Cheyenne county, Colorado, subject to the life estate of Sarah M. Greer, widow, upon which life estate your petitioner has an option of purchase which will be consummated within a few weeks of this date, whereby the entire title to said land will be vested in fee simple in your petitioner. That W. J. Adams is now residing on said lands, and that your petitioner is informed and verily believes, and so states upon information and belief, that said Adams has made arrangements and is about to and will remove from said lands said fixtures and improvements thereon, to wit, buildings, houses, barns, corrals, fences, and other improvements and fixtures in, upon, and inclosing said lands, to the great injury to your petitioner and damage to said land and to said estate, and that unless said Adams is restrained by this court from so removing said fixtures and other improvements from said land he will remove or destroy the same to the great and irreparable injury of said estate and your petitioner. Wherefore your petitioner respectfully asks the order of this court, directed to said W. J. Adams, commanding him not to remove, destroy, or otherwise dispose of any of the improvements or fixtures

upon said land of any kind or nature whatsoever. George B. Slattery."

This petition was filed on the 1st day of November, 1902, in the office of the clerk of the county court of Cheyenne county. On the same date, the court issued the following order: "In the Matter of the Estate of Orlando J. Greer, Deceased. Order of Court. Now, at this 1st day of November, coming up for determination the petition of George B. Slattery, and the court, being fully advised in the premises, doth decree and order W. J. Adams not to interfere with, destroy, or remove any of the improvements, buildings, barns, corrals, fences, or other fixtures situate in or upon or inclosing the lands and premises belonging to the estate of Orlando J. Greer, deceased, to wit, the S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  and the E.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of Sec. 26, township 14 south, of range 50 west, and that a copy of this order be served forthwith upon said W. J. Adams. By the Court: Joseph Robinson."

On November 21st plaintiff in error entered his special appearance and moved the court to set aside the order hereinbefore mentioned, stating as reasons for the motion that the writ was issued in the probate proceedings and not in the exercise of civil jurisdiction of the court; that no process was issued or served whereby the court acquired jurisdiction of the person of W. J. Adams; that the injunction was a final injunction, and was granted without notice and without hearing for trial; that the writ was not issued for the protection of any interest of the estate of Orlando J. Greer, nor of the heirs of said estate, but for the sole purpose of protecting Slattery; that the court has no jurisdiction over the lands of the deceased; and that the petitioner is a stranger to the proceedings and not entitled to invoke the jurisdiction of the court. This motion was denied, and the injunction made permanent. The case is brought here on error.

This is in the nature of an action to prevent waste to real estate. The real estate descended directly to the heirs of the deceased, subject to the payment of the debts of the deceased. The administrator has no title or interest in the real estate, except the rents thereof, and except it shall become necessary to have recourse to the real estate to pay the debts of the deceased. *McKee v. Howe*, 17 Colo. 538, 31 Pac. 115. There is no allegation in this petition that there were any debts, nor that the waste complained of would lessen the rental value, nor that the estate would be prejudiced, except the phrase, which may be said to be a conclusion of law, that the removal of the improvements will constitute a great and irreparable "injury of said estate." On the contrary, the petition shows upon its face that Slattery was the owner of this property in his own right, subject to the life estate of Mrs. Greer; so that the real and only

parties in interest were Mrs. Greer and petitioner, in their personal capacity. A cause of action for a trespass or injury to land, occurring after the death of decedent, does not pass to the executor or administrator, but to the heir or devisee. 11 Am. & Eng. Enc. Law, 833. In order to maintain an action to restrain waste, unless complainant is in actual possession, he must establish a valid and subsisting title in himself to the premises. 30 Am. & Eng. Enc. Law, 287. This action is brought in the name of the estate of Orlando J. Greer. The averments of the petition negative any presumption that might exist as to the title being in the estate. An executor who has no estate in the premises except the right to lease the same cannot maintain an action for waste. Such action must be by reversioner in fee. Page v. Davidson, 22 Ill. 112. It is apparent that the action cannot be maintained on behalf of the estate of decedent. Consequently, the rule that probate courts have power to summarily issue orders for the protection of the estate does not apply.

The action, while entitled, "In the Matter of the Estate of Orlando J. Greer, Deceased," is, as a matter of fact, a personal action between Slattery and Adams, or Slattery, Mrs. Greer, and Adams, and in such case the defendant was entitled to notice of the application for an injunction, unless the applicants made the necessary showing and filed a bond pursuant to the provisions of the statute. Before the injunction could be made permanent, the defendant was entitled to have his day in court. This was denied him. Consequently, the judgment of the county court will be reversed, and the cause remanded. Reversed.

GABBERT, C. J., and GODDARD, J., concur.

(36 Colo. 353)

HASSELL IRON WORKS CO. v. COHEN  
et al.

(Supreme Court of Colorado. March 5, 1906.)

1. SALES—BREACH BY BUYER—ACTION BY SELLER—MEASURE OF DAMAGES.

Where a purchaser of personal property, which is to be delivered at a specified time and place at a stipulated price, refuses to receive and pay therefor, the seller's measure of damages, where no part of the purchase price has been paid and the property in the meantime declines in price, is the difference between the contract price and the current price at the time and place of delivery.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1098-1107.]

2. APPEAL—VERDICT—INSUFFICIENCY OF EVIDENCE.

Where there is no evidence on which a verdict can be sustained, a judgment based on such verdict must be reversed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3923-3943.]

Appeal from District Court, El Paso County; Wm. P. Seeds, Judge.

Action by Max Cohen and another against the Hassell Iron Works Company. Judgment for plaintiffs, and defendant appeals. Reversed.

J. W. Shuafor, for appellant. Robert Kerr, for appellees.

BAILLY, J. The court correctly instructed the jury that "when a purchaser of personal property, which by the terms of the purchase is to be delivered at a specified time and place and at a stipulated price, refused to receive and pay for the property, and no part of the purchase price has been paid, and if the price in the meantime declined, then, in an action by the vendor against the vendee for refusing to comply with the contract, the proper rule of damages is the difference between the contract price and the current price at the time and place of delivery." According to the testimony of the plaintiffs, there was no current price for the goods in question at the place of delivery provided in the contract. Plaintiffs introduced proof as to the market price at Chicago, St. Louis, and Kansas City, and that, according to the prices prevailing at those places, plaintiffs should have recovered judgment for \$765.57, as their testimony shows. The testimony on behalf of defendant is that there was a market price at the place named in the contract and that the difference between the contract price of the goods and the current price at the place of delivery, according to the testimony introduced on behalf of defendant, was \$352.50. The verdict of the jury was for \$517.96½. This verdict is not in harmony with the instruction and is not supported by any evidence. If the theory of plaintiff should be taken, the verdict should have been \$765.57. If that of the defendant should be taken, it should have been \$352.50.

There being no evidence upon which the verdict can be sustained, the judgment based upon the verdict must be reversed. Robeson v. Miller, 4 Colo. App. 313, 35 Pac. 880.

The judgment will be reversed, and the cause remanded.

Reversed.

GABBERT, C. J., and GODDARD, J., concur.

(36 Colo. 350)

LAMBERT v. SHUMWAY.

(Supreme Court of Colorado. March 5, 1906.)

1. QUIETING TITLE—ISSUES AND PROOF.

While plaintiff, in an action to quiet title, to maintain the action must aver his possession coupled with title, the duty is devolved on defendant of asserting an adverse interest in himself and specifying its nature, and before he can put plaintiff upon proof touching his possession and the title he must plead accordingly.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, §§ 78, 84-88.]

2. TAXATION—NOTICE OF SALE—PROOF OF PUBLICATION.

Unless an affidavit of publication of a notice of a tax sale shows that copies of each num-

ber of the paper in which the notice was published were delivered by carriers or transmitted by mail to each subscriber of the paper according to the custom in the office, it is insufficient, and a sale was invalid where the affidavit stated that the paper was delivered by carrier or transmitted by mail to each of the subscribers "in the county."

Appeal from District Court, Arapahoe County; S. L. Carpenter, Judge.

Action by Charles W. Shumway against William T. Lambert. From a judgment for plaintiff, defendant appeals. **Affirmed.**

Wm. T. Rogers and Frank W. Barry, for appellant. Herbert M. Munroe, for appellee.

**BAILEY, J.** This is an action to quiet title to real estate. The complaint is in the usual form. Two defenses are attempted to be set up in the answer, the first consisting of admissions and denials only. The second pleads title in defendant by virtue of a tax deed. Plaintiff replied, denying the validity of the tax deed, and alleging that the proceedings leading up to its execution were defective in several respects, among which was that no sufficient affidavit of publication of the notice of the tax sale had been made. The cause went to trial, and among other things it is shown that the proof of publication recites that copies of each number of the paper in which the notice of tax sale was published were delivered by carrier or transmitted by mail to each of the subscribers of said paper "in the county of Arapahoe," according to the custom of business in the office of the newspaper. Judgment was rendered for the plaintiff. Defendant appeals.

The questions discussed in the briefs are as to the sufficiency of defendant's defense, and as to whether or not it was necessary for the plaintiff to prove possession in order to maintain the action. Appellant contends that plaintiff was not entitled to judgment, because the proof does not show that he was in possession of the premises, and that his being in possession is a jurisdictional matter. While plaintiff, to maintain the action, must aver his possession coupled with title, the duty is devolved upon defendant of asserting an adverse interest in himself and specifying its nature, and before he can put plaintiff upon proof touching his possession and the title he must plead accordingly. *Wall v. Magnes*, 17 Colo. 476, 30 Pac. 56. Defendant has not done this. The first alleged defense consists merely of denials and admissions. This defense, standing alone, is not sufficient to put in issue the possession of plaintiff, because, as was said in the case of *Wall v. Magnes*, supra, before defendant can put plaintiff upon proof touching his possession and title, he must plead an adverse interest in himself. The defendant may plead as many defenses to the cause of action alleged in plaintiff's complaint as he desires, but each of these defenses must be complete of itself and must be tested by its own allegations. *Weston v. Estey*, 22 Colo.

343, 45 Pac. 367; *Travelers' Ins. Co. v. Redfield*, 6 Colo. App. 196, 40 Pac. 195. The first defense neither alleges title nor possession in the defendant.

The second defense of defendant fails, because the affidavit containing the proof of publication of the notice of tax sale shows that the paper containing the notice "was delivered by carrier or transmitted by mail to each of the subscribers in the county of Arapahoe, in the state of Colorado." The statute requires that this affidavit shall show that copies of each number of the paper were "delivered by carrier or transmitted by mail to each of the subscribers." It is apparent that the delivery of the papers to each of the subscribers in a single county does not conform to the requirements of the statute. Unless an affidavit of publication of notice of a tax sale shows that copies of each number of the paper in which the notice was published were delivered by carriers or transmitted by mail to each subscriber of the paper, according to the custom and mode of business in the office, it is insufficient, and a sale based thereon is invalid. *Rustin v. M. & M. Tunnel Co.*, 23 Colo. 351, 47 Pac. 300; *Morris & Thombs v. St. Louis N. Bk.*, 17 Colo. 235, 29 Pac. 802. The second defense failing, the denial of plaintiff's possession in the first defense is not sufficient to put plaintiff upon proof touching the same.

Perceiving no error in the proceedings of the court, the judgment will be affirmed.

**Affirmed.**

**GABBERT, C. J., and GODDARD, J.,** concur.

(35 Colo. 28)

### **WILLIAMS v. WOODRUFF.**

(Supreme Court of Colorado. Dec. 4, 1905.  
Rehearing Denied Feb. 5, 1906.)

#### **TRUSTS—REPUTATION—RIGHTS OF CESTUI—ENFORCEMENT—LACHES.**

Testator divided the residue of his estate into three shares, and directed that the same be invested and the income paid to the beneficiaries semiannually for 10 years after his death, when the principal should be paid to them. Defendant was appointed sole executor. Plaintiff, who was one of the beneficiaries of the trust, was 22 years of age when testator died, and resided with her aunt during a large part of the period of defendant's administration, who was in communication with defendant almost constantly; but for a period of 13 years, during which she received no interest on her share of the estate, she took no steps either to discover or set aside conveyances by which defendant personally acquired a large part of the property of the estate, nor until she was advised to bring suit by certain attorneys who had discovered defendant's repudiation and breach of trust. *Held*, that plaintiff was guilty of such laches as deprived her of relief in such action.

Appeal from District Court, Las Animas County; Jesse G. Northcutt, Judge.

Action by Elizabeth L. Williams against Thomas T. Woodruff. From a judgment in

favor of plaintiff, defendant appeals. Reversed.

James M. Rice made his last will and testament, wherein, after providing for the payment of his funeral expenses and debts, he devised to each of his six nephews and to his niece Mary the sum of \$500. The will then provides that, after deducting the above-named bequests, the balance of all his property shall be divided into four equal shares, for the benefit of his three sisters, Joanna E. Wallace, Sarah B. French, and Eleanor D. Rice, and his niece Elizabeth L. Rice—one share to each of the four named. "The amounts of the said bequests to be severally invested by the executors of my will, and the interest to be paid to the said beneficiaries semiannually for ten (10) years from the time of my death. And then the principal amounts to be severally paid over to them." Provision is then made for the appointment of Joanna E. Wallace, Thomas T. Woodruff, of Quincy, Ill., and William B. Collins, of Keokuk, Iowa, as executors of the will. James M. Rice died about the 5th day of December, 1879. Joanna E. Wallace and William B. Collins declined to act as executors of the will in the state of Colorado. Woodruff then resided at Quincy, Ill., where also lived Mrs. Wallace, with whom Eleanor D. Rice (now Walker) and plaintiff, Elizabeth L. Rice (now Williams) resided. Shortly after the death of Rice, Mrs. Wallace had defendant, Woodruff, call at her residence in Quincy, and informed him that he was named as one of the executors of the will; that she and the other executor did not care to accept the executorship; and that it was desired that Mr. Woodruff come to Colorado and administer the estate. This he did. He came to Colorado, was duly appointed executor by the court, administered the estate, made his final settlement, and was discharged in the month of August, 1881. At the close of the administration it was found that the estate would pay but 52 cents upon the dollar of the claims allowed against it; the remaining 48 per cent. of such indebtedness and the specific legacies still remaining unpaid. Without attempting to describe the real estate of the decedent, it may be classified as follows: Incumbered property, unincumbered property, and certain property of which he was the owner of an undivided one-half; the other half being owned by Edward C. Smith, upon whose interest Rice held a deed of trust to secure the payment of a promissory note for \$1,450. Of the incumbered property one portion was mortgaged to N. P. Hill. After the letters testamentary were issued, and previous to the closing of the estate, Hill foreclosed his deed of trust, and the property was purchased by one J. M. John, as the agent of Woodruff. The note secured by the other deed of trust was held by John. He proceeded to foreclose. Just previous to the date of sale Woodruff purchased the note, and John, at

Woodruff's instance, purchased the property at trustee's sale. It is not quite clear whether John purchased this property in his own right, and subsequently sold Woodruff a half interest therein, or whether he purchased it as an agent of Woodruff, and subsequently purchased a half interest therein. However, this is immaterial, as we view the case. Mrs. Wallace, the sister of Rice, was one of the heaviest creditors of the estate, and, when it became necessary to sell the unincumbered real estate at administrator's sale, she purchased it at Woodruff's suggestion. The administrator's deed went to Mrs. Wallace; Mr. Woodruff supplying the money to make the purchase. She immediately executed a deed to the same property to T. D. Woodruff, brother of defendant, and T. D. Woodruff executed his bond for a deed, wherein he agreed to reconvey this property upon payment of the advances made by defendant. At the time of the death of Rice the interest upon the Smith note had not been paid for several years. Smith was dead, having died insolvent. The county court of Las Animas county, in which the estate of Rice was being administered, made an order authorizing the administrator to sell the Smith note for a sum not less than \$1,450. T. D. Woodruff purchased this note, with money advanced by defendant, for the sum of \$2,000. This deed of trust was defective, because no trustee was named. There was a second deed of trust held by the relatives of Smith. T. D. Woodruff purchased the second deed of trust, foreclosed it, purchased the property at the sale, and obtained a quitclaim deed from the Smith heirs. In 1885, defendant purchased from Mrs. Wallace, for the sum of \$5,000, all of the lands which she had purchased from the Rice estate and which had not theretofore been sold. She had, previous to this time, discharged her indebtedness to defendant on account of the money advanced for the purchase price of said land; Woodruff giving to her his notes for the \$5,000, and securing their payment by an assignment of a life insurance policy. Joel M. Rice, the father of James M. Rice, died in Iowa shortly before the latter died in Colorado. Decedent also left estates in Iowa and Illinois. Mrs. Wallace was appointed as the administratrix of the estate of Joel M. Rice. Defendant, Woodruff, and William B. Collins declined to act as executors of the estate of James M. Rice in Iowa and Illinois, and Mrs. Wallace was appointed sole executrix of the will in those two states. The estate of Joel M. Rice obtained a judgment against the estate of James M. Rice for the sum of \$12,000. The estates of James M. Rice in Iowa and Illinois proved insolvent. Plaintiff, Williams, was served, personally and by mail, with certain processes issued from the courts in each of those states, and in one instance filed her answer to a petition to sell real estate belonging to the estate of

**James M. Rice.** There is no evidence which shows that defendant at any time communicated to plaintiff, Williams, the condition of the estate in Colorado, although he says that he is under the impression that she was present at some of the conversations between Mrs. Wallace and himself. There is no evidence to show that he concealed or attempted to conceal any of his actions concerning the estate here from Mrs. Wallace or any of the other heirs or creditors.

This action was instituted by plaintiff, Williams, and her aunt, Mrs. French, upon the 4th day of December, 1894. Defendant demurred to the complaint; the demurrer was sustained; plaintiffs brought the matter to this court; the decision of the district court was reversed, and defendant was held to answer. A composition or settlement was made between plaintiff French and defendant, and the action was dismissed so far as Mrs. French was concerned. The action then went back, to result in a judgment that plaintiff, Williams, was entitled to one-fourth of all the real estate described in the judgment, being the lands then owned by Thomas T. Woodruff which had at one time been the property of James M. Rice or the property of Smith, embraced in the deed of trust to Rice; and for the sum of \$48,244.60, being one-fourth of the rents and profits collected by defendant from said property. Defendant acquired title to all the lands which had at one time been the property of decedent, Rice, either by deeds direct from Mr. John, T. Dewey Woodruff, or from Mrs. Wallace, less such portions as had been sold at administrator's sale, or by the parties above named to other individuals. So that in 1885 Woodruff had the record title to all of such property, with the exceptions above noted. Much of this property was situate in or near the town of La Junta, which, at the time of the close of the administration, was a hamlet struggling for existence. Subsequently a railroad built some shops and hospitals there, and made it the end of the division, causing it to be a somewhat prosperous railroad town. It also became the county seat of Otero county. During the period between the time when Woodruff obtained the deeds to this property, and the commencement of this action, for the purpose of increasing the value of the La Junta property, he donated to the town of La Junta about \$18,000 for a public library, and about \$2,000 to the public schools. He also constructed a public drinking fountain upon a portion of the property, and devoted some money toward the creation of a park in front of part of this property. At Trinidad he expended \$5,467 for a public library, founded a kindergarden, and devoted some money to railroad surveys. All of which was done for the purpose of promoting the welfare of the towns, and incidentally increasing the value of this property. The money so expended amounted to

upwards of \$28,000. In the accounting which was had in this case no allowance was made to defendant for any of these expenditures. In addition to this outlay of money, the defendant improved the property by extensive buildings, one of which cost upwards of \$16,000, and others less amounts. The defendant devoted practically all of his time from 1882 until 1902 to the promotion, welfare, and development of the communities in which this property was situate. At the time of the death of Mr. Rice, plaintiff, Williams, was 22 years of age. She was residing with her aunt, Mrs. Wallace, and continued to reside there until her marriage to Mr. Williams in February, 1892. Soon after the death of Mr. Rice, Mrs. Williams learned that he had left an estate. About a month after his death she learned that she was one of the devisees, and that Thomas T. Woodruff was named as one of the executors. She knew that Woodruff had gone to Colorado to settle the estate. She never wrote to the clerk or the judge of any court at Trinidad concerning the administration of the estate. She never visited either Las Animas, Bent, or Otero counties to investigate her interests in the estate. She never made any inquiry of defendant, Woodruff, as to the administration of the estate, did not write him concerning same, and did not send any one to him to make such inquiries. She was entirely under Mrs. Wallace's care and protection from December, 1878, until her marriage. Her relations with Mrs. Wallace then and since her marriage have been friendly. She never made any inquiry of Mrs. Wallace or either of her other aunts. She says that she first learned of the alleged misconduct of defendant, concerning her interest in the estate, in 1891, when the law firm of Mahin & Johnson reported the same to her. She first consulted with her husband about investigating the affairs of her uncle's estate and protecting her interests, in September, 1891, after the visit of Mahin & Johnson. She frequently saw defendant, Woodruff, at her aunt's home, both before and after he took charge of the estate. She never conversed with him upon the subject of the estate, or any business matters. She talked with Mrs. Walker concerning the administration of the estate. She knew that her aunt, Mrs. Billings, who was a creditor of the estate, received but 52 cents on the dollar of the amount of her claims, and that the rest of the creditors received the same amount. She knew that her aunt, Mrs. Wallace, was a creditor of the estate, and thought that the amount of the claim was \$5,000. She knew that Mrs. Wallace and Woodruff were in constant communication by letter. She states in her testimony that she did not know that the estate of James M. Rice was being administered in the county court of the county of Adams, state of Illinois, and in the circuit court of the county of Lee, state of

Iowa; yet the transcript of the record of the administration of the estate in Adams county, Ill., wherein Mrs. Wallace was executrix, shows that this plaintiff and her husband entered their appearance in answer to a certain petition, and consented that an order be made for the sale of certain property; and also that, in the administration of the estate of Joel M. Rice, father of James M. Rice, which occurred in the county of Lee, state of Iowa, in a certain proceeding, wherein Mrs. Williams was made defendant, it appeared that she was duly served with a process in an action to collect \$12,000 against the estate of James M. Rice.

Charles E. Gast, for appellant. J. N. Carter, A. C. McChesney, and Govert, Page & Govert, for appellee.

BAILEY, J. (after stating the facts). In the complaint as originally filed, and upon which the demurrer was based, it was alleged that the administration of the estate of James M. Rice in Colorado was closed in 1801, instead of 1881. The demurrer interposed was that the action was barred by reason of the statute of limitations. Upon the allegations of the complaint, the court found that the action was not barred. See *French v. Woodruff*, 25 Colo. 339, 54 Pac. 1015, wherein will also be found a complete statement of the allegations of the complaint. The question of laches was raised in the argument upon that demurrer, and while the court determined that that question must be raised by answer, in the opinion it is stated that from the case as made by the complaint, it did not appear that the plaintiff was guilty of laches. However, as we shall presently discover, it appears from the evidence produced at the trial that plaintiff has slept upon her rights to such an extent as will bar a recovery. Courts of equity will not interfere if a party slumbers on his rights or the means of detecting a fraud. *Pipe v. Smith*, 5 Colo. 146; *Angell on Limitations*, § 190; *Young v. Cook*, 30 Miss. 330; *Johnson v. Johnson*, 5 Ala. 103; *Veazle v. Williams*, 3 Story, 612, Fed. Cas. No. 16,907; *McLure v. Ashby*, 7 Rich. Eq. (S. C.) 440. The laws assist those who are vigilant, not those who sleep over their rights. To avoid the force and show the inapplicability of the doctrine of laches to the case at bar, the plaintiff relies upon *Platt v. Longworth's Devises*, 27 Ohio St. 159; *Riddle v. Roll*, 24 Ohio St. 572; *McCormick v. Ocean City Ass'n* (N. J.) 18 Atl. 112; *Lewis v. Welch*, 47 Minn. 193, 48 N. W. 608, 49 N. W. 605; *Nobles v. Hogg*, 36 S. C. 322, 15 S. E. 359; and *Warren v. Adams*, 19 Colo. 515, 36 Pac. 604. In her brief she says that it has already been determined by this court, in this action, that plaintiff was not guilty of laches. *French v. Woodruff*, 25 Colo. 339, 54 Pac. 1015. It will be remembered that when the case was here before it was upon demurrer, and this court held that laches was not a ground of demurrer; that when the point is raised by de-

fendant, the usual and proper method is by answer, but, because it was urged by both parties, the court expressed an opinion concerning the laches of the plaintiff as shown by the complaint; the language of the court being as follows: "Though a cause of action be not barred by some statute, a court of equity may refuse to entertain a stale claim, or give relief, where the plaintiff once had a meritorious demand, if he has unreasonably slept upon his rights. Whether laches will be imputed depends largely upon the facts and circumstances of each case. Where the rights of innocent purchasers are involved, or the subject-matter of the controversy is materially changed, and in various other circumstances not necessary to specify, a strict rule may be enforced; but where, as in the case at bar, the defendant still retains, in his own name, title to a large part of the trust property he is charged with having bought, and the delay, in part, at least, is due to concealment of the wrongful acts by the defendant, and full relief, so far as the plaintiffs are entitled to anything, may be administered without injury to innocent third parties, a more liberal rule should be applied. Under the facts of this case, as alleged in the complaint, we think the plaintiffs are entitled to maintain their action." As will be shown hereafter, the facts, as they developed on the trial, so far as any concealment by the trustee, and so far as a necessity for diligence upon the part of the cestui que trust is concerned, are materially different from those alleged in the complaint. The plaintiff claims in her brief that she could have done nothing at an earlier period, toward the recovery of the property in the hands of Woodruff, because, by the very terms of the trust, he was to hold it during the period of 10 years; that the question of the alleged laches of the plaintiff is one that concerns only plaintiff and defendant; the rights of no third parties having intervened; that inasmuch as this is an express trust, laches is not imputable to the cestui que trust; and that the failure of Woodruff to inform plaintiff of the condition of the estate, or that he had directly purchased the property, amounted to a concealment of the alleged fraud. After reviewing such of the cases cited by the appellee as we have access to, we shall then consider these contentions as to why the doctrine of laches should not be applied against her.

The case of *Platt et al. v. Longworth's Devises*, 27 Ohio St. 159, is one in which the alleged wrongful actions of the administrator were similar to those charged against the defendant in this case. In that action, at the administrator's sale certain property was purchased in the name of certain of the relatives of the administrator with money furnished by the administrator, and subsequently the property was conveyed by the purchaser to the administrator. It was determined by a divided court that the heirs could main-

tain an action for the recovery of this real estate after a period of time from the purchase of the property, exceeding that which has elapsed in the case at bar; and at first glance it seems to be an authority for the maintaining of this action. The action was commenced on the 11th day of March, 1850. The real estate had been sold by the administrator, and was reconveyed to him on the 17th day of December, 1834, but final settlement of the estate was not made until 1846; so that the case differs from the one at bar in this, that the defendant was still the administrator at the time when the real estate was reconveyed to him, and the action was commenced about four years after the settlement of the estate. Here the action was commenced 13 years after the settlement of the estate, and the property was not conveyed to the defendant until after the estate was settled. In the Piatt Case it is alleged in the bill that the heirs had no knowledge of the fraudulent transactions until within eight months before filing the same. As we have seen, the estate was not settled and the administrator discharged until four years previous to the commencement of the action. The decision of the Supreme Court of Ohio seems to be based upon the theory that the administrator was a trustee of an express trust, and that the holding of the property purchased by him will not be deemed adverse while the fiduciary relations continue, unless distinctly disavowed. Here, as we view the matter, defendant's disavowal of the trust commenced with the settlement of the estate in 1881, and this was brought to the knowledge of the plaintiff by the failure of the trustee to pay the semiannual interest as provided in the will. In the Ohio case it does not appear that there was anything which should have called the attention of the heirs to the violation of the trust by the administrator. There was nothing to put them upon their inquiry. At least, in the opinion there is nothing to show that that point was considered by the court; neither does it appear to be argued in the brief of the administrator, which is published with the opinion. So the Ohio case is not in point, because the action was brought within four years from the time of the settlement of the estate, and the heirs had no information which would put them upon their inquiry until such time.

The case of Riddle and Parker v. Roll, 24 Ohio St. 572, relied upon by plaintiff, is not in point, for the reason that in that case the doctrine of laches was not considered. One of the heirs was a minor at the time of the commencement of the action, and time would not run against him until he attained his majority. It was determined in that case that the saving of the rights of the minor necessarily saved the rights of the balance of the heirs.

McCormick v. Ocean City Ass'n (N. J.) 18 Atl. 112, also cited by the plaintiff, does not

appear to be material, for the reason that the question of the laches or indifference of claimants was not raised or passed upon. The staleness of the claim is not mentioned. The case deals entirely with the question of a purchase by a trustee inuring to the benefit of the cestui que trust.

Lewis v. Welch, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665, is also relied upon by the plaintiff upon the question of laches. In that case the court spoke as follows: "It is, however, argued that the right of the plaintiffs to have the purchase by the defendant adjudged to be in trust is barred by lapse of time. Upon the facts as established by the findings of the court, its conclusion upon this point should be sustained. It will be borne in mind that the title still remains in the defendant. Rights of innocent purchasers have not intervened. The land has remained vacant and unoccupied. In order that a right of action be barred by laches there should be knowledge or notice which should prompt to inquiry concerning the facts upon which a right of action rests, or there should be some neglect of duty or of self-interest, to which want of knowledge may be attributable." It is also said: "The plaintiffs have not resided in this state since 1865, and they had no actual notice or knowledge of any of the proceedings for administration or for the foreclosure, nor of any of the defendant's acts until six months prior to the commencement of this action."

From this statement it will be seen that the case is not in point. There, according to the findings of the court, the plaintiffs had no knowledge of the administration proceedings nor of the foreclosure proceedings, nor of any of the actions of the defendant. There was nothing to put them on their notice; nothing to put them upon inquiry. There, also, the property remained in the same condition, at the time of the commencement of the action, that it was at the time of the purchase made by the administrator. Here, as we have seen, the defendant has expended a fortune in the improvement of the property and in the development of the resources of the country round about, in building schools and establishing public libraries. He devoted the better part of a strenuous life to the enhancement of the value of this property, while the plaintiff, with sufficient information to put her upon her inquiry and her notice, and knowing that she was not receiving the interest which the will of her uncle provided that she should receive, rests content until the property is made valuable, and then institutes an action to receive the benefits of the labors of another, which would not have been expended in this behalf but because of her inertia.

Nobles v. Hogg, 36 S. C. 322, 15 S. E. 359, cited by plaintiff, is not in point. In that case the defendant held in his hands as trustee certain moneys belonging to plaintiff, upon which he should have paid interest

annually. He failed to do this for more than 20 years. He acknowledged that he had received the money for her use and benefit.

He acknowledged that he had not paid it, nor the interest. He did not claim to hold the money adversely to the cestui que trust. The court said: "In this case the trustee admits he has not paid the interest, but nowhere introduces proof as to any adverse holding. It does not appear that his cestui que trust was ever informed that he held the moneys collected by him in 1854." The admission of the defendant was that he never paid the claim "in any way, shape, or form." We fail to see how the last statement of facts and the opinion given therein can be applicable to the facts here. In that case the trust was not repudiated; the defendant satisfying himself by saying, in effect: "It is true that I never paid anything and I owe the money, but I should not pay it, because it has been in my hands for more than 20 years."

Plaintiff also cites the case of *Warren v. Adams*, 19 Colo. 515, 36 Pac. 604. There the inaction was excused because the claimant was afflicted with a phase of insanity known as amnesia, or loss of memory. Consequently, the doctrine of laches did not apply. No excuse of that sort having been made in this case, *Warren v. Adams* has no application here.

The presumption is that if a party affected by any fraudulent transaction or management might, with ordinary care or attention, have seasonably detected it, he seasonably had actual knowledge of it. Full possession of the means of detecting fraud is the same as actual knowledge. *Pipe v. Smith*, 5 Colo. 146; *Farnham v. Brooks*, 9 Pick. (Mass.) 212; *Angell on Limitations*, § 187. "The statute of limitations, therefore, shuts the doors of the courts against a party unless he brings his suit within the prescribed time, although his claim is still due, and good faith would require its payment. And when he would take advantage of the exception which gives him a further time in case the cause of action has been fraudulently concealed from him, yet, if he had the means of discovering the fact, his want of knowledge is to be attributed to his own want of vigilance, and not to concealment by others." *Nudd v. Hamblin*, 8 Allen (Mass.) 130. Whatever is notice enough to put an interested party upon inquiry is generally regarded as good notice of all those matters which an inquiry prosecuted with reasonable diligence would have disclosed. *Allen v. Moore*, 30 Colo. 307, 70 Pac. 682; *Yates v. Hurd*, 8 Colo. 343, 8 Pac. 575; *Filmore v. Reithman*, 6 Colo. 120. "It is the well-established principle that whatever is notice enough to excite attention, and put the party upon his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." *Kennedy*

*v. Green*, 3 My. & K. 719; *Carr v. Hilton*, 1 Curt. 390, Fed. Cas. No. 2,437. "It will not do to remain willfully ignorant of a thing readily ascertainable." *McQuiddy v. Ware*, 20 Wall. 14, 22 L.Ed. 311.

Judged by these rules, Mrs. Williams had, or might have had, full knowledge of the transaction at any time during 13 years previous to the commencement of her action. She had knowledge that the final settlement of the estate was made in 1881, and that it was found to be insolvent. She knew that her aunt received but 52 cents on the dollar of the amount of her claim against the estate. She had knowledge that her aunt, Mrs. Wallace, was in constant communication with the defendant. Defendant frequently visited at the home of Mrs. Wallace, which was the abiding place of the plaintiff until her marriage. She knew that she was one of the legatees under the will, and that she was entitled to interest upon her legacy each six months. She knew that she received no interest during any of the periods for the 13 years. She might, with little effort, by writing to the judge or clerk of the county court, or by inquiring of her aunt, Mrs. Wallace, have discovered that a large portion of this estate had been purchased by Mrs. Wallace, and another large portion by T. Dewey Woodruff. She might, by making inquiry at the office of the clerk and recorder, have discovered that this property was all subsequently conveyed to the defendant. All the means of discovering the fraud, if fraud there was, which we do not determine, which she possessed in 1894, were at her hand at all times after the settlement of the estate in 1881. For 13 years she supinely waited until this property became valuable and her attention was called to the fact by lawyers who were desirous of taking the case, and then, after about three years, she instituted these proceedings. It will be observed that, during the long period over which the transaction referred to extended, the plaintiff never made or caused to be made the slightest inquiry in relation to any of them. It could not have been difficult to ascertain that this property, concerning which it is said the defendant was a trustee, had been acquired by the trustee in his own name. If he held it in trust for the plaintiff, as alleged, ordinary diligence could not have failed to find the clue which in every case would lead to evidence not to be resisted. With the strongest motives for action, the plaintiff was supine. If the transaction was fraudulent as she alleges, she did nothing to unearth it. It was her duty to make the effort. She had the right to know that the estate had at one time been possessed of this real estate. She never made the slightest inquiry, either in person or by letter, or caused any inquiry to be made as to what had become of this property. Knowing that she was a residuary legatee, and knowing that the claim was

made that there was no residue, she had notice enough to excite her attention, and, having notice sufficient to put her on her guard and call for inquiry, she had notice of everything to which such inquiry might have led. *Canty v. Green*, 3 Mylne & K. 732; *Angell on Limitations*, § 187; *Norris v. Haggin*, 12 Sawy. 53, 28 Fed. 275.

It is not disputed that the inventories, appraisement bills, petitions for sale, and reports of sale gave full information as to the existence of this property; that it was sold by the executor; and that the records of Las Animas, Bent, and Otero counties show that portions of it eventually passed into the hands of this defendant. If it is contended that the records are only a constructive notice to subsequent purchasers and incumbrancers, and are not such to other parties, for the purpose of this case, this may be taken as true, but this controversy hinges not upon the question of constructive notice. It is a question of the diligence of the party—whether she has exercised due diligence in ascertaining, or endeavoring to ascertain, her rights and pursuing her remedy. In this state, as well as in all others, the statutes provide for the recording of instruments of conveyance. A storehouse of information is here provided by law, open to every person. These laws, like all others, are presumed to be known to all who are affected by them, and, as a matter of fact, they are known to all citizens having the slightest degree of intelligence. At the time of the commencement of these transactions, this woman was 22 years of age, possessed of good education, and she apparently moved with intelligent people. Her aunt, with whom she lived, was in constant correspondence with at least two lawyers; so it cannot be said that she was ignorant of the means by which she could have determined or ascertained the facts which are relied upon as showing a violation of his trust. Being possessed of the means, it was her duty to prosecute inquiry with reasonable diligence unless she was lulled to sleep by some active deception, misrepresentation, or fraud of this defendant or his emissaries. No claim of that kind is made. Although the plaintiff and defendant frequently met, she was silent concerning her alleged rights, and he was silent concerning them. In cases of this character, failure to give notice does not constitute fraud. There must be a suppression of the facts from which knowledge may be obtained, or a deception as to the actual conditions, or a misrepresentation of the facts, none of which appear to have existed here.

It is not claimed that the notices necessary to be given by the executor of his intention to sell real estate, or of his intention to make final settlement of the estate, were fraudulently suppressed, or that they were not published according to law. The plaintiff excuses herself because she resided in Illinois and, while the papers published in Trinidad

were sometimes sent to her aunt's house, she never read them. In the *Case of Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599, it is said that if this excuse could prevail. It would unsettle all proceedings in rem, and confusion would be the result. There is no pretense that the facts constituting the alleged fraud were shrouded in concealment. The plaintiff rests her case upon the allegation that she had no knowledge or information regarding the making and executing of any of the several deeds referred to in her petition, by which the title to this property became vested in defendant, until September, 1891, but, as we understand the complaint and the record, there is nothing to show that by any act of the defendant this knowledge was kept from the plaintiff, nor that the plaintiff could not have become fully advised as to all of the facts.

In the case of *Manning v. San Jacinto Tin Co.*, 7 Sawy. 430, 9 Fed. 726, the allegations of the bill were: "That your orator never heard of the various actings and doings hereinbefore \* \* \* set forth, or any of them, until within two years last past." This is held not sufficient because no reason is given for not discovering the fraud; the court saying that there should certainly be some showing on this point, in view of the public and notorious acts alleged. In the case at bar, the allegation of the bill is: "Your orators further represent and charge that your orators, Sarah B. French and Elizabeth L. Williams, had no knowledge or information regarding the making and executing of any of said deeds \* \* \* and had no knowledge or information that the title to the lands owned by the said James M. Rice, deceased, at the time of his death, or in which he had any interest, and hereinbefore described, had been by means of said deeds or otherwise, attempted to be transferred, or transferred, from the estate of said James M. Rice, deceased, to any in the said Thomas T. Woodruff, and had no knowledge or information that the said Thomas T. Woodruff claimed title to the lands hereinbefore last described, adverse to the estate of the said James M. Rice, deceased, or adverse to your orators, and the other heirs and devisees of the said James M. Rice, deceased, until after the 1st day of September, 1891." It will be observed that here, as in the case last cited, no reason is given for not discovering the fraud. The proof in this particular does not aid the bill; the plaintiff contenting herself by saying that she knew nothing of the facts, and that she made no inquiry for the purpose of ascertaining them, relying upon the proposition that it was respondent's duty to inform her that he was endeavoring to defraud her and the other heirs.

Appellee contends that the case of *Swift v. Smith*, 79 Fed. 709, 25 C. C. A. 154, is not in point, for the reason that the land there in question had increased in value from \$250, at the time of the void administrator's sale,

to \$25,000, at the time the suit was brought, and had passed through many different hands, and had been improved. In that case the learned judge did not base his decision upon the ground that the property had passed into the hands of innocent third parties, because, he says: "Conceding, but not deciding, that the records of the deeds to and from Nye, the administrator, were notice to all parties claiming under him that he originally held the title in trust for the appellant, and that the decree of sale of the probate court was void, the appellant presents no case here which entitles her to relief in equity against a purchaser who paid \$25,000 for the title to this land more than 20 years after these deeds were recorded, on the faith of the conveyances of the administrator and the appellant's silent abandonment of the property." The court clearly intimates that the decision was based solely upon acquiescence and laches of the plaintiff. "Counsel for the appellant invoke the principle that there can be no acquiescence and no laches where there is no knowledge, and contend that, since the appellant did not know that she had any interest in these lots until 1891, she cannot be charged with laches in asserting her rights." In the case at bar, as we understand the position of appellee, it is that she could not be charged with acquiescence or laches because she did not know that this property had been purchased by the executor. The learned judge then proceeds to say: "Ignorance which is the effect of inexcusable negligence is no excuse for laches, and knowledge of facts and circumstances which would put a person of ordinary prudence and diligence on inquiry is, in the eyes of the law, equivalent to a knowledge of all the facts which a reasonably diligent inquiry would disclose. Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient knowledge to lead him to a fact, he shall be deemed conversant with it \* \* \*

This principle measures the knowledge which the law imputes to those who are charged with laches." After citing numerous authorities to the above proposition, the court then adverts to the facts as follows: "When the appellant became of age, in 1871, she had met and was acquainted with John A. Nye, who had been the administrator of her father's estate. [In the case at bar, appellee was 22 years of age at the time of her uncle's death, and was then personally acquainted with the executor.] She had lived for 10 years (from the age of 4 to the age of 14 years) in the same town, and for 4 years in the same house with her grandfather, who had been her guardian and had received \$1,000 from this administrator for her benefit. [Here, the appellee resided with her aunt, who was in constant communication with the executor. She knew of the death of her uncle, of the appointment of the executor, of the existence

of the will, and that she was a legatee.] She knew that her father had lived and died in Pueblo county, in the state of Colorado; that he owned some property in that state; and that Nye had been the administrator of his estate. If these facts were not sufficient to excite attention and call for inquiry as to the property of this estate left unsold or improperly sold by the administrator, we are at a loss to know what facts would have been sufficient. The least investigation in the natural and usual place to make such an inquiry would have led unerringly to a discovery in 1871 of all the facts which the husband of appellant learned of his own accord, and brought to her attention in 1891, without any inquiry on her part." So here, if the facts of which the appellee was conversant were not sufficient to put her upon her inquiry, it is difficult to determine what facts would be sufficient. The least investigation in the natural and usual place to make such an inquiry would have led unerringly to a discovery, at the time of the filing of the deeds to Woodruff, of all the facts which plaintiff says counsel advised her in 1891. The court then proceeds: "She was not the victim of any actual fraud or of any concealment. All the facts upon which she now relies were spread upon the records of the probate court of Pueblo county, and upon the records of the register of deeds at Denver, in 1871, open and ready for her inspection. The natural place to inquire for property of the estate of Russell, when she knew that he had lived and died in Pueblo county, in the state of Colorado, was in the probate court of that county. An inquiry would have disclosed a sufficient description of these lots and their location, both in the inventory of her father's estate, and in the account of the administrator, to have led to a discovery of their occupation by Brown, and of the record of the deeds of them in the register's office at Denver. Under the principle of law to which we have referred, the appellant must be charged with knowledge of all the facts on which this suit is founded, because she knew facts sufficient to put a person of ordinary prudence and sagacity upon inquiry which would have led inevitably to a knowledge of those facts, if it had been pursued with reasonable diligence."

In principle we can see but little difference between the case of Swift v. Smith and this one. While it is true that in that case the property had changed hands and was no longer in the possession of the executor, and in this case it is in the possession of the executor, yet in that case it is conceded that the owners of the property took it with notice of the defects of the title. The case is determined squarely upon the facts which should have put the plaintiff therein upon her inquiry, and which are similar to the facts here. There the property was originally worth \$250. It grew to be worth \$25,000. Here, the property was originally worth but

a few thousand dollars, and it grew to be worth many times that amount; the cash judgment alone being \$48,000. There, the property had been improved. Here, the property has been improved, and here, in addition to the improvements, the appellant has expended \$23,000 for the enhancement of the value of this property.

If one with sufficient notice or means of knowledge of his rights and of all of the material circumstances of the cases lies by for a considerable time and knowingly and deliberately permits another to deal with property or incur expense under the belief that this transaction has been recognized, or freely and advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity. 2 Herman on Estoppel and Res Judicata, § 1063. It is a familiar principle that courts of equity will only grant relief in cases in which the application therefor is made promptly and without unreasonable delay, whatever may be the merits of the controversy. Laches and neglect ought forever to be discouraged. There is in chancery always a limitation. Nothing will bring a court of equity into action but pure equity and a reasonable diligence. The strongest equity may be forfeited by laches or abandoned by acquiescence. Nothing can call forth an equity court into activity but conscience, good faith, and reasonable diligence. Where these are lacking the court is passive, and does nothing. Laches and neglect are always discountenanced. *Great Western Min. Co. v. Woodmas of Alston Min. Co. et al.*, 14 Colo. 91, 23 Pac. 908; *Peebles v. Reading*, 8 Serg. & R. (Pa.) 493; *Sullivan v. R. R. Co.*, 94 U. S. 811, 24 L. Ed. 324; *Smith v. Clay*, 2 Amb. 645. It is true, as a general rule, that when, in case of an express trust, the relation of trustee and cestui que trust is admitted to exist, and there is no assertion of adverse claim or ownership by the trustee, lapse of time can constitute no bar to relief, but, where the trust relation is repudiated, or the acts of the parties, or other circumstances, give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief on the ground of lapse of time. The fraud must be one that is secret and concealed, and not one that is patent and known. The presumption is that if a party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it. *De Mares v. Gilpin*, 15 Colo. 76, 24 Pac. 568.

Measured by this rule, the plaintiff was at fault. Having failed to receive her installment of interest each 6 months for 13 years, she had notice that the defendant had repudiated the trust, if any existed, and it was then her duty to make such investigation as would advise her of the full situation. Having had

notice enough to excite her attention, she had notice of everything to which it is subsequently found that such inquiry might have led, and this inquiry, if any had been made, would have led to the information that this property, which had at one time belonged to the estate, was now held by the defendant, claimed by him as his own property, and dealt with by him as such. But it is said that it was the duty of the defendant to inform the plaintiff that there was nothing for her, and that, having failed to inform her how he was dealing with the property, he is guilty of having concealed it from her. This is not the law as we understand it. It was her business to inquire as to what had become of this property. Slight inquiry would have informed her as to the full situation. "Concealment by silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry." *De Mares v. Gilpin*, 15 Colo. 76, 24 Pac. 568; *Wood v. Carpenter*, 101 U. S. 143, 25 L. Ed. 807. There is no proof of anything of that sort here. The order of the county court to sell the Smith-Rice note was made in April, 1881, and the entry showing the sale of the note was made in June, 1881. This was a matter of record. On July 20, 1881, the deeds from defendant to Mrs. Wallace and from Mrs. Wallace to T. Dewey Woodruff, of the Bent county lands, were recorded. On July 26, 1881, the deeds between the same parties as to the Las Animas county lands were recorded. On September 23, 1881, the deed from John to defendant for the Trinidad lots was recorded. On September 30, 1881, the deed from John to T. Dewey Woodruff, covering the lands sold by Collins, trustee, was recorded. On the same date the power of attorney from T. Dewey Woodruff to T. T. Woodruff was recorded. On March 30, 1882, petition to sell real estate in Adams county, Ill., was instituted, and plaintiff, Williams, appeared and filed her answer. In October, 1883, the deed from T. Dewey Woodruff and Mrs. Wallace to T. T. Woodruff, of the Las Animas county lands, was recorded. In March, 1885, deed from T. Dewey Woodruff to defendant for the Las Animas county lands was recorded. In March, 1885, deeds were recorded in Las Animas and Bent counties, showing transfers from T. Dewey Woodruff to Mrs. Wallace, and from her to defendant. In December, 1885, defendant deeded to F. T. Moore an undivided half interest in certain lands. In 1887 defendant sold certain lots to the La Junta Town Company. In 1890 he made a declaration of trust of the Highland addition to the people of La Junta. So it appears that there was no effort upon the part of defendant to conceal any of these proceedings. The deeds were promptly recorded and notice thereby promptly given to all the world that he was treating this property as his own. There was an absolute lack of any reasonable diligence or any diligence whatever on

the part of plaintiff to discover these transactions. She could have discovered all these matters by simply writing to the court at Trinidad, and to the recorders of the several counties. Having had the means, she must be presumed to have had the knowledge itself. "Reasonable diligence is always necessary to incite the activity of a court of equity. The strongest equity may be forfeited by laches or abandoned by acquiescence." *McLaughlin v. Thompson*, 2 Colo. App. 140, 29 Pac. 817.

It is said in *Warren v. Adams*, 19 Colo. 526, 36 Pac. 608: "An essential element in a case to constitute laches is that the party whose delay is in question shall have been blamable therefor in the contemplation of equity; that he ought to have moved before, if he desired the peculiar and discretionary relief which courts of equity afford. There must, therefore, have been knowledge, actual or imputable, of the facts, which should have prompted a choice either to diligently seek equitable relief or thereafter to be content with such remedies as a court of law might afford." In this case, if the plaintiff did not have actual knowledge, she at least had imputable knowledge of the facts. Having knowledge that the estate was treated as insolvent, and failing and neglecting to make any of the numerous inquiries which would have put her in possession of all the circumstances, she will be deemed to have slept upon her rights, and cannot now be afforded relief.

In the case of *Bateman v. Reitler*, 19 Colo. 553, 36 Pac. 551, it is said: "If she was entitled to the portion owned by Robert Standing at the time of his demise, she should have set up such claim; instead of doing this she waited nearly four years after the confirmation of the sale before asserting such claim. In the meantime a portion of the property had been deeded by the purchasers, and third parties had paid out large sums upon the faith of the order of the court. During all this time, the purchasers had been in possession, presumably paying taxes upon the property, or otherwise it would have been sold for taxes. In this new country the value of city property fluctuates continually, and parties claiming title thereto cannot be allowed, with full information, to remain silent for years, while interested parties invest on the strength of a title apparently perfect. To allow plaintiffs in error to maintain this suit would be a manifest injustice and a fraud upon the rights of the defendants. By a familiar principle, a party who is guilty of laches or unreasonable delay in asserting his rights must be denied equitable relief." In the case before the court, instead of waiting four years, as in the *Bateman v. Reitler* Case, the plaintiff saw fit to wait for 13 years, during which time she had permitted the defendant to treat this property as his own. He had donated to the public, in a manner which he considered would in-

ure to the benefit of this property, upwards of \$28,000. He had erected valuable improvements upon the property. He devoted the energies of the best years of his life to the upbuilding of the communities in which this property was situate, so as to make it valuable.

What is said in the case last cited as to the fluctuating value of property in this new country is peculiarly applicable to this case. For instance, about the time that Mr. Woodruff was appointed executor, Mrs. French, one of the original plaintiffs in this action and an aunt of plaintiff, Williams, wrote to certain citizens of Trinidad as to the value of this estate. They informed her that the entire property was worth but a few thousand dollars; that the lands known as the "Powell Canon Lands," being the same lands which were sold under the Hill trust deed, were worth from \$1.25 to \$2.50 per acre; yet we find sometime later that defendant sold a portion of these lands for \$100 per acre, and it is said that, at the time of the trial of this case, they were again of but nominal value. So with the lands in Trinidad and in La Junta. Some years the prospects were bright, and the lands would be worth considerable money. Other years there would be no market for them, and they would be of but little value. This is but the experience of nearly all new communities. Plaintiff may not sit by and watch the defendant treat the property as his own, sell it, exchange it, improve it, and expend his money for public improvement to enhance the value of the property until it becomes extremely valuable, and then say it belongs to her and his labor was vain. Having failed to speak when equity demanded that she should, she cannot now be heard when conscience demands that she be silent. True, she claims that she did not have knowledge of these things, but she had the means of knowledge, and, having had the means of knowledge, she will be considered as having had the knowledge itself.

In *Hagerman v. Bates*, 5 Colo. App. 402, 38 Pac. 1104, Judge Bissell says: "When the foundations of our system of equity jurisprudence were first laid by the learned lawyers and the wise judges who were its authors, it was declared that whenever a party invoked the extraordinary powers of a court of equity to compel the specific performance of a contract, he must proceed with both diligence and promptness. The absence of this diligence has long since become crystallized in the legal term 'laches,' which is incapable of an exact definition, and dependent upon neither the lapse of time nor the force of those statutes which, in actions at law, determine generally the plaintiff's right. The defense of laches is in no sense dependent upon the statute of limitations. The lapse of time and the staleness of the claim are undoubtedly the governing considerations which control the application of this rule, but the parties are always held bound to

proceed with reasonable diligence in the enforcement of their rights." Then, after reciting the facts, the court further says: "It may be truthfully said that for eight mortal years the plaintiffs failed to prosecute their action. There was a most notable absence of that 'conscience, good faith, and reasonable diligence,' which courts of equity always require." It is true that this case was reversed in 24 Colo. 72, 49 Pac. 139, by this court, but the soundness of the doctrines of law as announced in the Court of Appeals was not disputed. The court found that there were sufficient facts to excuse the delay of plaintiffs in that action, and the case was reversed, not because of any error in the law announced by Judge Bissell, but because it was found that the delay was occasioned by matters which rendered the plaintiff excusable. No excuse is offered in this case except, forsooth, that the defendant had not advised the plaintiff as to his actions.

Whatever may be said as to the moral obligation resting upon the defendant, there was still a legal obligation resting upon the plaintiff, whereby it was her duty to take some independent action for the purpose of supplying herself with such information as would lead her to a full knowledge of the facts. The plaintiff, knowing that she was a devisee under the will, and learning that the estates of Rice in Iowa and Illinois were insolvent, and knowing that defendant was engaged in the settlement of the estate in Colorado, and that the estate here was insolvent, had sufficient knowledge to put her upon her inquiry to determine or discover what had become of this property. The slightest effort would have led her to the true situation. It was only necessary for her to inquire of her aunt, under whose roof she was then sleeping, to learn all that she could have learned at the time of the commencement of this action. "No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of state titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and larger possessor security, and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years." *Naddo v. Bardon*, 51 Fed. 493, 2 C. C. A. 335. "The term 'laches' in its broad legal sense, as interpreted by courts of equity, signifies such unreasonable delay in the assertion of and attempted securing of equitable rights as should constitute, in equity and good conscience, a bar to recovery. \* \* \* A learned judge has aptly and beautifully said that this power, as exercised by the courts of equity, is well symbolized by

the emblem of Time, 'who is depicted as carrying a scythe and an hourglass, that, while with one he cuts down the evidence which might protect innocence, with the other he metes out the period when innocence can no longer be assailed.' No specific limit of time can be fixed within which the doctrine may be successfully invoked in courts of equity. It is not essential that such time should have elapsed as to make the statute of limitations effective. \* \* \* A delay which might have been of no consequence in an ordinary case may be amply sufficient to bar the title to relief, when the property is of a speculative character. \* \* \* If the property is of a speculative or precarious nature, it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage." *Graff v. Town Co.*, 12 Colo. App. 106, 54 Pac. 854; *Kerr on Fraud & Mistake*, 306; *Williams v. Rhodes*, 81 Ill. 571. "The question ordinarily is whether, during the period of delay, such changes have taken place in the position of parties, relative to the subject-matter of the litigation, as to render it inequitable to permit the enforcement of rights, concerning which otherwise there might be no difficulty. If, while the injured party is unnecessarily inactive \* \* \* the other party, on the faith of an apparent situation, the reality of which he had no reason to doubt, has so changed his position that, if existing conditions were disturbed, he would suffer injury, the delay is chargeable as laches, and, in equity the consequence of the laches is the loss of the remedy." *Du Bois v. Clark*, 12 Colo. App. 220, 55 Pac. 750.

Measured by this rule, we find that defendant, relying upon his own good faith and believing that this property was his own, expended his time, energy, and many thousands of dollars in the development of the section of country wherein the property was situate, with the purpose of making it valuable and his investment profitable. After he has succeeded in doing this and the plaintiff sat by silently for 13 years, during the progress of this development, she ought not now to be heard claiming that this money, labor, and energy were expended for her use and benefit. "The plaintiff has slept upon his alleged rights. His opponent has long been allowed to possess and enjoy the disputed property without complaint. The controversy has probably been settled. The evidence has been lost or obscured. The plaintiff has sought advantage by delay. His action is an experiment. There can be no justice or equity in his claim." *Dunne v. Stotesbury*, 16 Colo. 89, 26 Pac. 333.

In *Manning v. San Jacinto Tin Co.* (C. C.) 9 Fed. 737, it is said: "It must not be forgotten, not only that the world 'moves on,' but

that in this age and country and in this part of the country, it moves rapidly. Three years now, and especially in California, is longer, in events and progress, than 20 years some centuries ago, when the statutes of limitations were adopted in England. [The same is true in Colorado.] Parties cannot lie down to sleep upon their rights, and, on waking up many years after, find them in the same condition as that in which they were left. Even Rip Van Winkle, in a slower period and among a slower people, when aroused from his 20 years' slumbers in the recesses of the mountains, in the neighborhood of 'Sleepy Hollow,' found that the world had 'moved on.' \* \* \* If the open, known, notorious facts suggested in the bill, and apparent upon the records of the county, did not in fact put the complainant and his grantor upon inquiry, and lead them to a discovery of the frauds charged \* \* \* they must indeed have been grossly neglective of their own interests." The above remarks are especially applicable to the case at bar. The 13 years between the time when the plaintiff should have commenced to receive her semiannual interest, and the beginning of this suit, were big with progress in the counties in which this property was located. The world moved on in that locality: the repudiation of the trust, if there was a trust, was sufficiently open and notorious to put this plaintiff on notice: and she could not indulge in a Rip Van Winklian Slumber during the 13 years and then expect to wake up and find matters in the same condition in which they were left. "The law of laches, like the principle of limitation of actions, was dictated by experience, and is founded in a salutary policy. \* \* \* The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society. A departure from it would open an inlet to the evils intended to be excluded." *Brown v. County of Buena Vista*, 95 U. S. 157, 24 L. Ed. 422.

In the case of *Young v. Cook*, 30 Miss. 332, the court says: "It may be said, however, that Shotwell was, under the will, a trustee, and that the statute does not run in such a case. This is true in regard to express trusts, and this may be deemed to be of that character. But it is only true so long as the character of trustee and cestui que trust exists. By the settlement made in March, 1845, both parties treated the trust as satisfied. The petition, however, says that the trustee divested himself of his character of trustee by fraudulent means. Admitting this to be true, the fraud, to avail the party, must have been such that he could not, by the use of reasonable diligence, have discovered it within the period prescribed by the statute. He could have made this discovery as well within one year after the commission of the fraud, by proper diligence, as in the time alleged in his petition." That is true in this case. Suppose that Woodruff was a trustee of an express trust when he made his final settlement with

the court in 1881 wherein he stated that the debts were still unpaid and there was nothing to satisfy specific legacies, and, of course, nothing for residuary legatees. He repudiated the trust. The plaintiff knew of the making of this report, or had the means of knowing it. Everything that she has learned since 1891 could as well have been learned many years previous to that time. Numerous cases have been decided by this court, where delay for a much less period than that fixed by the statute of limitations has been held to preclude the right of the party to bring the suit. In such cases, it is said, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, the prosecution of the suit; and no general rule can be laid down for the guide of the court in every case." *Kerr on Fraud & Mistake* (Bump's Ed.) 306; *Williams v. Rhodes*, 81 Ill. 571.

Conceding what is contended for by the counsel for plaintiff, that time does not run against an express trust, it must be borne in mind that this rule is subject to the qualification that when the trust is repudiated by clear and unequivocal words and acts of the trustee who claims to hold the trust property as his own, and such repudiation and claim are brought to the notice of the beneficiary in such a manner that he is called upon to assert his equitable rights, or he has sufficient information to put him upon his inquiry, time will begin to run from the date such repudiation and claim, or information which would have led to the discovery, came to the knowledge of the beneficiary. Again, it is said by another court: "It is true, as a general rule, that when the relation of trustee and cestui que trust is uniformly admitted to exist, and there is no assertion of adverse claim or ownership, lapse of time can constitute no bar to relief. But where the trust relation is repudiated, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties, or other circumstances give rise to presumptions unfavorable to its continuance—in all such cases, a court of equity will refuse relief on the ground of the lapse of time and its inability to do complete justice." *Nettles v. Nettles*, 67 Ala. 599.

In *Buckner and Stanton v. Calcote*, 28 Miss. 599, it is said: "In the present case, there was a lapse of about 11 years, according to the statements of the bill, before any efforts were made to investigate the alleged frauds, when, from their nature as stated, they were open to detection all this period of time. It would be dangerous and mischievous in the extreme to sanction a rule that would, under such circumstances, permit transactions so long acquiesced in and involving immense interests, not only to the parties directly implicated, but in all reasonable probability to innocent persons whose rights are connected with, or dependent upon them, to be set aside and annulled without

the clearest equity shown by the complainant, and the absence of all laches."

In the case of *Hammond v. Hopkins*, 143 U. S. 244, 12 Sup. Ct. 427, 36 L. Ed. 134, it appears that the trustee purchased, as charged here, through an intermediary at his own sale, and that court, through the Chief Justice, said: "Each case must necessarily be governed by its own circumstances, since though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like." *Marsh v. Whitmore*, 21 Wall. 178, 22 L. Ed. 482; *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219; *Norris v. Haggin*, 136 U. S. 386, 10 Sup. Ct. 942, 34 L. Ed. 424; *Mackall v. Casilear*, 137 U. S. 556, 11 Sup. Ct. 178, 34 L. Ed. 776; *Hanner v. Moulton*, 138 U. S. 486, 11 Sup. Ct. 408, 34 L. Ed. 1032.

It is claimed that because the plaintiff resided at a great distance from the scene of the transaction, she necessarily remained in ignorance of many of the facts which were open and notorious to the people residing in the vicinity. This will not avail her, because it has been determined that absence does not excuse laches. Absence of itself is no excuse. Travel and communication are easy. If she could not and did not care to go to the location of the property, she could easily have written and ascertained exactly what was being done with it, and with equal ease could have given notice of her claim. There cannot be one law of laches for the resident and another for the nonresident. *Naddo v. Bardon*, 51 Fed. 406, 2 C. C. A. 335. In the case of *Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599 it is said: "They do not pretend that the facts of the fraud were shrouded in concealment, but their plea is that they lived in a remote and secluded region, far from means of information, and never heard of Broderick's death or of the sale of his property, or of any events connected with the sale of his estate, until many years after these events had transpired. Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition and of the vicissitudes to which they are subject."

While it may be true that the defendant has dealt with this estate in a manner prohibited by law, upon which subject we express no opinion, yet, from the careful investigation which we have made of this re-

cord, we cannot find that the plaintiff is in a position to complain. The authorities cited in this opinion are enough, and more than enough, to prohibit us from granting her relief.

The judgment of the lower court will therefore be reversed, and the cause remanded, with instructions to dismiss the bill at plaintiff's cost.

Reversed.

GABBERT, C. J., and GODDARD, J., concur.

#### DOUGAL v. EBY et al.

(Supreme Court of Idaho. Feb. 7, 1906. On Rehearing. March 8, 1906.)

##### 1. APPEAL—REVIEW—RECORD.

Affidavits and papers that are not shown to have been presented to the court or judge thereof at the hearing on a motion to dissolve an injunction and appear from the judge's certificate not to have been used or considered by him on such hearing, cannot be considered by this court on appeal from an order made granting or denying such motion.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 32(3).]

##### 2. SAME—RULINGS ON EVIDENCE.

Where the trial court or judge thereof refuses to consider affidavits or other papers or evidence offered on the part of either plaintiff or defendant, exception to such ruling must be saved, and the rejected evidence must be incorporated in a bill of exceptions, or certified to by the judge as having been presented and rejected in order to be considered on appeal.

##### 3. INJUNCTION—DISSOLUTION—LIABILITY OF SURETIES ON BOND.

Where a claim is made against the sureties on an injunction bond for costs, damages or counsel fees on breach of the bond, the sureties are entitled to their day in court and the right to defend against the demand, and it is error for the court or judge thereof to summarily enter judgment against the sureties on the dissolution of the injunction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 548.]

(Syllabus by the Court.)

Appeal from District Court, Bingham County; James M. Stevens, Judge.

Action by Albert C. Dougal against James S. Eby and others.

From an order dissolving a temporary injunction, and directing judgment for costs and damages against the sureties on the injunction bond, plaintiff and his sureties appealed. Affirmed as to the order dissolving the injunction, and reversed as to the order directing judgment against the sureties.

Charles A. Merriman, for appellants. J. Ed. Smith, for respondent.

AILSHIE, J. On the 1st of June, 1905, the plaintiff, who is appellant in this court, commenced an action against James S. Eby, as constable, and others, and on the filing of the complaint procured a temporary injunction against the defendants in any manner

selling or disposing of certain property. On the 7th day of the same month the defendants filed a general demurrer to the complaint, and at the same time gave notice of motion to dissolve the injunction. The motion to dissolve the injunction was made on the "pleadings and filed in the action and affidavit of D. H. Clyne, one of the defendants," and a copy of the affidavit of Clyne was served on plaintiff's attorney. The motion was noticed for June 12th, and it appears from the order of the district judge that it was not submitted for his consideration until the 14th day of August, at which time it was taken under advisement, and on the 20th day of August, the district judge made and entered an order dissolving the injunction, and at the same time made and entered the following order against the sureties on the injunction bond: "And it is further ordered and decreed that judgment be entered herein by the clerk of this court against D. B. Bybee and Franklin Larue, the sureties on the injunction bond filed herein, the same having been ascertained and assessed under the direction of the court in the sum of \$75 damages for which execution may issue." The plaintiff has appealed from both of these orders. The respondent has made a motion to dismiss the appeal on the ground that an order dissolving a temporary injunction is not appealable. Subdivision 3 of section 4807, Rev. St. 1887, authorizes an appeal from an order dissolving an injunction, and is decisive of the motion on that ground. The respondent also moves to dismiss on the ground that the transcript is not certified in the manner prescribed by sections 4819 and 4821, Rev. St. 1887. We think the certificate of the judge, however, is sufficient, and upon the argument of the case counsel for appellant procured an order permitting him to supply the record with a further certificate from the trial judge, which has been done. It is true the record contains some matters not authorized by the statute, but that is not a ground for dismissal of the appeal. The motion must therefore be denied.

The appellant complains of the failure of the trial judge to consider a number of affidavits filed on behalf of the plaintiff on June 16, 1905. These affidavits were filed in rebuttal to the evidence of Clyne, and in opposition to the motion to dissolve the injunction. The plaintiff failed, however, to appear at the hearing on the motion to dissolve the injunction, and it is not shown that these affidavits were called to the attention of the trial judge, or were ever presented to him. On the contrary, he certifies under section 4821, Rev. St. 1887, that the only papers used or considered on the hearing of the motion were: "The complaint then on file in said case, and the affidavit of D. H. Clyne, as shown by the transcript on appeal, and the sworn statements of J. Ed.

Smith, who testified in said matter." The record contains the complaint and the affidavit of Clyne, but it does not contain any statement or evidence given by Smith. If the respondent desired to present counter-affidavits, it was incumbent on him to see that such affidavits were presented to the judge at the hearing on the motion, and if the judge should then have refused to examine or consider them, it would have been appellant's duty to take exception to such ruling, and incorporate such affidavits and showing in a bill of exceptions or have them certified to by the judge as having been presented and rejected in order to present the same to this court on appeal. As the record comes before us with the judge certifying that he considered certain papers and files, and none other, and no showing that the affidavits on behalf of the appellant were presented or called to the attention of the trial judge at the hearing, we are without authority to consider them. They are not properly in the record. Sections 4819 and 4821; *Village of Sand Point v. Doyle* (Idaho) 74 Pac. 861. After an examination of the complaint and the affidavit of Clyne, we are not prepared to say that the trial judge abused his discretion in dissolving the injunction, and cannot, therefore, interfere with the order in that respect. *Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67; *Kindall v. Hdw. Co.*, 8 Idaho, 664, 70 Pac. 1056; *Meyer v. First Nat. Bank (Idaho)* 77 Pac. 334; *Price v. Grice (Idaho)* 79 Pac. 387.

The plaintiff and his bondsmen specially complain of that part of the order assessing damages against the sureties on the injunction bond. The appellants contend that the court was without jurisdiction to enter any judgment for damages and costs on the injunction bond until the case shall be finally determined on its merits. Respondent insists, however, that the practice adopted is permissible, and in support thereof cites the opinion of the United States Circuit Court of Appeals for the Ninth Circuit in the case of *Tyler Mining Co. v. Last Chance Mining Co.*, 90 Fed. 15, 32 C. C. A. 498, a case appealed from the Circuit Court for the District of Idaho. In that case the court held that: "A court of equity, on the dissolution of an injunction, may, under its general powers, and, in the absence of statutory provisions, have the damages occasioned by its issuance assessed under its own direction, and may render judgment therefor against the sureties as an incident to the principal suit." The practice upheld in the *Tyler-Last Chance* Case rests on the rule of the English Chancery Courts (2 High on Injunctions [4th Ed.] § 1656), and has received at least a partial recognition in the federal courts of this country where no statutory provisions control. The wisdom of this practice was doubted, however, in *Russell v. Farley*, 105 U. S. 445, 26 L. Ed. 1060. It should

be borne in mind that in this state we have a statute providing the manner of giving injunction bonds and the liability of sureties thereon and the conditions on which the liability attaches. Section 4291, Rev. St. 1887, requires a plaintiff who procures an order for an injunction to give an undertaking "with sufficient sureties to the effect that the plaintiff will pay to the party enjoined such costs, damages and reasonable counsel fees, not exceeding an amount to be specified, as such party may incur or sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto." This statute was adopted from California (Code Civ. Proc. § 529), and in *Clark v. Clayton*, 61 Cal. 634, it was held that an action commenced on an injunction bond prior to the final determination of the principal case was prematurely brought and that a nonsuit was properly granted. In *Dougherty v. Dore*, 63 Cal. 170, the court held that "a cause of action upon an undertaking for an injunction does not accrue until the final determination of the action upon which the injunction was obtained." The doctrine announced in this latter case has support in the following authorities: 1 *Spelling on Injunctions and Extraordinary Remedies*, § 957; 2 *High on Injunctions* (4th Ed.) §§ 1649-1654; *Supreme Ct. I. O. F. v. Supreme Ct. U. O. F.* (Wis.) 68 N. W. 1011; *Reddick v. Webb* (Okla.) 50 Pac. 363; *Cohn v. Lehman*, 93 Mo. 574, 6 S. W. 267; *Browne v. Edwards & McCullough Lumber Co.*, 44 Neb. 361, 62 N. W. 1070; *Brown v. Galena M. & S. Co.*, 32 Kan. 528, 4 Pac. 1013; *Asevado v. Orr* (Cal.) 34 Pac. 777.

We fail to find any case from California, or any other state where they have a like statute, in which the practice of entering judgment against the principal and sureties on an injunction bond by the court in the main case and without the commencement of an action on the bond bringing in the sureties, has ever received sanction or approval. The bond required to be executed upon the issuance of an injunction constitutes a contract whereby the principal and sureties agree to indemnify the defendant against loss in the matter of costs, damages, and attorney's fees incurred by reason of the injunction in case it should finally be determined that the plaintiff was not entitled thereto. Whenever the defendant claims that there has been a breach of such contract, and that he is entitled to recover for such breach, the defendants are entitled to their day in court and their right to defend both against the charge that there has been a breach in the contract as well as against the amount of costs, damages, and counsel fees claimed. We conclude that the order, dissolving the injunction, must be affirmed, and that the judgment entered against the bondsmen for \$75 damages for breach of the

injunction bond must be reversed and vacated, and it is so ordered.

The appellant will be awarded costs for one-half his transcript, and such other costs as are legally taxable.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

#### On Rehearing.

SULLIVAN, J. We have examined the petition and find nothing in it that would justify the granting of a rehearing. The certificate of the judge shows what papers were considered by him on the hearing of the motion to dissolve the injunction, but there is nothing in the record to show that the affidavits filed on behalf of the appellant were ever called to the attention of the judge. The record does not show why the judge did not consider said affidavits on the hearing. It was the duty of counsel for appellant to see that the said affidavits were presented to the judge, and if he refused to consider them, ascertain the ground of refusal and present it with said affidavits by bill of exceptions to this court. There is no doubt but that counsel for the appellant acted in perfect good faith in the matter.

The provisions of the statute are amply sufficient to protect the rights of the respective parties to this case, but on the record before us the petition for new trial must be denied, and it is so ordered.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

#### STATE v. STEERS.

(Supreme Court of Idaho. March 8, 1906.)

##### 1. EMBEZZLEMENT—PUBLIC OFFICER—WHAT CONSTITUTES.

The crime of embezzlement is committed by an officer of any county, city, or municipal corporation of this state when he fraudulently appropriates to his own use any money or property which he has in his possession or under his control by virtue of his trust as such officer. Sections 7065, 7066, Rev. St. 1887.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, § 24-29.]

##### 2. SAME—INFORMATION.

An information that charges a sheriff of a county of this state with willfully, unlawfully, fraudulently, and feloniously appropriating to his own use certain money paid to him in his official capacity is sufficient under the provisions of sections 7065, 7066, Rev. St. 1887.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, §§ 53, 54.]

##### 3. CRIMINAL LAW—COUNSEL FOR PROSECUTION—ASSISTANTS.

Attorneys, other than the Attorney General in this court or the county attorney in the lower court, may assist in the prosecution by and with the consent of the prosecuting officer, and it is not error to allow such appearance in the trial court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1487.]

**4. SAME—INSTRUCTIONS.**

When the court on its own motion has fully and fairly instructed the jury on all the essential elements constituting the crime of embezzlement, it is not error to refuse requests for instructions by counsel for appellant.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

**5. EMBEZZLEMENT—INSTRUCTIONS.**

Instructions in this case examined, and, no error appearing, *held* sufficient to sustain the judgment.

(Syllabus by the Court.)

Appeal from District Court, Bannock County; Alfred Budge, Judge.

Peter A. Steers was convicted of embezzlement, and appeals. Affirmed.

Rowen & Watson and S. C. Winters, for appellant. J. J. Guheen, Atty. Gen., Edwin Snow, R. M. McCracken, Co. Atty., and Standrod & Terrell, for the State.

**STOCKSLAGER, C. J.** The prosecuting attorney of Bingham county charged appellant with the crime of embezzlement. The charging part of the information is as follows: "The said Peter A. Steers, at and within Bingham county and state of Idaho, and within three years prior to the filing of this information, being then and there an officer of Bingham county, state of Idaho, charged by law with the receipt, safe-keeping, and transfer of public moneys, to wit, the sheriff in and for Bingham county, state of Idaho, and by virtue of his said office then and there a receiver of public moneys, to wit, a collector of licenses or license taxes, and authorized by law to receive said moneys, and then and there acting as such officer, did then and there willfully, unlawfully, fraudulently, and feloniously, without authority of law, appropriate to a use and purpose not in the due and lawful execution of his trust, to wit, to his own use, certain money paid to and received by him while acting in his official capacity as said sheriff, to wit, the sum of \$500, lawful money, the same being so paid to and received by him for said Bingham county, state of Idaho, by and from E. C. Shearer on or about the 23d day of May, 1904, for a license to sell spirituous, vinous, malt, and intoxicating liquors within Bingham county, state of Idaho." To this information a demurrer was filed, to wit: "(1) The facts therein stated do not constitute a public offense. (2) Said information does not substantially conform to the legal requirements of sections 7677, 7678, and 7679 of the Revised Statutes of Idaho of 1887, particularly in this, to wit: (a) Said information does not contain a statement of the acts constituting the offense attempted to be charged in such manner as to enable a person of common understanding to know what is intended. (b) It does not state either specifically or approximately the date of the commission of the alleged crime. (c) It is not direct or certain in stating the time of the commission of

the offense or in stating whether or not said offense was committed while the defendant was sheriff of Bingham county, Idaho, or in stating whether or not the \$500 referred to therein ever belonged to or was the property of said Bingham county, or whether said \$500 was, at the time of its alleged misappropriation, the property of the person named in said information as being the person who paid said money to the defendant. Nor is said information direct or certain in stating that the said \$500 or any part thereof was ever in the possession of the defendant, or under his control by virtue of any trust, or of his official position as sheriff of said Bingham county. Nor is said information direct or certain in stating whether or not any license was ever issued or granted by said Bingham county to said person who is alleged to have paid said \$500 to the defendant, or whether a license was refused or denied. (3) In the respects stated in subdivision 'c' of the foregoing paragraph 2 said information does not clearly and distinctly set forth the act or omission charged as the offense." In the minutes of the court of date April 19, 1905, it is shown that a motion to set aside the information was submitted to the court and overruled, and on the same day the demurrer was overruled. On the 25th day of April, 1905, a motion for a continuance was denied. On the same day a motion for change of venue was submitted to the court and granted. On the 4th day of May, in Bannock county, a motion and affidavit for a continuance of the cause, also a motion to postpone the time of trial to a later date. Both of these motions were overruled. On the same day a jury was impaneled, and on that and the succeeding day a trial was had, which resulted in a verdict of guilty as charged in the information, and on the 11th day of August, 1905, appellant was sentenced to serve a term of 2½ years in the state penitentiary.

Counsel for appellant insists that the demurrer to the information should have been sustained, as it does not state whether the money claimed to have been embezzled was the property of Bingham county or of E. C. Shearer, and does not in any manner comply with sections 7677 and 7678, Rev. St. Idaho. Subdivision 2, § 7677, provides: "A statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." The information informs the defendant that he, as sheriff of Bingham county, has received \$500 from E. C. Shearer for a license to sell spirituous, vinous, malt, and intoxicating liquors within said Bingham county, state of Idaho; that he has as such sheriff unlawfully, willfully, fraudulently, and feloniously appropriated to his own use such sum of money; that such willful, unlawful, fraudulent, and felonious appropriation was made

about the 23d day of May, 1904. An examination of section 7678 will disclose that the information fully complies with its requirements. The purpose of these two sections of the statute, it seems, should be so easily understood, and a fair consideration of them, it occurs to us, is that when the indictment or information informs the accused that on or about a date specified the grand jury by indictment, or the prosecuting attorney by information, charges the accused of some crime known to our statute, and that the alleged unlawful act was done willfully, unlawfully, and feloniously, the language used in the charging part of the complaint, information, or indictment indicating to the accused the particular crime with which he is charged, if the instrument sufficiently informs the accused of the time, place, circumstances, and conditions of his alleged unlawful act, and that it is unlawful, wrongful, malicious, and felonious, or other words used by the statute to indicate the particular crime charged, then the accused is informed what he must prepare to meet on the trial. We do not find the information in the case at bar lacking in any of the essential elements for a charge of the crime of embezzlement under our statute. Section 7063, Rev. St. 1887, defines embezzlement as follows: "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." Section 7066, Rev. St. 1887, provides how and when an officer, public or private, is guilty of embezzlement as follows: "Every officer of this state, or of any county, city, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of any such officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation, (public or private) who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement." We find no error in the order of the court overruling the demurrer. See *Bradley v. Territory* (Ariz.) 80 Pac. 698; *People v. Cobler* (Cal.) 41 Pac. 401; *People v. Jose De La Guerra*, 31 Cal. 416.

It is also urged by counsel for appellant that the court erred in "denying the defendant time to prepare for trial." It is shown that the case was removed from Bingham to Bannock county for trial on application of appellant, and that the clerk of Bingham county had complied with section 7773, Rev. St. 1887, by transmitting all the papers and necessary records to the clerk of Bannock county. Counsel for appellant say defendant did not know that they were received by the clerk of the court of Bingham county until the 2d day of May, 1905, and the court at 7:30 o'clock p. m. of May 2d, set the case

for trial on the 4th day of May, 1905, at 10 o'clock a. m., thus giving the defendant one day in which to get ready for trial, and that the defendant is entitled to at least two days in which to prepare for trial. Section 7790, Rev. St. 1887, provides: "After his plea, the defendant is entitled to at least two days to prepare for trial." It is shown that the plea of not guilty was entered in the district court of Bingham county on the 19th day of April, 1905, and the case set for trial in that county for the 21st day of April, 1905, at 10 o'clock a. m. It will be observed that section 7790, *supra*, does not say defendant shall have at least two days to prepare for trial after the case is set for hearing, but at least 10 days after plea; hence appellant had much more than the statutory time to prepare for trial. We are not prepared to believe that, if a proper showing had been made that it was impossible for the defendant to secure the presence of his witness for the time set for trial, the learned judge below would not have given such time as seemed necessary for him to procure their attendance, he did not furnish the court with an affidavit that his witnesses all lived in Bingham county, and that they could not be reasonably procured within the time set for the trial of said cause. This affidavit was met by that of Robert M. McCracken, the prosecuting attorney of Bingham county, in which he testifies that all the witnesses for the prosecution were procured in time for the trial, and that the witnesses for the defense could have been procured within the time if a proper effort had been made by defendant. Applications of this character are largely within the discretion of the court, and unless it is shown that there has been an abuse of this discretion the judgment will not be reversed. We find no abuse of discretion in the orders overruling the motion for postponement of the trial or a continuance of the case. *People v. Walter*, 1 Idaho, 386; *State v. Gordon*, 5 Idaho, 297, 48 Pac. 1061; *State v. Rice*, 7 Idaho, 762, 66 Pac. 87; *State v. Rooke* (Idaho) 79 Pac. 82; *State v. Wetter* (Idaho) 83 Pac. 341.

Counsel for appellant next urge as error the refusal of the court to sustain the objection of defendant "to the appearance of Standrod & Terrell as counsel for the state, as there is no law authorizing such appearance by private counsel in criminal actions, and it is against public policy." Our attention is called to *Conger v. Board of Commissioners* (Idaho) 48 Pac. 1064. This case holds that individual members of the board of county commissioners cannot make a contract to bind the county. "It is the county commissioners acting as a board that are given that authority" (that is, the authority to employ counsel). So says that opinion. This question has been before this court in *State v. Crump*, 5 Idaho, 166, 47 Pac. 814; *People v. Biles*, 2 Idaho (Hasb.) 114, 6 Pac.

120; *State v. Williams* (Idaho) 42 Pac. 511; *People v. Powell* (Cal.) 25 Pac. 481, 11 L. R. A. 75; *People v. Tidwell* (Utah) 12 Pac. 61; *Territory v. Catton* (Utah) 16 Pac. 902. We find no error in denying this objection.

The next assignment is based on the ruling of the court to the following questions: "Now I will ask you (witness) to examine that record again and say whether or not it contains any items of moneys received for liquor license issued to the Montana Saloon November 1, 1904?" The record shows that the witness was one W. W. Kinney, who was deputy sheriff under appellant, and as such deputy issued the receipt for the money claimed to have been embezzled by appellant; that he turned the check given him by E. C. Shearer for license over to appellant the same night or the next morning after it was received by him. The record referred to in the question was what is known as the "license register." After examining the record witness testified that "there was no record in the book for the \$501 for liquor license for Mr. Shearer." The receipt given Mr. Shearer by Kinney had been introduced in evidence by the prosecution. Other questions of similar import which referred to other licenses were asked, objected to by appellant, and the witness permitted to answer, all of which is alleged as error prejudicial to appellant. It is apparent that the purpose of the examination of the witness, who testified that he was the deputy sheriff at the time and before the alleged embezzlement of the \$501 paid by Shearer for license, and was familiar with the record of licenses kept by the sheriff, and that it was the only book kept for "recording licenses" while he was deputy sheriff, was to show that the book did not contain an account of certain licenses. The entire record was in evidence, and counsel for appellant had the opportunity to examine it and ascertain whether the witness testified truthfully or otherwise, and to cross-examine him to any extent he saw fit. Counsel for appellant insists that the book of record was the best evidence. We agree with this contention, but there was no error in having the witness, familiar with the record, point out to the jury the particular instances wherein the record was deficient in showing that which it was intended it should show. Appellant was there to assist his counsel in showing any error or falsehood in the evidence of the witness relative to his record. We find no error in the ruling of the court in this particular.

It is thus insisted that the court erred in permitting George S. Gagon, whom it was shown was clerk of the board of commissioners of Bingham county during the entire term of appellant as sheriff of that county and for a long time prior thereto, to answer the following questions: "What was your custom, Mr. Gagon, in receiving bonds of this character? What did you do with them?"

He answered that he delivered them in the sheriff's office, and continued: "But I can't say I delivered this bond there." It was perhaps immaterial, as well as incompetent, what his custom may have been; but we cannot see how the appellant could be prejudiced by what he said his custom was, especially when he says he cannot say he delivered the one in question there. Appellant urges that the court should have sustained the objection "to the introduction of the minute record of the board of commissioners, for the reason that these entries were made after defendant had retired from office and could not bind him, as he was not even present when they were made, and they tend to prejudice the minds of the jury against the defendant." The record introduced is as follows in the matter of the shortage of Peter A. Steers, former sheriff: "On this day it was ordered by the board of county commissioners that R. M. McCracken, county attorney, ascertain the amount of money paid to Peter A. Steers for liquor license, and which has not been paid over to the county by Steers, and to demand the amount of money so ascertained. Ordered, that if the amount of liquor license money collected by Steers is not turned over to the county upon demand the county attorney is ordered, authorized, and directed to bring an action for said board of county commissioners on behalf of said county against said Steers and his bondsmen." We know of no provision of our statute that requires the presence of the sheriff or any other officer when the county commissioners are making up their record. This was simply an order requiring the county attorney to ascertain whether appellant was delinquent in the settlement of his accounts, and, if so, he was required by the order to enforce collection by suit against appellant and his bondsmen. How could this record prejudice jurors against appellant? If the county attorney found no deficiency, his duty was easy. He had only to report that fact to the commissioners, and his labors were ended. The introduction of this record may have been immaterial, but certainly not prejudicial.

It is insisted that the court erred in not permitting county attorney McCracken to answer the following questions on cross-examination: "Q. Didn't they [meaning the agent of the bonding company, defendant and some citizens of Blackfoot] make a request of you to let this matter stand until the civil suit was decided to see whether he [Steers] was owing Bingham county anything? Q. Didn't Mr. King, as agent of the bonding company, and also several citizens in Blackfoot, request you to delay proceedings until matters were settled in the civil court?" In what way could it benefit appellant if the agent of the bonding company and every citizen of Blackfoot made the request of the witness as above indicated? Could or would

it excuse him from the performance of his sworn duty? If he believed any officer of his county was guilty of the crime of embezzlement, or any other crime, the law fixes his duty, and the agent of the bonding company, the citizens of Blackfoot, nor even the board of commissioners, can in any way control his action. There was no error in sustaining an objection to this question. It is shown that appellant offered to show by E. H. Watson, a practicing attorney of this court, that said Watson was attorney for defendant, and advised the defendant not to turn over the money in question to the county unless the court should hold it to be county money, and in support of this advice defendant offered in evidence a certain judgment roll, where the district court of Fremont county held that such moneys were not county moneys and held the sheriff liable on his bond for so treating it. If parties charged with the safe-keeping of county money could be excused from their wrongful and unlawful acts on the theory alone that their attorneys had advised them to withhold the money collected in their official capacities, then the criminal laws of the state would be a farce, and the next Legislature should be importuned to repeal all laws enacted to enforce faithful and honest performance of public duties. Counsel for appellant says: "Shearer did not file his application or bond for license until some time after the defendant went out of office. The law requires the officer to turn over the money when the license is sold and not before." Granting all this to be true, what right had defendant to withhold this money? Why did he not pay it over to his successor in office if his term as sheriff had expired; or, if he had doubts as to the proper disposition of the money alleged to have been embezzled, why did he not deposit it with the clerk of the district court, with instructions to safely keep it until it was determined what disposition should be made of it? Can it be supposed that a prosecuting officer would have filed his information charging appellant with embezzlement, had he been informed that the money was on deposit with the clerk, or any other safe place, where it could be had when it was finally determined to the satisfaction of the appellant where the money should go? Even if he had filed this information, and appellant had been prepared to show good faith and honest purposes by placing the money in the hands of any reliable person to be paid over as directed by the court, could a jury be found in Bingham or Bannock county that would have said he was guilty of embezzlement or any other crime? Certainly not. If such conditions had been shown to exist, the court would have instructed the jury to return a verdict of not guilty; at least that would have been its plain duty. But, if the advice of his counsel under any circumstances could be an excuse for withholding the money, it

could not aid him under the showing made by the record in this case. We find the money was paid for a license to retail liquors in Bingham county by Mr. Shearer to the deputy sheriff of Bingham county on the 23d day of May, 1904. The deputy sheriff testifies that he turned the money over to appellant that evening or next day. Shearer continued his saloon business, and appellant did not seek the advice of his counsel until after demand had been made on him by the county attorney for the payment of this money, and after the expiration of his term of office. Appellant knew it was not his money. He also knew it was not Shearer's money, as he was conducting the business for which he had paid the money for license to so conduct. An officer cannot avoid the plain mandate of the statute in this way. The advice of his counsel, long after the alleged crime was committed, cannot avail him. If so, it would be impossible to convict an officer charged with the crime of embezzlement.

It is next urged that the court erred in not admitting in evidence the judgment roll in a certain case theretofore tried in the district court of Fremont county, wherein it is claimed that the court found that money paid to the sheriff under similar circumstances to the case at bar was not the property of the county. We know of no rule of law that would make such evidence competent. It might be available in an effort to induce the court to instruct the jury that such money was not the property of the county; but even then the court might take a different view of the law and refuse to give such instructions. Then the question could be presented to this court as an error of law occurring at the trial. But, if appellant desired to show by this record that he was withholding the payment of the money without criminal intent, he did not bring himself within the rules of law prescribed for the introduction of this evidence, and the record would not have aided him, owing to the difference in the facts. In justice to the learned judge who presided over the court at the time the findings and judgment above referred to were made and entered, we feel it our duty to say the facts in that case were widely different from the one at bar. Neither the county nor state was a party to the litigation. It was a suit of an executor of a will against the sheriff of Fremont county and his bondsmen. The complaint alleged: That the plaintiff, as executor, etc., had commenced an action against Frank Brady and A. S. Anderson to recover the sum of \$44.64 on a promissory note in favor of plaintiff's testator. Summons was issued, and thereafter a writ of attachment was issued and placed in the hands of Hanson, with instructions to serve said papers and attach the sum of \$425 in his (said Hanson's) possession, belonging to Frank Brady, one of the defendants, etc.

That in pursuance of said writ of attachment said Hanson, by his deputy, D. P. Rich, did attach the sum of \$425, lawful money belonging to said Brady. Later a judgment was secured by plaintiff against the defendants for the sum of \$496.61 and costs. That plaintiff demanded of said Sheriff Hanson said money held by him under the writ of attachment, and also placed a writ of execution in his hands, but that said sheriff, Hanson, failed and refused to turn over the money so attached. Then it is shown that another execution was placed in the hands of the said defendant Hanson, and frequent demands were made for the money alleged to be in his hands. The answer denies that Hanson, as sheriff or otherwise, had any money belonging to Frank Brady, but alleges that on the 12th day of June, 1901, Brady paid to Hanson, as sheriff, the sum of \$425 to apply on a retail liquor dealer's license from June 2, 1901; that on August 10, 1901, a further sum of \$75 was paid by said Brady to said Hanson as sheriff; and that said money as above paid to Hanson as sheriff was not the money of Brady after it was paid, but belonged to the license moneys of the county of Fremont. Hanson testified that he had received a partial payment from Brady for a liquor license, but did not return the money as county money for the reason he did not have full payment and was expecting the balance; that he gave Brady a receipt for the \$425 for partial payment on liquor license; and that the attachment was served before the balance of the \$75 was paid. The jury returned a verdict for plaintiff. Without an expression of our opinion of the justice or legality of this verdict and judgment, it is readily seen that the facts were very different from the case at bar. In *Beeman v. Hanson et al.*, the controversy was between Beeman and Hanson as sheriff. The county did not intervene and set up any right to the money. It was shown that the full amount of money had not been paid, and a receipt given for only partial payment for a liquor license for one year from June 2, 1901. Before the payment was fully made, an attachment was issued and the sheriff made his return, showing the above facts. Not so in the case under consideration. The entire payment had been made by Shearer, and the sheriff had given his receipt therefor. Shearer was permitted to conduct his business during the balance of the term of office of appellant. No controversy between the sheriff (appellant) and any one else by reason of a writ of attachment, or other proceedings questioning the ownership of the money in his hands paid by Shearer; no one demanding it, excepting the county, through its county attorney, and that demand was that the money should be paid to the county for the purposes for which it was paid to him for the coun-

ty by Shearer, and for which Shearer had had the benefit by conducting his business.

Objections are urged to the giving of certain instructions and refusal to give certain requests of counsel for appellant. A careful examination of the instructions convinces us that they fairly state the law on all the material issues involved in the prosecution, and in our view of the case the requests of counsel for appellant were properly rejected by the court. It is apparent, from the instructions given by the court and the character of the evidence submitted by the prosecution, that the case was prosecuted and the jury instructed on one theory alone, and that was that the acts of appellant in collecting and receipting for the money from Shearer, and permitting him to continue his business without a full compliance with the statutory requirement, and failing and refusing to turn the money into the proper channel before and after his term of office had expired, constituted the crime of embezzlement. If we are to be guided by the character of evidence offered on behalf of appellant, together with the requests for instructions prepared and submitted to the court to be given to the jury as the law of the case, the theory was that the appellant could withhold the money paid him by Shearer for the express purpose of procuring a retail liquor dealer's license until the court should determine to whom the money belonged, thus avoiding the penalty of wrongfully withholding the money and escaping a prosecution for the crime of embezzlement. The law does not encourage such conduct by the officials of the state. It requires honesty in all branches of the public service.

We think the judgment should be affirmed, and it is so ordered.

AILSHIE and SULLIVAN, JJ., concur.

AMBERGRIS MIN. CO. v. DAY et al.

(Supreme Court of Idaho. Feb. 27, 1906.)

1. MINES AND MINERALS—ADVERSE CLAIMS—EVIDENCE OF MINERAL DEPOSITS.

Evidence of the indications miners had successfully followed in the same district and on contiguous ground in attempting to find a lode or mineral deposit is admissible in determining as to whether or not a valid mineral discovery has been made by one who attempted to locate a lode claim on similar indications and showing upon adjacent ground.

2. SAME.

It is incompatible with the spirit of judicial inquiry to allow a litigant to introduce, for comparison, evidence of indications and conditions found on a particular mining property which led up to a rich ore body over which he has absolute control and from which he may exclude every other person, unless such litigant permit his adversary to examine and inspect such property for the purpose of introducing rebuttal evidence if he so desires; and where such evidence is admitted, and examination of the property is denied the adverse party, a new trial will be granted.



Respondents applied for a patent to the Anna, and the appellant thereupon, within the statutory time, filed an adverse claim and commenced this suit in support thereof. The appellant bases its claim to the right of possession of the ground in conflict upon the grounds: "(1) Because of the fact that the Anna is not based upon any valid discovery of the ledge, lode, or vein of mineral-bearing rock in place. (2) Because the respondents did not within 60 days from the date of their location perform the location work required by law." The cause was tried by the court, and findings of fact and conclusions of law were made and filed, and judgment was thereupon entered in favor of the defendants. Plaintiff moved for a new trial, which motion was denied, and thereupon appealed from the judgment and order denying its motion for a new trial. After the plaintiff had introduced its evidence and rested its case, the defendant August Paulson was sworn and examined on behalf of the defense, and testified to his acquaintance and familiarity with the Hercules and Fire Fly claims, which are adjoining claims. He was thereupon asked the following question: "What did you find in those claims at that time on the Fire Fly?" To this question counsel for the plaintiff objected on the ground of incompetency, and that evidence of the nature, condition, and character of the Hercules vein was wholly immaterial, and on the further ground that the plaintiff had not been permitted to examine the Hercules property. The objection was overruled by the court, and the witness thereupon narrated the conditions which led up to the discovery of the Hercules vein, and the character of the gangue and vein matter and ore body therein, and the fact that he found soft white porphyry carrying mineral traces and mixed with the ore body. The witness described the same kind of ore, vein, and gangue matter in the Fire Fly, and then testified to finding similar surface conditions at the Anna claim. He also testified that, judging from the character of rock and the formation and traces of ore as found on the Hercules at the time of its discovery, and the fact that those indications and traces led to the development of a rich and paying mine in the Hercules, a miner, familiar with those facts and the peculiar formation in that particular locality, would be justified in locating another claim in the same vicinity based upon similar rock and like mineral traces and outcroppings and formation. Several other witnesses testified on behalf of the defendants, over the objection of plaintiff, to the same effect and like conditions and circumstances as that testified to by Paulson. After the defendants had introduced all their evidence and rested their case, counsel for plaintiff moved the court for an order

permitting plaintiff's witnesses to examine and inspect the Hercules mine, and that for such purpose the court might continue the further hearing of the case until such time as the plaintiff could have an examination made, in order to be able to meet and rebut the evidence produced by the defendants in reference to the Hercules vein and the character of rock, ore, and gangue matter found therein. The court denied this motion, and the plaintiff again excepted. The rulings of the court in admitting the evidence concerning the Hercules mine, comparing the formation therein with the Anna, and in refusing to grant plaintiff an order for examination and inspection of the Hercules, and refusing a continuance for that purpose, are assigned as error on this appeal.

Our consideration of the objection to the class of evidence admitted on behalf of the defendants has forced us to the conclusion that such evidence is admissible and competent in this class of cases. If a miner has discovered certain mineral indications, which he has followed up, with the result that a rich and valuable ore body has been developed therefrom, it seems clear that another miner, finding similar indications and conditions on contiguous ground or in the immediate vicinity, would be in a measure justified in following up those evidences with a reasonable expectation of finding mineral deposits. And this is true, even though the indications, rock, and deposits found are such as the expert, scientist, geologist, and mineralogist in their finest of theories tell him are not evidence of mineral deposits, or even that they are evidences of the entire absence of mineral. As a matter of fact and greatly to their credit, these scholars, who have added so largely to the store of knowledge, have been observant and progressive enough to from time to time revise and modify their views and theories to keep apace with the actual demonstrations of the man who risks his judgment (though oftentimes a hazard) and delves into the earth at uninviting and unseemly places. The miner, as well as the man engaged in any other occupation or business, is entitled to act on experience and observations, and while he may not, and indeed will not, always attain the same results, the exception to the rule does not preclude him from availing himself of his own observations and those of his fellows, as well as demonstrated existing conditions. We are not, however, without the aid of judicial expression on this question. In *Shoshone Mining Company v. Rutter*, 87 Fed. 807, 31 C. C. A. 229, Judge Hawley, speaking for the Court of Appeals for the Ninth Circuit, said: "The seams, containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in their character to

the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which by continued developments thereon had resulted in establishing the fact that the seams, as depth was obtained thereon, were found to be a part of a well-defined lode or vein containing ore of great value. The discovery made at the time of the Kirby location was therefore such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located. *Erhardt v. Boaro*, 113 U. S. 528, 536, 5 Sup. Ct. 560, 28 L. Ed. 1113. The subsequent developments, made after the claim was located and before the location of the Shoshone, show more clearly the existence of a lode or vein." In *Harrington v. Chambers*, 1 Pac. 362, 3 Utah, 94, the syllabus says: "Evidence as to what sort of indications other miners would follow in attempting to find a lode is admissible, not as stating the opinions of third parties, but as stating the value of the indications in the mining community. A lode is whatever the miners could follow and find ore." This holding by the Supreme Court of Utah was affirmed by the United States Supreme Court in *Chambers v. Harrington*, 111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452.

This brings us to a consideration of the application made by plaintiff for permission to examine the Hercules for the purpose of enabling its witnesses to testify concerning the natural conditions and formation as found in that mine. It does not seem to use that this phase of the case demands very extensive consideration here. It is so manifestly unjust and incompatible with the spirit of judicial inquiry to allow a litigant to employ, as a standard of comparison and test, a mine over which he has custody and absolute control and from which he may exclude every other person, without allowing his adversary an opportunity of having his witnesses inspect and examine the property, that it cannot receive the sanction or approval of the courts. If a litigant who offers evidence of this class and character is not willing that his adversary may inspect and examine the property used as a standard of comparison, then his evidence should be excluded. A branch of inquiry worthy of the introduction of evidence on the one side is subject to rebuttal by the other side, and he who opens up such field of inquiry cannot be permitted to preclude the possibility of the adverse party furnishing any contrary evidence on the subject. It should not have been necessary for the plaintiff to apply to the trial court for an order allowing an examination of the Hercules. The defendants in fairness, upon a mere request, should have permitted it. The examination requested by plaintiff should have been allowed, and, if denied by the defendants,

their evidence concerning the Hercules should have been excluded.

The appellant urges the insufficiency of the evidence produced by the respondents to establish a discovery of mineral-bearing rock in place by the locators of the Anna, and also its insufficiency to show that the location work required by law was ever done on the Anna claim prior to the Ambergris location. As above indicated, this case must be remanded for a new trial, and these questions of fact will have to be again submitted to a jury or the court, and a greater weight or preponderance of evidence on one side or the other may be produced at the next trial, and new and additional facts may be shown. For that reason we will express no opinion as to the weight and sufficiency of the evidence presented in this record.

There appears to be some difference between the respective parties as to the legal principle applicable in this case touching the discovery on the Anna. It should be borne in mind that the strictness with which the courts will inquire into the sufficiency and validity of an alleged mineral discovery depends upon the class of claimants to which the contestants belong. In *Migeon v. Montana Cent. Ry. Co.*, 77 Fed. 254, 23 C. C. A. 161, the United States Circuit Court of Appeals points out this distinction in the following manner: "There are four classes of cases where the courts have been called upon to determine what constitutes a lode or vein within the intent of different sections of the Revised Statutes: (1) Between miners who have located claims on the same lode, under the provisions of section 2320 [U. S. Comp. St. 1901, p. 1424]; (2) between placer and lode claimants under the provisions of section 2333 [U. S. Comp. St. 1901, p. 1433]; (3) between mineral claimants and parties holding townsite patents to the same ground; (4) between mineral and agricultural claimants of the same land. The mining laws of the United States were drafted for the purpose of protecting the bona fide locators of mining ground, and at the same time to make necessary provision as to the rights of agriculturists and claimants of townsite lands. The object of each section, and of the whole policy of the entire statute, should not be overlooked. The particular character of each case necessarily determines the rights of the respective parties, and must be kept constantly in view, in order to enable the court to arrive at a correct conclusion. What is said in one character of cases may or may not be applicable in the other. Whatever variance, if any, may be found in the views expressed in the different decisions touching these questions arises from the difference in the facts and a difference in the character of the cases, and the advanced knowledge which experience in the trial of the different kinds of cases brings to the court. \* \* \* The fact is that there is a substantial difference

in the object and policy of the law between the cases where the determination of the question as to what constitutes the discovery of a vein or lode between different claimants of the same lode, under section 2320 [U. S. Comp. St. 1901, p. 1424], on the one hand, and a 'lode known to exist' within the limits of a placer claim at the time application is made for a patent therefor, under section 2333 [U. S. Comp. St. 1901, p. 1433], on the other. \* \* \* The question as to what constitutes a discovery of a vein or lode under the provisions of section 2320 of the Revised Statutes [U. S. Comp. St. 1901, p. 1424] has been decided by many courts. All the authorities cited by appellants are referred to in *Book v. Mining Co. (C. C.)* 58 Fed. 106, 121. The liberal rules therein announced are substantially to the effect that, when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. It was never intended that in such a case the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode." The same court in *Shoshone Mining Company v. Rutter*, supra, again said: "The purpose of the statute, in requiring that 'no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located,' was to prevent frauds upon the government by persons attempting to acquire patents to land not mineral in its character. But, as was said in *Bonner v. Melkle (C. C.)* 82 Fed. 697: 'It was never intended that the court should weigh scales to determine the value of mineral found, as between a prior and subsequent locator of a mining claim, on the same lode.' The location of the Kirby was made in 1886. The discovery of mineral then made was sufficient to induce the locators and their grantees to perform the amount of annual labor thereon as required by the mining laws—to expend their time and money in prosecuting the work thereon—in the belief and expectation of finding ore of profitable value therein." The following authorities are to the same effect: *Book v. Justice Mining Co. (C. C.)* 58 Fed. 120; *McShane v. Kenkle*, 44 Pac. 979, 33 L. R. A. 851, 56 Am. St. Rep. 579; *Muldrick v. Brown (Or.)* 61 Pac. 428; *Iron S. M. Co. v. Cheesman*, 116 U. S. 529, 6 Sup. Ct. 481, 20 L. Ed. 712; 1 *Snyder on Mines*, § 345; *Harrington v. Chambers (Utah)* 1 Pac. 375.

In *Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98, the plaintiff requested the following instruction: "A lode, within the meaning of

the statute, is whatever the miner could follow, and find ore. Under the requirements of the law, a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore; and a valid location of a mining claim may be made of a ledge deep in the ground, and appearing at the surface, not in the shape of ore, but in vein matter only." The trial court had modified the instruction by changing the word "willing" to "justified." Concerning that change in the instruction, this court, speaking through Mr. Justice Morgan, said: "The word 'justified' radically changes the whole meaning of the instruction. The question whether the miner is willing to spend his time and money is an entirely different one from the question whether he is justified in doing it. The former is a question to be answered by the miner himself, with or without advice, as he may choose. The latter word would present a question for experts and for the jury to determine. The instruction was correct, without modification." In support of the foregoing statement the court cited *Harrington v. Chambers*, supra. Mr. Lindley, in volume 1 (2d Ed.) § 336, of his work on *Mines*, after stating the principle announced in *Burke v. McDonald*, and citing that case, proceeds as follows: "But it would seem that the question could not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state which could not be satisfactorily proved. The facts which are within the observation of the discoverer, and which induced him to locate, should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property." Judging from the cases cited by the author in support of the foregoing statement, we infer that he makes that statement as a general principle, and without any intention of its special application to a contest between two miners who have located the same ground as a lode claim. His authorities do not support a stronger position. Again, under our statute, the discovery must be followed by doing the location work within 60 days, which in itself is, at least, a partial "exploitation." Where one miner has discovered what he considers mineral indications and deposits, and has followed up that discovery by staking the claim and doing the necessary location work, and another miner comes along and makes a discovery, and locates a part or all of the same ground covered by the former location, and thereupon goes into court to contest the senior location, and in order to sustain that contest shows that the ground does in fact contain valuable mineral deposits, as contemplated by section 2320 of the Revised Statutes of the United States [U. S. Comp.

St. 1901, p. 1424], and at the same time contends that the senior locator had not made a mineral discovery, the courts will not examine the evidence of the senior discovery with very great strictness. The case is quite different from a contest between the miner and the agriculturist.

The foregoing views cannot, of course, be carried to the extent of relieving any one who claims ground under the mineral laws of the United States from a substantial compliance with the United States statutes in the matter of mineral discovery. The observation of Justice Field in *Erhardt v. Board*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1113, is worthy of repetition here. He said: "It would be difficult to lay down any rules by which to distinguish a speculative location from one made in good faith with a purpose to make excavations and ascertain the character of the lode or vein, so as to determine whether it will justify the expenditures required to extract the metal; but a jury from the vicinity of the claim will seldom err in their conclusions on the subject." Anent the contention that the location work was never done on the Anna, counsel for appellant cite *Lavagnino v. Uhlig*, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119, while respondents cite on the same point *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735. It is contended by appellant that this most recent ruling of the United States Supreme Court overrules the doctrine as to location of forfeited and abandoned claims announced in the earlier case. It has been generally understood throughout the mining states that *Belk v. Meagher* had become the settled law, to the effect that no valid relocation can be made on a mining claim until the rights of the former locator have been finally forfeited or abandoned, and that a location made after the forfeiture or abandonment would take precedence over such invalid relocation; but *Lavagnino v. Uhlig*, decided less than a year ago, appears to have entirely upset that doctrine, and it will be a matter of great interest to the lawyers and courts, as well as the miners of these Western states, to know just whether these cases are distinguishable on principle or the one overrules the other entirely.

For the error above considered, the judgment must be reversed; and it is so ordered, and a new trial is granted. Costs awarded in favor of appellant.

STOCKSLAGER, C. J., concurs. SULLIVAN, J., concurs in the conclusion reached.

SULLIVAN, J. (concurring). I concur in the conclusion reached and fully indorse what is said by Mr. Lindley in volume 1 (2d Ed.) § 336. This court in *Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98, did not say, nor intend to convey the idea, that a valid mining claim could be made upon alluvial soil not containing a vein or lode, or

upon loose alluvial rock or debris on the mountain side, simply because the locator was "willing" to spend his time and money in prospecting it with the expectation of finding a lode, or vein of mineral-bearing rock. In that case the court said: "And a valid location of a mining claim may be made of a ledge deep in the ground, and appearing at the surface, not in the shape of ore, but in vein matter only." The terms "vein" and "lode" have been so often defined by the courts of the United States that it is unnecessary for me to cite many authorities as to the well known, established, and accepted meaning of those terms. Many of the decisions defining those terms are collected in volume 5 of *Words and Phrases Judicially Defined* under the word "Lode" (page 4423). Justice Field in the case of *Eureka Consolidated Mining Co. v. Richmond Mining Co.*, 8 Fed. Cas. 819, defines a "lode" to be "a zone or belt of mineralized rock and lying within boundaries clearly separating it from the neighboring rock." In *Book v. Justice Mining Co.* (C. C.) 58 Fed. 106, it is said: "The word 'lode,' as used in the United States statutes, and as understood by miners, is applicable to any body or belt of mineralized rock lying within clearly defined boundaries separating it from the country or non-mineral rock." If in a certain district the country rock is limestone, and veins or lodes of mineral are found in such country rock, the Revised Statutes of the United States and of the state of Idaho, in regard to the location of quartz claims, do not contemplate that a valid location can be made upon such limestone without first having discovered some vein or lode within such country rock. It is shown in the record in this case that many of the most important mines of Shoshone county are found in quartzite; that being the country rock of that region that contains traces of mineral. It is clear to me that simply because veins or lodes of mineral-bearing matter is found within such quartzite or country rock, a valid location cannot be made on the quartzite without first having discovered some vein or lode therein. Section 2320 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1424] clearly contemplates that quartz mining claims can only be located upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, or other metals of value. Said section is as follows: "Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the 10th day of May, 1872, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or

lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th day of May, 1872, render such limitation necessary. The end lines of each claim shall be parallel to each other."

That section contemplates that the vein or lode must be first discovered before a valid location can be made. It provides, *inter alia*, that no claim shall extend more than 300 feet on each side of the middle of the vein or lode, and as the law contemplates, that boundaries of the claim must be marked upon the ground, how could they be marked upon the ground without having first discovered the vein or lode, in order to ascertain the distance of 300 feet on each side of the center thereof. Section 3100 of the Revised Statutes of Idaho of 1887, as amended by the laws of 1899, p. 237, is as follows: "Mining claims hereafter located upon veins or lodes of quartz, or other rock in place bearing any of the metals, or other valuable deposits mentioned in section 2320 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1424], may extend to 300 feet on each side of the middle of the vein or lode: Provided, that when the locators have set the stakes, posts or monuments described in the next section, to indicate the line of the vein, ledge or lode, such stakes, posts or monuments must be taken for the purposes of said location, to mark correctly the line thereof, and such line must not be afterward changed so as to affect rights acquired or interfere with any location made subsequent thereto." That section provides that the location may extend 300 feet on each side of the middle of the vein or lode, and it contemplates that the locator shall mark the same with posts or monuments to indicate the line of the vein, ledge, or lode. Section 3101 of the Revised Statutes as amended provides that the locator at the time of making the discovery of such vein or lode must erect a monument at such place of discovery, and within three days after making the discovery must mark the boundaries of his claim. The law clearly contemplates that the discovery of a vein or lode must be made before a valid location can be made thereon, simply because the country rock of a certain district is porphyry or granite or limestone or quartzite, and that veins carrying any of the precious metals have been discovered therein, the law does not contemplate that a valid quartz claim location can be made upon such porphyry or other coun-

try rock. Had Congress intended that a valid quartz claim location could have been made on any ground where the locator was "willing" to expend his time and money in prospecting for a vein or lode, it certainly would have used different language from that used in section 2320 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1424]. To hold that valid location of a quartz claim may be made upon porphyry or limestone, that being the country rock in which valuable mines have been discovered, would be in direct violation of the provisions of said section. If the prospector discovers "float" on the mountain side, which is covered with loose slide rock and debris or soil, he could not make a valid location thereon until he had discovered a vein or lode "of quartz or other rock in place bearing some valuable deposit," even though he were "willing" to spend his time and money trying to discover a vein or lode. The "discovery" must be made before location can be made.

In *Migeon v. Montana Cent. Ry. Co.*, 77 Fed. 249, 23 C. C. A. 156, Judge Hawley, who has written many of the most important mining decisions on the Pacific Slope, referring to the case of *Book v. Mining Co.* (C. C.) 58 Fed. 106, said: "The liberal rules therein announced are substantially to the effect that when a locator of a mining claim finds rock in place [observe the words "finds rock in place," not "hopes" to find rock in place, or is willing to try to find rock in place] containing mineral in certain quantity to justify him in expending his time and money in prospecting and developing a claim he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor. \* \* \* There the term "rock in place" is used, the identical expression used in section 2320 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1424], thus clearly holding that something more permanent must be discovered than mere shale, slide rock, or debris. Judge Hawley there states: "It was never intended that in such a case the court should weigh scales to determine the value of the mineral found as between a prior and a subsequent locator of a mining claim on the same lode." That, no doubt, is true; but nearly all of the decisions emphasize the fact that a vein or lode of rock in place must first be discovered before a valid location can be made, and clearly indicate that a valid location cannot be made upon a "hope and desire" to discover by future developments.

While in the opinion in this case it is not intended to hold that a valid location could be made upon loose debris or slide rock, without first discovering a lode or vein therein, I desire to emphasize my views upon that question as above set forth.

# **NATIONAL BANK OF THE REPUBLIC v. AGNEW.**

(Supreme Court of Idaho. March 8, 1906.)

## **APPEAL—DISMISSAL ON MOTION.**

A motion to dismiss an appeal will be sustained, when it is shown that counsel for appellant has been served with such notice and fails to appear and resist such motion, unless it appears to the court that appellant is not guilty of laches.

(Syllabus by the Court.)

Appeal from District Court, Ada County; George H. Stewart, Judge.

Action by the National Bank of the Republic against James D. Agnew. Judgment for plaintiff. Defendant appeals. Dismissed.

S. H. Hays, for respondent.

STOCKSLAGER, C. J. Respondent moves to dismiss the appeal taken from a judgment rendered in the district court of Ada county on the 8th day of March, 1905. It is shown that counsel for appellant was notified to appear in this court and show cause why such motion should not be sustained; and, there being no appearance on behalf of appellant, the motion will be sustained, and it is so ordered. Costs to respondent.

AILSHIE and SULLIVAN, JJ., concur.

## **MAXWELL, et al. v. TERRITORY.**

(Supreme Court of Arizona. March 30, 1906.)

### **1. CRIMINAL LAW — VERDICT — DEGREE OF CRIME.**

Under a statute providing that where a crime is distinguished into degrees the jury must find the degree of which the defendant is guilty, the jury need specifically name the degree only when under the indictment they may find the defendant guilty of any of several degrees. The statute does not apply where the offense charged as of a certain degree cannot possibly embrace any other degree. *McLane v. Territory* (Ariz.) 71 Pac. 938, distinguished.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 2104-2106.]

### **2. LARCENY—PROPERTY INTEREST.**

One who has taken an estray and is in possession thereof has such property interest therein that the taking of it from him may be larceny; so also one in possession of stolen property purchased from the thief; so also a thief, in possession of property he has stolen, as against another than the owner.

Doan, J., dissenting in part.

(Syllabus by the Court.)

Appeal from District Court, Apache County; before Justice Richard E. Sloan.

Arch Maxwell and R. W. Molter were convicted of grand larceny, and appeal. Affirmed.

Herndon & Norris and Isaac Barth, for appellants.

NAVE, J. Appellants were convicted and sentenced for the crime of grand larceny in the taking of a steer alleged to be the property of one P. They have appealed to this

court, making four imperfect assignments of error, as follows: "(1) The court erred in its charge to the jury as to law. (2) The verdict of the jury is contrary to the evidence. (3) The verdict of the jury is contrary to law. (4) The court erred in overruling defendants' motion for new trial." The matters urged by the appellants are clearly set forth in their brief, however; and we will consider them.

As to the contentions that the court erred in its charge to the jury and that the verdict of the jury is contrary to the evidence it is sufficient, without going into the matter at length, to state that we find no error in the instructions complained of and that the verdict is not unsupported by the evidence.

The third assignment is that the verdict is contrary to law. The verdict rendered was, "We, the jury, find the defendants guilty as charged in the indictment and we unanimously recommend them to the mercy of the court." It is contended that this verdict is void in that the jury did not therein find the degree of the crime of which they convicted the defendants. Sections 441 and 443 of the Penal Code read as follows: "Larceny is the felonious stealing, taking, carrying, lending, or driving away the personal property of another. Larceny is divided into two degrees, the first of which is termed grand larceny; the second, petit larceny." Section 444 of the Penal Code, amended by Act No. 18, p. 24, of the Legislature of 1903, which act was in effect at the time of this alleged offense, provides as follows: "Sec. 444. Grand larceny is larceny committed in either of the following cases: (1) When the property taken is of the value exceeding fifty dollars. (2) When the property is taken from the person of another. (3) When the property taken is a horse, mare, gelding, cow, steer, bull, calf, mule, jack, jenny, goat, sheep, or hog, or any neat or horn cattle." By section 972 of the Penal Code it is provided: "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." In support of their proposition appellants cite a previous decision of this court, *McLane v. Territory*, 71 Pac. 938. In that case the defendants were convicted under an indictment charging them with the crime of grand larceny in stealing four head of cattle of the aggregate value of \$60.

It is to be observed that at the time of the offense alleged in the *McLane* Case grand larceny was defined by statute as "larceny committed in either of the following cases:

(1) When the property taken is of value exceeding \$50. (2) When the property is taken from the person of another." Section 974 of the Penal Code provides: "The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." Therefore under the indictment in the *McLane*

Case the jury could have returned any one of three verdicts, respectively finding defendants: (1) Guilty of grand larceny, if all the elements of the offense had been proved and the value of the cattle had been proved to be in excess of \$50. (2) Guilty of petit larceny, if all the elements of the offense had been proved but the cattle shown to be of a value of \$50 or less. (3) Not guilty. On behalf of the territory it was contended in that case that the jury found the degree of the crime by finding the defendant to be guilty "as charged in the indictment," because the indictment specifically charged the defendant to be guilty of grand larceny. But the indictment in that case did not charge grand larceny alone but included also the lesser degree of larceny, to wit, petit larceny; for the degree depended upon the value of the cattle stolen, and proof of the value as laid was not essential to conviction.

Under the indictment which we must now consider the jury could find but one of two verdicts. No lesser offense is included in the offense charged in the indictment. Under the law in force when this offense was committed the larceny of a steer was grand larceny irrespective of the value of the steer; the taking of the steer was either grand larceny, or it was not larceny at all. Therefore the jury could not more definitely find the defendants guilty of grand larceny by specifically returning the verdict "We find the defendants guilty of grand larceny" than they do when they return the verdict "We find the defendants guilty as charged in the indictment." The crime charged in this case is not distinguished into degrees in the sense of the statute requiring the jury to find the degree of the crime of which the defendant is guilty whenever a crime is distinguished into degrees. That statute can apply only where the jury could under the indictment find the defendants guilty of any of several degrees of a crime; it is inapplicable where there is no possible alternative verdict of guilty. Therefore we conclude that the verdict is not contrary to law.

The appellants urge further that in support of a motion for new trial they made a sufficient showing of the discovery of new evidence to entitle them thereto. The indictment charged that the steer in question was the property of one P. Proof of the ownership of the steer was made by the testimony of P. who testified that he had bought the steer from the wife of one T. On motion for new trial the affidavit of T. was adduced, the statements of which show that T. is the owner of the steer, and taken in the light of P.'s testimony and of a counter affidavit filed by the territory, that P. obtained possession of it in one of three ways; that is to say, he stole the steer, or took it as an estray, or purchased it from a person, other than the owner, who had no authority to sell it. It is true that the ownership of stolen property must be alleged and proved as alleged; but

it would utterly defeat the ends of justice if in the trial of larceny ultimate title to the property in question must be conclusively determined. Such is not the law. One who has taken and is in the possession of a stray animal has such property interest in it that the taking of it from him may be larceny. So also has one in possession of stolen property purchased by him from the thief; so also, indeed, has the thief himself, in possession, as against another than the owner of the property. The utmost that is shown in the affidavit in support of the motion for new trial is that there is a dispute between P. and T. as to the ownership of the steer. There is nothing to show that P. did not have possession of the steer and such right thereto as to make the steer subject of larceny from him. Therefore the court was not in error in denying the motion for new trial.

The judgment is affirmed.

KENT, C. J., and CAMPBELL, J., concur.

DOAN, J. I concur in the affirmance of the judgment of the lower court, but dissent from that part of the opinion that reaffirms the *McLane Case*, 71 Pac. 938.

(10 Ariz. 9)

SALT RIVER VALLEY CANAL CO. v. NELSEN.

(Supreme Court of Arizona. March 30, 1904.)

1. WATERS—IRRIGATION—SERVICE.

Principles announced in *Gould v. Maricopa Canal Co.* (Ariz.) 76 Pac. 538, and in *Slosser v. Salt River Valley Canal Co.* (Ariz.) 65 Pac. 332, as modified in *Gould v. Maricopa Canal Co.*, reaffirmed.

2. SAME—REASONABLE RATES.

There rests upon a public corporation, so long as it uses its franchise, a duty to render to the public at a reasonable rate, the services for which it was created.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 312.]

3. SAME—JUDICIAL INQUIRY.

Whether rates which have been charged for its services by a public corporation are unreasonable, is a proper subject for judicial inquiry.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 812.]

4. SAME—RECOVERY OF EXCESSIVE RATE PAID.

Where statutes do not define a maximum lawful rate for the services of a public corporation, if prices are exacted which, in the light of all the facts to be considered, are unreasonably high, one who pays such prices under protest, or under such circumstances as do not amount to acquiescence in the charge, may by suit recover the excess over a reasonable price.

5. SAME—EVIDENCE.

What is a reasonable price is, in such a suit, a fact to be proved as other facts are proved.

6. SAME.

In determining what is such reasonable rate, the effect of the rate upon persons to whom the services are rendered is as important a factor as is the effect thereof upon the profits of the corporation.

7. SAME—INJUNCTION.

A decree perpetually enjoining an irrigation canal company from preventing the flow of wa-

ter through its canals upon the lands of an appropriator of water, subject to the payment of the company's reasonable charges, and to its reasonable regulations, should also make such water service subject to the prior rights of any prior appropriators served by the company.

(Syllabus by the Court.)

Appeal from District Court, Maricopa County; Before Justice Edward Kent.

Peter Nelssen brought suit against the Salt River Valley Canal Company to compel it to deliver water for the irrigation of his ranch. From a judgment in favor of plaintiff, defendant has appealed. Judgment modified.

C. F. Ainsworth, for appellant. E. W. Lewis, for appellee.

NAVE, J. Peter Nelssen is the owner of lands lying under the Salt River Valley Canal which are barren without the artificial application of water. He is neither a stockholder nor owner of a water right in the Salt River Valley Canal Company, but by renting water rights he has obtained, for a number of years, service of water from the canal of this company for the irrigation of his lands. The policy sought to be maintained by the Salt River Valley Canal Company of serving with water only those who own or lease water rights, is described in previous decisions of this court (*Slosser v. Salt River Valley Canal Company*, 65 Pac. 332, and *Gould v. Maricopa Canal Company*, 76 Pac. 598); and needs no description or explanation in this opinion.

In the fall of 1903, without purchasing or renting a water right, Nelssen demanded of the company service of water upon his land, tendering to the company the price charged those who own or rent water rights. The company refused to deliver the water unless plaintiff should enter into a contract for the purchase of a water right. Nelssen, averring his willingness to pay reasonable charges for the service of such water, and paying into court the amount theretofore tendered, brought suit against the company to compel it to deliver the water demanded. Pending final judgment, he prayed a temporary mandatory injunction requiring the company to deliver water to him for use upon his ranch at such price as should be fixed by the court. This injunction was granted; a price was fixed by the court for the service, and paid to the company by plaintiff. Plaintiff then filed a supplemental complaint averring that at the hearing upon the application for temporary injunction defendant had offered to deliver water to plaintiff at an exorbitant price much in excess of that charged to its stockholders and water right owners, and in excess of the price fixed by the court in the temporary injunction; that the amount paid by plaintiff and received by defendant, as so fixed, was unreasonably high and unjust; and praying judgment, upon final determination of the suit, for the repayment to him of the excess paid above a reasonable price. Upon

final hearing judgment was rendered for the plaintiff perpetually enjoining the defendant from preventing the flow from the Salt river through its canal to plaintiff's premises of the amount of water prayed for, subject to payment by plaintiff of the company's reasonable charge for the diversion and carriage of water; and also decreeing the recovery by plaintiff from defendant of \$45 found by the court to be the excess over a reasonable price paid for service of water during the pendency of the litigation.

Numerous errors are assigned by appellant, which, being grouped, raise five points. Under one of these appellant seeks a reconsideration and disapproval of the principles set forth by this court in the *Slosser* and *Gould* Cases supra, underlying the service of water by such companies as appellant. After consideration, in the light of appellant's argument, of the views expressed in the *Gould* Case and in the *Slosser* Case, as modified by the opinion in the *Gould* Case, we perceive no reason to disapprove thereof; but reaffirm them.

The second point is that the court erred in granting a mandatory writ of injunction compelling the company to serve water to plaintiff upon payment of a rate fixed by the court, pending final judgment. If the granting of this order was an erroneous exercise of power the error would not be ground for reversing or modifying the final judgment, upon the rendition of which the interlocutory order expired by its own limitation. Therefore we need not pass upon the point.

The remaining points raised, go to that portion of the judgment decreeing a recovery by plaintiff of the excess over a reasonable price paid by him for the service of water. The jurisdiction of the court in rendering such judgments; questions permitted, over objection, to be asked by plaintiff of witnesses to support his contention that the price paid by him was in excess of a reasonable price; and the court's finding of fact, are each attacked.

Appellant contends that the fixing of a rate for the rendition of services by a public corporation is a legislative act, and not judicial. It is necessary to apply a distinction which we may accurately make by adopting the language of the Supreme Court of the United States, in *Interstate Commerce Commission v. Cincinnati, etc., R. R. Co.*, 167 U. S. 479, 490, 17 Sup. Ct. 896, 900 (42 L. Ed. 243): "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act." The court did not seek to fix a rate for future service by appellant, but exercised jurisdiction to determine whether the rate was unreasonably high which had been collected by appellant from Nelssen for service of water pending a final judgment,

which rate was paid by Nelsen under an order of the court and, therefore, presumably without acquiescence in the amount thereof. A public corporation does not enjoy its franchise solely for the profit of its promoters or stockholders. While it uses the franchise there rests upon it a duty to render to the public, at a reasonable rate, the services for which it was created. *Munn v. Illinois*, 94 U. S. 113, 126, 134, 24 L. Ed. 77. It is clear in reason, and is well settled by precedents that where statutes prescribe maximum rates, one from whom a rate has been exacted in excess of the legal maximum, may sue for the excess. It is equally well supported by reason that where statutes do not define a maximum lawful rate if prices are exacted which, in the light of all the facts to be considered, are unreasonably high, one who pays such prices under protest or under such circumstances as do not amount to an acquiescence in the charge, may by suit recover the excess paid over a reasonable price; and we so hold. Whether one who has acquiesced in the excessive price may recover, is a matter not before us, and one upon which we express no opinion. What is a reasonable price is, in such a suit, a fact to be proved as other facts are proved. A maximum rate is not fixed by law for the service rendered by such companies as the Salt River Valley Canal Company. It was a proper exercise of jurisdiction for the court to determine that the price paid by Nelsen for the service of water under the temporary order was in excess of a reasonable price, and to decree a recovery of the excess.

Witnesses of the plaintiff were asked the following questions: "When you receive the service of water in a season of scarcity do you make any profit out of that water? What is the service of water worth to the farmer? What would you consider to be a fair price for water service under the Salt River Valley Canal during the last year? During the past year were there any assessments on those 109 shares?" [reference being made to shares in the Tempe Canal Company, a company shown to be similar to the defendant company and operating in the same valley under like conditions.] What was the total assessment levied upon the 109 shares in the Tempe Canal for the fiscal year last past?" No issue was made as to the competency of the witnesses to answer these questions, but it was objected by the defendant that the questions tended to elicit facts, which have no bearing upon the question of the reasonable price for the service rendered to plaintiff by the defendant.

In determining what is a reasonable price to be charged for its services by a public corporation an examination must be made not only from the point of view of the corporation, but from that of the one served, also. A reasonable rate is not one ascertained solely from considering the bearing

of the facts upon the profits of the corporation. The effect of the rate upon persons to whom services are rendered is as deep a concern in the fixing thereof as is the effect upon the stockholders or bondholders. A reasonable rate is one which is as fair as possible to all whose interests are involved. In *Covington, etc., Turnpike Company v. Sandford*, 164 U. S. 578, 593, 17 Sup. Ct. 193, 205 (41 L. Ed. 560), the Supreme Court of the United States had under consideration the question what was a reasonable toll to be charged by a turnpike company. The court said: "It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent. upon its capital stock. When the question arises whether the Legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. \* \* \* The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. \* \* \* If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the service rendered by the company are reasonable, is an element in the general inquiry whether the rates established by law are just and reasonable." See, also, *Smyth v. Ames*, 169 U. S. 466, 544, 18 Sup. Ct. 413, 42 L. Ed. 819. In using the expression "value of the service rendered" we must understand that the word "value" means value to the person to whom the service is rendered.

Applying the law as we have stated it, it is readily seen that the first three questions quoted, tend to elicit information which it was proper for the court to consider. Answers to the other two, as is shown by an examination of the questions and answers preliminary to them, should tend to disclose the expense of operating and maintaining another canal serving water under similar conditions in the same valley and thus to throw some light upon what are appellant's necessary expenses. It was not error to permit those questions to be answered. Finally it is contended by appellant that the court erred in the valuation placed upon appellant's property and in the amount fixed as the reasonable price for

plaintiff's service. The findings of the court in these matters are sufficiently supported by the testimony, and should not be disturbed.

The judgment reads in part as follows: "It is now ordered, adjudged, and decreed that the plaintiff is an appropriator of water from the Salt river and is entitled to the service of defendant corporation in the diversion and carriage of water from Salt river to plaintiff's said premises through and by means of the Salt River Valley canal in amount sufficient for the cultivation of crops growing upon plaintiff's premises, to-wit, the east one-half of the southwest one-quarter of section 9, township 1 north, range 2 east of Gila and Salt River Base and Meridian, in Maricopa county, Arizona Territory, and for domestic use and stock-raising purposes in connection therewith, in all not exceeding twenty-five (25) miners' inches, upon payment to said defendant corporation by plaintiff, his heirs or assigns, of its reasonable charges for such diversion and carriage, and subject to defendant's reasonable regulations as to service of water. And it is now further ordered, adjudged and decreed that defendant be forever enjoined from in any manner or by any means whatsoever preventing the flow from said Salt river through said Salt River Valley canal to the plaintiff's said premises in amount the same as that diverted and carried by said defendant through said canal for similar uses upon other lands of equal acreage under said canal entitled to the same amount of water and not to exceed the amount necessary for the cultivation of crops growing upon said land and for stockraising and domestic use thereon subject to the reasonable regulations of said defendant as to the service of said water, and the payment to said defendant by plaintiff, his heirs or assigns, of its reasonable charge for such diversion and carriage."

We observe that provision is not made therein for the possibility that by reason of a shortage of water during a drought or under other circumstances there may arise a condition such that appellee would not be entitled to water as against prior appropriators served by appellant. To remedy this, that portion of the judgment which is quoted is modified so as to read as follows: It is now ordered, adjudged and decreed that the plaintiff is an appropriator of water from the Salt river and, subject to the prior rights of prior appropriators, is entitled to the service of defendant corporation in the diversion and carriage of water from Salt river to plaintiff's said premises through and by means of the Salt River Valley Canal in amount sufficient for the cultivation of crops growing upon plaintiff's premises, to-wit, the east one-half of the southwest one-quarter of section 9, township 1 north, range 2 east of Gila and Salt River Base and Meridian, in Maricopa county,

Arizona Territory, and for domestic use and stock-raising purposes in connection therewith, in all not exceeding twenty-five (25) miners' inches, upon payment to said defendant corporation by plaintiff, his heirs or assigns, of its reasonable charges for such diversion and carriage, and subject to defendant's reasonable regulations as to service of water. And it is now further ordered, adjudged and decreed that, subject to the prior rights of appropriators supplied with water by defendant whose appropriations are prior to that of plaintiff, defendant be forever enjoined from in any manner or by any means whatsoever preventing the flow from said Salt river through said Salt River Valley canal to the plaintiff's said premises in amount the same as that diverted and carried by said defendant through said canal for similar uses upon other lands of equal acreage under said canal entitled to the same amount of water and not to exceed the amount necessary for the cultivation of crops growing upon said land and for stock-raising and domestic use thereon subject to the reasonable regulations of said defendant as to the service of said water, and the payment to said defendant by plaintiff, his heirs or assigns, of its reasonable charge for such diversion and carriage.

The judgment as modified is affirmed.

SLOAN, C. J., and DOAN and CAMPBELL, JJ., concur.

#### KASTNER v. FASHION LIVERY CO. et al.

(Supreme Court of Arizona. March 30, 1906.)

##### 1. CHATTEL MORTGAGE—AFTER ACQUIRED PROPERTY.

A chattel mortgage, to be construed to cover after acquired property, must be in language apt and clear to indicate such purpose.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, §§ 208, 209.]

##### 2. SAME—CONSTRUCTION.

A chattel mortgage construed. *Held* not to include after acquired property.

##### 3. SAME—FORECLOSURE—DEFENDANT.

Under Arizona practice, a mortgagee may, in a foreclosure suit, join as party defendant a grantee of the mortgagor who has assumed payment of the mortgage debt, and recover a deficiency judgment against him. Following *Johns v. Wilson*, 53 Pac. 583, 6 Ariz. 125.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 562.]

##### 4. SAME—DEFICIENCY—PERSONAL JUDGMENT.

Under statutes providing that, when a mortgage is foreclosed, the court shall render judgment for the entire amount found to be due; that an execution may be issued against the mortgagor for a deficiency, after sale of the mortgaged property, where the defendant has appeared in the action; that all judgments shall be so framed as to give the party all the relief to which he may be entitled either in law or equity, if the facts in the complaint disclose that defendant is personally liable for the mortgage debt, personal judgment should be entered against him, if he has appeared in the action.

though the prayer is only for foreclosure and for such "further relief as may be meet and proper in the premises."

5. SAME—FINDING.

A finding that "defendant assumed the mortgage" is to be construed as meaning that defendant assumed payment of the mortgage debt.

6. SAME.

Where the complaint does not set forth facts showing that defendant is personally liable for the mortgage debt, a finding that he is so liable is beside the issues, and no personal judgment can be rendered thereunder.

(Syllabus by the Court.)

Appeal from District Court, Yavapai County; before Justice Richard E. Sloan.

Action by Peter L. Kastner against the Fashion Livery Company and others. Judgment for plaintiff for less than amount claimed and he appeals. Affirmed.

E. M. Sanford, for appellant. Herndon & Norris, for appellees.

NAVE, J. Peter L. Kastner brought suit against the Fashion Livery Company and others to foreclose a chattel mortgage. From a judgment in his favor granting him inadequate relief, as he contends, plaintiff has appealed, seeking to have the judgment extended in its scope.

There are but two questions involved in the case: First, whether the mortgage in question by its terms covers after acquired property; second, whether the plaintiff is entitled to personal judgment against the Fashion Livery Company.

The portion of the mortgage which must be construed reads as follows: "That the said mortgagor mortgages to the said mortgagee all that certain personal property situated and described as follows, to wit, being all the property now used and hereafter being used in the business of the Fashion Livery Stables, consisting of a leasehold interest in the land and buildings in which said business is carried on, and the following live and other stock used in said business: One rubber-tire buggy, two surreys, one phaeton, three pole buggies, one single buggy, and one spring two-seat wagon, one barouche, nineteen head of livery and saddle horses, five sets of double harness, three sets single harness, three men's riding saddles, one ladies' sidesaddle, all lap robes, whips, other and all stable and livery furnishings, equipments and appliances, feed, hay and grain, and other property constituting and comprising said livery business. The said business and stables being situate on Goodwin street, facing the Plaza on the south side, in the city of Prescott, county of Yavapai and territory of Arizona." Appellant contends that by a correct interpretation of the language quoted he was entitled to foreclose his mortgage upon after acquired property as well as upon property in the Fashion Livery Stables at the time of the execution of the mortgage. He bases this contention upon the phrase "all

the property now used and hereafter being used in the business of the Fashion Livery Stables." While a chattel mortgage may include property to be acquired after the execution thereof, the language used must be apt and clear to indicate such purpose. It is by no means clear from the description in this mortgage that it was intended to include after acquired property. Its wording is more readily explained upon the theory that the mortgagor and the mortgagee were seeking to make clear the intention that the mortgagor should continue to use the mortgaged property, than by the theory that they intended to include in the mortgage all property thereafter purchased and used in the business of the stable. The description points out the precise property covered by the general terms and defines this property as consisting of two classes: First, a leasehold interest in the land and buildings; and, second, certain live and other stock used in the business. This interpretation is fortified by reason of the fact that, in describing some other property covered by the same mortgage (and afterwards released from the operation thereof), the parties included after acquired property in unequivocal language, as follows: "Also all the right, title, and interest of the said mortgagor (being an undivided one-half interest) of, in, and to the tools, implements, appliances, material, and stock on hand, and fixtures," in certain shops, "and also in and to all tools, implements, appliances, material, fixtures, stock and furnishings which shall hereafter be added to \* \* \* said tools," etc. This is the interpretation given to the mortgage by the district court, and is not erroneous.

The court did not enter personal judgment against the Fashion Livery Company. Appellant contends that he is entitled to have the judgment extended so as to include such personal judgment. Among the findings of fact are the following: Finding 12. "That on April 11, 1903, \* \* \* the defendant the Fashion Livery Company purchased the interest of Hobbs & Storm, in and to all the property used in said business \* \* \* subject to the provisions of the mortgage herein; and thereupon on that day the said Hobbs & Storm executed and delivered to the said Fashion Livery Company a bill of sale including all the property comprised in and used in said livery business, and contemporaneously therewith the said Fashion Livery Company entered into the possession of all the said property and assumed the said mortgage." Under our practice a mortgagee may, in a foreclosure suit, join as a party defendant a grantee of a mortgagor who has assumed the payment of the mortgage debt, and may recover a deficiency judgment against such grantee. *Johns v. Wilson*, 6 Ariz. 125, 53 Pac. 583; same case, affirmed, 180 U. S. 440, 21 Sup. Ct. 445, 45 L. Ed. 613. Appellees contend that the plaintiff could not recover personal judgment against the Fashion

ion Livery Company by reason of his failure to pray for such judgment. Plaintiff prayed for a foreclosure of the mortgage in question and a judicial sale of the mortgaged property. He concludes his prayer as follows: "That plaintiff have such other, further, or different relief as may be meet and proper in the premises." It is not necessary to consider whether this prayer is broad enough to support a personal judgment. In the absence of a statute prescribing the scope of the judgment. Under our statutes this prayer is sufficient to obtain personal judgment against a defendant who has appeared in the action, if the facts alleged and proved disclose that he is personally liable for the debt. Sections 3275, 3277, and 1428, Rev. St. 1901, provide, respectively, as follows:

"3275. When a mortgage or deed of trust is foreclosed, the court shall render judgment for the entire amount found to be due, and must direct the mortgaged property, or so much thereof as is necessary, to be sold to satisfy the same, with interest and costs. An execution shall issue accordingly, and the sale thereunder shall be subject to the redemption as in cases of sale under execution."

"3277. If the mortgaged property does not sell for sufficient to satisfy the execution, an execution may be issued for the balance against the mortgagor in all cases where there has been personal service or the defendant has appeared in the action, unless the parties have stipulated otherwise."

"1428. The judgment of the court shall conform to the pleadings, the nature of the case proved, and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity."

The Fashion Livery Company appeared in the action. The court's finding that this company "assumed the said mortgage" should be interpreted as a finding that it assumed the payment of the debt secured by the mortgage. Under these statutes and this finding of fact, the plaintiff should have personal judgment against this company for the amount of the indebtedness proved and should have execution thereunder for the deficiency, if any, after the application to the debt of the proceeds from the sale of the mortgaged property, if the allegations in his complaint tender an issue under which this finding of fact could properly be made. An examination of the complaint discloses that the only allegation therein involving the Fashion Livery Company in the case is "that the defendant the Fashion Livery Company (and other defendants) now claim, hold out, and assert that they are the owners of all the right, title, interest, and equity of redemption in and to the said mortgaged property formerly held and owned by the said H. K. MacDonald as aforesaid, the nature and extent of which said right, title, and interest, and equity of redemption \* \* \* is subse-

quent and subject to the mortgage lien in and to the property therein mentioned"; and, further, that this company now has in its possession certain of the mortgaged property. There is no allegation in the complaint that the Fashion Livery Company assumed the payment of the mortgage debt, or, in the language of the finding of fact, "assumed the mortgage." Therefore this finding is beside the issues in the case, and cannot be made the basis of a personal judgment against this company.

The judgment is affirmed.

KENT, C. J., and DOAN and CAMPBELL, JJ., concur.

EMERSON et al. v. YOSEMITE GOLD MIN. & MILL. CO. et al. (Sac. No. 1,142.)  
(Supreme Court of California. March 27, 1906.  
Rehearing Denied May 21, 1906.)

JUDGMENT—CONCLUSIVENESS—MATTERS CONCLUDED.

Code Civ. Proc. § 1908, subd. 2, provides that the effect of a judgment is conclusive as to matters directly adjudged, and by section 1911, that only is deemed to have been adjudged in a former action which appears upon its face to have been so adjudged. *Held*, that where, in an action to quiet title to a mining claim, plaintiffs claimed a certain interest by forfeiture from co-owners, and defendants claimed under a conveyance from such co-owners, a former judgment in a suit brought by plaintiffs against defendants to obtain a judgment permitting plaintiffs to redeem the property from mortgage sale did not show forfeiture: the complaint in that action having merely alleged that plaintiffs were "the successors in interest" of the co-owners and it not appearing that the question of succession by forfeiture was directly involved and adjudicated.

In Bank. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by E. L. Emerson and others against the Yosemite Gold Mining & Milling Company and others. From a judgment in favor of plaintiffs, the Milling Company appeals. Modified.

F. W. Street, W. C. Kennedy, and Will M. Beggs, for appellant. Crittenden Hampton and J. P. O'Brien, for respondents.

ANGELIOTTI, J. This is an action to quiet title to a mining claim in Tuolumne county, called the Slap Jack mine. Judgment went for the plaintiffs, and defendant Yosemite Gold Mining & Milling Company appeals from the judgment and an order denying its motion for a new trial. This is the second appeal in this cause. See Emerson et al. v. McWhirter et al., 133 Cal. 510, 65 Pac. 1036. Upon the first trial, judgment was given in favor of defendant McWhirter, and on the appeal therefrom, this judgment and an order denying plaintiffs' motion for a new trial were reversed. Upon the going down of the remittitur, the Yosemite Gold Mining & Milling Company, claiming to be the successor in interest of defendant Mc-

Whirter and defendants Argall, was substituted for "R. S. McWhirter et al." as a defendant. Plaintiffs base their claim upon a location made by one Coyle in January, 1896. The claim of defendants Argall, which embraced an undivided nine-twentieths of the property, was based on the same location, and by deed dated May 31, 1899, said Argalls purported to grant to appellant's immediate predecessor all their interest in said property. The claim of defendant McWhirter, succeeded to by appellant corporation, was based upon an attempted location by McWhirter on January 1, 1899, a few minutes after midnight, made by him upon the theory that plaintiffs had failed to perform the assessment work for the year 1898.

It is first contended by appellant that Coyle never made a valid location, because he posted but one notice of location on the claim, while the local regulation of the miners of Tuolumne county required two such notices to be posted. The same contention was made upon the former appeal, was there fully discussed and decided adversely to appellant's claim. What was there said in this matter is now the law of this case.

The second and third points made by appellant relate to the question of the sufficiency of the evidence to support the findings of the court as to the doing by the plaintiffs of the assessment work for the year 1898. The court found "that during the year 1898, the plaintiffs performed \$84.80 worth of labor upon said mine and mining claim; that on the 31st day of December, 1898, the plaintiffs resumed work upon said mine and mining claim, and prosecuted said work diligently thereafter until more than \$100 worth of labor and improvements were performed and made thereon, in addition to the labor performed during the year 1898, as aforesaid." Upon the former trial, the court found that the assessment work for 1898 had not been performed, and that the land was, therefore, on January 1, 1899, public mineral land, open to location, and McWhirter's attempted location on that day consequently valid. The judgment then given was reversed upon the ground that, conceding that the requisite \$100 worth of labor had not been done during the year 1898, the evidence showed that some work had been done in good faith during that year, and that on December 31, 1898, prior to McWhirter's attempted location, work was resumed thereon in good faith by plaintiffs, and continuously carried on thereafter, to some time late in January, 1899, until more than \$100 worth of work, in addition to that done during 1898, had been done. Section 2324, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1426], providing that on a failure to comply with the conditions as to doing the requisite work, the mine "shall be open to relocation in the same manner as if no location of the same had ever been made, provided, the original locators, their heirs, assigns, or legal representa-

tives, have not resumed work upon the claim after failure and before such location," it was held by this court thereunder that the resumption of work on December 31, 1898, and the continuance thereof to the requisite amount, prevented a forfeiture, and that McWhirter's attempted location at a time during which plaintiffs were in possession, engaged in the continuance of such work, was unavailing. It cannot be seriously contended that the evidence given upon the second trial was substantially different from that given on the first trial as to the character of the work done, and the amount thereof. Under the views expressed on the former appeal, which must here be accepted as the law of the case, the only point upon which there may be a question at all, so far as the finding of the court is concerned, is as to whether plaintiffs resumed work on December 31, 1898, or not until January 2, 1899. Upon this point, however, there can be no real question here, for there was a clear conflict in the evidence. There was added to the testimony given on the former trial, that of two new witnesses, who testified positively that Boynton, who commenced the work, did not arrive at the mine until late in the afternoon of December 31st, and that he did no work at all that day. On the other hand, Boynton testified positively that he arrived at the mine on December 30th, and commenced his work the next day. As to the time of his arrival, he was corroborated by another witness, who accompanied him there, and who was positive as to the date. The evidence of the other witnesses for appellant upon this subject was not materially different from that given by them upon the former trial, where it was held not to be sufficient to even raise a substantial conflict. There was, as shown above, a substantial conflict in the evidence upon this matter on the second trial, but that is the most that can be said for appellant. It was for the trial court to determine this conflict, which it has done by the finding in question, and its determination is conclusive upon this appeal. These are the only points made in relation to the McWhirter interest, and it thus appears that so far as appellant claims under McWhirter, the judgment in favor of plaintiffs was correct.

The remaining points relate to the Argall nine-twentieths interest. This action was commenced February 10, 1899, and it was alleged in the original complaint that the Argalls were, with plaintiffs and one other defendant, the owners of all the property here involved, and that they were made defendants because they would not join as plaintiffs. The Argalls filed their answer on February 27, 1899, admitting all the allegations of the complaint. Judgment was given for McWhirter, and against plaintiffs and the Argalls, May 4, 1899. Upon the reversal of this judgment by this court, and the substitution of appellant as the succes-

sor of McWhirter and the Argalls, the plaintiffs, on February 4, 1902, filed a supplemental complaint, alleging that at the time of the commencement of the action the Argalls and the plaintiffs were the owners of this property, and that since the filing thereof one of the then plaintiffs had transferred his interest to another plaintiff, and that the Argalls had forfeited to the plaintiffs, their co-owners, all their interest, for failure to contribute their proportion of the cost of the assessment work for the year 1898, after proper notice given them on December 20, 1899, the allegations in this behalf being apparently sufficient to bring the case within the provisions of section 2324, U. S. Rev. St., relative to forfeiture to co-owners. It was also alleged that the alleged subsequent grants to the immediate predecessor of appellant and appellant itself were taken by the grantees with full notice of such forfeiture. It was further alleged that the plaintiffs were the owners and entitled to the possession of all the property, that the appellant claimed some interest therein adverse to plaintiffs, which claim was without any right whatever, and this was followed by the ordinary prayer in complaints to quiet title. The appellant answered, denying the allegations of the supplemental complaint, setting up its claim based on the McWhirter location, and alleging the transfer by the Argalls to have been made on May 31, 1899, prior to the giving of the notice to contribute. The case was tried upon the issues thus made. The court found in accord with the allegations of the supplemental complaint as to the doing of the required work for the year 1898, the failure of the Argalls to do any of the same, and their failure to contribute their proportion after notice personally served on them, but it further found that such notice was not given until "after they had executed and delivered" their conveyance to the Yosemite Company, and had ceased to be co-owners with plaintiffs, and upon this ground, concluded that there had been no forfeiture. It made no finding at all upon the allegation that the Yosemite Company and appellant had notice of the facts upon which the claim of forfeiture is based. It, however, further found facts, not specifically alleged in the complaint or answer, upon which it based the conclusion that as between plaintiffs and appellant, the plaintiffs are the successors in interest of the Argalls in their nineteenth parts of said claim. These findings were based upon the judgment roll in an action brought by said plaintiffs in March, 1901, against certain parties, including this appellant, to obtain a judgment permitting them to redeem the property from a sale of an undivided nineteen-twentieths of the land, made under a decree of foreclosure of mortgage. It was alleged in the complaint therein that these plaintiffs are the owners of an undivided nineteen-twentieths of said property, and "are the successors in interest of the

judgment debtors in said action," among whom were the Argalls, who were, with others, personally liable for the debt, and whose interest in the land was subject to the mortgage. The appellant was the assignee of the certificate of purchase issued by the commissioner at such sale, and it and the commissioner refused to receive from plaintiff the money necessary to effect a redemption. The defendants in that action filed their answer, denying specifically that plaintiffs were the successors in interest of the judgment debtors. They then offered to allow judgment permitting plaintiffs to redeem the property upon payment of \$2,440, less their costs, and plaintiffs accepted the offer, and judgment was entered accordingly, plaintiffs waiving their further claim for damages. The court did not make findings of fact, findings having been waived, and the judgment entered recited the offer and acceptance, and, the money having been paid, decreed a redemption, and further expressly adjudged "that the plaintiffs herein redeemed the premises and property herein-after described from said foreclosure sale, as the successors in interest of the judgment debtors in the action aforesaid." This judgment had become final prior to the trial of this cause.

Plaintiffs claim, and the trial court held, that the effect of these proceedings was to estop appellant from here disputing that plaintiffs succeeded to the Argall interest. The judgment roll in that proceeding was offered by plaintiff in rebuttal, appellant's testimony having been to the effect that the notice to contribute was not given to the Argalls, until after they had ceased to be co-owners in the property. It was objected to upon the grounds, among others, that it was not put in issue by the pleadings, and was irrelevant, incompetent, and immaterial. It was received in evidence, subject to a motion to strike out, and such motion was made at the conclusion of the trial, upon substantially similar grounds, and denied. The exceptions to these rulings sufficiently present the points made by appellant in regard to the effect of the proceedings in the redemption suit, so far as this appeal is concerned. We are satisfied that this judgment roll should not have been received in evidence. It is urged that it was proper evidence in rebuttal of appellant's evidence tending to show that there was no forfeiture. There is, however, nothing in the judgment roll to indicate that the precise question of the alleged Argall forfeiture was involved in the redemption suit. Taking the allegation of succession in the complaint therein as material in its full scope, it was simply that the plaintiffs therein "are the successors in interest of the judgment debtors in said action." By what means they succeeded to those interests was not alleged. The allegation was broad enough to include any of the numerous methods by which realty may

be acquired. That plaintiffs were the successors in interest of the Argalls by forfeiture, or, indeed, that they were their successors in interest at all, is not essential to the validity of the judgment therein, for admittedly they had succeeded to the other interests, and, as successors in any mode of one or more of the co-tenants, were entitled to redeem the whole property. Code Civ. Proc. § 701, subd. 1. As successors in part, they could not redeem at all, except by redeeming the whole. *Eldridge v. Wright*, 55 Cal. 531-534. Where it is sought to show that a certain question in issue has been litigated and determined between the same parties in a previous action, it is not enough that the proposed evidence tends to show that the precise question may have been involved in such litigation. It must clearly appear that it was directly involved and adjudicated. *Beronio v. Ventura Co. L. Co.*, 129 Cal. 232-236, 61 Pac. 958, 79 Am. St. Rep. 118. The judgment roll here not showing affirmatively that the question of forfeiture of the Argall interest was involved in that action, it was not admissible in rebuttal of appellant's evidence showing that there was, in fact, no forfeiture.

We are also of the opinion that the judgment in the redemption suit cannot be held to raise an estoppel upon the question as to the succession to the Argall interest. In *Beronio v. Ventura County Lumber Co.*, supra, it was said: "In order that a judgment in one action may constitute an estoppel against the parties thereto in a subsequent action, it must be made to appear, either upon the face of the record or by intrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action. Citing authorities. 'Every estoppel must be certain to every intent, and not to be taken by argument or inference.' *Coke on Littleton*, 352b. 'If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence.' \* \* \* By section 1908, subd. 2, of the Code of Civil Procedure, 'the effect of a judgment is conclusive in respect to the matters directly adjudged,' and by section 1911, 'that only is deemed to have been adjudged in a former action which appears upon its face to have been so adjudged, or which was actually and necessarily included therein, or necessary thereto.'" See also *Freeman on Judgments*, § 256. This is simply a statement of elementary principles relative to estoppel by judgment. The thing adjudged in the redemption action was simply that the plaintiffs, as successors in interest, had the right to redeem the whole of this property from the foreclosure sale. That they should have this right, it was essential that they should be successors in interest of one or more of the judgment debtors in some portion of the property, but it was not essential to this

right, and, therefore, not essential to the judgment, that they should be the successors in interest of all the judgment debtors. Code Civ. Proc. § 701, subd. 1. Their allegation that they were the successors of all the judgment debtors was material in the sense that it was necessary for them to prove that they had succeeded to the interest of some judgment debtor in some part of the property, and the judgment is necessarily conclusive upon that point. Does it appear that anything further was determined by the judgment? We certainly cannot say that the offer to allow judgment permitting plaintiffs to redeem admitted anything more than was essential to such right of redemption. The judgment upon its face shows that there was no trial of any of the issues, and that the judgment was purely a consent judgment, based entirely on the offer and acceptance. It cannot be said, with any degree of certainty whatever, from the face of this record that the question of the succession as to the Argall interest was litigated and determined in that proceeding. Indeed, the contrary affirmatively appears, and we are satisfied that the judgment is conclusive only of that which is essential to support it, viz.: that plaintiffs had succeeded to such an interest in the property as entitled them to redeem. We think the somewhat peculiar adjudication of the decree as to the character in which the plaintiffs redeemed the premises, adds nothing to the effect of the record. Some point is made as to the acceptance on redemption of all the redemption money, including that portion due on the Argall interest, but we do not see how this can affect the question here discussed.

It is contended by appellant that, as the plaintiffs have chosen to set forth in their supplemental complaint the particular facts upon which their alleged title to the Argall interest rests, the allegation of ownership, in connection therewith, was a mere conclusion, that they could, therefore, recover only by showing title by forfeiture from the Argalls, and that the judgment roll in the redemption suit was inadmissible under the issues made to show title in them. See *Castro v. Richardson*, 18 Cal. 478; *Lick v. Diaz*, 30 Cal. 65, 75; *Haven v. Seeley*, 59 Cal. 494; *Turner v. White*, 73 Cal. 299, 14 Pac. 794; *Levins v. Rovegno*, 71 Cal. 275, 12 Pac. 161; *Hesser v. Miller*, 77 Cal. 192, 19 Pac. 375; *Gruwell v. Seybolt*, 82 Cal. 9, 22 Pac. 938; *Sav. & Loan Soc. v. Burnett*, 106 Cal. 514, 538, 39 Pac. 922. There is much force in this contention, but as we here uphold objections made by appellant to this judgment roll, which go to the merits, it will be unnecessary to discuss an objection of this nature, which could be obviated by amendment of the pleadings. No point is made on this appeal as to the findings of fact relating to the question of forfeiture. It may be material to that question to determine whether at the time of the service of the notice to

contribute, the plaintiffs had been notified, actually or constructively, of the transfer by the Argalls. As this question has not been discussed, we do not decide the same. It appears unnecessary to require the parties to again litigate the question of title as to the remaining eleven-twentieths of the property. As to that portion the judgment was clearly correct.

To the extent that the judgment decrees that plaintiff F. F. Britton is the owner of an undivided one-fourth of the property, that plaintiff Annie L. Emerson is the owner of an undivided one-fourth thereof, and that plaintiff Jacob Miller is the owner of an undivided one-twentieth thereof, the judgment and order denying a new trial are affirmed.

As to the remaining undivided nine-twentieths, constituting what is known as the Argall interest, the judgment and order are reversed, and the cause remanded for a new trial, with the right to the parties to amend their pleadings as they may be advised.

We concur: SHAW, J.; HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

3 Cal. App. 274

#### WAGNER v. WEDELL.

(Court of Appeal, First District, California.  
March 19, 1906.)

#### 1. CHATTEL MORTGAGES — ASSIGNMENT — RIGHTS OF PARTIES—FORECLOSURE.

Where, after plaintiff assigned a second chattel mortgage on property to defendant, a prior mortgagee, with the understanding that both mortgages were to be foreclosed at the same time, the amount due plaintiff to be paid out of the proceeds of sale, and the assignment appointing defendant plaintiff's attorney to take all lawful means for the recovery of the amount due, defendant, who had acquired title to the property, satisfied both mortgages of record, he was liable to plaintiff for the amount due on the latter's mortgage; plaintiff having the right to rely on a judicial sale before he could be deprived of his security without payment of the amount due him.

#### 2. SAME—ESTOPPEL.

Where defendant, a prior mortgagee, took an assignment from plaintiff of the latter's second mortgage, under an assignment appointing him plaintiff's agent to collect the indebtedness, and thereafter acquired title to the property, satisfied the mortgages of record, sold the property, and took notes and mortgages for part of the purchase price, he was responsible to plaintiff for money had and received, was thereafter estopped as to plaintiff from saying that such notes and mortgages were not money.

#### 3. MONEY RECEIVED—GROUNDS OF ACTION.

Where, after taking an assignment of plaintiff's second chattel mortgage for the purposes of foreclosure only, defendant, a prior mortgagee, who had acquired title to the property, satisfied the mortgages of record and sold the property, he was responsible to plaintiff for money had and received under the common counts, and plaintiff's remedy was not limited to pursuit of the mortgages taken by defendant for the purchase price.

#### 4. SAME—COMPLAINT—SUFFICIENCY.

A complaint charging defendant, as agent of plaintiff, with having sold plaintiff's note and mortgage for a certain sum for and on account of plaintiff, and that, although demand

had been made, defendant had not paid plaintiff the said sum, nor any part thereof, stated facts sufficient to constitute a cause of action.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Money Received, §§ 55, 56.]

#### 5. TRIAL—MOTION FOR NONSUIT—EVIDENCE.

A plaintiff's evidence must be regarded as true for the purposes of a defendant's motion for nonsuit.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 373, 374.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by David Wagner against Theodore Wedell. From a judgment for defendant, and from an order denying his motion for a new trial, plaintiff appeals. Reversed.

Reed & Hankins, for appellant. Edgar D. Peixotto, for respondent.

COOPER, J. Upon the close of plaintiff's testimony the court granted defendant's motion for a nonsuit, and judgment was accordingly entered. Plaintiff appeals from the judgment, and order denying his motion for a new trial.

The evidence shows substantially the following facts: On July 22, 1903, Lucien Blum and Peter Verdon executed to defendant a chattel mortgage on the furniture, household goods, and kitchen and dining-room wares, contained in a building known as 41 and 45 Stockton street, to secure the payment of a promissory note for \$1,500 and interest to accrue thereon. On the same day the same mortgagors executed and delivered to plaintiff a second chattel mortgage on the same property to secure a promissory note for \$1,000, besides interest. Both mortgages were properly recorded. Afterwards, the mortgagors being in default in the payment of interest, the defendant went to the plaintiff and asked him to assign his mortgage to defendant for convenience, so that defendant could foreclose both mortgages in the one action. It was finally agreed that the plaintiff should assign his mortgage to the defendant, and that the defendant should immediately commence foreclosure proceedings, and pay plaintiff out of the proceeds of the sale under foreclosure. The plaintiff told defendant at the time of the assignment that he would bid in the property for enough to cover both mortgages. The assignment was in writing, and contained the following clause: "And hereby appoint the said Theodore Wedell my true and lawful attorney irrevocable, in my name or otherwise, to have, use, and take all lawful means for the recovery of said note, money and interest." It was duly acknowledged, and was afterwards placed upon record at the request of the defendant. At the time of making the assignment the defendant gave to plaintiff the following writing: "San Francisco, Oct. 8th, 1903. One day after date I, Theodore Wedell, promise to pay to David Wagner, the sum up to one thousand dollars in

gold coin, out of the sale of the rooming house known as 41 and 45 Stockton street, San Francisco, Cal., after gaining possession of the same. Theodore Wedell. Witness: George Pattison." Plaintiff asked the defendant about the words of the writing "up to one thousand dollars." Defendant replied: "Well, that is only a matter of form. That is all right. You will get your money as soon as the foreclosure is made." Plaintiff replied that he would bid in the property to the amount of both mortgages. On the 12th day of October, 1903, the defendant, being the owner of the first mortgage, and the owner of record of the second mortgage, had both said mortgages satisfied of record. Although the evidence does not show it, the defendant evidently had procured the title from the mortgagors at the time he had the mortgages satisfied, for he afterwards sold the property and dealt with it as his own. Defendant sold the property afterwards, the date not being shown, to George P. Beck and wife, and received therefor \$1,000 in money, and a note for \$1,500, in his own favor, secured by a mortgage upon the same property, and also a note for \$1,350, executed in favor of A. C. Blum, secured by a second mortgage upon the same property. The defendant, in satisfying the former mortgages of record, in selling the property to Beck and wife, and in taking the second set of mortgages from Beck and wife, acted without the consent or knowledge of the plaintiff. In fact, after plaintiff had heard of the sale from other sources and asked defendant about it, defendant did not state the facts, but said to plaintiff, "There is a sale on, but it had not been consummated." Afterwards in a conversation with plaintiff as to the mortgage to Blum, defendant said: "There has been a good deal of crooked business done up in the real estate office, and that second mortgage I know nothing about, anything more than it is put there. It is a fictitious name that was put there as a bluff." When plaintiff asked the defendant as to the money coming to him defendant said: "Everybody in this country has got to look out for himself and do the best he can." Plaintiff has not been paid.

We are of the opinion that the defendant is liable to the plaintiff for the \$1,000, and the interest that was due thereon at the time the property was sold by defendant, less the \$10 paid plaintiff when he assigned his mortgage to defendant, and legal interest on such sum since the said sale. The defendant was the agent of plaintiff "to take all lawful means for the recovery of said note, money, and interest." As such agent it was his duty to act in the utmost good faith for the interests of his principal. He had taken the assignment for the purpose of foreclosing both mortgages, and under an express statement by plaintiff that at foreclosure sale he would bid in the property for an amount sufficient to cover both mortgages. He had been

made the plaintiff's agent to foreclose the plaintiff's mortgage, and to recover the money and interest due thereon. Plaintiff had the right to rely upon defendant, and it was the duty of the defendant to act within the scope of his agency for the interest of his principal, and not adversely to him. If defendant had proceeded to foreclose the mortgages, he would have had the right to a decree that his own mortgage and costs be first paid, and then the balance to be applied to plaintiff's second mortgage. If defendant had so foreclosed, and the property had only sold for enough at judicial sale to pay the amount due to defendant, he would not have been responsible to plaintiff; but plaintiff had the right to rely upon a judicial sale before he could be deprived of his security without payment of the amount due him. Defendant satisfied and canceled the mortgage held by plaintiff without plaintiff's consent. He did this to clear his own title to the property. He then sold the property, without consulting the plaintiff, and apparently for a sum more than sufficient to pay both himself and the plaintiff; and, even if he did not, he had no right to satisfy and cancel the mortgage of the plaintiff without becoming liable to plaintiff for the amount due him. When defendant sold the property, and took notes and mortgages for part of the purchase price, he was thereafter estopped as to plaintiff from saying that such notes and mortgages were not money. He sold the property and was paid for it. Whether it was all in money or that which, as to plaintiff, ought to have been money, makes no difference. He is responsible to plaintiff for money had and received, for the reason that he is estopped from saying that he did not sell for money. Defendant's main argument is to the effect that plaintiff has mistaken his remedy, and that defendant is not responsible for money had and received under the common counts, but that plaintiff's only remedy is by pursuit of the mortgages taken by defendant. We are not inclined to look with favor upon such contention. It certainly would not be in furtherance of honesty and fair dealing between man and man. In *Moses v. McFarlan*, 2 Burr. 1005, Lord Mansfield said, in speaking of the action for money had and received: "One great benefit which arises to suitors from the nature of this action is that plaintiff need not state the special circumstances from which he concludes that, *ex æquo et bono*, the money received by the defendant ought to be deemed to belong to him. He may declare generally that the money was received to his use, and make out his case at the trial. This kind of action to recover back money which ought not, in justice, to be kept is very beneficial, and therefore, much encouraged. It lies for money paid by mistake, or upon a consideration which happens to fail, or extortion, or oppression, or an undue advantage of the plaintiff's situation, contrary to the laws made for the

protection of persons under these circumstances." The above quotation was referred to with approval by our own court in *Minor v. Baldridge*, 123 Cal. 190, 55 Pac. 783, where it was said that it is well established in this state that the common counts in assumpsit may be used, and that at common law such counts could be used to recover money obtained by false and fraudulent representations.

In *Floyd v. Day*, 3 Mass. 403, 3 Am. Dec. 171, it was held that where an agent compromises a demand of his principal, by receiving from the debtor a negotiable note, indorsed specially to the agent, an action for money had and received will lie. In the opinion it is said: "In fact, when the defendant, instead of money, received this note of Pillsbury, and discharged him, the property of the note was in the defendant, and he became immediately answerable to the plaintiff for the amount of the liquidated damages, which made a part of the consideration of the note, as so much money received by him to her use, and an action of assumpsit is her proper remedy. For, although the defendant received no money, yet by this transaction he discharged Pillsbury from the plaintiff's demand on him for money, and he must be considered as having made himself answerable to her for the money he ought to have received from Pillsbury." *Floyd v. Day* has everywhere been regarded as authority on the proposition that, in such case, an action for money had and received will lie. Under the rule in that case, when the defendant in the present case, instead of foreclosing the mortgages, or instead of receiving the money on the sale, released plaintiff's mortgage and received the \$1,000 and the mortgages of Beck and wife, he became immediately chargeable to plaintiff as for so much money received to the use of plaintiff. The same rule was laid down in *Beardsley v. Root*, 11 Johns. (N. Y.) 464, 6 Am. Dec. 386, where it was held that such action would lie, even though the defendant had received no money, but had wrongfully discharged a debt due his principal in payment of his own debt. It is there said: "The general rule indisputably is, that the action for money had and received cannot be supported unless the defendant has actually received money. It has, however, been held in the English courts that taking negotiable paper is equivalent to the receipt of money. \* \* \* Here the attorney or agent has discharged a debt due to his principal, and applied that debt to the payment and satisfaction of his own debt, for the amount of which he is liable to the plaintiff in this form of action."

In *Bullard v. Hascall*, 25 Mich. 132, it was held that such action would lie even though defendant did not receive any money. It is there said: "But it is objected, by the counsel for plaintiff in error, that assumpsit for money had and received could not be

maintained by the plaintiff, because there was no evidence that the defendant actually received the money for the draft. To this objection there are two sufficient answers: First, as the evidence clearly shows that the draft, which belonged to the plaintiff, came to the defendant's possession, who gave a receipt for it in the name of the firm, and thus discharged the government from liability for the claim, and thereby cut off the plaintiff's remedy against the government, and then, instead of handing it over to the plaintiff, or procuring the money upon it and paying it over to him, that he wrongfully deprived the plaintiff of the opportunity of obtaining the money upon it, and wrongfully enabled another party to obtain it, it does not now lie with him to deny that he had himself received the money, whether he did in fact receive it or not. It was his duty, as between himself and the plaintiff, if he disposed of it at all, to have obtained the money for it, and to have paid it over to the plaintiff; and if he chose to dispose of it without obtaining the money, the disposition being wrongful as against the plaintiff, he is estopped to deny that he received the money." In *Thompson v. Babcock*, *Brayton* (Vt.) 24, the plaintiff, having mortgaged a lot of land, executed a deed of the same land to Burbank, and delivered the deed to Babcock to enable him to dispose of the same and pass the title to a purchaser. Babcock, on disposing of the land as plaintiff's agent, took notes of hand against a third person and a quantity of paper instead of money. The court held that defendant was not authorized to sell for anything but money, and having done so he was liable on the common counts for money had and received. In *Andrew v. Robinson and Others*, 3 Campbell, 199, it was held that where an insurance broker had received credit in account with an underwriter for a loss upon a policy, and had thus deprived his principal of all remedy against the underwriter, the action for money had and received would lie, and Lord Ellensborough held that defendants "were estopped from saying that they had not this sum in their hands for the plaintiff's use."

The complaint states facts sufficient to constitute a cause of action. It charges the defendant, as agent of the plaintiff, with having sold the plaintiff's note and mortgage for \$1,000 for and on account of plaintiff; that, although demand has been made, the defendant has not paid the plaintiff the said sum of \$1,000 nor any part thereof. If the defendant sold the plaintiff's note and mortgage for \$1,000, and did not receive the \$1,000, he should have received it. What has been said relates to the ruling on the motion for a nonsuit, and in such case we must regard all the plaintiff's evidence as being true for the purposes of the motion.

The judgment and order are reversed.

We concur: HARRISON, P. J.; HALL, J.

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## ORACK v. POWLESON et al.

(Court of Appeal, First District, California.  
March 20, 1906.)1. QUIETING TITLE—STATUTORY PROVISIONS—  
DEFENSES.

Where, in a suit against the city and county of San Francisco to quiet title, it appeared that plaintiff had had such adverse possession as to confer title under Civ. Code, § 1007, the fact that the land involved was within the lands included in Act March 14, 1870 (St. 1869-70, p. 353, c. 249), authorizing the city and county to convey certain lands to persons claiming under those in possession prior to a certain date, was no defense, in the absence of any showing that some person existed for whom, by reason of such possession, the property was held in trust.

## 2. SAME.

The fact that plaintiff himself might have secured a deed from the city and county under the act of 1870 did not defeat the title acquired by him by virtue of his adverse possession.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by E. Orack against Grace M. Powleson, as administratrix, and others. From a judgment in favor of plaintiff, except as against defendant city and county of San Francisco, plaintiff appeals. Reversed.

Tobin & Tobin, for appellant. Percy V. Long, City and County Atty., for respondent.

**HARRISON, C. J.** Action to quiet title. Judgment was rendered in favor of the plaintiff, quieting his title to the land described in the complaint as against the defendant Powleson, but refusing to quiet it as against the defendant the city and county of San Francisco. The plaintiff has appealed from the judgment, presenting his appeal upon the judgment roll without any bill of exceptions.

The land involved in the action is situated in the city and county of San Francisco on the southerly line of Golden Gate avenue 100 feet easterly from Scott street, and having a frontage of 25 feet with a depth of 100 feet. The court found that the plaintiff derails his title by mesne conveyances under a so-called pre-emption claim of one Henry Merritt, made in 1850, which embraces the land described in the complaint; and it also found that "the plaintiff, by himself and his predecessors in interest, has been in open, notorious, exclusive, and adverse possession of said premises and every part thereof, and has paid all taxes levied and assessed thereon for city, county and state purposes for a period of more than 10 years next before the beginning of this action." By virtue of the provisions of section 1007, Civ. Code, the finding that the plaintiff has had an adverse possession of the land in question for more than 10 years prior to the commencement of the action shows that he has acquired a title thereto by prescription sufficient against all. The provisions of the section include the respondent, and in the

absence of any further evidence, the plaintiff was entitled to the judgment asked for by him. If there were any ground upon which the respondent would not be subject to the provisions of the section it was an affirmative defense, to be presented upon the record and established by evidence. In its answer to the complaint the respondent alleges that it holds the legal title to the property in trust, to be disposed of and conveyed to the parties entitled thereto and designated in an act of the Legislature of the state of California entitled "An act to expedite the settlement of land titles in the city and county of San Francisco, and to ratify and confirm the acts and proceedings of certain authorities thereof," approved March 14, 1870; and that the legal title thus held by it in trust is the only interest or claim which it has therein; that by the aforesaid act of March 14, 1870, the Legislature has prescribed the terms and conditions and designated the manner in which the legal title of said premises shall be disposed of and conveyed by it to the party or parties designated in said act as entitled to said conveyance; that said title has never been disposed of or conveyed at all; and that said act provides a plain, speedy, and adequate method by which its title can be conveyed to plaintiff if he has title to it; and that he has never availed himself of said method for the purpose of procuring said legal title. The court made a finding in accordance with these averments, and as a conclusion of law therefrom held that the plaintiff is not entitled to a decree quieting his title as against the city and county.

The lands within the city and county of San Francisco which were formerly held by the pueblo of San Francisco are those which were embraced within the limits of the Van Ness ordinance and those commonly known as "Outside Lands." The former includes those within the charter limits of the city of San Francisco as defined in the act for its incorporation, passed April 15, 1851, and were released to the city by the act of Congress of July 1, 1864; and the latter includes that portion of the pueblo lands confirmed to the city by the decree of the Circuit Court of the United States May 18, 1865, which lie outside of the charter limits of 1851 and were conveyed to the city by the act of Congress of March 8, 1866. The act of March 14, 1870 (St. 1869-70, p. 353, c. 249), covers the land included in both of these descriptions, and authorizes a conveyance to be made by the city and county of land included in each; but in defining the class of persons to whom such conveyances may be made the Legislature has precluded it from making a conveyance to any one who is not within the class so defined. Of the outside lands it is authorized to make a conveyance only to those who, either in person or through persons from whom they claim or derive possession, were in possession on the

8th of March, 1866. Of the lands covered by the Van Ness ordinance the conveyance can be made only to those who, by themselves, their tenants or the persons through whom they claim or derive possession, were in possession on or before January 1, 1855, and remained in such possession until and including June 20, 1855. It is only for such persons that the city and county holds any of said land in trust for conveyance, or to whom it is authorized by said act to make a conveyance; and in the absence of any showing of such possession the provisions of the act of March 14, 1870, are not available as a defense to the plaintiff's complaint. It was therefore incumbent upon the respondent, not only to allege as an affirmative defense to the plaintiff's right of action, but also to show at the trial the existence of some person for whom, by reason of such possession the property is held by it in trust to be conveyed to him. The land involved in the present action is within the limits of the Van Ness ordinance; and the finding of the court that it was not reserved under that ordinance for any public use, or set apart for any municipal purpose, showed that it is not incapable of alienation or of being acquired by adverse possession.

Neither did the fact that it was held under a trust to convey it to persons who might be entitled thereto prevent the plaintiff from acquiring a title by adverse possession. *Ames v. San Diego*, 101 Cal. 390, 35 Pac. 1005. As the respondent did not allege in its answer any previous possession of the property, and as the court states in its findings that there was no evidence introduced at the trial to show that the plaintiff or his predecessors were or were not in possession of any portion of the property on the 1st day of January, 1855, or on the 20th day of June, 1855, or at any time between those dates, the act of March 14, 1870, was irrelevant to the controversy between the parties. "There is no presumption that any portion of the land covered by the ordinance was or was not in the actual possession of any one during this period; but in any legal proceeding, in which the fact whether a particular parcel of land was or was not then held in actual possession, becomes material it must be established by that party who relies upon the fact as an affirmative issue in support of his claim or defense." *Goodwin v. Scheerer*, 106 Cal. 690, 40 Pac. 18. The finding that the plaintiff might have secured a city deed under the Act of 1870 if he had proved possession of said property by himself or his predecessors in interest on the 1st day of January, 1855, and continuously thereafter until the 20th day of June, 1855, has no legal significance in the absence of a finding that he had such possession or was able to make such proof. Even if such possession could have been established it would not have defeated the title acquired by him by virtue of his 10 years' adverse possession, or

justified the court in refusing to give him judgment.

The judgment in favor of the respondent is reversed, and the superior court is directed to enter judgment upon its findings in favor of the plaintiff and against the respondent as prayed for in his complaint.

We concur: COOPER, J.; HALL, J.

3 Cal. App. 286

### CANNON v. MCKENZIE.

(Court of Appeal, Third District, California. March 20, 1906.)

#### 1. MOTIONS—SURPRISE—LEAVE TO RENEW.

Where, on motion by defendant for a change of the place of trial, he made no claim that he was taken by surprise by plaintiff's affidavit in opposition to his own affidavit and asked no time to offer further proof, a subsequent motion for leave to renew his former motion on the ground of surprise and for the purpose of introducing new evidence to rebut the affidavit of plaintiff was properly denied.

#### 2. JUDGMENT—CONFORMITY TO PLEADING.

A complaint for board furnished, labor done, and the value of broom brush will not support a judgment for hire of a team, nor for gasoline furnished.

#### 3. WORK AND LABOR—WAGES OF SON.

Under Civ. Code, § 197, providing that a father is entitled to the services and earnings of his minor son, there may be a recovery for labor of the plaintiff's son under a complaint for labor done.

#### 4. SALES—ACTION FOR PRICE—TIME TO SUE.

Under a contract whereby defendant purchased broom brush while the broom corn was standing in the field and agreed to cut, harvest, and bale the crop at his own expense, and the plaintiff delivered possession of the crop to him but defendant failed to perform the contract, an action for the price of the broom brush might properly be commenced before the crop was harvested and baled, where the failure to harvest and bale it was due to the fault of the defendant.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by Allen Cannon against George F. McKenzie. From a judgment in favor of plaintiff, defendant appeals. Modified.

E. De Los McGee, for appellant. Donohoe & Freeman, for respondent.

CHIPMAN, P. J. This is an action to recover the value of certain 18 tons of broom brush and for board furnished defendant and labor done. The court gave judgment for plaintiff in the sum of \$612.33, with interest, and costs and disbursements, amounting to \$273.45. The action was commenced in Glenn county, and summons was served in said county on October 3, 1904. Defendant appeared by demurrer, and, at the same time, served his demand in writing and notice of motion that the place of trial be changed to the city and county of San Francisco. The motion was made on the affidavit of defendant, the demand in writing and the papers and records on file in the action. The motion was heard on October 31, 1904, and at the hearing plaintiff's attorney filed an affidavit

of plaintiff in reply to defendant's said affidavit. The court denied the motion of defendant, to which exception was duly taken. Thereafter, on November 10, 1904, defendant served and filed his motion to vacate and set aside the order of the court made October 31st, and to grant defendant leave to renew his said motion. This latter motion was made on the alleged grounds: (1) That said order was given and made through inadvertence and mistake. (2) That the court was not fully advised as to defendant's residence. (3) That the affidavit of plaintiff is false and untrue so far as it relates to defendant's residence. (4) That defendant was taken by surprise at the hearing of said motion to change the same and was given no opportunity to reply to plaintiff's said affidavit. (5) That there is no evidence before the court sufficient to justify said order.

With defendant's said motion for leave to renew his former motion, defendant served and filed the affidavit of defendant and also the affidavit of Frank Moody, Esq., his attorney, appearing at the hearing of the first motion. It was stated in the motion that it would be heard upon the affidavits of defendant and said Moody "and upon all the papers on file in this cause, and upon such other evidence as may be introduced at the hearing of this motion." It was admitted that at the hearing of the first motion no objection was made by defendant to the introduction of plaintiff's affidavit, "nor was any time asked by counsel for defendant to reply to said affidavit." The court denied defendant's motion to vacate said order of October 31, 1904, and denied the motion for leave to renew said motion to change the place of trial. "The court, in denying defendant's motion, said that the additional showing of defendant for a change of venue should have been made in the original affidavit of defendant." No exception appears to have been taken to the order or decision of the court denying defendant's motion to set aside the first order, and to permit defendant to serve his motion for a change of the place of trial. Respondent makes the point that the second order is not appealable under section 939, Code of Civil Procedure, and therefore, not having been excepted to, cannot be reviewed. Citing section 647, Code Civ. Proc.; *Grazidal v. Bastanchure*, 47 Cal. 167. It is not necessary to determine the point. At the hearing of the first motion defendant stated in his affidavit that at "the commencement of the action, and long prior thereto, he was, and ever since has been, a resident of the city and county of San Francisco" and "is not now, and never has been, a resident of Glenn county." The counter affidavit of plaintiff stated that at the time of the commencement of the action, and at the time summons was served, defendant was a resident of Glenn county and that for several months prior to the commencement of this action the said George F. McKenzie has resided in the county of Glenn and many times

stated to plaintiff "that he intended to reside and make his home in the county of Glenn, and would vote in said county at the election this fall, and intended to register as a voter as such." The first motion was heard on these two affidavits without objection by defendant, and without asking time to file further affidavits or submit further evidence, and at that hearing defendant made no suggestion of surprise and made no complaint, as he now makes, that plaintiff's affidavit had not been served upon him prior to the hearing. If he was taken by surprise and desired further time to meet plaintiff's affidavit he should have made known his desire then and there. His attorney deposed, in support of the second motion, that if he had been given the opportunity to reply to plaintiff's affidavit he "believes that the utter and entire falsity of plaintiff's affidavit could and would have been shown." We cannot see that he was deprived of this opportunity, for he did not ask that it be accorded to him.

As to the fact of defendant's residence, Attorney Moody made no statement. Defendant in his second affidavit merely reiterates what he stated in his first affidavit, with the additional statements that he had registered as a voter in the city and county of San Francisco, in July, 1904, which is shown by a copy of his certificate of registration; that he had been a resident of San Francisco for over 20 years and that his business had led him to visit Colusa and Sutter counties in August, 1904, for the purpose of buying broom corn, and, being unable to secure all he required, he went to Glenn county for the same purpose and was there for that purpose alone. He denied making the statements deposed to by plaintiff in his affidavit. There is nothing in the record in support of defendant's claim of surprise or excusable neglect. No new facts were before the court except as above stated, which were facts tending to corroborate the facts stated in his first affidavit. Defendant may have registered as a voter in San Francisco in July, 1904, and later have changed his residence to Glenn county. His registration in San Francisco was not conclusive as to his residence when the action was brought. The second motion was made on the papers on file, including plaintiff's affidavit. The question was within the discretion of the court, and we cannot say that there was such abuse of discretion as should compel a reversal of its orders.

The appeal from the judgment is on the judgment roll, and it is claimed that certain findings are not within the issues—namely, the finding that there is due the sum of \$37.50 for hire of a team, that there is due the sum of \$22.50 for the labor of plaintiff's son, and that there is due the sum of \$2.25 for gasoline. The complaint was for "board furnished, labor done, and the value of 18 tons of broom brush." A demurrer to the complaint on the ground of ambiguity and uncertainty was overruled, but defendant does not

claim error in this regard. We do not think that plaintiff can have greater relief than he prayed for, or on issues not before the court, and hence there is no basis in the complaint for the items mentioned except the item for services of plaintiff's son. All intendments must be indulged in support of the judgment. The father is entitled to the services and earnings of his minor son. Civ. Code, § 197. The evidence under the claim for labor performed may have shown that the son was a minor, and there is no claim that defendant paid the minor. Civ. Code, § 212; *Commissioners v. Barnard*, 98 Cal. 199, 32 Pac. 982; *Rudel v. Los Angeles County*, 118 Cal. 281, 50 Pac. 400. We see no reason why the judgment for the other items mentioned in the complaint should not stand.

The court found that defendant purchased the broom brush while the broom corn was standing in the field and "agreed to cut, harvest, and bale the said crop at his own cost and expense," and that the crop was to be harvested and baled and paid for at the agreed price on September 15, 1904, and that plaintiff delivered possession of the crop to defendant on or about August 1, 1904; and the court also found that defendant failed to perform the contract on his part in all these particulars. It is claimed that because the court also found that all the broom corn was not harvested and baled at the commencement of the suit the cause of action had not accrued. But the court found that the failure of defendant to harvest and bale the crop "was due to the fault of the said defendant and not to any act or fault of the said plaintiff"; and "that the plaintiff at the time of the commencement of this action had performed in every respect the terms of his agreement of sale of said crop." There is no merit in the claim that the action was prematurely commenced.

The judgment is modified by deducting therefrom the sum of \$39.75, and otherwise it is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

3 Cal. App. 291

HUTCHASON et al. v. SPINKS.

(Court of Appeal, Second District, California.  
March 23, 1906.)

FRAUD—ELEMENTS—RELIANCE ON REPRESENTATIONS.

In an action for fraud, the plaintiff, in order to recover, must show not only fraudulent representations by the defendant, but also that they relied on the representations, and were thereby induced to enter into the contract.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 1, 3, 17.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by W. E. Hutchason and others against M. E. Spinks. From an order deny-

ing defendant's motion for a new trial, he appeals. Reversed.

Byron Waters and J. W. McKinley, for appellant. Edward L. Hutchison, E. C. Bower, and Bower & Hutchison, for respondents.

SMITH, J. This is an appeal by the defendant from an order denying his motion for a new trial. It is somewhat difficult to determine from the complaint the nature of the action. It appears, however, that the cause of action originated in the lease or contract of date April 13, 1901, set out in the complaint, and in the subsequent conduct of the defendant. This contract purports to be a lease of the "dental office and business" of the defendant in the city of Los Angeles, and there is contained in it, among other provisions, an agreement by the defendant that he "will not, during the term thereof, open or conduct any dental office in the city of Los Angeles, or engage directly or indirectly in the practice of dentistry in said city"; and we construe the contract, also, as being in effect a transfer of the good will of the business. Civ. Code, § 992. It is further alleged that the defendant, as an inducement for plaintiff to enter into the contract, represented to them that he was receiving from the business the sum of \$1,800 per month, and that this representation was untrue; the business being worth not to exceed \$250 per month; and that the plaintiffs, relying upon these representations, were induced thereby to enter into the contract. Other false representations by the defendant to the plaintiffs are also alleged; but these are, in effect, simply allegations of the promises contained in the contract, and of other promises and of failure upon the part of the defendant to perform them. The suit may, therefore, be regarded as a suit to recover damages for the misrepresentation of fact above specified, and for breach of contract; and as no objection to the joinder of these causes of action was interposed, it must be so regarded. The complaint concludes with the allegation that by reason of said misrepresentations, which will include both causes of action, the plaintiffs were damaged in the sum of \$10,000, for which amount they pray judgment. The jury found a general verdict for the plaintiffs in the sum of \$2,994; but in the special findings the sources of the several damages suffered by the plaintiffs are distinguished, and it is found that by reason of the misrepresentations of the defendant the plaintiffs suffered damage in the sum of \$2,394, and "by reason of the defendant not performing his agreements" they suffered damage in the sum of \$600. The points made by the appellant are very numerous, but it will be sufficient to consider the following:

1. The jury were, in effect, instructed that if they believed from the evidence "that as an inducement for plaintiffs to purchase

said business \* \* \* the defendant represented that said business was paying from \$1,800 to \$2,000 per month, whereas \* \* \* as a matter of fact, said business was not then paying more than \$250 a month," they should "find for the plaintiffs." But this omits an element essential to plaintiffs' cause of action, namely, that they relied upon these representations and were thereby induced to enter into the contract. It is clear, therefore, that as to the amount \$2,394 the verdict cannot be sustained.

2. As to the \$600 damages for breach of contract, the matter is not so clear. According to the theory of appellant the plaintiffs, at some time subsequent to the commencement of the suit, ceased to perform the contract, and he claimed that such being the case the plaintiffs could not recover; but the jury were instructed, in effect, that if the plaintiffs had complied with the terms of the contract up to the time of the commencement of the suit, their subsequent failure of compliance would not prevent them from recovering the amount, if any, to which they were entitled when the suit commenced or while performing the terms of their contract. But the applicability of this instruction to the case depends upon a very intricate question, which we do not deem it necessary to discuss; though on this point some explanation will be necessary. By the terms of the lease set out in the complaint the consideration is stated to be \$7,570; but it appears that upon the execution of the lease the plaintiffs paid the defendant in cash the sum of \$4,050, making with the amount specified in the lease an aggregate of \$11,620, and continued to pay the installments mentioned in the lease until the 15th day of February, 1902, thus paying in the aggregate \$8,207.50, or \$637.50 in excess of the amount stated in the lease. Accordingly, in the original complaint, filed September 16, 1901, it is alleged, in effect, and in the third amended complaint, filed January 18, 1902, expressly, that the consideration of the contract was the aggregate of the amount paid and the amount specified in the contract—that is to say, the sum of \$11,620—which is also the theory of the defendant. But in the present complaint it is claimed by the plaintiffs that the sum mentioned in the contract, \$7,570, was the whole consideration agreed upon, and that the cash payment of \$4,050 was a payment upon the amount specified in the written contract. On this point the jury found specially in accordance with the theory of the plaintiffs, and one of the points urged by the defendant is that this finding is not supported by the evidence. On the other hand, it is claimed by counsel for the appellant that the matter was not in issue; and in this we agree. But the question was material to the instruction under consideration; for upon the defendant's theory of the case it would have been applicable. Upon the case as presented to us on this appeal, however, it has

no application; nor can we assume that on another appeal it will become so. We, therefore, deem it unnecessary to pass upon the correctness of the instruction.

3. There are some other instructions bearing upon the credibility of the testimony of a witness, the correctness of which is at least doubtful. But upon this point and the numerous, or rather innumerable, other points presented in the case, we deem it unnecessary to enter.

For the error first above specified, the order appealed from must be reversed, and the cause remanded for a new trial; and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

3 Cal. App. 304

FRENCH et al. v. SUPERIOR COURT OF  
SAN DIEGO COUNTY et al.

(Court of Appeal, Second District, California.  
March 24, 1906.)

ADMINISTRATORS—SPECIAL ADMINISTRATORS—  
ACCOUNTING AND SETTLEMENT.

Code Civ. Proc. §§ 1622-1627, relating to accounting and settlements of executors and administrators, applies to special administrators appointed under the provisions of section 1411 et seq., so that it is the duty of the judge to hear and determine issues made by an account of a special administrator and objections thereto, before the appointment of a regular administrator.

Application by Louise A. French and others for a writ of mandamus to the superior court of San Diego county and N. H. Conklin, judge thereof. Writ granted.

C. H. Rippey, E. W. Britt, and Hunsaker & Britt, for plaintiffs. W. J. Mossholder and Stearns & Sweet, for defendants.

SMITH, J. In this case, one C. W. Buker was, on the 27th day of July, 1903, duly appointed special administrator of the estate of Harriet M. Arnold, deceased, pending the contests of two wills of the decedent of different dates, which still remain undetermined, and has duly qualified as such. May 10, 1904, he rendered and filed in the superior court a report and account or exhibit of the property of the estate received by him and of payments made by him as such administrator. The account or exhibit prayed that a day be appointed for the hearing thereof, and upon the hearing the same be allowed, approved, and settled; and accordingly notice of such hearing was given by the clerk in the usual manner. The matter, however, was not taken up by the court at the time appointed or afterward; but on the 28th day of March, 1905, the plaintiffs, who are heirs of the deceased and beneficiaries under either will, filed in the superior court their objections to the account and contested the allowance and settlement of the same, and thereafter, upon due notice to the court, moved the court to

hear and determine the issues thus presented. But the court refused, and has ever since refused, to hear or determine the issues made by said account and objections, or to appoint a time for the hearing thereof; and this proceeding is an application for a writ of mandamus compelling the court to act in the premises.

From the answer of the defendant Conklin it appears that the motion to hear the case was denied by the court on the grounds following: "(5) That there is no law or provision of law in said state of California requiring or authorizing or permitting said special administrator of said estate to make, render or present any account of his administration of said estate prior to the time of the appointment of a regular administrator of said estate, or the appointment of an executor under the last will and testament of said decedent. (6) That there is no law or provision of law in said state authorizing or empowering or directing said superior court, or said respondent N. H. Conklin as the Judge thereof, to settle or refuse to settle, allow or refuse to allow, or approve or disapprove said account and report of said special administrator prior to the appointment of a regular administrator or an executor as aforesaid. (7) That said superior court has not, nor has said respondent N. H. Conklin, any jurisdiction to allow or disallow, approve or disapprove, or settle or refuse to settle said account of said special administrator prior to the appointment of a regular administrator or executor as aforesaid. \* \* \* (12) That should said court settle, allow, and approve said account, the order settling, allowing, and approving the same would not bind any heir of said decedent or any legatee or devisee named in the last will and testament of said decedent, nor any executor or administrator of said estate who might hereafter be appointed. \* \* \* (17) That there is no law or provision of law in said state requiring or authorizing or empowering said special administrator to make any report of his acts as such special administrator prior to the close of his administration as such special administrator."

Upon this showing, we are of the opinion that the court in refusing to hear the case declined to perform functions devolving upon it by the law. A special administrator is, according to the ordinary use of language, merely a kind of administrator; and accordingly the provisions specially referring to him in section 1411 et seq. of the Code of Civil Procedure, form but part of the general chapter entitled "Of Executors and Administrators," etc. We think it clear, therefore, that it was the intention of the Legislature that the provisions of this chapter, so far as applicable, should apply to the case of a special administrator, and hence that sections 1622 to 1627, inclusive, are applicable, and the court should have

heard the case. As to the kind of order or judgment that should be entered by the court, or its effect as an estoppel, these are questions that it would not be proper to consider in this proceeding; but we are clearly of the opinion that it is the duty of the court to hear the case and at least to take such action with regard thereto as may be necessary for the preservation of the estate.

It is ordered that a peremptory writ of mandamus be issued to the defendants, requiring the court and the judge thereof to hear and determine the issues raised by the exhibit of the special administrator, and the objection thereto of the plaintiffs heretofore filed, and to render such judgment or order thereon as it may be advised.

We concur: GRAY, P. J.; ALLEN, J.

3 Cal.App. 294

DANIELS v. DANIELS et al.

(Court of Appeal, Third District, California.  
March 22, 1906.)

1. PLEADING—JUDGMENT ON PLEADINGS—MOTION—EFFECT.

Where in an action on a note, the answer merely stated that the cause of action was barred by limitations, a motion for judgment on the pleadings did not admit the truth of the allegation that the cause of action was barred.

2. LIMITATION OF ACTIONS—ACTION ON NOTE—ACCRUAL.

Civ. Code, § 1042, provides that several contracts relating to the same matter and parts of substantially the same transaction are to be taken together, and by section 1636 effect must be given to every part of the contract. At the time of making a demand note, without interest, and as a part of the same transaction, the parties executed an instrument reciting the execution of the note in payment for shares of stock and providing that the note should be given to a third person and retained by him until the death of one of the makers, provided it occurred within a specified time, and that upon such death or the expiration of such time the third party should deliver the notes to the payees. *Held*, that limitations did not commence to run against the note until the death of the maker mentioned.

3. CONTRACTS—CONSIDERATION.

There was a sufficient consideration for the agreement as the consideration for the notes would support the agreement, and the forbearance evidenced by the suspension of the right to sue was a part of the consideration for which the notes were given.

Appeal from Superior Court, Sonoma County; A. G. Burnett, Judge.

Action by Walter A. Daniels against Sarah L. Daniels, as executrix, and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

C. H. Pond and J. H. & R. L. Thompson, for appellants. W. B. Kollmyer, for respondent.

McLAUGHLIN, J. It appears from the complaint herein that on the 5th day of June, 1897, at Chicago, Ill., Newell Daniels and Sarah L. Daniels made and executed their

promissory note for \$1,000 without interest, payable to Walter A. Daniels at his office in Chicago upon demand, and at the same time and place made and executed a similar note for a like amount to Adelaide M. and Cora Jean Daniels. That at the time the said notes were so made and executed, and as a part of the same transaction, the payors, who were described as residents of the state of California, as parties of the first part, the payees, as sole heirs at law of Leo H. Daniels, deceased, as parties of the second part, and one James A. Stoddard of Chicago, as party of the third part, entered into an agreement in writing, reciting the execution of the two notes, in renewal of two notes given to secure the payment of 61 shares of stock in the Milwaukee Cranberry Company, representing an interest in 680 acres of land in Wisconsin, and recording their mutual agreement with regard thereto, which was, in substance, as follows: It was mutually covenanted that the two notes be placed in the keeping of the third party to be by him or his legal representatives retained until the death of Newell Daniels provided such death occurred within 9½ years from date thereof; that the payors might pay or renew either or both of the notes at any time within the period mentioned; and that upon the death of Newell Daniels, or at the expiration of 9½ years, if he should live so long, the third party, upon notification, would immediately deliver the notes to the parties of the second part, their heirs, executors, or administrators, to be used by them as they might deem proper "by negotiating them or otherwise." It was further alleged in the complaint that Newell Daniels died on April 16, 1904, that Sarah L. Daniels was the duly appointed, qualified and acting executrix of his will, that claims upon said notes in due form had been presented within the time allowed by law, and rejected, and that plaintiff was the assignee of the payees and claimants Adelaide M. and Cora Jean Daniels. The defendant demurred to the complaint on general grounds, and on the special ground that the causes of action therein stated were barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. The demurrer was overruled, and an answer was filed which contained only an affirmative allegation that Newell and Sarah L. Daniels had resided in this state continuously for more than four years prior to the death of the former, and a reiteration of the plea that the causes of action were barred by the statute of limitations. The court granted plaintiff's motion for judgment on the pleadings, and this appeal is from the judgment thereupon entered.

As preliminary to the main inquiry touching the plea of the statute of limitations, it is contended that the motion for judgment on the pleadings admits the truth of the averments that the causes of action are barred by the provisions of section 337 and sub-

division 1 of section 339 of the Code of Civil Procedure. This contention cannot be sustained. While the ordinary rule is that such a motion must be treated as an admission that every substantive fact stated in the answer is true, that rule cannot have the conclusive effect claimed for it here. The absence of denials in the answer was an express admission that every fact alleged in the complaint was true. The answer must, therefore, be construed as confessing such facts, and the special plea in bar of the causes of action thereby admitted must be treated as an averment that, though the facts so admitted and affirmatively alleged are true, the bar of the sections of the Code enumerated had intervened when the complaint was filed. In other words, such special plea is a conclusion of law which the law for mere convenience tolerates in a pleading, but the sufficiency of such plea rests on facts admitted or proven. If the facts show that the causes of action are barred, the plea attaches and the plaintiff must be denied relief. If the facts demonstrate the contrary, it would be giving the plea undue force to say that it not only contradicts the other admissions, but conclusively establishes something which is admittedly untrue. We are of the opinion that the causes of action stated in the complaint were not barred by the provisions of law relied upon, when that pleading was filed. It stands admitted that the agreement was executed contemporaneously with the notes, as part of the same transaction, and that the notes were thereupon delivered to and deposited with Stoddard under the terms of the contract. "Several contracts relating to the same matters between the same parties, and made as parts of substantially the same transaction, are to be taken together." Civ. Code, § 1642. Therefore, the notes and auxiliary agreement must be viewed as one contract, and construed as a whole, effect must be given to every part, to the end that the intention of the parties as it existed at the time of contracting may be effectuated. Civ. Code, §§ 1636, 1642. So viewed, it must receive an interpretation that will make it lawful, operative, definite, reasonable, and capable of being carried into effect if this can be done without violating the evident intention of the parties, and if uncertainty exists the language must be interpreted most strongly against the promisors, who are, presumably, the parties who caused the uncertainty to exist. Civ. Code, §§ 1643, 1654, 3541, 3543. The purpose and intention of the parties to the transaction as evidenced by the auxiliary agreement, seems quite evident. The execution and unconditional delivery of the notes would create the relation of debtors and creditors, with the correlative rights pertaining to such relation. If it was not intended that the legal rights which would otherwise result from the delivery of the notes and the relation thereby created, would

be changed, modified, or suspended by the agreement, then it could have no possible purpose or object. But that such was the intention is apparent from the context. By the general terms of the agreement the notes were placed in the keeping of Stoddard until death or lapse of time should entitle the payees to the full possession and control thereof. Unless it was intended by such general terms to suspend the legal rights incident to complete delivery and control of the notes, there could be no necessity for the insertion of a clause reserving the right of the debtors to pay or renew either or both of the notes. They would have this right as debtors under ordinary circumstances, and the only purpose the reservation could have would be to guard against a postponement or suspension of the particular rights reserved, which would otherwise result from the general terms and conditions upon which the notes were delivered to and held by Stoddard. If it was not intended that the right of the payees to collect, control, indorse, negotiate, and use the notes would be postponed or suspended, then there could be no object in stipulating that the right to possess, control, use, and negotiate them should only accrue after death or flight of time had rendered their delivery by Stoddard a duty. Indeed there could be no necessity for placing the notes in the hands of a stranger for a stated period unless the design was to deprive the payee of the rights which ordinarily attend the complete delivery, control and possession of negotiable instruments. A fair, unstrained and reasonable construction of the agreement leads to the conclusion that the notes were delivered to Stoddard as escrows to be delivered upon the death of Daniels or the expiration of the prescribed period of time. It was perfectly competent for the parties to enter into such an agreement. Daniels on Negotiable Instruments (5th Ed.) § 68; Witmer Bros. v. Weld, 108 Cal. 574, 41 Pac. 491; Bradbury v. Davenport, 120 Cal. 152, 52 Pac. 301; Ruiz v. Dow, 113 Cal. 496, 45 Pac. 867. And the statute of limitations did not commence to run until the death of Newell Daniels when a cause of action accrued on each of the notes. Smith v. Lawrence, 38 Cal. 29, 99 Am. Dec. 344; State Loan, etc., Co. v. Cochran, 130 Cal. 252, 62 Pac. 466, 600; W. F. Co. v. Enright, 127 Cal. 674, 60 Pac. 439, 49 L. R. A. 647; McDonald v. Huff, 77 Cal. 283, 19 Pac. 499.

If this is not the proper construction of the agreement then but one other is possible, and that is that the payees thereby agreed to suspend their legal rights and forego the pursuit of legal remedies which would otherwise be open to them, during the time the notes were held by Stoddard under the agreement. Under the former construction the time necessary to complete the bar of the statute would not commence to run until the death of Daniels, and under the latter the

running of such time was suspended while the impediment created by the agreement of the parties endured. *Harrington v. Home L. Ins. Co.*, 128 Cal. 540, 58 Pac. 180, 61 Pac. 99, and cases cited supra. In either event the causes of action were not barred by the provisions of law relied upon. There was a sufficient consideration for the agreement. Aside from the fact that the notes and agreement were part of the same transaction, and that the consideration for the notes would support the agreement, it was perfectly competent for the parties to agree that the notes should be delivered at a specified time and in a particular manner. In any event, the forbearance evidenced by the suspension of legal right to sue on notes bearing no interest must be considered as being an essential part of the consideration for which the notes were given.

The judgment is affirmed.

We concur: CHIPMAN P. J.; BUCKLES, J.

3 Cal. App. 300

SMITH v. VANDEPEER et al.

(Court of Appeal, First District, California.  
March 23, 1906.)

JUDGMENT—RES JUDICATA—DISTRIBUTION OF ESTATE.

Where a residuary legatee was properly brought before the court on the hearing on an application for distribution, and she did not appeal from the judgment, which among other things distributed a certain sum to the executors, she could not thereafter attack the judgment in equity on the ground that the distribution to the executors was violative of the constitutional provision against perpetuities, though the executors held the legacy merely in trust, and though it did not appear upon the record whether the objection was considered on the application for distribution.

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Suit by Catherine Smith against J. G. Vandeppeer and another. From a decree in favor of defendants, plaintiff appeals. Affirmed.

D. Kinsell, for appellant. J. B. Richardson, for respondents.

HARRISON, P. J. The last will and testament of Fannie Simpson appointed the defendants herein as its executors, and contained among other provisions the following:

"Fourth. I desire to be buried beside my husband in the cemetery of San Lorenzo; and I give, devise and bequeath to my executors hereinafter named the sum of two thousand dollars, in trust, however, that they shall invest the same in such way as their good judgment shall dictate so as to produce an annual income, which income shall be applied perpetually to keep in repair, embellish and make attractive our burial lot in said cemetery."

"Tenth. All the remainder of my estate

I give and bequeath to my sister the said Catherine Smith."

The testatrix died December 26, 1891, and on January 11, 1892, her will was admitted to probate by the superior court of Alameda county, and on the same day letters testamentary thereon were issued to the defendants. Thereafter such proceedings were had that on January 16, 1893, the superior court settled the final account of the executors, and made its decree of distribution of said estate, in and by which it distributed to the defendants herein the sum of \$2,000 in trust (setting forth the provisions of the trust as stated in the will), and distributed to the plaintiff herein all the remainder of the estate of said decedent, which was described in said decree as "and all the rest of said estate, whether herein described or not." The \$2,000 thus distributed to the defendants was received by them February 20, 1893, and, with the exception of so much thereof as has been expended in the care of said burial plot, they still have the same in their possession, together with its accumulations. March 2, 1904, the plaintiff brought the present action against the defendants, alleging that under the Constitution of the state no perpetuity is allowed except for eleemosynary purposes, and that by the above clause in her will the testatrix attempted to create a perpetuity which is not for eleemosynary purposes, that the judgment of the court distributing the legacy to be held by the defendants for the purposes of said trust is void, and that as the residuary legatee of the decedent she is entitled to the same, together with its accumulations, and praying that the defendants be declared to hold the same for her benefit, and that they render an account thereof, and be directed to pay the same to her. A demurrer to this complaint on the part of the defendants was sustained, and from the judgment entered thereon the plaintiff has appealed.

In the cases of *William Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323, *Crew v. Pratt*, 119 Cal. 139, 51 Pac. 44, *Goldtree v. Allison*, 119 Cal. 344, 51 Pac. 561, *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145, *Trust of Trescony*, 119 Cal. 568, 51 Pac. 951, *Jewell v. Pierce*, 120 Cal. 79, 52 Pac. 132, and *Toland v. Earl*, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100, the nature and effect of a decree of distribution of the estate of a decedent, and its conclusiveness upon the rights of heirs, legatees, and devisees, have been so fully discussed and distinctly stated that a mere reference to those cases is sufficient to show that the demurrer to the complaint was properly sustained.

The plaintiff seeks herein, by a suit in equity, to make a collateral attack upon the validity of a judgment of a court that had jurisdiction of the subject-matter, and of all the parties interested therein and which, by reason of lapse of time since its rendition and entry, has become final. The same

principles attach to a judgment of a superior court in a matter of probate, as to its judgment in actions at law or suits in equity (*Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458), and for any error committed by the court in its decree of distribution, whether in matter of fact or in the application of the law to the facts before it, the party aggrieved must seek his remedy by appeal. Mere error is not a ground for relief in equity. *Daley v. Pennie*, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61; *Lynch v. Rooney*, 112 Cal. 279, 44 Pac. 565.

The plaintiff herein was a party interested in the distribution of the estate of the decedent, and was properly brought before the court at the hearing upon the application therefor. Whether she then made the objection to the validity of the provision in the will which she now makes does not appear; but, whether she made it or not, she had the opportunity to do so, and, whether she did or neglected to do so, she is equally bound by the decree. *William Hill Co. v. Lawler*, supra. Nor does it appear from the record whether this objection was considered by the court; but the omission of the court to place upon the record its ruling upon the objection cannot impair the effect of the judgment which it rendered. It was its duty to consider all of the provisions of the will, and to determine the validity of the above provision before making the decree of distribution (*Goldtree v. Allison*, supra); and, as it distributed the legacy to the defendants, it must be assumed that it determined that the provision was valid and created a valid trust. Its action in this respect must receive the same consideration as if, upon an objection made by the plaintiff at the hearing, the court had overruled the same, and incorporated into its decree a specific finding that the trust was not created for eleemosynary purposes and did not purport to create a perpetuity. If it should be conceded that the court erred in making such finding, it was competent for the plaintiff to waive the error so far as it affected her rights, and by failing to appeal therefrom, she has waived it.

The conclusiveness of the judgment is not affected by the fact that it involved the construction of a provision of the Constitution instead of a statute. A statute passed by the Legislature within its constitutional power is as authoritative and of as high a sanction as is a provision of the Constitution. Each is an expression of the sovereign will of the people—the one by its direct vote; the other by its duly constituted representatives—and the failure of a court to give a proper construction to either is but an error of law. Neither is the conclusiveness of the judgment impaired by the fact that the defendants hold the legacy distributed to them merely in trust, and have no personal interest therein. The exigencies of this appeal do not require us to determine whether this trust is valid or not; but, conceding the claim

of the plaintiff to be correct, the jurisdiction of the court to determine that question was not affected thereby, and not having been reversed remains binding upon all parties to the proceeding. An erroneous judgment that is unreversed is binding upon the parties thereto as an adjudication of their rights, and, when invoked before any other tribunal, is conclusive thereof. *Thompson v. McKay*, 41 Cal. 221; *People v. Holladay*, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; *Lamb v. Wahlenmaier*, 144 Cal. 91, 77 Pac. 765, 103 Am. St. Rep. 66.

The judgment is affirmed.

We concur: COOPER, J.; HALL, J.

#### WEST et al. v. COMEAUX.

(Supreme Court of Kansas. March 10, 1906.)

##### FORCIBLE ENTRY AND DETAINER—EVIDENCE.

In an action of forcible entry and detainer, where defendant claims to have entered peaceably under a bond for a deed executed by plaintiffs, who were the owners of the premises, and that at the time the bond was executed plaintiffs gave him verbal permission to take possession, it was proper to admit in evidence the bond for a deed for the purpose of showing the character of defendant's entry and possession.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forcible Entry and Detainer, § 136.]

(Syllabus by the Court.)

Error from District Court, Brown County; Wm. I. Stuart, Judge.

Action by John H. West and others against R. L. Comeaux. Judgment for defendant, and plaintiff brings error. Affirmed.

R. F. Buckles, F. M. Pearl, and D. E. Reber, for plaintiff in error. James Falloon and J. F. Kerrigan, for defendant in error.

PORTER, J. This was an action of forcible entry and detainer. John H. West and D. C. Barnes were the owners of a hotel at Morrill, in Brown county. On March 26, 1903, they executed a bond for a deed to defendant, by which they agreed to convey the property to him for \$1,600, payable in monthly payments. The bond was drawn at the request of both parties by a notary who took the acknowledgment of the grantors. It was left in their possession to be held for some purpose; plaintiffs claiming here was no delivery, defendant that it was delivered to him, and he consented that they should retain it in their possession. At the time it was executed the evidence of defendant shows that plaintiffs told him he could take possession of the hotel at any time, the sooner the better. Defendant took possession between 3 and 5 o'clock on the morning of April 6th. Plaintiffs claimed that they had reconsidered the matter after signing the bond, and had notified him that he could not have the

place. Upon his refusal to vacate, upon 3 days' statutory notice, this action was brought. The jury returned a verdict for defendant, and answered several special questions. Plaintiffs' motion for judgment on these findings was denied, a new trial refused, and plaintiffs bring the case here for review.

The main contention of plaintiffs was that the bond for a deed had never been delivered, and that before defendant made the entry he was notified the trade would not be carried out and that he could not have possession.

The general verdict was against plaintiffs, and there was abundant evidence to support the verdict. They insist that they were entitled to a judgment on the special findings. This claim is based upon the findings of the jury, in substance, that on March 26th the former tenant surrendered possession of the hotel to plaintiffs, and that plaintiffs gave the statutory three days' notice before bringing the action. Counsel then say in their brief: "It stands out bold and clear all through the findings of the jury and the evidence as quoted herein that the defendant knew and was informed by plaintiffs that they did not intend to place him in possession of the premises, and that they did not intend to abide by or fulfill the alleged contract for a deed, and notwithstanding this defendant entered the property in question in the absence of the plaintiffs and between 3 and 5 o'clock in the morning of Monday, April 6, 1903. And that he refused to surrender possession on demand, and that he was still in possession at the time of the trial of this action."

The seventh question was asked and answered as follows: "Did not D. C. Barnes, one of the plaintiffs herein, tell the defendant, Comeaux, that they were not going to let him have the property before he entered and took possession? A. No." This is the only finding in reference to this matter, and with the weight of the evidence we have nothing to do in considering a motion for judgment on the findings. The claim that upon these findings the court should have rendered judgment in favor of plaintiffs has no merit.

It is urged that the court committed error in admitting the bond for a deed, as the title was not involved. This was an action of forcible entry and detainer, and defendant claimed to have entered lawfully and peaceably by the verbal permission of the owners who certainly had the right to authorize him to enter. In connection with the alleged verbal permission to enter, it was competent to offer in evidence the bond for a deed as explaining the verbal permission. It was proper for the purpose of showing the character of defendant's entry as well as the character of his detention. *Conaway v. Gore* 27 Kan. 122, 126, 127; 13 A. & E. Enc. of Law, 754, 756.

We have examined the instructions and find no error in them. They correctly state the law of forcible entry and detainer as applied to the facts in evidence.

The judgment will be affirmed. All the Justices concurring.

DEMING INV. CO. v. WALLACE et al.

(Supreme Court of Kansas. March 10, 1906.)

1. EVIDENCE — PAROL EVIDENCE — FRAUD IN PROCURING NOTE.

Parol testimony is competent for the purpose of proving fraud and misrepresentation in procuring the execution of a promissory note where fraud is pleaded as a defense.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2005-2020.]

2. SAME—BILLS AND NOTES—CONSIDERATION.

Between the original parties to a bill or note the consideration may always be inquired into.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1925.]

(Syllabus by the Court.)

Error from District Court, Jewell County; R. M. Pickler, Judge.

Action by the Deming Investment Company against B. F. Wallace and others. Judgment for defendants, and plaintiff brings error. Affirmed.

E. P. Hotchkiss for plaintiff in error. D. L. Palmer, J. C. Postlethwaite, and R. C. Postlethwaite, for defendants in error.

PORTER, J. Plaintiff in error brought this action to foreclose a mortgage upon two notes, each for \$500. Defendants claimed that the indebtedness amounted to only \$500 and that the second note was without consideration. The case was tried by the court without a jury, and, from a judgment in favor of defendants as to the second note, plaintiff in error appeals.

Plaintiff negotiated a loan of \$10,000 for five years on defendants' farm and claimed that these notes were given as a commission of 1 per cent. agreed upon. Defendants claimed that the commission agreed upon was one-half of 1 per cent., or \$500, and that they were induced to sign the two notes by false and fraudulent representations of plaintiff's agents. It appears from the evidence that three sets of papers were made out and executed; the first and second being destroyed on account of errors. B. F. Wallace testified that the agents of plaintiff came to his farm during harvest, when he was busily engaged with a number of men in his field, and informed him that it was necessary to execute new papers which they had prepared; that the notary they had brought with them was sick at defendants' house, and urged him to attend to the matter at once; that he quit work and went to the house where he and his wife signed the papers including these commission notes, without examination,

relying upon the representations of the agents that the papers were all exactly the same as the ones previously executed, and believing that these notes were each for \$250 which he claims was the amount of the former commission notes. It is stated in the answer that defendants signed the notes upon the representations of the agents of plaintiff that the notes were exactly alike in amounts of the former notes; that these representations were false and fraudulent, and made for the purpose of inducing defendants to sign them; and that the representations were relied upon by defendants as true.

The first complaint is that there was error in the admission of parol testimony to contradict the terms of a written contract. In the cases cited by plaintiff in error from this court, it is expressly stated that no fraud or misrepresentation was relied upon. It is always competent to show by parol evidence that a contract was obtained by fraud where fraud or misrepresentation is pleaded as a defense. The rule that oral representations and inducements preceding or contemporaneous with the agreement are merged in the writing is subject to the exception that if the representations amount to fraud which avoids the written contract they are not merged therein and parol evidence is admissible to show the fraud. *Brook v. Teague*, 52 Kan. 119, 123, 34 Pac. 347; *McKinney v. Herrick*, 66 Iowa, 414, 23 N. W. 767; *Greenleaf on Evidence*, § 284; *Browne on Parol Evidence*, § 79. In *Brook v. Teague*, supra, it is said: "Parol evidence is admissible as between the original parties to a negotiable note to show fraud, and so as to third parties with notice or without having paid value." Between the original parties to a note or bill the consideration may always be inquired into. *Blood v. Northrup & Chick*, 1 Kan. 28; *Miller v. Brumbaugh*, 7 Kan. 343; *Dodge v. Oatis*, 27 Kan. 762; 4 A. & E. Enc. of Law, 196. There was no error, therefore, in admitting parol testimony to show the actual consideration, and for the purpose of proving the alleged misrepresentation and fraud. It is argued that as defendants were able to read it was negligence for them to sign a note without knowing its contents, and that by their negligence they are estopped. *Burroughs v. Pacific Guano Co.*, 81 Ala. 255, 1 South. 212. Is in point. The court there say: "Where a person signs an instrument without reading it, or, if he cannot read, without asking to have it read to him, the legal effect of the signature cannot be avoided by showing his ignorance of its contents, in the absence of some fraud, deceit, or misrepresentation having been practiced upon him. But the rule is otherwise, and the instrument will be held void, where its execution is obtained by a misrepresentation of its contents; the party signing a paper which he did not know he was signing, and did not really intend to sign. It is immaterial, in the latter aspect

of the case, that the party signing had an opportunity to read the paper; for he may have been prevented from doing so by the very fact that he trusted to the truth of the representation made by the other party with whom he was dealing." See, also, *Buchanan v. Gibbs*, 26 Kan. 277.

The only other errors complained of relate to the admission of certain testimony which it is claimed was not relevant. A wider range with reference to testimony is permissible where a case is tried by the court, and the testimony with reference to the customary rate of interest at the time of the transaction could not have prejudiced plaintiff. While there was a sharp conflict in the testimony as to the facts upon which the fraud and misrepresentations were predicated, there was sufficient evidence to sustain the finding of the court that the second note was without consideration. The court having heard and seen the witnesses was better able than we are to determine the question of fraud, and, having upon sufficient evidence decided that question, it is not before us.

The judgment will be affirmed. All the Justices concurring.

#### WILKINS v. LEE et al.

(Supreme Court of Kansas. March 10, 1906.)

#### JUSTICE OF THE PEACE—JURISDICTION—TRESPASS.

The bill of particulars involved in this controversy examined, and held not to state a cause of action for trespass on real estate within the meaning of section 6 of the Code of Civil Procedure before Justices (Gen. St. 1901, § 5233).

(Syllabus by the Court.)

Error from District Court, Atchison County; B. F. Hudson, Judge.

Action by Barney Lee, Jr., and J. A. Smith against Sarah E. Wilkins. Judgment for plaintiffs before a justice was affirmed on appeal, and defendant brings error. Affirmed.

J. M. Challis, for plaintiff in error. Adams & Conlon, for defendants in error.

BURCH, J. The question for decision in this case is if a bill of particulars filed before a justice of the peace states a cause of action for trespass on real estate. If it does, the matter was beyond his jurisdiction; the damages claimed exceeding \$100. Section 6, Code Civ. Proc. before Justices (Gen. St. 1901, § 5233). The justice rendered judgment for the plaintiff. The defendant appealed to the district court, and the plaintiff was again successful. The question of jurisdiction was first raised by a motion filed after the trial in the district court. The motion was overruled. The defendant then commenced a separate action to enjoin the enforcement of the judgment of the district court on the ground that it is utterly void.

Having been denied that relief, he prosecutes this proceeding in error.

The bill of particulars reads as follows: "Plaintiff for cause of action alleges: That he is the owner by lease of certain crops, to wit, corn, hay, and grass, on what is known as the 'Cavanaugh Farm,' in Mt. Pleasant township, Atchison county, Kan., and at all times hereinafter mentioned was such owner of said crops growing on said premises. That the defendant is the owner of certain cattle, which were kept on adjoining land part of the time, and permitted them to trespass upon the land of this plaintiff, and permitted the division fence between the land of this plaintiff and the land on which she permitted said cattle to run to become down, so that the same was not a legal fence or sufficient to prevent the said cattle from trespassing upon the land of this plaintiff, and said cattle did trespass upon the lands of this plaintiff, and did enter thereon through the said insufficient fence of the defendant, and did tramp down and eat and destroy all the corn on 14 acres thereof, and did damage and destroy a part of a 20-acre field, and did tramp, eat, and destroy several acres of grass and meadow of the plaintiff, in all to his damage in the sum of \$200. Whereof plaintiff asks judgment against the said defendant for the sum of \$200 and the costs of this action." It has been decided by this court that the action referred to in section 6 of the Justice's Code is the equivalent of the common-law action of trespass *quare clausum fregit*. *Kaub v. Mitchell*, 12 Kan. 57, 60; *St. L. & S. F. Ry. Co. v. Sharp*, 27 Kan. 134. It has also been decided by this court that trespass *quare clausum fregit* is a possessory action, brought because of a disturbance or the peaceable possession of plaintiff. *Hedley v. Baker*, 19 Kan. 9. The gist of the action is the wrongful entry, the breaking in upon and the interruption of the quietude of the plaintiff's possession; and whatever follows in the nature of damages to buildings, fences, crops, or other property is mere aggravation. To maintain the action, possession of the premises upon which the property destroyed is situated, by the plaintiff, personally or by his tenant, is indispensable. *Loring v. Rockwood*, 13 Kan. 178, 181; *Fitzpatrick v. Gehhart*, 7 Kan. 35, 42. The decisions of other states to this effect are collated in 46 Cent. Dig. col. 295. Without something to indicate that the pleader intended to allege and rely upon possession as an element of his cause of action, no issue could be framed upon that subject, no proof could be offered concerning it, and no judgment could be rendered presupposing possession in the plaintiff.

The bill of particulars contains no allegation relating to possession. Much stress is laid upon the fact that it makes several references to "land of the plaintiff." The first paragraph, however, limits the meaning of all such expressions to the Cavanaugh farm in Mt. Pleasant township, which, so far as

the pleading shows, may have been in the possession of Cavanaugh, or any one else other than the plaintiff, with no right in the plaintiff, under his lease, except to enter and gather his corn and cut his meadow. The allegations relating to the negligence of the defendant in permitting the division fence between the lands of the respective parties to become defective, so that it no longer constituted a legal fence, are quite foreign to an action of trespass quare clausum fregit. They are, however, characteristic of an action on the case for damages occasioned by cattle negligently allowed to escape, and clearly indicate the theory upon which the bill of particulars was drawn. It is immaterial that the allegations may not be entirely sufficient to make a case under the fence law. That fact does not destroy jurisdiction, and the pleader certainly did not intend to state a case which the court could not try at all. It is immaterial that growing crops and hay are regarded, for almost all purposes, as forming a part of the real estate. Trespass on the case was a common form of action for the recovery of damages for injuries to such property, and that it may be employed under circumstances similar to those under consideration is shown by the decision in *St. L. & S. F. Ry. Co. v. Sharp*, 27 Kan. 134. If the character of the action were more doubtful than it appears to be, the bill of particulars should be given a liberal interpretation in favor of jurisdiction. The plaintiff in error submitted to the authority of both courts until each one had decided against him, and now ought not to be permitted to defeat the jurisdiction he so long acknowledged upon any but the most meritorious ground.

The judgment of the district court is affirmed. All the Justices concurring.

(3 Kan. 210)

MISSOURI, K. & T. RY. CO. v. PRATT.  
(Supreme Court of Kansas. March 10, 1906.)  
ESTOPPEL—ACTION ON WARRANTY.

In an action for damages for the breach of a covenant of warranty in a conveyance of real estate, it appeared that at the time of the delivery of the deed, and the payment of the consideration by the grantee, a third person was in actual possession of the real estate, claiming to hold under a title paramount to that of the grantor in such deed. Such occupancy and claim was well known to the parties to such conveyance, and they knew that the occupant intended to hold possession until ousted by judicial process.

Litigation was then pending and suits were contemplated by the grantor, which would finally determine the ownership of such real estate. In the litigation which ensued the occupant was successful in the lower courts, but the grantor carried the cause to the Supreme and federal courts.

The grantee concluding that the grantor would eventually lose insisted upon repayment of his money. The grantor, however, by assurance that his title would ultimately be established, and if not, that the money would be refunded, requested and induced the grantee to wait until

the end of the litigation, which he did, relying upon such representations of the grantor. The matter was not fully ended until long after the statute of limitations had expired, within which a suit upon the covenant of warranty might have been brought. The grantee, soon after the final determination of the litigation, which was adverse to the grantor, brought suit upon the covenant of warranty in said conveyance. The grantor pleaded the statutes of limitations.

*Held*, that the grantor is estopped from maintaining such defense.

(Syllabus by the Court.)

Error from District Court, Allen County; Oscar Foust, Judge.

Action by C. H. Pratt against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

John Madden and W. W. Brown, for plaintiff in error. Cates & Cates, for defendant in error.

GRAVES, J. The only question involved in this case is the statute of limitations as applied to a covenant of warranty in a conveyance of real estate. The facts briefly stated are these:

In June, 1880, the plaintiff in error conveyed the land in controversy, to the defendant in error, by an ordinary deed of general warranty, in consideration of \$354.20 cash paid at that date. At the time of such conveyance, the grantor held a patent to the land from the United States. The land was occupied by one N. L. Ard, who claimed it as a settler under the homestead and pre-emption laws of the United States. He settled thereon in 1866, long before the plaintiff in error received its patent thereto. On July 26, 1866, the United States by an act of Congress, granted the alternate sections of a 10-mile strip of land to the plaintiff in error, then known as the Union Pacific Railway Company, Southern Branch, upon conditions named in the grant. To indemnify said company from loss on account of lands to which homestead and pre-emption rights might attach before said conditions were complied with, said act provided that the company might select in lieu thereof an equal amount of land from lands adjacent to said 10-mile strip belonging to the United States. There was a large number of settlers upon these lands claiming under the homestead and pre-emption laws, and a sharp controversy arose between them and the railroad company as to their respective rights, thereto. The land in controversy in this suit, was outside the 10-mile strip. November 3, 1873, the company selected it as an indemnity for lands lost, as before stated. The controversy between the settlers and the company, involved many homes and large and valuable tracts of land. It aroused great excitement, and many lawsuits were commenced relating thereto, both in the federal and local courts. The claims of the respective parties were subjects of public discussion, and were

a matter of general notoriety and of common knowledge. This controversy continued without interruption from the date said land was selected by the company to December 19, 1900, a period of 16 years prior to the execution of the conveyance to the defendant in error. To settle this dispute the plaintiff in error, brought an action of ejectment against Ard in 1890, to recover the land. The case was carried to the Supreme Court where it was decided in favor of Ard, March 4, 1895.

In 1894, Pratt, the defendant in error, commenced suit against Ard which was taken to the Supreme Court of this state and decided against Pratt, June 8, 1901. On December 19, 1900, in a case brought by the United States, in the United States Circuit Court of Kansas, against all parties interested in said 10-mile strip, and indemnity lands, the patent to the plaintiff in error for the lands involved in this suit and the conveyance to the defendant in error thereto, were canceled and soon afterwards the land was patented to Ard. The defendant in error was never in possession of this land and never received any profits therefrom because of the adverse possession of Ard. During the progress of said litigation, and after the conveyance to the defendant in error, considerable correspondence occurred between the attorneys for the company, who were fully authorized to bind the company thereby, and Pratt and his attorneys, among which were the following letters:

"Parsons, Kans., Nov. 18, 1895. I have your favor of the 16th stating that the case of yourself against Ard, for possession of the East half of the Southeast quarter of 2-26-20, was decided against you by the court and in favor of Ard, and I note what you say about not taking the case further unless the company requires it. You will readily understand that you are hardly in a position to compel the company to assume all responsibility in this case at this late day. This suit has been pending since January 5th, 1895, the date of the filing of your petition; and yet, no notice whatever was given the company of the pendency thereof until the last ten days and then we were right in the midst of a half a dozen courts where we had more business than we could attend to. Of course if you had given us notice earlier we could have assumed the responsibility which you now ask us to assume, but it was utterly impossible for me to be present at the trial of this case. I can only say we desire the case carried clear through all the courts. From your statement of the case to me Mr. Ard has not a ghost of a show, in my opinion. I have great confidence in the ability and integrity of Mr. Cates and Mr. Foust and have no doubt they made the best case possible for you to make. I hope you have taken time to take the case to the Supreme Court, and as soon as I can get time I will investigate the matter and if you do not

desire to carry the matter further, I will do it myself in your name. You spoke of the other cases. Of course I know nothing of the other cases that you have lost except the other piece of land owned by Mr. Ard. If you have any claim against the company which you have not presented and which you desire to make you will have to make it and present it in due form so that it can be properly investigated. Please write me how much time you have to make case for the Supreme Court in the case of yourself vs. Ard and whether or not you have the record in shape and tried it with a view to going to the Supreme Court. Of course we do not give up on a single trial."

"Parsons, Kans. \* \* \* I have before me your favor of the 12th instant and also yours of January 30th regarding the case of yourself vs. N. L. Ard, and which you designate as the statute of limitations case. This case was taken to the Court of Appeals at Ft. Scott, the record being filed there October 28th, 1896, as shown by the clerk's letter to me. A waiver of summons was filed in the case on November 10th, 1896. Its number on the clerk's docket is 422. With reference to your claim for refund of money: I can tell you nothing more than what I have already told you. At Mr. Rouse's request I sent him a statement of such lands as I supposed we would eventually be called upon to refund the purchase money, and yours was included in the list. Since that time patents have been issued to some of the land, and certain decisions have been rendered which looks as though our title to all this land would be good. I apprehend our company is waiting to see what the decision of the circuit court will be with reference to these lands. If your title is made good, there is nothing then due you from the company; if, on the other hand, your title is not made good, we certainly will have to refund you the money, I suppose. But you ought to wait patiently as the others are doing, until this litigation is determined. I know how you feel about it, and you do not owe me any apology for anything you have said."

"Parsons, Kan., March 28th, 1900. I have before me your favor of the 27th, and I note you say that you sent me a copy of a letter from the commissioner to the register of the Topeka land office sent you by Mr. Pratt, and asking me to return the same. Beg to advise that the papers you sent were sent to our attorneys Britton & Gray, and were returned to you with the answer of Britton & Gray on March 3d. I at the same time inclosed you a copy of the protest which the railway company filed in the local land office. You will find these papers all together. With reference to the appeal from the local land office: It does not seem to me that it is necessary to take any notice whatever of the decision of the local land office. The patent for the land has already been issued, and the local office and in fact the entire land department is ai-

ready without jurisdiction and cannot obtain jurisdiction of this land until the court, by some proceeding instituted for that purpose sets aside the present patent. If I obtain judgment against Ard in the case of *U. S. v. M. K. & T.*, I will have him ejected from the land. On the other hand, the only way that Ard can obtain a title to the land is by going into court and instituting a proceeding to set aside the present patent, and if he is successful then he can make his proof before the local land office. But nothing that is done in the local land office or by the land department would have any effect whatever upon the present litigation regarding the title to this land. Therefore, I see no occasion for worry, trouble or expense over what may be taking place in the local land office."

"Parsons, Kans., April 7, 1900. I have before me your favor of the 6th instant regarding the contest case pending in the local land office between Ard on one side and yourself and the company on the other. I have advised that we pay no attention whatever to this case, because the Supreme Court of the United States has decided that when a patent has once issued to a piece of land the Land Department of the United States has lost jurisdiction, and cannot again entertain an application to enter the land, and any patent subsequently issued is absolutely void. Judge Stillwell has so held in a case in Woodson county. The land department seems to be misled entirely by the decision of the case of yourself v. Ard wherein the Supreme Court held that Ard should have been permitted to enter the land, but in that decision the court did not set aside the patent, and no application to enter the same could be entertained until it is set aside."

"Parsons, Kans., June 28, 1901. I have before me your favor of the 27th instant asking what the company proposes to do with reference to the piece of land in Section 2 involved in the late case of *Pratt v. Ard*, wherein the court decided that the statute of limitations had run in favor of Ard, and also the other piece in Section 2, wherein Judge Hook set the patent to the railway company aside and adjudged the land to belong to Ard under the homestead claim thereto. Beg to advise that neither of these cases are yet finally determined. Whenever they are, then we will determine what course we will pursue with reference to your claim for a refund of the money. In the meantime, you might send me a statement of the amount you claim should be refunded to you, so that I may look it over and consider the matter."

This suit was commenced some time in 1902, or we so infer, as the amended petition was filed January 21, 1903. The amended petition refers to the deed as a whole, but the particular covenant sued on reads: "And the said Missouri, Kansas & Texas Railway company hereby covenants with the said party of the first part his heirs and assigns that it will, and its successors shall warrant and de-

fend the same to the said party of the second part his heirs and assigns, against the lawful claims of all persons." All informality in the pleadings is waived by stipulation. The suit was tried in the district court of Allen county, and the defendant in error recovered judgment for \$1,760.36, January 8, 1904. The plaintiff in error brings the case here complaining that the trial court erred in not deciding that the plaintiff's cause of action was barred by the statute of limitation, and also because the court gave judgment for attorney fees and taxes. The plaintiff pleads waiver and estoppel as to the statute of limitations.

It is conceded that no cause of action arises upon a covenant of warranty until after eviction either actual or constructive. It is here claimed that the actual possession of Ard, at the date of the conveyance to Pratt, under a claim of right which was subsequently decided to be the better and paramount title, constituted a constructive eviction, and a cause of action arose at once which would become barred in five years in this case, or on June 6, 1894. It is sought to bring this case within the rule stated by Justice Allen in the case of *Clafin v. Case*, 53 Kan. 502, 36 Pac. 1063, which reads: "The weight or authority seems to be to the effect that, where the land conveyed is actually occupied by another, under an adverse and better title, the covenant is broken without any other act by either party, and an action may be at once maintained upon it." In a certain sense this case probably falls within the above rule, but under the facts here shown, we do not think the plaintiff in error ought to be permitted to make this defense. To do so is an act in bad faith, and operates as a fraud upon the defendant in error. When the conveyance was made and the company received the money of Pratt, it was known by both parties that the land was occupied by Ard, who would maintain possession until ousted by judicial process. It was thoroughly understood that whether Pratt would receive anything by his deed or not, could only be known at the end of litigation then contemplated or already in progress. The conveyance to him was evidently made with the intention on the part of both parties to wait and abide the judicial determination of title to the land. It would be trifling with the rights of these parties to assume that they contemplated an immediate repayment of the money paid by Pratt, or that a suit for its recovery could or would be commenced at once. The relation of the parties to the land remained uncanceled after the delivery of the deed and the payment of the consideration money by Pratt, until the decision of the United States Circuit Court on December 19, 1900. Up to that time Pratt waited patiently, at the request of the plaintiff in error, while it was testing its title to said land, in long and repeated lawsuits. He was assured from time to time that his title

would be ultimately sustained, that "Ard did not have a ghost of a show," and was requested to "wait patiently, like other parties are doing, until this litigation is determined."

The plaintiff in error assumed control of the case commenced by Pratt, and carried it to the highest court, apparently confident of success. Pratt was at times urgent and insistent, but was pacified by the assurance that "our company is waiting for the decision of the Circuit Court. If we win, we owe you nothing; if not, you will get your money." It is not suggested that Pratt failed in any respect to do his full duty in the premises. He carried out the original understanding and subsequent requests by waiting for the company to establish its title to the land. In this there was no cessation of effort. The company was diligent and persistent. The fact it was originally understood by each of the parties that the whole matter as to the conveyance, and Pratt's ultimate right to the land should be held in abeyance until the end of the litigation concerning the same, and that Pratt was induced to wait longer that he otherwise would have done by the urgent requests of the plaintiff in error, are as unmistakably established, as they would be if fully and formally reduced to writing. After Pratt has so waited and the company after full opportunity to test its claim has failed, it would be unconscionable for it to assert the very delay which it requested for the purpose of avoiding payment to Pratt, of the money paid by him for which he has received nothing. The ordinary rules of justice and fair dealing rebel at the suggestion. The facts furnish abundant reason for the application of the rule of estoppel to such conduct. We think this is a case where this rule should be applied. Cases may be found which are apparently opposed to this view; in fact considerable conflict exists among the decisions concerning the general subject of changing the statute of limitations by agreement, waiver, and estoppel. Much of this confusion arises from the difference in statutes, and in the application thereof to particular cases.

Very few can be found which, when closely examined, will be found to differ materially, in principle, from the view we have here taken; it would be useless, therefore, to attempt a review thereof.

In the case of *Missouri Pacific Railway v. Commission Co.*, 71 Mo. App. 299, there were unsettled accounts between the parties and negotiations for adjustment were pending a long time. After failure to settle, suit was brought on one of them in which the statute of limitation was pleaded. The court said as to this plea: "If there was any understanding between the plaintiff and defendant or assurance given by the plaintiff to defendant that the latter would accept the former's account in payment or discharge of that of the latter when their mutual accounts should be thereafter settled, and that the former relying upon such understanding or assurance did not bring an action on its account within the statutory period, and but for that it otherwise would have done so, the latter should not be allowed to invoke the statute of limitation in bar of the former's account." In the case of *Haymore v. Com. of Yadkin*, 85 N. C. 268, following the case of *Daniel v. Com. of Edgecomb*, 74 N. C. 494, it was said: "Defendants will not be allowed to set up the statute of limitations in bar of the plaintiffs' claim, when the delay which would otherwise give operation to the statute has been induced by the request of the defendants expressing or implying their engagement not to plead it." To same effect see *Mickey v. Insurance Co.*, 35 Iowa, 174, 14 Am. Rep. 494; *Renacknowsky v. Water Co.*, 122 Mich. 613, 81 N. W. 581; *Home Ins. Co. v. Myer*, 93 Ill. 271.

Complaint is made that attorney fees and taxes are not legitimate elements of damage in cases of this character. We are unable to ascertain from the record that either of these matters entered into the judgment of the district court, and therefore it will be unnecessary to consider the legal questions relating thereto.

The judgment is affirmed. All the Justices concurring.

(146 Cal. 173)

## In re YOUNG'S ESTATE.

(Supreme Court of California. April 10, 1906.)

## 1. EXCEPTIONS, BILL OF—SERVICE—"ADVERSE PARTIES."

On application for partial distribution of the estate of a decedent, persons claiming as devisees under the will left by decedent and appearing in that capacity to contest the petition for partial distribution were "adverse parties," within Code Civ. Proc. § 650, declaring that a draft of the bill of exceptions or a copy thereof must, within 10 days after notice of entry of judgment, be served upon the adverse party.

## 2. APPEAL—AFFIRMANCE—FAILURE TO SERVE BILL OF EXCEPTIONS.

Where, on petition for partial distribution of the estate of a decedent, devisees in a will left by decedent appeared and moved to strike the petition from the files which was done, the judgment could not be overthrown on appeal without affecting the interests of those devisees, and hence failure to serve upon them a draft of the bill of exceptions, as required by Code Civ. Proc. § 650, necessitated an affirmance of the judgment, so far as points contained only in the bill of exceptions were concerned.

## 3. SAME—FAILURE TO SHOW ERROR.

Where the record on appeal merely showed the filing by appellants of a petition for the partial distribution of a decedent's estate, and the making and granting of a motion to strike the petition from the files on the ground that a previous similar proceeding had terminated in the final judgment denying the relief sought, no error was shown.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Separate petitions by Pauline Young Hyde and Sarah Young against A. St. Clair and others, as executors, for partial distribution of the estate of M. Young, deceased. From orders striking the petitions from the files, petitioners appeal. Affirmed.

J. J. Scrivner and William M. Aydelotte (Alfred H. Cohen, of counsel), for appellants. Jeter & Makinney, W. P. Netherton, and Hugh R. Osborn, for respondents.

SLOSS, J. M. Young died, leaving a last will, which was admitted to probate in the superior court of Santa Cruz county, and letters testamentary thereon were issued to A. St. Clair and William Armstrong on the 27th of April, 1903. On December 12, 1904, Pauline Young Hyde, one of the appellants, filed a petition for partial distribution, in which she alleged that the decedent had left as his sole heirs four children, of whom she was one, and that said decedent had, by an omission not appearing to be intentional, failed to provide in his will for any of his said children. The executors met this petition by a motion to strike the same from the files, and a similar motion was made, upon notice to the petitioner, by K. A. Osborn and three others named as residuary devisees in the will. Subsequently, a similar petition for partial distribution was filed by Sarah Young, claiming to be one of the children and heirs of M. Young, and motions to strike this petition from the files were made by

the executors and the four devisees above mentioned. The petitions and motions having been submitted, the court made an order, in which it "adjudged and decreed that the said petitions of Pauline Young Hyde and Sarah Young, and each of them, be, and the same hereby are, denied and dismissed." From this order the petitioners prosecute this appeal.

The points made by the appellants for reversal appear in a bill of exceptions. This bill contains a recital by the judge of the trial court to the effect that the draft of the proposed bill of exceptions had not been served on the respondent devisees within the time allowed by law. Said devisees objecting to the settlement of the bill, the judge sustained their objections and refused settlement of the bill "so far as it relates to or purports to in any way bind said devisees," and settled it "so far as it relates to the executors." It is now contended by the respondents that the order must be affirmed for want of a bill of exceptions binding all the necessary parties to the appeal. Under section 650, Code of Civil Procedure, the draft of a bill of exceptions, or a copy thereof, must, within 10 days after notice of entry of judgment, be served upon the adverse party. The phrase "adverse party" is also found in section 940, relating to service of notice of appeal, and as used in that section has been construed many times by this court. Such "adverse party" is defined in *Senter v. De Bernal*, 38 Cal. 637, to be "every party whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken." *O'Kane v. Daly*, 63 Cal. 319; *Williams v. Santa Clara Min. Ass'n*, 66 Cal. 195, 5 Pac. 85; *In re Castle Dome, etc., Co.*, 79 Cal. 249, 21 Pac. 746; *Harper v. Hildreth*, 99 Cal. 267, 33 Pac. 1103; *Vincent v. Collins*, 122 Cal. 390, 55 Pac. 129; *Estate of Scott*, 124 Cal. 671, 57 Pac. 654; *Elliott v. Superior Court*, 144 Cal. 501, 77 Pac. 1109, 103 Am. St. Rep. 102. And, except as hereinafter stated, service of a notice of appeal on every adverse party is essential to give the appellate court jurisdiction of the appeal. (See cases cited above.) It is true that notice need not be served on all parties to the action if a modification sought can be effected without affecting the rights of those not served. *Williams v. Santa Clara Min. Ass'n*, supra; *Miller v. Thomas*, 71 Cal. 406, 12 Pac. 432. And not every person who may be affected by a reversal or modification of the judgment or order is an "adverse party," who must be served. The "adverse party" upon whom a notice of appeal is to be served is the party who appears by the record to be adverse. *Harper v. Hildreth*, supra; *In re Ryer's Estate*, 110 Cal. 556, 42 Pac. 1082; *In re Bullard's Estate*, 114 Cal. 462, 46 Pac. 297. That is, a party who has appeared and taken part in the proceeding in the lower

court. *Estate of McDougald*, 143 Cal. 478, 77 Pac. 443. No doubt the phrase "adverse party" is to be given a similar interpretation as applied to service of bills of exception. In the present case, the devisees respondent were "adverse parties," who were entitled to service of a draft of the bill. They, as claimants under the will, would be directly and most injuriously affected if the appellants should succeed in reversing the order here appealed from, since, if the facts alleged in the petition for partial distribution should be established, the petitioners (together with their brother and sister) would succeed to the entire estate. The rights of the devisees could not be protected if any modification or reversal of the order should be made. And such devisees, having appeared in the lower court to resist the application for partial distribution, are parties who appear by the record to be adverse. Indeed, the devisees are the only parties to the record having a substantial interest in opposing the distribution sought. The executors, while authorized to resist an application for partial distribution (Code Civ. Proc. § 1660; *Estate of Kelley*, 63 Cal. 106), have no interest in having the property go to one rather than another of the contending claimants of the estate. If, then, the devisees who appeared and resisted the petitions in the superior court were adverse parties who were entitled to service of a draft of the bill of exceptions, what is the effect of failure to so serve them? A failure to serve some of the necessary parties does not require or authorize the trial court to refuse to settle the bill at all (*Gutierrez v. Hebbard*, 106 Cal. 167, 39 Pac. 529), nor does it affect the jurisdiction of the appellate court to entertain the appeal. *Barnhart v. Fulkerth*, 92 Cal. 155, 28 Pac. 221; *In re Ryer's Estate*, 110 Cal. 556, 42 Pac. 1082; *In re Bullard's Estate*, 114 Cal. 462, 46 Pac. 297; *Herriman v. Menzies*, 115 Cal. 16, 25, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81; *Scott's Estate*, 124 Cal. 671, 57 Pac. 654; *Sutter County v. Tisdale*, 128 Cal. 180, 60 Pac. 757. But, while an appeal duly perfected will not be dismissed for such failure, a want of service on an adverse party of a notice of intention to move for a new trial is a good ground for affirming an order denying the motion (*In re Ryer's Estate*, supra; *McMahon v. Thomas*, 114 Cal. 588, 46 Pac. 732; *In re Bullard's Estate*, supra; *Johnson v. Phoenix Ins. Co.*, 146 Cal. 571, 80 Pac. 719), and the same effect must follow a failure to serve a draft of a bill of exceptions on an adverse party, if the points made for reversal appear only in the bill. See *Gutierrez v. Hebbard*, supra; *Howell v. Howell*, 101 Cal. 115, 35 Pac. 443; *Randall v. Duff*, 105 Cal. 271, 38 Pac. 739. The devisees who appeared in the lower court were entitled to be heard in opposition to the petitions; they are equally entitled to be heard on the appeal; they cannot be bound by a record in the making of which they

have not had the opportunity to participate which the statute gives them; a reversal or modification cannot be ordered as to any party without affecting their rights. It follows that the bill of exceptions cannot be considered for any purpose on this appeal.

But it is contended by the appellants that no bill of exceptions was necessary, and that without it the record contains all that is necessary for a review of the order complained of. In fact, the entire transcript is made up of the bill of exceptions, followed by a notice of appeal, and a stipulation (subject, as to the devisees, to all objections and exceptions) that the "foregoing is a full, true and correct transcript on appeal," and that an undertaking has been filed. If this be regarded as a sufficient authentication of such papers contained in the bill as would constitute what may be called the judgment roll, we find as to each petitioner a petition for partial distribution, based on the theory that such petitioner was a child of the decedent, who had unintentionally omitted in his will to provide for her; two demurrers to the petition; two motions to strike the petition from the files on the ground, among others, that theretofore, a similar proceeding on behalf of the petitioner had terminated in a final judgment denying the relief sought, and adjudging that the omission by the testator to provide for the petitioner was intentional, and that she was not entitled to any share of the estate; and an order, which, after finding in support of such allegation as to a prior judgment, denies and dismisses the petition for partial distribution. This shows no error. Assuming the finding of the lower court to have been sustained by the evidence (as, in the absence of a bill of exceptions, we must) the prior adjudication against the rights of the petitioners concluded them on this hearing. In this discussion we treat the motion to strike from the files as substantially an answer. It raised issues of fact, on which evidence was taken, and findings made. If, however, such motion is not to be treated as an answer, the petitioners are not helped. In that view, there is nothing in the record to be considered except the petitions, the demurrers and the order dismissing and denying the petitions, and on the face of these papers no error appears. The facts recited and found in the order fully justify the conclusion reached.

The foregoing views necessitate the affirmation of the order appealed from without a determination of the points made by the appellant. It is, perhaps, unfortunate that the appeal cannot be decided on the merits of the questions litigated in the lower court, but this result cannot be avoided without depriving the respondent devisees of clear and substantial rights.

The order is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

149 Cal. 200

## IN RE LUX'S ESTATE.

(Supreme Court of California. April 11, 1906.)

## 1. PERPETUITIES — SUSPENDING POWER OF ALIENATION—TRUSTS.

A will, devising property in trust for the life of testator's son and the lives of the children of such son as were living at testator's death, with a provision whereby it might terminate sooner, the property to be then divided between the children of such son then living whether born before or after testator's death, does not contravene Civ. Code, § 715, prohibiting the suspension of the absolute power of alienation by any limitation or condition for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition; as the will speaks only from the death of testator.

## 2. WILLS—PROPERTY DEVISED — COMMUNITY PROPERTY.

All and not merely one-half of community property, of which testator became the absolute owner by the death of his wife after the making of his will, passed under it, it in terms purporting to cover all his property "real, personal, and mixed, and wheresoever the same may be," notwithstanding a provision whereby he declared that all of the estate of which he was possessed was his separate estate, except a certain lot, and that, in his disposition of his estate by the will, he had undertaken to dispose of all his separate property and one-half of the community property.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

In the matter of the estate of Henry Lux, deceased. From the decree of distribution, V. M. Turney appeals. Affirmed.

W. C. Kennedy, for appellant. Wm. A. Bowden, Wm. P. Veuve, and Leo Archer, for respondents.

ANGELOTTI, J. This is an appeal from the decree of final distribution in the matter of the estate of Henry Lux, deceased. The sole appellant is one V. W. Turney, who claimed, as the successor of Charles H. Lux, a son of deceased, that an undivided one-sixth of a lot in the city of San José should be distributed to her. His claim is based on the fact that prior to the death of deceased, one Clayton had recovered a judgment against said Charles H. Lux for \$493.75, that after such death an execution was issued on said judgment, whereunder the interest of Charles H. Lux in said lot was sold to her, and a certificate of sale therefor issued to her. For this reason, she claims to be entitled to distribution of whatever interest in said lot said Charles H. Lux would have been entitled to from his father's estate, if such execution sale had not been made, section 1678, Code Civ. Proc. providing that distribution may be made, although some of the original heirs, legatees, or devisees may have conveyed their share to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees or devisees.

Disregarding the objections of respondents

as to the right of appellant, under these circumstances, to be heard on distribution, the real question presented is as to whether or not Charles H. Lux was entitled to any portion of his father's estate, or rather, to any portion of said lot of land. If he was not so entitled, it is plain that one claiming as his successor in interest in said lot would not be entitled to any relief in this proceeding. For the purposes of this proceeding, appellant, at best, simply stood in the place of Charles H. Lux, and was entitled to relief only as to such portion of said lot as said Lux was entitled to receive on distribution of his father's estate. In *re* Angle's Estate (Cal. Sup.) 82 Pac. 668. The lower court distributed the estate upon the theory that Charles H. Lux was entitled to no portion of the estate. The deceased left a will which was duly admitted to probate, and on which the distribution was based. Charles H. Lux was not a devisee or legatee. It is claimed that a trust attempted to be created as to a portion of the estate was void, and that as to this portion, the deceased died intestate. It is further claimed that if the trust was valid, nevertheless the deceased died intestate as to an undivided one-half of the lot in question. These claims will be separately considered.

By his will, the deceased, after providing for a few legacies, gave "all the rest, residue and remainder" of the estate to his wife, for her life, and upon her death one-third thereof to each of two daughters, and the remaining one-third to his said daughters in trust. The provisions of the will as to the trust, so far as material to appellant's contention, were as follows, viz.:

"Eighth. The uses and purposes upon which I give, devise and bequeath the remaining one-third (1-3rd) of the aforesaid estate to said Lizzie M. Pott, and said Lena B. MacBride are as follows: During the continuance of the trust term herein provided, the trustees are to have, hold, manage, and control the said trust property, and to pay over the net income derived therefrom to my son, Charles H. Lux, and in the event of his death, then to his children in equal shares, the issue of any deceased child taking by right of representation. Upon the termination of the trust term herein created, then the trust property shall be divided between all the children of Charles H. Lux, then living, in equal shares, the issue of any deceased child taking by right of representation; and to them and in that event I hereby devise the property so directed to be divided amongst them. In the event there be no issue of said Charles H. Lux living at the termination of the trust term herein provided, then I direct that the said trust property shall be divided between my two daughters, Lizzie M. Pott and Lena B. MacBride, share and share alike, and to them and in that event I hereby devise said property. The trust term herein created is to continue during the life

of my son, Charles H. Lux, and of all of his children who are living at the time of my death. With the death of the survivor of them the said trust is to terminate. It is furthermore to terminate before that time in the event of the occurrence before that time of the death of said Charles H. Lux, and of the attainment of the age of twenty-one (21) years by all his surviving children. \* \* \*

"Tenth. I hereby authorize and empower my said trustees, or either of them who shall act, and their successors in office, to sell any part of my estate, real or personal, herein devised to them, at public or private sale, and with or without notice, as they may determine, and without the order of any court, and to execute good and valid conveyances and transfers thereof; also to invest and reinvest the proceeds of sales of property, and to purchase or acquire other property, or apply the proceeds of sales of property to the improvement of other property; also to lease property, and to borrow or lend such sums of money as they may deem best, and to secure the repayment of loans by mortgage or other lien or transfer of real or personal property; also to make compromises and settlements."

It is urged that the attempted trust is void in that it is repugnant to the provisions of section 715 of the Civil Code, which prohibits the suspension of the absolute power of alienation by any limitation or condition whatever, "for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in section 772," which is not applicable to this case. It is manifest, however, that there is in the provisions of the will in question no suspension of the power of alienation for a longer period than during the continuance of lives in being at the creation of the limitation or condition, and the will was apparently very carefully drawn with a view to comply literally with the statute invoked. The will explicitly provides as follows: "The trust term herein created is to continue during the life of my son, Charles H. Lux, and of all of his children who are living at the time of my (the testator's) death. With the death of the survivor of them the said trust is to terminate." In no event can the trust, according to its terms, continue after the death of Charles H. Lux, and such of his children as were living at the time of the death of deceased, in other words, it cannot continue for a longer period than during the continuance of the lives of persons in being at that time. According to other provisions, it may end sooner, but it cannot exist longer. The will speaks and is enforceable only from the death of deceased, and the limitation or condition was created, within the meaning of section 715, Civ. Code, only upon the death of deceased, and not at the time of the execution of the

will. While it is true, as stated by appellant, that by reason of the provisions requiring that upon the termination of the trust, the trust property shall be divided between all of the children of Charles H. Lux then living, children born after the death of deceased and before the termination of the trust would receive a share of the property, this in no degree affects the term of the trust, or prolongs the period of suspension of alienation. The devise to the trustee became effectual only at the death of deceased. The limitation or condition which had the effect of suspending the absolute power of alienation was created when the devise became effectual. Under the provisions of the will, the trust cannot continue beyond the continuance of lives of persons in being at that time.

Other objections made to the trust provision require very little notice here. There was no forbidden "trust to convey," as in the Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70, and kindred cases. Provisions similar to those contained in the tenth paragraph of the will, quoted above, were not held invalid in the Estate of Fair, 136 Cal. 79, 68 Pac. 306, as claimed by appellant. We see no reason to doubt that the trust created by this will was fully within the provisions of section 857, Civ. Code, enumerating the purposes for which express trusts may be created. We are unable to perceive the applicability of section 774, Civ. Code, prohibiting the limitation of successive estates for life, except to certain persons.

The claim that deceased died intestate as to an undivided one-half of the particular lot in controversy, is based upon the following provision of the will, viz.:

"Fourteenth. I hereby declare that all of the estate of which I am possessed is my separate estate, except a lot on the east line of First street, between San Antonio and San Carlos streets, in the City of San José, which lot has a frontage of seventy feet and a depth of about one hundred and thirty-seven feet; and in my disposition of my estate hereinbefore contained I have undertaken to dispose of all of my separate estate and one-half of the community property."

The lot of land described in this provision is apparently the land in controversy. It appears that the wife of deceased died after the execution of this will and prior to the death of deceased, whereupon the deceased became, of course, the absolute owner of all the community property, without administration. Civ. Code, § 1401. It is claimed that the provision quoted shows that the testator intended that the will should not be operative as to the undivided one-half of the lot described and that he consequently died intestate in regard thereto. We are of the opinion that construing all the parts of the will in relation to each other (Civ. Code, § 1321), it is clearly apparent that the testator

intended that the will should be operative as to all property which he was entitled to devise at the time of his decease. The disposing parts of the will are broad and sweeping, and in terms purport to cover all his property, "real, personal and mixed, and wheresoever the same may be." In the absence of a contrary intention, manifestly appearing in the will, they would be operative as to all property owned by him at the time of his death, which he was then entitled to devise. Such a contrary intention is not shown by the provision relied on. That provision indicates simply the claim of the testator that all of the property then possessed by him except this lot was his separate property, and, further, that it was his intention to dispose by his will of all property over which he had the power of testamentary disposition, viz., all his separate property, and one half of the community property, the other half being, as long as it remained community property, not subject to his testamentary disposition (Civ. Code, § 1402). The provision doubtless shows that the testator contemplated that if he died before his wife, she, under the law, would succeed to an undivided one-half of the lot in question, and that his will would not, in that event, be operative in regard thereto, but it shows no intention to exclude from the operation of the will any property which he might be entitled to devise at the time of his death. Instead of being a limitation on the previous portions of the will, disposing of all the property subject to the testamentary disposition of deceased, it is rather a reaffirmance thereof. It thus appears that Charles H. Lux was entitled to no part of his father's estate, either under the will or as an heir, and appellant as his successor was, therefore, properly denied any relief by the lower court.

Some doubt may exist as to whether the practice adopted in the lower court in this proceeding was entirely regular. To the petition for final distribution, presented with the final account, appellant filed her written objections, setting up her claims as hereinbefore stated, and asking that distribution be made of the undivided one-half of the lot in question, regardless of the will. Demurrers were interposed to the writing so presented by appellant, and these demurrers were sustained. If it be assumed that the allegations made by appellant in her objections were on their face sufficient to entitle her to relief on distribution, and that technical error was committed in sustaining the demurrers thereto, it is nevertheless manifest that so far as the alleged right of Charles H. Lux to take some portion of his father's estate is concerned, and without which appellant could take nothing, appellant's claim was based entirely on the language of the will of deceased. If the trust thereby attempted to be created was valid under the

laws of this state, and if a proper construction of the provisions of the will made it operative as to all property owned by deceased at the time of his death, concededly Charles H. Lux was entitled to nothing. Appellant's only contention is that the attempted trust is invalid on its face, and that the will on its face shows an intention on the part of testator that it should not be operative as to an undivided one-half of the lot in controversy. In support of this contention, she has incorporated the will in the bill of exceptions on this appeal, and it is apparent therefrom, as is already shown, that her claim in this behalf is not well founded. Regardless, therefore, of the question as to whether the demurrers were properly sustained, appellant could not have been prejudicially affected by the action of the lower court in that regard. The conclusion of that court to the effect that, upon the proper construction of the will, Charles H. Lux was entitled to no part of his father's estate was correct, and effectually disposes of appellant's claim.

In view of our conclusions upon the questions discussed, we have deemed it unnecessary to consider the question as to the right of the appellant to be heard on distribution.

The order or decree of distribution appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

(149 Cal. 167)

#### IN RE PEASE'S ESTATE.

(Supreme Court of California. April 10, 1906.)

##### 1. EXECUTORS AND ADMINISTRATORS—CREDITS—PAYMENT BEFORE APPOINTMENT.

Credits in an executor's account for payments made by him before his appointment, claim for which he never presented to the court, and with which at the time he made them he did not intend to charge deceased, are properly disallowed.

##### 2. SAME—NECESSITY OF EXPENSES.

An item of credit in an executor's account for rent of a safe deposit box is properly rejected on his testimony that he kept in the box only some papers which he could have kept safely at home.

##### 3. SAME—EXPENSES OF SUIT.

An executor is properly disallowed credit for expenditures in a suit which he commenced to recover property of the estate, he having abandoned the suit, though he thought the property belonged to the estate; no good reason for the abandonment being shown.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 448-455.]

##### 4. SAME—NOTICE OF SALE—PUBLICATION IN WRONG COUNTY.

An executor is properly disallowed credit for money paid for publishing, in a county other than that provided by statute, notice of sale of real estate.

##### 5. SAME—PROPERTY LOST TO ESTATE.

An executor is rightly charged with the value of property as lost to the estate, on his testimony that he thought it belonged to the estate, but nevertheless abandoned a suit for

its recovery, which he had begun, and allowed the defendant therein to keep it on payment to him of money which he retained for himself.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 394, 395, 484.]

#### 6. SAME—INTEREST.

An executor having used the funds of the estate for his private purposes is chargeable with interest thereon.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 425.]

#### 7. SAME—COMMISSIONS ON SALES.

An executor is entitled to commissions on the whole amount for which property sells, though it is subject to a mortgage, and though part of the purchase money equal to the amount of the mortgage is paid directly to the mortgagee; the sale not being subject to the mortgage, but the mortgage having been presented as a claim against the estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2090.]

#### 8. SAME—OBJECTIONS TO ACCOUNT.

An executor may not complain because one filing objections to his account is not a person interested, as the court has the right of its own motion to inquire into all of the items of the account, and to settle it properly.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2158.]

#### 9. COSTS—APPEAL—PRINTING OF TRANSCRIPT.

Appellant, though successful having filed a transcript containing much unnecessary matter, will be limited in his recovery of costs of appeal, so far as the printing of the transcript is concerned, to a proper porportion of the cost thereof.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 968-971.]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Emma S. Pease, deceased. From the order settling the account of the executor, Albert Simon, he appeals. Reversed, with directions.

Walter A. Coffee, for appellant. A. B. Weller and Fred W. Frey, for respondent.

SLOSS, J. Albert Simon, as executor of the will of Emma S. Pease, deceased, filed his first and final account of his administration of the estate. Objections were filed on behalf of certain legatees, and the executor was directed to file an amended final account. This he did, and after hearing witnesses produced by the executor and the legatees who had again filed objections to the amended account, the court made its order settling the account by disallowing certain items with which the executor had credited himself, adding certain sums to the debit side of the account, and charging him with interest on the difference between the debit and credit sides of the account. The executor appeals from this order, and contends that the evidence was insufficient to justify the court in disallowing any of his credits or in charging him with any further debits or with interest. The various items involved will therefore be briefly considered.

(a) As to credits disallowed. Three alleged payments to St. Luke's Hospital, aggregating \$38.50, were found by the court to have been paid by the deceased in her lifetime, and not by the executor. The testimony of Belle Hopkins supports this finding. The executor credits himself with five payments to Western National Bank, G. W. Townsend, River Dale Creamery, and for rent and gas, amounting to \$51.30. The appellant's own testimony shows that he made these payments before his appointment as executor, that he never presented any claim for these amounts to the court, and that, at the time he made them, he did not intend to charge his mother (the decedent) with them. On this showing, the items were properly disallowed. An item of \$10 for expenses of the executor in going to and from Alameda county on business of the estate was found to be neither necessary nor proper, and the finding is supported by testimony that the estate had an agent, who performed all services in taking care of the property of the estate in Alameda county, and that the compensation of this agent was charged to the estate. The court was justified in rejecting an item of \$4 for rent of a safe deposit box, in view of the testimony of the executor himself that he kept in the box only some papers of the estate which he could have kept safely at home. The executor expended \$7.50 in a suit which he commenced to recover certain personal property of the estate from one Isabel Hopps. In view of the fact, appearing for his own testimony, that he abandoned the suit, although he thought the property sued for belonged to the estate, no good reason being shown for such abandonment, there is no ground for his contention that this should have been allowed as a charge against the estate. An item of \$20, claimed to have been paid to Isabel Hopps for services rendered the estate was reduced to \$10, a witness having testified that \$10 of the amount paid Mrs. Hopps was for a personal debt of the executor. The court was, of course, justified in accepting the statement of this witness as against that of the executor. Forty-three dollars was paid to the Recorder Publishing Company, a newspaper printed and published in San Francisco, for publishing a notice of sale of real estate. The real estate was situated in Alameda county. Since a notice of sale of real estate should be published in a newspaper printed in the county in which the land is situated (Code Civ. Proc., §§ 1547, 1549), this item was not chargeable against the estate.

(b) As to additional debits. Mrs. Souriau testified that she saw the deceased, just before her death, give the appellant \$35, but not as a present. This was sufficient to authorize the court to debit him with the amount. The executor was also debited with \$175.60, the value of personal property belonging to the estate. This is the same property above referred to as being in the possession of Isabel Hopps. The executor's testi-

mony that he thought it belonged to the estate, but had abandoned a suit for its recovery, and permitted Mrs. Hopps to keep it on paying him \$62, which he retained for himself, is ample to show that the property was lost to the estate through his neglect, and he was rightly charged with its value.

(c) As to charges of interest. The court, after finding the difference between the credit and debit sides of the account, reached the conclusion that the executor should be charged with simple interest on this difference from July 6, 1903, the date when the proceeds of sale of real estate came into his hands, except as to the items of \$35 and \$175.60, added to the debit side of the account, on which he was to be charged interest from the date of his appointment. This conclusion was based upon a finding that he had used the funds of the estate "for his own private use and purposes." The finding is sustained by the testimony of the executor taken in connection with that of Mrs. Heilbron, and fully justifies the charging of the executor with interest. *Miller v. Lux*, 100 Cal. 609, 35 Pac. 345, 639.

The appellant contends, further, that the court erred in fixing the amount upon which his commissions were to be figured. It appears that there was a sale by the executor of land in Alameda county. The land was subject to a mortgage of \$882, which had been presented as a claim against the estate and allowed. The sale was \$1,500 to one Thena Heilbron. The court allowed commissions only on the net amount realized after deducting the amount of the mortgage from the amount for which the property was sold. We think commissions should have been allowed on the entire \$1,500. An executor or administrator is to be allowed commissions based on the value of the estate which has been taken into his possession and accounted for. *Estate of Simmons*, 43 Cal. 543, 549; *In re Ricaud*, 70 Cal. 69, 11 Pac. 471. Here the executor testified: "I never got the \$1,500. I only got what was left after paying off the mortgage." The ruling of the trial court was based, apparently, on the view that the \$1,500 had not come into the executor's possession. The general rule appears to be that where property subject to an incumbrance is sold, the executor is entitled only to commissions on the net purchase price in excess of the incumbrance. 2 *Woerner's Am. Law of Adm.* (2d Ed.) 1166; *Buerhaus v. De Saussure*, 41 S. C. 457, 19 S. E. 926, 20 S. E. 64; *Baucus v. Stover*, 24 Hun (N. Y.) 109; cf. *Hitchcock v. Mosher*, 106 Mo. 578, 17 S. W. 638. An examination of these cases indicates that what was sold was merely the equity of redemption, and it may well be held that where property is sold subject to an incumbrance which still remains, the commissions should be calculated only on the value of the interest sold. Here, however, the mortgage had been presented as a valid claim against the estate. The sale was not

made to the mortgagee, but to a third party. Under the Code of Civil Procedure, § 1569, where there is a sale of lands subject to a mortgage or other lien, the purchase money must be applied first to the satisfaction of the mortgage or lien. The property offered for sale and sold is not the equity of redemption (as it may, for this purpose, be termed), but the entire interest of the estate, regardless of the mortgage. It is the executor's duty to apply the purchase price to satisfying and removing the lien for the benefit of the purchaser, and this was done here. The statement of the appellant that he did not get the \$1,500, but only the surplus over the mortgage, can mean at most that the purchaser or a broker paid the mortgagee directly, instead of paying the full price to the executor and having him pay off the mortgage. But this does not alter the real nature of the transaction. Whoever paid the mortgagee did it as agent of the executor. In effect, the executor sold the land for \$1,500, and with the proceeds paid off the mortgage debt. "The executor is bound to account to the court for the entire proceeds of sales made under its order." *Estate of Turner*, 128 Cal. 388, 392, 60 Pac. 967. In this account the executor charged himself with the sum for which the sale was made, and he should be allowed commissions on it. "It would be a narrow construction of the statute to hold, that because he did not demand its delivery that therefore in law he did not receive nor pay out that for which he was responsible as received and paid out." *Huddleston v. Kempner*, 87 Tex. 372, 28 S. W. 936. There is no force in the point that one of the persons filing objections to the account was not shown to be a "person interested." Code Civ. Proc. § 1626. The evidence was sufficient to show that she was a legatee under the will, and even if she had not been, the court had the right, of its own motion, to inquire into all the items of the account, and to settle it properly.

The appellant claims, and the respondents concede, that, in fixing the interest to be charged against the executor on the balance which should have been in his hands, there was some error in computation. This need not be considered, since, when the account again comes before the court for settlement, any such error can be corrected. For the error in the matter of commissions the order will have to be reversed. To properly present the points raised, a much briefer record would have been sufficient. The appellant has, however, filed a transcript of 306 pages, of which the first 179 are made up largely of papers not constituting any part of the judgment roll nor authenticated by a bill of exceptions. *Miller v. Lux*, 100 Cal. 609, 35 Pac. 345, 639. And the bill of exceptions itself, occupying some 120 pages of the transcript, contains a great deal of unnecessary matter and repetition. Under these circumstances, it would be unjust to throw the entire burden of the costs of this appeal on the

respondent. *Bullard v. His Creditors*, 58 Cal. 600.

The order is reversed, with directions to the lower court to settle the account by allowing the appellant commissions as above indicated, and charging him with interest on the balance due from him, recomputed in accordance with the principles applied on the former hearing; in other respects the order of settlement to stand unchanged. The appellant shall be limited in his recovery of costs to this appeal, so far as the printing of the transcript is concerned, to one-third of the cost thereof.

We concur: ANGELLOTTI, J.; SHAW, J.

149 Cal. 181

BRESEE et al. v. LOS ANGELES TRACTION CO. et al. (L. A. 1419.)

(Supreme Court of California. April 5, 1906. Rehearing Denied May 4, 1906.)

#### 1. APPEAL—REVIEW—SCOPE OF REVIEW.

That the trial court limited the ground on which a new trial was granted does not deprive the Supreme Court of the right to review on appeal any of the grounds on which the new trial was asked, except that of the sufficiency of conflicting evidence to support the verdict.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3477.]

#### 2. NEGLIGENCE—EVIDENCE—ADMISSIBILITY.

Where the negligence of a person on a particular occasion is in issue it is usually permissible to prove every fact known to such person at the time which would have a reasonable tendency to increase or decrease the danger of a particular course of action.

#### 3. SAME—IMPUTED NEGLIGENCE—NEGLIGENCE OF DRIVER OF VEHICLE IMPUTABLE TO OCCUPANT THEREOF.

Though a person who is injured while riding in a vehicle driven by another is not chargeable with the contributory negligence of the driver in which he did not participate, yet he is not absolved from all personal care, but must exercise ordinary care to avoid all injury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 147.]

#### 4. STREET RAILROADS—INJURIES TO TRAVELERS ON STREET—COLLISIONS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action against a street railway company for injuries received by plaintiff while riding in a vehicle driven by another in consequence of a collision with a car, evidence of the habits of the driver of the vehicle with respect to the dangers arising from collisions with cars, coupled with proof of knowledge thereof on the part of plaintiff, is admissible on the issue of his contributory negligence.

#### 5. SAME.

Where, in an action against a street railway company for injuries received by plaintiff while riding in a vehicle by another in consequence of a collision with a car, it was not claimed that the accident was attributable to the driver's lack of control over the horse due to his manner of holding the reins, evidence of the driver's habits of driving with a loose rein was inadmissible on the issue of plaintiff's contributory negligence.

#### 6. APPEAL—REVIEW—NEW TRIAL—DISCRETION OF LOWER COURT.

The granting of new trial in an action for an injury received by plaintiff while riding in a vehicle driven by another, in consequence of a collision with a street car, on the ground of error in admitting evidence of the driver's habits of driving with a loose rein, will not

be disturbed on appeal, though the evidence was of slight importance, since the trial court has a large discretion in the matter of granting new trials.

#### 7. STREET RAILROADS—INJURIES TO TRAVELER—COLLISIONS—EVIDENCE—INSTRUCTIONS.

Where, in an action against a street railway company for injuries received by a traveler in a collision with a street car, the evidence showed that the car at the time of the accident was running at a high rate of speed and greatly in excess of the speed limited by a municipal ordinance, it was error to charge that it was not negligence on the part of the motorman to assume that a person would not attempt to cross the track in front of the approaching car so near as to render a collision probable, it being for the jury to determine whether the speed of the car was so great that he should have assumed that persons might ignorantly attempt to cross so near as to make a collision probable.

#### 8. SAME—NEGLIGENCE.

Running a street car at a speed in excess of the rate fixed by a municipal ordinance is negligence as a matter of law, and renders the street railway company liable for any injury caused by the excessive speed.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 175, 200, 201.]

#### 9. SAME—INSTRUCTIONS.

Where, in an action against a street railway company for injuries received by a traveler in a collision with a car, the evidence showed that the car was running at a rate of from 25 to 30 miles an hour, while the maximum speed was limited to eight miles an hour and the injury complained of was directly caused by the impact of the traveler's body against the ground, an instruction that if injuries to the traveler would have resulted though the car had been operated at a speed not in excess of eight miles per hour, then any rate of speed in excess of eight miles per hour was not the proximate cause of the collision and the company was not liable, was erroneous, for whatever additional injury to the traveler was due to the excess of speed was an injury caused by the company's negligence.

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Paul Bresee and another against the Los Angeles Traction Company and another. From an order granting a new trial after verdict for defendants, they appeal. Affirmed.

E. E. Millikin, for appellants. J. L. Murphy, for respondents.

SHAW, J. This is an action by the plaintiffs to recover damages for injuries to the plaintiff Ada Bresee, alleged to have been caused by the negligence of the defendants. Paul Bresee is the husband of Ada Bresee, and is made a party solely for that reason. The wife will hereafter be referred to as the plaintiff. The plaintiff was riding in a two-seated canopy top carriage, driven by P. F. Bresee, along Hill street in the city of Los Angeles, at about 10 o'clock at night, and in crossing the track of the defendant company a car, under the management of the defendant Majonnier as motorman, ran against the carriage and threw the plaintiff with great force and violence to the ground, and thereby severely bruised and injured her. The particular negligence charged against the defendants in the complaint is that the car was being propelled along the street at an unlaw-

ful, excessive, and reckless speed. The answer pleads contributory negligence on the part of the plaintiff. The jury having returned a verdict for the defendants, the plaintiffs moved for a new trial on the minutes of the court, and in the notice of intention so to do set forth a number of grounds, embracing errors in rulings upon evidence and in giving and refusing of instructions, and that the evidence in several particulars was insufficient to sustain the verdict. The motion was granted, and from the order the defendants appeal.

The order granting the new trial is in the following words: "The motion of plaintiffs for new trial is granted on the ground that evidence relating to Dr. P. F. Bresee's habits of driving on occasions other than that of the accident was improperly admitted, opinion filed." It is contended by the defendants that the limitation expressed in the order excludes from our consideration the sufficiency of the evidence upon any and every point upon which it is conflicting. The order, it will be seen, does not expressly declare that the motion was denied, so far as it was based on other grounds than those mentioned therein, and, therefore, it does not affirmatively exclude the other grounds from our consideration. In *Kauffman v. Maier*, 94 Cal. 277, 29 Pac. 481, 18 L. R. A. 124, it was said upon this subject: "If the trial court in its order granting a new trial, excludes this as a ground of its action *by direct language*, and the record shows that there was a conflict of evidence," this court will not re-examine the evidence. (The italics are ours.) In that case the lower court did, by direct language, exclude the ground that the evidence was insufficient and declared that, so far as that ground was concerned, the motion was denied, and hence the decision is not a precedent for the present case, where this ground, if excluded at all, is excluded by implication only, and by force of the rule "*expressio unius est exclusio alterius*." We do not find it necessary to decide whether or not the order in question should be construed to prevent a review of the evidence by this court. It is the established rule of practice that such an order, even if it is expressly limited to a single ground, does not exclude from review on appeal any of the grounds upon which the new trial was asked, except that of the sufficiency of conflicting evidence to support the verdict or decision. *Kauffman v. Maier*, supra; *Thompson v. California Con. Co.* (Cal. Sup.) 82 Pac. 367; *Simon Newman Co. v. Lassing*, 141 Cal. 175, 74 Pac. 761; *Swett v. Gray*, 141 Cal. 69, 74 Pac. 439; *Siemens v. Oakland, etc., Ry.*, 134 Cal. 496, 66 Pac. 672; *People v. Castro*, 133 Cal. 12, 65 Pac. 13; *Newman v. Overland, etc., Co.*, 132 Cal. 74, 64 Pac. 110; *Churchill v. Flournoy*, 127 Cal. 362, 59 Pac. 791.

It is conceded on both sides that the plaintiff was a mere guest of P. F. Bresee at the time of the accident, and had neither the control of, nor the right to control, the driv-

ing of the carriage, and that under such circumstances the carelessness of the driver, P. F. Bresee, contributing to the injury, cannot be imputed to her so as to constitute contributory negligence on her part; that to sustain the defense of contributory negligence, the defendant must prove personal failure of plaintiff to exercise ordinary care. In the discussion of the evidence to show such contributory negligence of plaintiff, it will be assumed that P. F. Bresee did drive upon the track imprudently near the approaching car, and that his negligence contributed to the plaintiff's injury. The contention of the defendant on this point is that P. F. Bresee, was a careless driver with respect to the act of passing in front of cars while driving about the streets, that he had a disposition to cross tracks in front of and dangerously near to approaching cars, that she knew his character in that respect, and that, so knowing, she did not look to see if a car was approaching when she saw that he was about to cross the track, or, if she saw it, did not warn him, nor make an effort to have him desist from the attempt, or, that she did not make the extra effort in these particulars that ordinary care demanded of her, in view of her knowledge of his careless character, that if she had made such effort he would have been deterred from crossing and she would have been unhurt, and hence, that her own lack of care contributed to her injury.

The evidence on this question, referred to in the order granting a new trial, consisted of testimony to the effect that P. F. Bresee had been for many years almost constantly driving about the city with the same horse and carriage, that on five occasions prior to the accident he had been seen to drive in front of cars so near thereto that the witnesses testifying considered it carelessly and dangerously near, that he usually drove with a loose rein and held the reins loosely in one hand, frequently driving with his head down, or turned to the rear conversing with others riding with him, and that he did not seem to be observant of other cars or vehicles approaching him. This evidence was not introduced for the purpose of proving that P. F. Bresee negligently drove in front of the car on the occasion of the accident. The defendants relied on other evidence to prove that fact, and so stated to the court. The question of its admissibility for that purpose is, therefore, not involved, and this must be kept carefully in mind. It was offered and admitted expressly for the purpose of showing the character of P. F. Bresee as a careless driver. In that connection, and in order to make it relevant, it was further proposed by the defendants to show that plaintiff, at the time, knew, or should have known, his character in that respect. It is first to be noted that the cases on the subject of the introduction of such evidence of character or previous habits to prove the fact of negligent driving on the occasion of the accident are not applicable to the question now under

consideration. Upon that question there is much confusion and considerable conflict in the authorities. We think the admissibility of the evidence, for the purposes for which it was here offered, depends upon different conditions and upon a difference in the issue to which it is directed.

The purpose of the evidence was to lay a foundation for the application of the familiar rule that the degree of care necessary to constitute the ordinary care required of a person upon any particular occasion, is measured by reference to the circumstances of danger and risk known to such person at the time. When the negligence of a person upon a particular occasion is in issue, it is usually, if not always, permissible to prove every fact, known to such person at the time, which would have a reasonable tendency to increase or decrease the risk and danger of a particular course of action. There are numerous instances of the application of this rule which are somewhat analogous to the case at bar, though we have not found any case precisely to the same point. Thus, vicious habits of an animal may be proven to show that it was negligence to allow it to go at large or unmuzzled, and particular exhibitions of such viciousness, of which the owner has knowledge, may be shown as evidence of the vicious disposition and of the neglect in issue. *Judd v. Claremont*, 66 N. H. 419, 23 Atl. 427; *Lynch v. Richardson*, 163 Mass. 100, 39 N. E. 801, 47 Am. St. Rep. 444; *Muller v. McKesson*, 73 N. Y. 199, 29 Am. Rep. 123; 1 *Wigmore on Evidence*, § 251. And lack of skill of an employé, and particular instances thereof, may be shown, coupled with knowledge thereof by the employer, to prove negligence of the employer in hiring or retaining him. *Pittsburgh, etc., Co. v. Ruby*, 38 Ind. 312, 10 Am. Rep. 111; *Mich. Cent. R. R. v. Gilbert*, 46 Mich. 179, 9 N. W. 243; *Davis v. R. R. Co.*, 20 Mich. 120, 4 Am. Rep. 364; 1 *Wigmore on Evidence*, §§ 208, 250. Although the rule is, as conceded here, that a person who is injured while riding in a vehicle driven by another is not chargeable with the contributory negligence of the driver, in which he did not participate, yet such person is not absolved from all personal care, but is required to exercise ordinary care to avoid the injury. *Dean v. Penn. R. R. Co.*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; *Michigan City v. Boeckling*, 122 Ind. 39, 23 N. E. 518; *Brickell v. N. Y. Cent. R. R.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; *Nesbit v. Garner*, 75 Iowa, 314, 39 N. W. 516, 1 L. R. A. 152, 9 Am. St. Rep. 486; 1 *Shearman & R. on Neg.* § 66a. The character and habits of the driver of the carriage with respect to similar dangers, if known to the plaintiff, would naturally have some effect on her own conduct, on the particular occasion in keeping a lookout for the danger herself, in giving him warning, and in enjoining on him a prudent course, and in order to enable the jury to determine whether or not she exercised ordinary care in that respect,

it was proper to give evidence of such character and habits, coupled with proof of knowledge thereof on her part. These observations and conclusions, however, are not applicable to the evidence of the driver's previous habits of driving with a loose rein, or of holding the reins loosely in one hand. These habits would not tend to prove either a careless habit of driving in front of cars too close for safety, or a disposition to do so. It was not claimed that the accident was attributable to his lack of control over the horse due to his manner of holding the reins. This evidence was not pertinent to any issue in the case and was improperly admitted. Although it was probably of slight importance, yet, in view of the large discretion committed to the judge of the trial court in the matter of granting a new trial, we cannot say it was not properly granted on that ground. We do not consider it necessary to consider the question of the sufficiency of the evidence to show plaintiff's knowledge of the driver's habits and character and of the particular instances of his negligence. Upon another trial the court can, if deemed best, direct the order of proof so that the evidence of such knowledge on her part shall be first introduced, and if no sufficient evidence to go to the jury is offered on that point, or in respect to some of the instances, the corresponding evidence thereof can be excluded.

At the request of the defendant the court instructed the jury with respect to the conduct of the motorman that: "It is not negligence on the part of such motorman to assume that a person will not attempt to cross the track in front of an approaching car, which is so near as to render a collision probable." The probability of a collision between a moving car and a vehicle crossing in front of it, depends largely upon the speed of the car, and the action of a careful person attempting to cross, in choosing the distance at which to cross in front of such car, will depend upon his knowledge, and means of knowledge, of the speed with which the car is approaching him. There was evidence strongly indicating, if not absolutely demonstrating, that the car in question at the time of the accident was running at a speed of at least 25 or 30 miles an hour. This was in the nighttime and upon a street in the thickly settled portion of the city. With the car going at such tremendous speed, it is not unlikely that persons about to cross the track might choose a place so near as to make collision probable, and yet, from their point of view, it might seem entirely reasonable and safe for them to cross at the place selected. Their failure to perceive the danger might be entirely due to the excessive speed of the car, and to their inability in the darkness to detect it and comprehend the shortness of the time required for the car to pass over the distance between it and the place selected for the crossing. The motorman must be assumed to know approximately the speed of his car. Under such circumstances,

and while running at such excessive speed, it cannot be said as a matter of law, that the motorman ought not reasonably to have expected that persons might attempt to cross the track at a point which would in fact be dangerously near, but which to them would not appear so. The circumstances might be such as to charge him with knowledge of this likelihood. Due care would require him in that case to anticipate such probability reasonably arising from the consequences of his own gross carelessness. The court, therefore, should not have stated as a matter of law that the motorman, under the circumstances had a right to assume that persons would not cross dangerously near in front of him. It should have been left to the jury to say whether or not his speed was so great that he should have assumed that persons might ignorantly attempt to cross so near as to make a collision probable.

The court also, at the request of the defendants, instructed the jury with respect to the proximate cause of the injury, as follows: "If you believe from the evidence that said collision, and the injuries so sustained by said Ada Bresee, would have resulted, even had said car been operated at a rate of speed not in excess of eight miles per hour at the time the vehicle in question was turned to cross the railway tracks, then any rate of speed in excess of eight miles per hour that said car may have been running at said time, was not a proximate cause of said collision, and cannot render the defendants liable in this action." This instruction implies a fact not physically possible, namely, that an injury caused by being thrown with great force and violence from the carriage to the ground would have been as great if the force and violence had been less than it actually was, the other circumstances being precisely the same. The action of force and violence, other things being the same, is mechanical and absolute, and it is impossible that different degrees of force should produce the same results, where all other circumstances are precisely the same. So far as the mere fact of the collision was concerned, it may be that, although the speed of the car was more than eight miles an hour, it would have occurred had the speed been less. The injury complained of, however, was alleged to have been directly caused by the impact of the plaintiff's body against the ground, and its extent would necessarily depend upon the force of the impact, and that force would depend on the speed of the car. Any increase in the speed would, necessarily, add to the force and, consequently, to the extent of the injury. At the time this accident happened it was unlawful to propel a street car along the streets of the city at a rate exceeding eight miles an hour, and a speed in excess of that rate constituted negligence, as a matter of law, and rendered the party operating the car liable for any injury caused by such excessive rate. Whatever additional injury, therefore,

was due to the excess of speed over eight miles an hour, was an injury caused by the defendants' negligence. The excess in the speed over that rate, an excess which is assumed by the instruction in question, must have been the direct cause of such additional injury. This additional injury from such negligence would render the defendants liable in the action, in the absence of plaintiff's contributory negligence. If the instruction had been limited to the happening of the collision alone, it might not have been objectionable in this respect, although even in that case it is metaphysical in form and would have tended to confuse the jury. But in the assertion that, under the circumstances stated, the excess of speed could not render the defendants liable in the action, it was erroneous. In either event it should not have been given. The order is affirmed.

We concur: BEATTY, C. J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.; ANGELLOTTI, J.

3 Cal. App. 142

#### In re REED'S ESTATE.

(Court of Appeal, Second District, California.  
Feb. 23, 1906. Rehearing Denied by Supreme Court May 31, 1906.)

#### 1. EXECUTORS — SALES — POWER OF COURT — WHO MAY QUESTION.

The question of the power of the court to direct a new sale on setting aside a former executor's sale cannot be raised by the original purchaser; the executor making no objection.

#### 2. SAME — SETTING ASIDE SALE.

Under Code Civ. Proc. § 1552, authorizing the court to set aside an executor's sale if an offer of 10 per cent. more in amount than that named in the return be made in writing by some responsible person, the court may set aside the sale on such an offer being made by the original purchaser.

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Proceedings for the sale of real estate by Martin Winch, executor of Amanda W. Reed. From an order refusing to confirm the sale, the purchaser, Francis E. Crawford, appeals. Affirmed.

Wright, Bell & Ward, for appellant.  
Works, Lee & Works, Oscar A. Trippet, and John A. Goodrich, for respondent.

SMITH, J. This is an appeal from an order refusing to confirm a sale of real estate at which the appellant was purchaser. The sale was made under a power in the will of respondent's testatrix, authorizing the executor to sell and convey the property, real and personal, of the estate "upon such terms and conditions and for such prices as to him shall seem good."

The objections to the order urged by the appellant are: (1) That the sale was fair; (2) that the price was not disproportionate to the value of the property sold at the time of the sale; (3) that to justify the order proof of two conditions were essential, name-

ly, that the price was insufficient at the time of the sale, and that a sum exceeding such bid at least 10 per cent. exclusive, etc., could be obtained; and (4) that the court had no power to direct a new sale. Of these points, the first is sustained by the recitals of the order, and may be admitted. As to the second, the preponderating evidence was no doubt in favor of appellant's contention; but there was some evidence to the contract, which it appears from the statements of the court was regarded by it as sufficient to reject the sale. As to the fourth, it is a matter with which we think the appellant was not concerned; and as the order was made upon the application of the executor, who is respondent, no objection can be urged to it.

The remaining objection is based upon an incorrect construction of the statute, which authorizes the court in its discretion to set aside the sale. "If an offer of 10 per cent. more in amount than that named in the return be made to the court, in writing, by a responsible person." *Estate of Robinson*, 142 Cal. 157, 75 Pac. 777. There is nothing in the decision in *Estate of Leonis*, 138 Cal. 194, 71 Pac. 171, inconsistent with this view; that case dealt with a different provision of the statute. In the present case, a written offer of 10 per cent. more than the amount named in the return was made by the appellant himself; and it was then in the discretion of the court, under the provision in question, either to accept such offer and confirm the sale, or to order a new sale. It is, indeed, claimed by the appellant that his bid was the result of a mistake. But this, we think, is immaterial; nor do we think that the court was bound to accept the offer. It may be added, however, that the appellant's bid was increased by 10 per cent. by another written offer by responsible bidder to purchase for the sum of \$36,300; and we are of opinion, notwithstanding the objections of appellant—which seem to have had some weight with the court below—that the court might have accepted this bid. The objections referred to are, that under the terms of the sale to Crawford the deed was to contain certain "conditions, covenants and restrictions" as to modes of building, etc., to operate for 10 years, and that the bid of \$36,300 was upon the condition that the purchaser should be so far relieved from the conditions imposed on the appellant as to permit them to erect an opera house as described in the bid. The executor expressed his acquiescence in the proposed change, which, it appears, would have been equally beneficial to the estate; and we are of the opinion that the provisions of section 1552, Code Civ. Proc., were substantially complied with.

The order appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

3 Cal. App. 338

**ALCATRAZ MASONIC HALL ASS'N v.  
UNITED STATES FIDELITY &  
GUARANTY CO.**

(Court of Appeal, First District, California.  
March 28, 1906.)

**1. PRINCIPAL AND SURETY—DISCHARGE OF  
SURETY—CHANGE IN OBLIGATION.**

Under Civ. Code, § 2819, exonerating a guarantor if by any act of the creditor the original obligation is altered in any material respect, a surety in a bond conditioned on performance by a contractor of a building contract for \$16,300, is released from liability on the owner and contractor changing the plans and increasing the cost \$315.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, §§ 162-165.]

**2. SAME—EXTENT OF LIABILITY.**

Since a contractor, under contract for the construction of a building and the delivery thereof free from all liens, is liable only for enforceable liens, a surety in a bond conditioned on the performance of the contract is liable only for enforceable liens.

**3. SAME.**

A contract for the construction of a building required the owner to pay 75 per cent. of the contract price in installments, and the balance (\$4,075) 35 days after the acceptance of the work. A surety executed a bond in the sum of \$4,075, conditioned on the contractor delivering the building free from liens. *Held* that, unless the owner was compelled to pay a greater sum than \$4,075 to free the building from valid liens, the surety was not liable; it having the right to have this amount applied toward the satisfaction of valid claims.

**4. SAME.**

A surety in a bond conditioned on a contractor, under contract for the construction of a building, performing his contract and delivering the building free from liens, is not liable for the expenses incurred by the owner in suits for the enforcement of liens, where under the contract he was not required to pay 25 per cent. of the contract price until 35 days after the completion of the building, during which time he could ascertain the lien claimants and pay them from the sum unpaid.

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by the Alcatraz Masonic Hall Association against the United States Fidelity & Guaranty Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Snook & Church, for appellant. Campbell, Metson & Campbell, for respondent.

HARRISON, P. J., The plaintiff entered into a contract with one L. U. Grant, October 19, 1899, for the construction by the latter of a building upon its land at the agreed price of \$16,300, and at the same time the said Grant as principal and the defendant as surety executed to the plaintiff a bond of indemnity in the sum of \$4,075, conditioned that Grant should faithfully perform the said contract and deliver the building to the plaintiff within the contract time for its completion, free from all liens, demands, and claims, and should pay to the persons performing labor or furnishing materials for the construction of the building the value thereof.

The contract provided that the building should be completed within 150 working days from the date thereof, and that the payment of the contract price should be made in installments as the work progressed, in sums equal to 75 per cent. of the value of the work done and materials furnished, as estimated on the 1st and 15th days of each month, and the balance, to wit, 25 per cent. of the contract price of \$16,800 (\$4,075) 35 days after the completion and acceptance of the work. After the execution and recording of the contract the plaintiff and Grant made certain alterations and changes therein, by which the cost of the building was increased in the sum of \$315, and agreed that the said additional cost should be paid at the same times and in the same manner as payments under the original contract. During the progress of the work payments were made to Grant upon certificates of the architect on account of installments due on the contract, amounting to \$12,138.85. Before the building was completed Grant abandoned the contract, and the plaintiff completed the construction of the building and expended therefor \$641.23. After its completion certain parties, who had furnished materials and performed labor for Grant in its construction, filed claims of lien therefor, amounting to about \$7,500, and subsequently brought actions in the superior court for their enforcement. These actions were, by an order of court, consolidated, and the plaintiff filed its answer thereto, alleging that the building was not subject to liens exceeding in the aggregate \$3,834.92, and offering to deposit that sum in court for their satisfaction. Upon the trial of the cause the court found that that was the amount due from the plaintiff to Grant upon the contract at the commencement of the action; and upon its order the sum was deposited in court for the said claimants, and the court thereupon rendered its judgment that the said liens were thereby fully satisfied. In this litigation the plaintiff employed certain attorneys, for whose services he paid \$500, and incurred certain costs, amounting to \$27. The present action is brought to recover these amounts from the defendant. A demurrer to the complaint was sustained, and from the judgment entered thereon the plaintiff has appealed.

The bond of the defendant makes no reference to the provisions of section 1203, Code of Civil Procedure, and the objection to its validity based upon the rulings of the Supreme Court in reference to that section are inapplicable. It is unnecessary to consider the effect of the provision in the bond for the payment by Grant to the laborers and materialmen, since the complaint herein is limited to the rights of the plaintiff alone. The condition of the defendant's obligation is the failure of Grant to faithfully perform his contract and deliver the building to the plaintiff free from all liens, claims, and

demands. Although it is alleged that Grant did not complete the building, but abandoned his contract when it was uncompleted, and the plaintiff was compelled to complete the same, it does not show that it has sustained any damage thereby, or make any claim against the defendant therefor. The total amount of the contract price for the building and for the extra work is \$16,615. Deducting from this \$12,138.85 paid to Grant upon the certificates of the architect as the work progressed, and \$3,834.92 determined by the court to be in the plaintiff's hands applicable for the discharge of the liens upon the building, there remains \$641.23, the amount paid by the plaintiff for the completion of the building, thus showing that the plaintiff sustained no pecuniary damage by reason of Grant's failure to complete his contract. The basis of the defendant's obligation which the plaintiff presents in support of its right of action is the failure of Grant to deliver the building free from liens, and upon this point it alleges that upon the completion of the building the sum of \$3,834.92 was chargeable against the building for liens and claims thereon; and it also alleges that upon the trial of the action to enforce the liens the court found that the lien claimants were entitled to this amount of money, and that upon depositing that amount in court for the discharge of said liens the court rendered its judgment that the liens were fully satisfied.

1. The alteration of the contract as set forth in the complaint had the effect to release the surety from its contract of indemnity. There is no allegation in the complaint supporting the suggestion in the brief of the appellant that the original contract contained a provision authorizing changes to be made therein; nor is it alleged that the changes were made with the consent of the defendant. For the purpose of determining the sufficiency of the complaint as against the demurrer we can consider only matters therein set forth. There is no principal of law better settled than that a surety has the right to stand upon the very terms of his contract, and that any alteration in the terms of the principal's contract, made by the parties thereto without his assent, will have the effect to discharge him from all liability. By such alteration the contract ceases to be the one for which he became surety, and the extent of such alteration, or whether his liability will be increased or diminished thereby, is immaterial. Having the right to determine in the first instance whether he will become such surety or not, he has the right to be consulted upon the terms proposed for any variation of his obligation, and if made otherwise his obligation is extinguished. The principle of this rule is discussed in *Brandt on Suretyship*, § 106. See, also, *Miller v. Stewart*, 9 Wheat. (U. S.) 680, 6 L. Ed. 189; *Bethune v. Dozier*, 10 Ga. 235. In this state the Legislature has

declared in section 2819, Civ. Code, that if by any act of the creditor without his consent the original obligation of the principal is altered in any respect he is exonerated. That the alterations in the contract agreed upon between the plaintiff and Grant had the effect to alter the obligation of the surety is apparent. A greater length of time was thereby required within which to finish the building, and a greater amount of labor and of expenditure incident thereto than that for which the defendant had agreed to indemnify the plaintiff. Because of these alterations the defendant ceased to be liable on its contract. *Judah v. Zimmerman*, 22 Ind. 388; *O'Neal v. Kelley*, 65 Ark. 550, 47 S. W. 409; *Eldridge v. Fuhr*, 59 Mo. App. 44; *Beers v. Wolff*, 116 Mo. 179, 22 S. W. 620. The expression found in the opinions in some cases that the surety is discharged by any "material" alteration of the contract has reference to such an alteration as will merely vary the form of the contract without changing its substance, but does not include such an alteration as will increase the obligation for which the indemnity was given. In *O'Neal v. Kelley*, 65 Ark. 550, 47 S. W. 409, the increased cost of the alteration was \$25, and in *Beers v. Wolff*, 116 Mo. 179, 22 S. W. 620, where the contract price was \$31,000, the cost of the alterations was \$231. It cannot be said that an alteration which cost upwards of \$300, as in the present case, is not material. Nor can the court say that if this additional cost had been included in the original contract the defendant would have been willing to bind itself as surety for its performance.

2. The contract with the plaintiff on the part of Grant to deliver the building free from all liens, claims, and demands is to be construed as limited to such liens and demands as can be enforced against the building, and not as including claims of lien which are unauthorized or invalid, or for which the claimants have no right of recovery; and the obligation of the defendant as surety for Grant has the same limitation. Unless the plaintiff has been compelled to pay a greater sum of money to free the building from the liens than the unpaid amount of the contract price for its construction it has suffered no damage. By its contract with Grant it agreed to retain from him the sum of \$4,075—the exact amount of the defendant's agreement of indemnity—until 35 days after the completion of the building. This was an additional security in its hands for the faithful performance by Grant of his contract, including the delivery of the building free from liens, and the defendant was entitled to have this amount of money applied by the plaintiff toward the satisfaction of the claims of lien for which it had been retained. Under the well-established rule in this state, if the "owner" in a building contract observes

the conditions of the contract on his part to be performed, the amount of liens against his property cannot exceed the amount of the unpaid portion of the price agreed upon for constructing the building; and in the present case when the building was completed the plaintiff had in its hands the full amount for which liens were afterward found to be valid charges against the building. The fact that liens for a greater amount were claimed and filed, and for the enforcement of which actions were brought did not in any respect enlarge the liability of the defendant. The record does not disclose the nature of these claims of lien, or the circumstances under which they were filed, or for which the claims were made; but, as the court found that the amount chargeable against the building was no greater than the unpaid amount of the contract price, it must be assumed that for any excess of that price these claims had no valid foundation. It was therefore within the power of the plaintiff to satisfy the amount of all the valid liens against its building by appropriating therefor the amount in its hands; and in view of the rights of the defendant as a surety, and the plaintiff's obligation towards it, it was the duty of the plaintiff to do so before it could call upon the defendant for any relief. Good faith towards the defendant required it to discharge the liens with the money then held by it for that purpose. The contract of the defendant did not extend to or include any trouble or expense which the plaintiff might incur in the performance of its own duty. Before the expiration of the 35 days from the completion of the building the plaintiff knew or could have ascertained the amount of liens claimed thereon; and as it knew that the amount of the unpaid portion of the contract price was the limit for which any liens could be enforced it was in its power to satisfy these liens by appropriating the money in its hands therefor. If, instead of so doing, it chose to await actions for their recovery, and thereby incur additional expense, it was an act of its own choosing for which the defendant is in no wise responsible. Whatever expense was incurred by reason of the attempt of the claimants to enforce liens to which they were not entitled is not embraced in the defendant's contract of indemnity, whether such attempt was to enforce liens for a greater amount than they were entitled to recover, or liens for which they had no claim whatever. The plaintiff therefore is not entitled to recover from the defendant for the services of its attorneys in defending these actions, or the expenses incurred therein, and the court properly sustained the demurrer to the complaint.

The judgment is affirmed.

We concur: COOPER, J.; HALL, J.

3 Cal. App. 335

**MILLER v. DONOVAN (ENGLE, Intervener).**  
(Court of Appeal, Third District, California.  
March 23, 1906.)

**1. PUBLIC LANDS—CONTESTS—STATEMENT OF GROUNDS—COMPLAINT AND AFFIDAVIT—SUFFICIENCY.**

Under Pol. Code, § 3414, providing that when a contest arises concerning the approval of a survey or location of public lands and when either party demands a trial in the courts of the state, the surveyor general must make an order referring the contest, and section 3415, providing that after such order is made "either party may bring an action in the superior court of the county wherein the land is situated to determine the conflict, and the production of a certified copy of the entry made by either the surveyor general or the register gives the court full and complete jurisdiction to hear and determine the action," a contestant is not required to file a statement of the specific grounds of contest with the surveyor general, a complaint setting forth plaintiff's application and affidavit and averring that he filed with such officer his written protest against the application and certificate of purchase issued to defendant, demanded that the conflicting claims of plaintiff and defendant be referred to the superior court, that said officer declared a contest to exist concerning the right to purchase the land, and that he thereupon made an entry and order referring such contest to said court, was sufficient.

**2. SAME—CERTIFICATE OF PURCHASE—EVIDENCE—CONFLICT OF STATUTES.**

Contests arising under Pol. Code, § 3414, involving conflicting claims to public lands, are governed by Pol. Code, § 3514, relating to public lands of the state and their disposition, amended in 1874 (Code Amendments 1873-74, p. 52), and making a certificate of purchase prima facie evidence of title, and not by Code Civ. Proc. § 1925, making such certificate primary evidence of title; the former section having been amended since the enactment of the latter section, and being the latest expression of the legislative will.

**3. STATUTES—CONSTRUCTION.**

It is a cardinal rule of statutory construction that specific provisions on a particular subject control general provisions for the class to which the subject belongs.

**4. PUBLIC LANDS—CONTEST—PAYMENT—TITLE—WHEN VESTED.**

Under Pol. Code, § 3414, relating to the disposal of contests involving title to public lands, making no distinction between certificates of purchase on which there has been partial payment and certificates where full payment has been made, and providing that when, in the judgment of the officer before whom the contest is made, a question of law is involved, or when either party demands a trial in the courts of the state, he (the officer) must make an order referring the contest to the district court, etc.; section 3519, providing that patent will issue whenever final payment has been made for any tract of land the selection of which has been accepted and approved by the United States authorities, etc.; and section 3521, providing that no patent must issue until after the expiration of one year from the date of approval of the survey or location by the surveyor general, nor until the lands are relinquished to the state by authority of the General Land Office at Washington—the legal title remains in the state until the patent issues, and a contest may arise in the state land office as to the right of the holder of a certificate of purchase, whether the original applicant or his assignee, so long as such certificate is outstanding, or at least until the holder thereof is entitled to call for his patent; there being no difference in the effect of the certificate upon

the title whether a part or the whole of the purchase price is first paid.

**5. SAME—APPLICATION FOR PURCHASE—AFFIDAVIT—REQUIREMENTS.**

The affidavit of an applicant for the purchase of state lands, must set forth all the requirements of the statute, and the facts stated must be true.

**6. SAME—COMPLAINT—FRAUD—NECESSITY FOR ALLEGING.**

One instituting a contest involving title to public lands need not allege or prove previous knowledge or notice, on the part of an assignee of an applicant for the land intervening in the action, of any fraud in procuring his assignor's certificate, as such assignee has no equities entitling him to greater rights than his assignor.

**7. EVIDENCE—BURDEN OF PROOF—FAILURE TO SUSTAIN.**

When a party alleges a material fact, and offers no evidence in support of it, the court is authorized, if denied, to find its nonexistence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 122.]

Appeal from Superior Court, Plumas County; E. P. McDaniel, Judge.

Action by W. J. Miller against Louis Donovan; J. M. Engle, intervener. Judgment for plaintiff, and intervener appeals. Affirmed.

Goodwin & Moncur and J. D. Goodwin, for appellant. W. A. Gett and L. N. Peter, for respondent.

**CHIPMAN, P. J.** This is an action commenced under sections 3414 and 3415 of the Political Code to determine the right to purchase certain lieu lands as indemnity for school land upon a contest, between plaintiff and defendant, Donovan, on reference by the Surveyor General as register of the State Land Office, to the superior court of Plumas county. J. M. Engle by leave of court filed a complaint in intervention as the assignee of defendant's certificate of purchase. Plaintiff moved to strike from the files the complaint in intervention, and also filed a general demurrer to the same. The motion was denied, and the demurrer was overruled. The default of defendant for failure to appear was duly entered, and intervener, Engle, made answer. Judgment was entered in favor of plaintiff and against the intervener, and the latter appeals from the judgment on bill of exceptions.

Plaintiff has moved the court to dismiss the appeal on the grounds: First, that appellant is not a party aggrieved within the meaning of section 938 of the Code of Civil Procedure; second, that this court has no appellate jurisdiction in actions brought under section 3414 of the Political Code, for the reason that such actions were special. Upon this second point we understand that the jurisdiction of the appellate court is questioned only as to the intervener, and as to him because he was not a party to the contest in the land office. The view we have taken of the case does not require that we should decide the motion to dismiss.

1. Appellant contends that, under section 3414 of the Political Code, the contestant

must file a statement of the specific grounds of contest with the Surveyor General. The section makes no such requirement. A contest arises when two persons make separate applications to purchase the same state land, if the land is still open to location; and "when either party demands a trial in the courts of the state, he [the surveyor general as ex-officio register of the state land office] must make an order referring the contest"; and section 3415 provides that "after such order is made either party may bring an action in the superior court of the county in which the land is situated, to determine the conflict, and the production of a certified copy of the entry, made by either the Surveyor General or the register, gives the court full and complete jurisdiction to hear and determine the action." The complaint sets forth plaintiff's application and affidavit, and avers that he filed with this officer his written protest against the application of and certificate of purchase issued to defendant, and demanded that the conflicting claims of plaintiff and defendant be referred to the superior court of Plumas county, and that said officer declared a contest to exist concerning the right to purchase said land, and that he thereupon duly made and entered an order referring said contest to said court. These averments are supported by the evidence, and are sufficient.

2. It is next contended that the certificate held by intervenor, Engle, assignee of defendant, Donovan, is not the subject of a contest in the state land office, chiefly for the reason that Donovan had paid in full for the land and his certificate is equivalent to a patent and must be treated the same as if patent had issued. It appears that the land involved is timber land, not suitable for cultivation. Defendant, Donovan, applied to purchase on October 14, 1902, and in April, 1903, one Perrin and Intervenor, Engle, filed their affidavit in the office of the Surveyor General stating that the land was unfit for cultivation. On May 15, 1903, Donovan's application was approved, and on May 26, 1903, the county treasurer received a check for payment in full for the land, and on June 1, 1903, a certificate of purchase was issued in the name of Donovan reciting payment in full by him and stating that "on surrendering this certificate to the state of California and after the said lands have been confirmed to the state, the said Louis Donovan, or his assigns, shall be entitled to receive a patent for the same." Intervenor introduced a deed dated June 8, 1903, purporting to have been executed and acknowledged on that day by Donovan and indorsed as recorded at Donovan's request on June 12, 1903, conveying the land to intervenor. The county treasurer testified that he did not know Donovan and that no man representing himself by that name came to his office or offered to pay for the land, and that payment was made by the check of F. A. Hyde, a land attorney. Plaintiff's application and affidavit were filed in

the office of the Surveyor General on July 24, 1903, numbered 4323, but approval was refused, and on August 8, 1903, a contest was declared to exist, and the order of reference to the superior court was duly made, and on September 4, 1903, plaintiff's complaint was filed. The court found, on sufficient evidence, that plaintiff was a qualified entryman; that his application and affidavit conformed in all respects to the requirements of the law, and that the facts therein set forth were true. The only evidence introduced by intervenor was the original certificate of purchase issued to Donovan and the deed from Donovan to intervenor, with the indorsements showing recordation in Plumas county on June 12, 1903. Appellant cites *Somo v. Oliver*, 52 Cal. 378 (approved in *McFaul v. Pfankuch*, 98 Cal. 402, 33 Pac. 397), to the effect that a contest cannot be made before the Surveyor General in respect to the right to purchase land for which a patent has been issued to one of the parties. *McCabe v. Goodwin*, 106 Cal. 490, 39 Pac. 941, is cited, where it was said: "When a party is authorized to demand a patent for land, his title is vested as much as if he had the patent itself, which is but evidence of title." It is claimed that this is the doctrine relative to government entries of public land, as shown in *Simmons v. Wagner*, 101 U. S. 260, 25 L. Ed. 910; *Barney v. Dolph*, 97 U. S. 652, 24 L. Ed. 1063; *Stark v. Starr*, 73 U. S. 402, 18 L. Ed. 925; *McNee v. Donahue*, 76 Cal. 506, 18 Pac. 438. Furthermore, that the certificate is made primary evidence of title by section 1925 of the Code of Civil Procedure. It is further claimed that contests arising under section 3414 of the Political Code are based on the assumption that title to the contested land still remains in the state, citing *Lobree v. Mullan*, 70 Cal. 152, 11 Pac. 685; *Bode v. Trimmer*, 82 Cal. 516, 23 Pac. 187.

As to the application of section 1925, Code Civ. Proc., we have this to say: Section 3514 of the Political Code relates to the public lands of this state and their disposition, and is found in the title so designated. The section, as amended in 1874 (Code Amendments 1873-74, p. 52), makes a certificate of purchase prima facie evidence of title. Section 4480 of the Political Code requires that the "four Codes must be construed (except as in the next two sections provided) as though all such Codes had been passed at the same moment of time, and were parts of the same statute." But section 4481 provides that "if the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title." It is a cardinal rule of statutory construction that specific provisions upon a particular subject control general provisions for the class to which the subject belongs. *Endlich on Interpretations of Statutes*, § 399. It seems to us that under section 4481, the section of the Code of Civil

Procedure (1925) relied upon by appellant does not apply; and besides, section 3514 of the Political Code was amended since section 1925 of the Civil Procedure was enacted, and is the latest expression of the legislative will on the particular subject. Section 3414 makes no distinction between certificates of purchase on which there has been partial payment and certificates where full payment has been made. Donovan's certificate shows that patent will not issue until after the "said lands have been confirmed to the state," and also "after having in all other respects (other than paying for the lands) complied with the requirements of the laws providing for the sale of said lands." Section 3519 of the Political Code provides that patent will issue "whenever final payment has been made for any tract of land, the selection of which has been accepted and approved by the United States authorities," etc., but, under section 3521 of the same Code, "no patent must issue until after the expiration of one year from the date of approval of the survey or location by the Surveyor General, nor until the lands are relinquished to the state by authority of the General Land Office at Washington." The section does not require relinquishment of locations of school "land in place" but the location here is for lieu and not for school lands in place. By the terms of the law and by the terms of the Donovan certificate as the facts appear, Donovan was not entitled to a patent when the action was commenced. The government has not, so far as appears, relinquished and may never relinquish these lands.

We do not understand the case of McCabe v. Goodwin, supra, to hold that the state is precluded from entertaining a contest or from ordering a reference under section 3414 because one of the applicants has paid in full at the time he made his application. At page 491 it is stated: "If any other interested person would show that the state is not bound to comply with such contract [the certificate as evidence of a contract to convey (Taylor v. Weston, 77 Cal. 540)], he is authorized by section 3414 of the Political Code to procure a judicial determination of this question by having previously instituted a contest in the Surveyor General's office, and causing a transfer to the superior court." The case seems to proceed upon the assumption that McCabe had a standing in court sufficient to enable him to institute the contest, and what was said as to the effect of the certificate held by Goodwin went to his right to the land, because the original applicant had fully complied with the law and was entitled to patent for that reason, and not solely because the certificate had issued and full payment had been made. We do not think it should be held that an entryman can shield himself from the effects of an entry made in violation of the statute by simply paying for the land. The postponement of

the patent for one year may be intended to give opportunity to prevent fraudulent locations from being consummated or to give other locators an opportunity to file applications and present their superior claims to the land. There are certain requirements of the law which have been held many times to be essential to a valid application for location; and the policy of the law is well established to be that these requirements must be shown to have been complied with. It was said in Taylor v. Weston, 77 Cal. 534, 20 Pac. 62, that "this policy would be defeated if persons who falsely pretend to be of the class entitled to purchase could, after deceiving the land department into giving them their preliminary papers, shut off investigation by immediately assigning such preliminary papers to some other party." And we say, further, that investigation cannot be shut off by immediately paying in full for the land. When patent issues the state parts with its title, and not until then. With the rights of parties holding patent we are not now concerned. The cases all hold that the title remains in the state after certificate issues, and the very object of the reference, in case of contest, is to determine to whom the state title should go. This is true of certificates where full payment has been made equally with certificates where only partial payment has been made. Intervener, Engle, stood in the shoes of his assignor, Donovan, and occupied no better or different relation to the lands or to the state than did Donovan. See Taylor v. Weston, supra, for a full discussion of the rights of an assignee of a certificate of purchase and as to the office of such certificate.

We cannot subscribe to the doctrine that the state in effect issues two different and distinct certificates—one, where part payment is made, being only prima facie evidence of title, and the other, where full payment is made, being primary evidence of title and equivalent to patent. We cannot agree with the apparent position of applicant that the certificate of purchase issued by the state is different in cases of full payment and partial payment, or, if the same, have a different effect in passing title. As already said, section 3414 contemplates but one certificate and recognizes no difference in its effect upon the title, whether but 20 per cent. of the purchase price is first paid or the full amount thereof. The certificate is assignable alike in both cases and carries with it like rights to the assignee, but in neither case is it equivalent to a patent. Our view is that the legal title remains in the state until the patent issues, and that a contest may arise as to the right of the holder of a certificate of purchase, whether the original applicant or his assignee, so long as this certificate is outstanding, or at least until the holder is entitled to call for his patent. And such

contest may be instituted by a person who connects himself with the paramount source of the title, as in this case. The analogy between such a certificate as we have here and a final receipt issued by the general government, upon final proof and payment, is not complete. Our law furnishes the means for a contestant to connect himself with the paramount source of title and thus clothe himself with the right given by the statute to have his claim adjudicated by the courts, while no such means are given by the United States law in the entry of land. The rule, therefore, laid down in the cases cited by appellant touching the effect of the final receipt upon entry of public land is not apposite.

3. It follows from what has been said that this is the ordinary and familiar case, often before the Supreme Court, of contest between two claimants to state land, one of whom, plaintiff, as in this case, has by pleading and proof brought himself clearly within the law, and the other of whom, intervenor, has pleaded what we may concede to be ample to show the right of Donovan, through whom he claims, to purchase the land in question, but has wholly failed to make proof of the facts alleged and denied. Intervenor has submitted no proof except the possession of a certificate of purchase and a deed from Donovan, and contends that no such proof was necessary. He plants himself on the proposition that the register of the state land office had no authority or jurisdiction to entertain a contest of Donovan's certificate, and hence the court was without jurisdiction to deal with it. Consistently with this theory intervenor abstained from supporting Donovan's application by proof of the facts set forth in his application and affidavit. With equal consistency, holding as we do, it was, in our view of the case, incumbent upon intervenor, as it would have been upon Donovan if the sole defendant, to sustain by evidence the averments of his application and affidavit, for, as already said, he stood in Donovan's shoes. The law is well settled, and to the point citations are not called for, that in the purchase of state lands the affidavit must set forth all the requirements of the statute, and the facts stated must be true. In case of a contest in the courts each party is an actor and must stand or fall upon the truth of his own statements, and these statements must embrace all the statutory prerequisites. Neither party gains anything by simply defeating his adversary, but must himself establish a clear right before judgment will pass in his favor. The learned counsel for appellant have had too long experience in cases of this character to controvert these well-established rules, and we do not understand that they now question their correctness; but they stoutly contend, erroneously as we think, that they do not apply to this

case. It was not necessary for plaintiff to allege or prove previous knowledge or notice on the part of intervenor of any fraud in procuring the certificate by Donovan. Intervenor, as assignee, had no equities entitling him to greater rights than his assignor. This is fully shown in the case of *Taylor v. Weston*, supra, and the principle was applied in *Jennings v. Bank of California*, 79 Cal. 323, 21 Pac. 852, 5 L. R. A. 233, 12 Am. St. Rep. 145; *People v. Swift*, 96 Cal. 165, 31 Pac. 16.

4. It is complained that none of the material findings are supported by the evidence. The specifications are directed mainly to the findings negating the facts set forth in the complaint in intervention and embraced in Donovan's application and affidavit. As there was an utter failure to establish these facts by evidence, which were denied by plaintiff, it was proper for the court to negative their existence by findings. When a party alleges a material fact, and offers no evidence in support of it, the court is authorized, if denied, to find its nonexistence. The court found that Donovan made his location for the sole use and benefit of Engle, the intervenor, and that Engle paid no consideration to Donovan for said land. There was no evidence submitted by Engle of payment to any one except such as might be presumed from the fact that Donovan conveyed the land to Engle by deed which recited a consideration of \$2,600, and there was no evidence of non-payment by Engle offered by plaintiff. We cannot see that the judgment necessarily rests in any degree upon these findings. The real question before the court, first to be determined, was whether either plaintiff or defendant, Donovan, was entitled to the land, and, if either, which one. Had Donovan's claim been fully established, and had the court ordered that patent issue to him, Donovan's patent would have fed his deed to Engle. The real issue was Donovan's right to a patent, not whether Engle paid a consideration.

We have endeavored to cover all the questions presented by the appeal, and have reached the conclusion that the judgment should be affirmed; and it is so ordered.

We concur: BUCKLES, J.; McLAUGHLIN, J.

3 Cal. App. 333

SHAFFER v. SLOAN.

(Court of Appeal, Second District, California.  
March 27, 1906.)

# 1. SALES—CONTRACT FOR SALE OF BUSINESS—CONSTRUCTION.

A contract for the sale of "all my right, title, and interest in and to the goods, wares, and merchandise in my storeroom," etc., except certain articles specified, coupled with an agreement that the seller should not enter into or engage in the business or occupation of second-hand dealer in the same town so long as the buy-

or should continue in business, indicated upon its face the sale of a business.

## 2. EVIDENCE—ORAL EVIDENCE TO EXPLAIN WRITTEN CONTRACT.

Under Civ. Code, § 1647, providing that a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates, oral proof was properly admitted in explanation of the circumstances under which a contract for the sale of the seller's right, title, and interest in and to goods, wares, and merchandise in his storeroom, coupled with an agreement that the seller would not engage in the business of secondhand dealer in the town so long as the buyer should continue in business was made, to show that the buyer was seeking to purchase an established secondhand store business in the town, and that the contract was for the sale of such business.

## 3. GOOD WILL—CONTRACT FOR SALE OF BUSINESS—CONSTRUCTION.

The obvious intention of a contract for the sale of a business, coupled with an agreement by the seller not to engage in the business in the same town so long as the buyer continues in business, is to sell the good will of the business.

## 4. SAME—VALIDITY—STATUTORY PROVISIONS.

Under Civ. Code, § 1674, providing that one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof so long as the buyer thereof, or any person deriving title to the good will from him, carries on a business therein, the fact that a contract for the sale of a business is in excess of the rights conferred by the section, in that it undertakes to restrict the right to engage in business so long as the buyer continues therein, omitting the word "similar," does not render the contract void, but only to the extent to which it attempts to enlarge the rights beyond the statute.

## 5. SAME—BREACH—DAMAGES—PLEADING AND PROOF.

In an action for breach of a contract for the sale of the good will of a business providing for the payment by the seller, on breach of the contract, of a certain sum to the purchaser, it is unnecessary to plead or prove the impracticability of fixing the damages.

## 6. DAMAGES—PENALTY—LIQUIDATED DAMAGES.

Where it does not clearly appear that the penalty inserted in a contract for the sale of a business and the good will thereof was intended as security for the payment of actual damages in case of breach of contract, the court will regard the amount as liquidated damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 154-160.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by John Shafer against J. G. Sloan. Judgment for plaintiff. Defendant appeals. Affirmed.

Henry M. Willis, for appellant. Byron Waters, for respondent.

ALLEN, J. Action for damages. Findings and judgment in favor of plaintiff for \$500, from which defendant appeals. The complaint, the allegations of which were by the trial court found to be true, alleges the sale by defendant and purchase by plaintiff in 1886 of a stock of secondhand furniture, together with the good will, under a written agreement that defendant should not engage

in the occupation of keeping a secondhand store in the town of San Bernardino so long as plaintiff should continue in such business, upon default of which defendant should pay to plaintiff the sum of \$500. It is further alleged that plaintiff is, and ever since such sale has been, engaged in such business. That defendant in 1908 entered into and engaged in the secondhand business in said town, to plaintiff's damage in the sum of \$500.

The principal contention of appellant is that the good will was not sold under the terms of the written contract, which only specified that the sale was of "all my right, title and interest in and to the goods, wares and merchandise in my storeroom," etc., excepting certain articles specified, coupled with an agreement that the seller should not enter into or engage in the business or occupation of secondhand dealer in the town of San Bernardino so long as the buyer should continue in business. We are of opinion that, by a fair interpretation of this entire agreement, it indicates upon its face the sale of a business. The sale of the contents of a store amounts to a sale of the store. The subsequent provision by which the seller agrees not to engage in the secondhand business accentuates the correctness of this interpretation. Section 1647, Civ. Code, provides: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Under this provision, if any uncertainty exists as to the intent, the oral proof adduced upon the trial—and which, in our opinion, was properly admitted—demonstrated that the defendant was seeking to purchase an established second-hand store business in the town of San Bernardino. If, then, the contract related to the sale of a business, such contract has received a construction in *Streeter v. Rush*, 25 Cal. 68, in which it is held that the obvious intention of such contract is to sell the good will of such business. It is true the contract is in excess of the rights conferred by section 1674, Civil Code, in that it undertakes to restrict the right to engage in business so long as the party of the first part may continue in business, omitting the words "similar business" found in the section. This, however, would not render the contract thereby void, but only to the extent to which it attempted to enlarge the rights beyond the statute. *Brown v. Kling*, 101 Cal. 299, 35 Pac. 995. "The damages for breach of contract for the purchase of the good will of an established trade or business are so absolutely uncertain that courts have recognized the fullest liberty of parties to fix beforehand the amount of damages in that class of cases." *Potter v. Ahrens*, 110 Cal. 681, 43 Pac. 389. The contract, therefore, being of such character, it was unnecessary to plead or prove the impracticability of fixing the damages, which is the rule when contracts are not of

such obvious character. *Long Beach, etc., v. Dodge*, 135 Cal. 405, 67 Pac. 499. It not appearing clearly that the penalty inserted was intended as security for the payment of actual damages, the court will regard the amount as liquidated damages. *Streeter v. Rush*, *supra*.

We think there was no error in the admission of the evidence excepted to, which was all received in explanation of the circumstances under which the contract was made and in relation to the subject-matter of the contract, and the tendency of which was not to create a new contract or to enlarge the terms of the original written contract. There is no point made upon this appeal, nor in the court below, of the insufficiency of the complaint by reason of the absence of the allegation of nonpayment of the damages, and the same is therefore not considered.

We perceive no error in the record, and the judgment is ordered affirmed.

I concur: GRAY, P. J.

I concur, on the authority of *Streeter v. Rush*, 25 Cal. 67, cited in the opinion: SMITH, J.

3 Cal. App. 345

SYVERTSON v. BUTLER et al.

(Court of Appeal, Second District, California.  
March 28, 1906.)

# 1. PLEADING — CROSS-COMPLAINT — PERMISSION OF COURT.

Under Code Civ. Proc. § 442, providing that, whenever defendant seeks affirmative relief against any party affecting the property to which the action relates, he may, in addition to his answer, file a cross-complaint at the same time, or by permission of the court subsequently, a cross-complaint to which no objection is raised by the original plaintiff, and as to which a demurrer by the defendants therein is overruled, will be regarded as on file by consent of the court, although no formal permission to file the cross-complaint was granted.

# 2. APPEAL—FILING CROSS-COMPLAINT—DISCRETION OF COURT.

Under Code Civ. Proc. § 389, declaring that, when a complete determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in and may order amended and supplemental pleadings or a cross-complaint to be filed, etc., the action of the court in permitting defendant, in an action concerning real property, to file a cross-complaint against persons not originally parties, but who claimed an interest in the land, was an exercise of discretion which will not be interfered with on appeal.

Appeal from Superior Court, Los Angeles County, D. K. Trask, Judge.

Action by F. J. Syvertson against Mary A. Butler and others, in which defendant Butler filed a cross-complaint against Amelie Delonee and others. From a judgment in favor of cross-complaint, Pearl Mecartney and another, as executrices of the will of Amos Mecartney, deceased, defendants to the cross-complaint, appeal. Affirmed.

Pringle & Pringle and Lawler, Allen & Van Dyke, for appellants. O. B. Carter, for respondent.

ALLEN, J. Appeal by defendants Pearl and Meda Mecartney, executrices of the estate of A. Mecartney, deceased, from a judgment rendered in favor of defendant Butler, upon a cross-complaint, against defendants appellants. The plaintiff commenced his action against defendant Butler and others, alleging his ownership and seisin in fee of certain described real estate. Defendant Butler answered, disclaiming any interest in the premises set out in the complaint, other than as to a single lot described, as to which she averred ownership and denied that plaintiff had any estate or interest therein. At the time of filing answer, defendant Butler filed a cross-complaint against plaintiff, appellants, and one Carter, administrator of the estate of Butler, deceased. A copy of the cross-complaint was served upon the attorney of plaintiff, and the summons, with a copy of the cross-complaint, upon the other defendants to the cross-complaint. All defendants to the cross-complaint, other than Pearl and Meda Mecartney, the executrices, made default. They demurred to the cross-complaint upon various grounds, among which was that the court had no jurisdiction of the person of said defendants, in that they were not parties to the original complaint, and that it does not appear that their presence is necessary to a complete determination of the controversy arising from the complaint. The demurrer was overruled, and appellants and other defendants to the cross-complaint suffered a default to be entered. The plaintiff in writing stipulated that a decree might go as prayed for in the cross-complaint. Thereupon judgment went for cross-complainant, from which the Mecartneys, as executrices, appeal.

Section 442, Code of Civil Procedure, provides: "Whenever the defendant seeks affirmative relief against any party \* \* \* affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint." While the court did not formally grant permission to file this cross-complaint, the plaintiff interposed no objection thereto, but, on the contrary, assented to the granting of its prayer; and the action of the court upon the demurrer can only be taken as evidence that the court considered the cross-complaint to be on file with its consent. The only question presented, therefore, is as to the authority of the court in actions of this character to order new parties brought in when in its opinion their presence is necessary to a complete determination of the controversy. The power of the court so to do is given by section 389, Code of Civil Procedure, in which case they may and should be brought in. *Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243. "This section does not give the court power to bring into the action for determination a controversy between a defendant and strangers to the action which

is irrelevant to the action between the parties already before it, except for the purpose of making its determination of the controversy between the parties already before it complete." *Alpers v. Bliss*, 145 Cal. 570, 79 Pac. 171. The controversy between plaintiff and defendant was with reference to the title to certain real property, which was the thing to which the action related. The power to order others brought into the action is a discretionary one. *Alpers v. Bliss*, supra. The court in this instance having done that which is the equivalent of an order to bring in new parties, and it appearing that the claims between the cross-complainant and defendants thereto were not irrelevant to the subject of the action, and the plaintiff not objecting, we can see no reason why the action of the court below should be disturbed. The effect of the order overruling the demurrer was the same as would have been an order denying the motion of plaintiff to strike out the cross-complaint.

We perceive no error in the trial court retaining jurisdiction and rendering the judgment. Judgment affirmed.

We concur: GRAY, P. J.; SMITH, J.

3 Cal. App. 348

HONEYCUTT, County Auditor, v. COLGAN,  
State Controller.

(Court of Appeal, Third District, California.  
March 30, 1906.)

**TAXATION—PENALTIES—PERCENTAGES—DISTRIBUTION.**

Pol. Code, § 3816, provides that on redemption of land from tax sales the original and subsequent taxes and percentages, penalty, and interest paid on redemption shall be apportioned between the state and county according to a specified rate, and that the additional penalties received on account of delinquency, together with the costs, shall be paid into the treasury for the use and benefit of the county, or city and county, etc. Section 3817 declares that an owner of land sold to the state for taxes may redeem by paying the county treasurer the amount of taxes, penalties, and costs, with interest, and all costs and expenses of such redemption and penalties, to wit, certain graduated percentages ranging from 10 to 100 per cent., if redeemed within five years or less from the date of the sale. *Held* that, while moneys received for original and subsequent taxes, penalties, and interest growing out of the delinquency on the part of the taxpayer were distributable wholly to the county, the graduated penalties on redemption of land sold for taxes, etc., was subject to apportionment between the state and the county, according to the rate specified in section 3816.

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by A. S. Honeycutt, as auditor of Madera county, Cal., against E. P. Colgan, as State Controller. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

R. R. Fowler and W. H. Larew, for appellant. U. S. Webb, Atty. Gen., for respondent.

CHIPMAN, P. J. Plaintiff is the auditor of Madera county and defendant is Controller of the state. The action is to compel defendant to settle with plaintiff by allowing the latter the several amounts claimed, aggregating \$8,547.26. These several amounts making this aggregate are set out in 17 separate counts, in an amended complaint, representing sums accruing at the semiannual settlements from May, 1895, to the December settlement in 1903. It is alleged that these amounts were "part of the punitive penalties collected upon the redemption of real estate in Madera county during the six months immediately preceding their settlement; that no part of said penalties were required by law to be paid into the state treasury, that the whole thereof belongs to the county of Madera" and that said sums were "paid into the state treasury illegally and by error and mistake of the State Controller in requiring" the same to be so paid. It is alleged that the mistake consisted in this: "that the State Controller ever since the month of May, 1895, has required and still does require that all punitive penalties lawfully collected upon the redemption of real estate sold to the state for delinquent taxes shall be distributed between the state and county in the same ratio that the state rate of taxation bears to the county rate of taxation, whereas, in fact, under the provisions of section 3816 of the Political Code the county of Madera, was and is entitled to the whole of the penalties so collected upon redemption of real estate sold to the state for delinquent taxes, and the same should all have been paid" to the county. It is further alleged that said mistake was not discovered by any officer of said county until the month of June, 1903. A general demurrer was filed to the amended complaint, pleading also the statute of limitations. The court overruled the demurrer, and, plaintiff declining to further amend, judgment passed for defendant, from which plaintiff appeals.

The case will be disposed of without considering the statute of limitations. The sections cited *infra* are sections of the Political Code, unless otherwise noted. The so-called "punitive penalties" mentioned in the complaint are the penalties imposed by section 3817, which must be paid by the person desiring to redeem land sold to the state for delinquent taxes. It is to section 3816 we must look to ascertain the disposition which the statute makes of these penalties when collected. And the question is: Are these so-called "punitive penalties"—or, more properly speaking, these graduated penalties on redemption—to be divided between the state and county as has been the practice under the controller's construction of section 3816, since its amendment in 1895, or are all these penalties to go to the county?

Before examining these two sections it will be well to notice briefly the legislative provisions leading up to the point of redemption

from delinquent tax sales. Taxes are payable by installments, the first in November and the second in April, and become delinquent respectively in these months. A penalty of 15 per cent. is added to the taxes delinquent in November and must be collected for the use of the county, and if these taxes be not paid when the second installment becomes delinquent in the following April, the tax collector "shall collect an addition of 5 per cent. thereon." When the last installment is delinquent in April, if unpaid, the tax collector must collect for the use of the county "an addition of 5 per cent. thereon." Section 3756. (These penalties are, as now claimed by respondent, the "additional penalties on account of delinquency" mentioned in section 3816.) When the delinquent list is completed the tax collector is required to publish the same, giving the amount of the "taxes, penalties and costs due" (section 3764), with notice that unless paid "the real property upon which such taxes are a lien will be sold" (section 3765). It will be observed that the word "penalties" in section 3765 is changed to read "percentage" by amendment in 1895 (St. 1895, p. 18, c. 11). Later along in the provisions relating to sale the word "penalties" is used. Section 3813 provides that where the property is sold to the state "it must be assessed each subsequent year for taxes, until a deed is made to the state therefor, in the same manner as if it had not been so purchased," but no further sale shall be made for nonpayment of taxes (section 3814). (These taxes are the "subsequent taxes" which with the "original taxes" are to be apportioned as provided in section 3816.) Semiannual settlements of the county treasurer and auditor and the state controller are required by sections 3866 and 3868 and the question now here has arisen out of these settlements and relates to the penalties required to be paid on redemption under section 3817, and their distribution between the state and county under section 3816. A better arrangement of these two latter sections would have been to reverse the order of their occurrence, fixing the penalties first and directing their distribution afterwards. But the arrangement cannot affect the construction to be given them. Section 3816 is as follows: "Whenever property sold to the state, pursuant to the provisions of this chapter, shall be redeemed as herein provided, the moneys received on account of such redemption shall be distributed as follows: The original and subsequent taxes, and percentages, penalty, and the interest paid on redemption, shall be apportioned between the state and county, or city and county, in the same proportion that the state rate bears to the county, or city and county rate of taxation" (it is under the foregoing clauses as now, claimed by respondent that the graduated "penalties on redemption" are to be apportioned); "the additional penalties received on account of delinquency together

with the costs shall be paid into the treasury for the use and benefit of the county, or city and county; the total amount received for state poll tax shall be paid to the state, without deduction of any percentages; the amounts received for road or hospital poll tax, and the amounts received for school, or road district, or other taxes, together with the penalties thereon, shall be paid into the county treasury and placed to the credit of the proper funds." The section then requires an accurate account of these moneys to be kept by the auditor and treasurer and a settlement to be made with the controller semiannually as provided in sections 3865, 3866, and 3868, "in such form as the Controller may desire." Section 3817 provides that where redemption from sale to the state takes place, the redemptioner may redeem "by paying to the county treasurer the amount of the taxes, penalties and costs due thereon at the time of sale, with interest on the aggregate amount of said taxes, penalties and costs at the rate of seven per cent. per annum; and all taxes that were a lien upon said real estate at the time said taxes became delinquent; and also all unpaid taxes of every description assessed against the property for each year since the sale; or, if not so assessed, then upon the value of the property as assessed in the year nearest the time to such redemption, with interest from the first of July following each of said years, respectively, at the same rate, to the time of redemption." (To this point it is conceded that the county is entitled to the items mentioned as charges on "delinquency.") The section then reads: "And also all costs and expenses of such redemption, and penalties as follows, to wit: ten per cent. if redeemed within six months from the date of sale; twenty per cent. if redeemed within one year therefrom; forty per cent. if redeemed within two years therefrom; sixty per cent. if redeemed within three years therefrom; eighty per cent. if redeemed within four years therefrom; and one hundred per cent. if redeemed within five or any greater number of years therefrom." (These "penalties" are now claimed by appellant to be included in the terms "additional penalties," as used in section 3816, and should all go to the county, while respondent contends that they should be apportioned between the state and the county as penalties on redemption.) The section continues: "The penalty (or percentage as it is sometimes called) shall be computed upon the amount of each year's taxes in like manner, reckoning from the time when the lands would have been sold for the taxes of that year, if there had been no previous sale thereof." The section then directs the auditor, in case a person desires to redeem, to make certificates in triplicate of the estimate of the amount to be paid, which shall be delivered to the county treasurer with the money, who shall give receipts in triplicate indorsed thereon. The redemptioner then is

to deliver one of these to the auditor and one to the state controller, and thus the deed "to the state shall become null and void."

The controversy (as has been indicated parenthetically in quoting the statute) relates to the graduated penalties, or punitive penalties, or percentages (whatever they may be called) of 10, 20, 40, 60, 80, and 100 per cent. imposed on redemption. These graduated penalties were first imposed in 1895 and have been, without question, until this action was commenced, apportioned between the state and county, the same as original and subsequent taxes and interest paid on redemption. They were construed to mean penalties or percentage paid on redemption first mentioned in section 3816, and not as "additional penalties received on account of delinquency," subsequently therein mentioned. The distinction between penalties for delinquency and penalties on redemption would seem to be a natural one to draw, and should be kept in mind. Prior to 1895 the state became the purchaser at delinquent tax sales only where there was no bidder for the land and redemption was limited to one year, after which a deed was given to the purchaser. The state now becomes the purchaser in all cases and deed does not pass to the state for five years, although the land continues to be taxed for subsequent years "until a deed is made to the state therefor." Section 3813. Redemption may be made at any time, but if not redeemed the state may sell at public auction when the state gets its deed. The graduated redemption penalty was imposed in a way to encourage redemption, the penalty increasing with each year of non-redemption.

Prior to 1895 there were, as there still are, two classes of penalties, sometimes called percentages, a penalty for delinquency in paying the tax, and a penalty paid on redemption. The penalties for delinquency have always gone to the county while the penalties on redemption have always been apportioned between the state and county. This distinction seems to have been in the minds of the framers of the law of 1895. We do not see how these graduated penalties on redemption, imposed from year to year by increasing proportions, can be regarded as "additional penalties received on account of delinquency." The property is sold to the state upon the first year's delinquency, and is not again sold for taxes. The subsequent taxes are added from year to year until the state gets its deed, and they form a part of the "subsequent taxes" mentioned in section 3816 which are apportioned. The penalties required to be paid on redemption have nothing to do with the delinquency in the payment of the tax and bear no relation to it for the land has passed to the state. They may well be embraced in one or other or both of the terms "percentages" and "penalty" mentioned in section 3816 to be apportioned as therein provided. The "addi-

tional penalties" referred to which are to be paid into the treasury for the use of the county, are expressly mentioned as being "received on account of delinquency," and how can we say that this must mean the graduated penalties which are imposed by section 3817, not on "account of any delinquency" but which are expressly stated to be exacted as "penalties on redemption?" We must, according to admitted canons of construction, give some meaning to all terms of the statute if we can do so without violating its obvious purpose. An interpretation which gives effect is preferred to one which makes void. Civ. Code, § 3541. The natural reading of section 3816 would lead to the meaning that all "percentages, penalties (penalty is the equivalent word used) and the interest paid on redemption," shall be apportioned as therein directed, as well as "the original and subsequent taxes," and this would clearly include the graduated penalties on redemption mentioned in section 3817. The percentages and penalty are "paid on redemption" as are the "original taxes." Upon similar rules of construction we must give some meaning to the terms "additional penalties received on account of delinquency" which go to the county. To do this we derive no aid from section 3817, for no mention is there made of penalties for delinquency except such as clearly refer to penalties before sale. We do, however, find in other sections a source of some light which is shed upon these terms, "additional penalties received on account of delinquency." Section 3817, by act of 1883 (St. 1883, p. 23, c. 10), mentions a penalty of 25 per cent. on redemption, and it was apportioned under section 3816 to the state and county as is now done with the graduated penalties on redemption. Section 3816 then provided, as to what are now referred to as "additional penalties received on account of delinquency," as follows: "the 5 per cent. additional \* \* \* shall be paid to the county." This obviously referred to the 5 per cent. penalty for delinquency under section 3756 as it then read and was so construed and so enforced. See *Collier v. Shaffer*, 137 Cal. 319, at page 322, 70 Pac. 117. But section 3756 was amended in 1891 (St. 1891, p. 447, c. 230) to correspond with the statute requiring semiannual payment of taxes, and imposed three different penalties for delinquency, namely, 15, 5 and 5 per cent., already explained supra. When section 3816 was amended in 1895, there being several of these penalties, it very properly referred to them as "additional penalties (using the plural number) received on account of delinquency." When there was but a single "additional penalty" of 5 per cent. for delinquency, the statute so referred to it and its meaning was not doubted. No more, do we think, should the present statute be held to be of doubtful meaning. It means the additional penalties on delinquency im-

posed by section 3756. They are imposed by the county before sale and become in fact part of the taxes and we do not see how the language can reasonably be held to include the graduated penalties on redemption, after sale, mentioned in section 3817.

There is an essential difference in the relation of the owner of the taxable land while it is resting under assessment for taxes, and after it has passed into other ownership by sale for failure to pay the taxes. In the first case he is a delinquent because he has failed to perform a duty. The term "delinquency" is apt and is expressive of the owner's attitude to the state. But when his land is taken by the state in lieu of the taxes which he failed to pay, it is then optional with him whether to take advantage of the privilege given him by law to redeem the land or let the state keep it. He is then a redemptioner, and he cannot divest the state of its interest in the land except he redeem within the period of the redemption which continues until the state has disposed of the land (section 3897). He is not any longer a tax delinquent in any proper sense; he is not even a redemption delinquent for there is no duty on him to redeem. Indeed he is not any kind of a delinquent, for the term delinquency does not apply because of his neglect to redeem. The Supreme Court said in *San Francisco, etc., L. Co. v. Banbury*, 106 Cal. 129, 39 Pac. 439: "If the state has become the purchaser of land at a delinquent tax sale the tax has been extinguished by the sale, and the state, instead of being a creditor of the taxpayer, or entitled to receive any money due to it for taxes, has acquired an interest in the land, which is to be divested only by some affirmative action on the part of the delinquent taxpayer." This affirmative action is neither more nor less than redemption. As throwing still further light upon the meaning of section 3816, it may be well to call attention to the fact that this section was twice amended at the same session of the Legislature in 1895. The first amendment was on February 25th (St. 1895, p. 21, c. 11). There the language used was "the original and subsequent taxes, and all percentages and penalties paid in redemption," but made no mention of interest. The language used further along to cover the penalties for delinquency was "the 5 per cent. additional \* \* \* shall 'be paid to the county.'" This latter phrase failed to correctly refer to the amendment that had taken place in section 3756 wherein several additional penalties for delinquency had been imposed, as already pointed out. To make clear the meaning, and to include interest and to amend in some other respects, section 3816 was again amended (or re-enacted with amendments) on March 28, 1895. St. 1895, p. 333, c. 218. It there reads: "Additional penalties received on account of delinquency." In the first amendment the words "on account of delinquency" did not

appear, and the single penalty of 5 per cent. failed to include all the penalties referred to in section 3756. The change in phraseology seems to point to the construction we have given. The change in the phraseology from "percentages and penalties paid on redemption" to "percentages, penalty, and interest paid on redemption" was intended to include interest, omitted in the first amendment, and we have no doubt was also intended, and sufficiently expresses that intention, to mean the same thing as the phraseology first used in respect of the percentages or penalties on redemption.

Pursuing the changes in the statute some further, some additional light is thrown upon the question. In 1891, when the change was made in section 3756 to meet the semi-annual payments of taxes, already noted (St. 1891, p. 447, c. 230), section 3816 was also amended (St. 1891, p. 449, c. 230), and the latter section directed "the original tax and the 25 per cent. and interest paid in redemption" to be "apportioned between the state and county and city and county in the same proportion that the state tax bears to the county and city and county tax." And the section then provides that: "the moneys received from delinquencies shall be paid to the county, or city and county." Undoubtedly these "moneys received for delinquencies" which were to go to the county, under section 3756 as amended, referred to the penalties or moneys received at the same time. The statute as then understood and enforced, recognized the clear distinction between penalties on redemption and penalties for delinquency. This distinction occurs so frequently in the Code sections as to leave no doubt in our minds that it was intended to be observed in the enforcement of the law. It is still further seen in section 3753 where the auditor is directed to "enter against all the items of taxes due and unpaid the penalty for delinquency," clearly referring to section 3756. Also section 3770, where the tax collector is directed to collect "in addition to the taxes due on the delinquent list, together with the penalties for delinquency." Everywhere in the Code the per cent. referred to in section 3756 is spoken of as "penalties for delinquency," and no reason is perceivable why the words "additional penalties received on account of delinquency" should be given any different construction when used in section 3816. A careful examination of the statutes establishing the system or policy of taxation of lands, their sale for delinquent taxes, the conditions on which redemption may be made and the steps to be taken on redemption shows a consistent and uniform purpose of the law to be and the practice under it has been, for a long period of years, to apportion the moneys collected on percentages or penalties on redemption between the state and county "in the same proportion that the state tax bears to the county and city and county tax," and

likewise the moneys received for original and subsequent taxes and the interest on such moneys have been so apportioned. Some question has arisen between the parties as to the effect on the question here by reason of the decisions in *Collier v. Shaffer*, 137 Cal. 319, 70 Pac. 177, and *San Diego Investment Co. v. Shaffer*, 137 Cal. 323, 70 Pac. 179. These cases concerned taxes imposed under the law prior to 1891 and do not, so far as we can see, aid us materially in the solution of the question now here.

We have not singled out for comment the points made in argument by counsel for appellant in the careful and able presentation they have given the case. But we have endeavored to treat the question before us in a way to cover all material points and to leave no doubt as to our construction of the statute. The conclusion we have reached seems to us to result not only from a reasonable construction of the statute, but to be fair and just to the state and counties concerned. After sale the burden has shifted to the state and the redemptioner's relations are then with the state and the penalties in question begin to be imposed when this relation begins. In the apportionment of these charges on redemption the state receives much the smaller part, the counties receiving the balance. In the long run, should the counties get all these moneys, the benefit to them would be but temporary, for this loss of revenue to the state would have to be made up ultimately by taxation. While these considerations should not control in reaching a decision, they coincide with what is the ultimate aim of judicial determinations—to do substantial justice between litigants. The judgment is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

3 Cal. App. 358

### NIXON v. GOODWIN.

(Court of Appeal, Third District, California.  
April 2, 1906.)

#### 1. FRAUDULENT CONVEYANCES—INVALIDITY—STATUTES.

Under Civ. Code, § 3439, declaring that every transfer of property made with intent to delay or defraud any creditor or other person is void against all creditors and against any person on whom the estate of the debtor devolves for the benefit of others than the debtor, a fraudulent conveyance by the debtor is void at the instance of creditors, or of the debtor's assignee in insolvency, without reference to whether the conveyance was made within 30 days prior to the filing of the debtor's petition in insolvency, provided there were creditors at the time of the conveyance and there was not sufficient other property with which to pay them.

#### 2. SAME—CONSIDERATION—INSOLVENCY.

Where a transfer of property was made voluntarily and without a valuable consideration by a debtor while insolvent or in contemplation of insolvency, the same is void as to

existing creditors, as provided by Civ. Code, § 3442.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 138, 139, 141–158, 186–190.]

#### 3. CORPORATIONS—CONVEYANCES—WHEN INSOLVENT—FRAUD—EVIDENCE.

Defendant, while the owner of one-third of all of the stock of a mining corporation, advanced \$44,000 to it, and knowing that the company was insolvent resigned from his office as president and director, so that a deed of the company's property could be made to him, which was done on the succeeding day. This transfer was kept secret by the parties for fear of creditors, and was only disclosed by defendant at a meeting of creditors for the purpose of effecting a settlement, when defendant stated that the deed had been made to him to protect all the creditors before himself. A few days thereafter, however, defendant conveyed the property to a bank, which was also a creditor of the corporation, and the bank subsequently reconveyed the property to defendant, taking a mortgage back to secure its indebtedness. The creditors did nothing to ratify these transactions, and in a suit by the corporation's assignee in insolvency to set aside the deed defendant did not testify. *Held*, that the deed was fraudulent as against the creditors of the corporation.

#### 4. SAME—CONVEYANCES TO OFFICERS.

Where the president of a corporation, who was its largest creditor, resigned as president and director, for the purpose of qualifying himself to take a conveyance of all of the corporation's property, which he did on the succeeding day, the conveyance should be treated as made to him as an officer of the corporation for the purpose of preferring himself over the other creditors of the corporation, and was therefore void.

#### 5. SAME—ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Where defendant, the president of a corporation, secretly resigned in order to accept a conveyance of the corporation's property in settlement of a pre-existing debt, which was secretly made on the next day, and though he thereafter stated that the conveyance was made for the benefit of all of the corporation's creditors, he subsequently conveyed the property to a bank, by which it was reconveyed to defendant and a mortgage taken by the bank to secure the corporation's debt, such facts were insufficient to warrant a finding that the deed to defendant was made by the corporation for the benefit of all of the corporation's creditors.

#### 6. FRAUDULENT CONVEYANCES—EVIDENCE.

In an action by a corporation in insolvency to set aside an alleged fraudulent conveyance of the corporation's property to its president, a judgment recovered against the grantor after the conveyance was made was inadmissible.

#### 7. WITNESSES—EXAMINATION—NONRESPONSIVE ANSWER.

In a suit to set aside a fraudulent conveyance by a corporation to defendant, its president, a witness was asked whether the money procured from a certain bank was given to defendant for his individual account. Witness answered that it was not, but that it was all defendant's because, when the witness went to the bank and filed the security, the bank gave witness a line of credit to allow the corporation to increase the overdraft \$15,000. *Held*, that the answer was properly stricken as not responsive.

#### 8. FRAUDULENT CONVEYANCES—ACTION TO VACATE—EVIDENCE.

Where, in an action to vacate an alleged fraudulent conveyance, defendant claimed that the conveyance was made to him for the benefit of all of the creditors of the grantor, a deed

by which defendant conveyed the property to a bank, a subsequent reconveyance by the bank to defendant, and a mortgage by defendant to the bank securing the latter's claim against the grantor, was admissible to contradict such defense.

#### 9. EVIDENCE—BEST AND SECONDARY EVIDENCE.

In an action to set aside an alleged fraudulent conveyance by a corporation, a question calling for the amount of a creditor's claim against the corporation, which the witness answered by simply stating the amount, was not objectionable as not the best evidence.

#### 10. APPEAL—EVIDENCE—HARMLESS ERROR.

Where, in an action to set aside a fraudulent conveyance by an insolvent, the amount of the insolvent's indebtedness to a creditor was shown by the approved claim of such creditor in insolvency proceedings, the erroneous introduction of a memorandum made by the witness at a meeting of creditors to prove such indebtedness, which was hearsay, was harmless.

#### 11. FRAUDULENT CONVEYANCES—EVIDENCE.

Where defendant claimed that an alleged fraudulent conveyance had been made to him for the benefit of creditors of the grantor corporation, a mortgage on the property included in the conveyance in controversy executed to C. to secure a note given by defendant was admissible to rebut such defense.

#### 12. APPEAL—HARMLESS ERROR.

Where defendant could have derived no advantage from a witness' answer to a question which was objected to, an error of the court in sustaining the objection was harmless.

#### 13. WITNESSES—ATTORNEY AND CLIENT—PRIVILEGE.

Where, in a suit to set aside an alleged fraudulent conveyance by an insolvent corporation, an attorney for certain creditors was asked concerning a paper purporting to relate to an agreement concerning the manner of paying the debts of the corporation, and after identifying the paper stated that he received the same, and after reading it returned it to his client, a question as to whether he advised his client in relation thereto was not objectionable as calling for a communication between attorney and client and for the witness' opinion as an attorney.

#### 14. FRAUDULENT CONVEYANCES—EVIDENCE—ADMISSIBILITY.

In an action to set aside an alleged fraudulent conveyance by a corporation to its president, certain notes purporting to have been made by the corporation to defendant were inadmissible to show an indebtedness due from the corporation to defendant, in the absence of proof that the execution of the notes was authorized by the corporation's board of directors.

#### 15. EVIDENCE—CORPORATE RECORDS—CERTIFICATION.

Code Civ. Proc. § 1918, subds. 6, 7, provide that documents may be proved by the original or by a copy certified by the legal keeper thereof, and if from another state it must be accompanied by a certificate of the Secretary of State, judges of the superior or county court, or mayor of a city, that the copy is duly certified by the officer having the local custody of the original. *Held*, that an affidavit attached to extracts from the minutes of the meetings of a corporation's board of directors, held in another state, reciting that the affiant was president of the corporation and to the best of his knowledge and belief the extracts were true extracts of the minutes of the several meetings, was not properly certified to authorize the admission of such extracts in evidence.

#### 16. FRAUDULENT CONVEYANCES—EVIDENCE—ADMISSIBILITY.

In an action to set aside an alleged fraudulent conveyance from a corporation to its president, evidence as to the first money that was

borrowed by the corporation from its president was inadmissible, in the absence of a showing first made that the corporation had authorized the borrowing of the money.

#### 17. SAME.

Where, in an action to set aside a fraudulent conveyance of property from a corporation to its president, there was no legal offer to show what took place at a certain meeting of the corporation's board of directors, a question as to who was present at such meeting was immaterial.

#### 18. WITNESSES—KNOWLEDGE.

In an action to set aside a fraudulent conveyance by a corporation to its president, evidence that certain money borrowed by the corporation from its president belonged to him was properly stricken, because of the witness' lack of knowledge concerning the source from which the money was produced.

#### 19. EVIDENCE—CORPORATE RECORDS—DIRECTORS' MEETINGS.

Recitals of the minutes of a meeting of a corporate board of directors cannot be proved by parol.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 512, 546.]

#### 20. FRAUDULENT CONVEYANCES—EVIDENCE—ADMISSIBILITY.

Where, in an action to set aside an alleged fraudulent conveyance by a corporation to its president, a witness testified that on the date of the conveyance the corporation owned 60,000 shares of the capital stock of a mining company, but that witness did not know its value since about a year prior to that time, evidence as to the value of the stock a year prior to such conveyance was immaterial.

Appeal from Superior Court, El Dorado County; M. P. Bennett, Judge.

Action by George S. Nixon, as assignee of the Montauk Consolidated Gold Mining Company, against William Dallas Goodwin. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

John M. Fulweiler, for appellant. L. T. Hatfield and William E. Kleinsorge, for respondent.

BUCKLES, J. This action was brought to cancel a deed of conveyance executed and delivered to defendant William Dallas Goodwin on April 3, 1901, by Montauk Consolidated Gold Mining Company, a foreign corporation, upon the grounds that it was made with the intent to hinder, delay, and defraud the creditors of said mining corporation, and to prevent the property of said corporation from coming into the hands of its assignee in insolvency, and to evade the provisions of the insolvent act of 1895. Defendant interposed a demurrer to the complaint on all the statutory grounds. The appeal is from the judgment in favor of plaintiff and from an order denying defendant's motion for a new trial.

The court found that the Montauk Consolidated Gold Mining Company was insolvent on April 3, 1901, and that defendant knew of said insolvency; that defendant was a stockholder in said corporation and a member of the board of directors thereof until some time between the 1st and 3d of April, 1901, when he resigned as director

and president for the purpose of having the said deed made to him; that on April 3, 1901, said mining corporation executed to defendant the deed in controversy for the purpose of placing the property of said corporation beyond the reach of the creditors of said corporation, and to hinder, delay, and defraud said creditors; and that said defendant had full knowledge that said deed was without valuable consideration and was for the purpose and with the intent to hinder, delay, and defraud said creditors, and to prevent the property of said corporation from being distributed ratably among its creditors. The demurrer alleged, among other things, that plaintiff had no capacity to sue to set aside said deed, and that only the creditors could do so, because the said deed was executed, delivered, and recorded more than 30 days before the filing of the petition in insolvency against the Montauk Consolidated Gold Mining Company; and the appellant insists on this idea in his brief and cites in support thereof *Francisco v. Aguirre*, 94 Cal. 180, 29 Pac. 495, and *Babcock v. Chase*, 111 Cal. 351, 43 Pac. 1105. But neither of these cases seems to furnish any authority for appellant's contention. In *Francisco v. Aguirre* the question was over the delivery of the furniture in a lodging house. In *Babcock v. Chase* the deed was made five years prior to the adjudication in insolvency, and at a time when the insolvent, Wilson, is not alleged to have had any creditors. The deed was made to Burch on a consideration of \$5, and it is further alleged that Burch subsequently conveyed to Martenstein and Chase for a like expressed consideration, but that there was no real consideration in either transaction, and that it was all at the request of Wilson, that the land might be held for his benefit. The court held: "Upon the allegations of this complaint these deeds cannot be successfully attacked by the grantor, Wilson, or his assignee in insolvency. No express trust is charged, and there is nothing recited in the pleading that would authorize the introduction of evidence to establish a trust in parol." But in the case at bar the complaint alleges the insolvency of the mining company at the time it made the deed, and in the second count alleges the deed to have been made for the benefit of all the creditors, but was not accepted by the creditors, and that such assignment, transfer, and conveyance to defendant tended to coerce the creditors of the said mining company to compromise or release their demands. In *Salisbury v. Burr*, 114 Cal. 451, 46 Pac. 270, the court held that under section 3439 of the Civil Code every transfer of property made with intent to delay or defraud any creditor or other person of his demands is void against all creditors, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor. It

is further said: "This broad provision renders it void, at the instance of creditors or of the assignee in insolvency." And we think this must be so, without reference to whether the deed was made within 30 days of the time of filing the petition in insolvency, providing that there were creditors at the time and not sufficient other property with which to pay them, as in the case at bar, and the attempted transfer was made with intent to hinder, delay or defraud the creditors. This settles the right under the pleadings in this case of the assignee in insolvency to bring the action to set aside the deed made as here alleged. The demurrer was properly overruled.

The said deed was made April 3, 1901, and the petition in insolvency was filed June 6, 1901, and appellant contends that, the deed not having been made within 30 days before the insolvency proceedings were instituted, the conveyance was not a prohibited or void one under the insolvent act of 1895, and that there is no evidence to support finding 6 that the said mining company, "acting in concert with said defendant and for the purpose of hindering, delaying, and defrauding its creditors, and to prevent its property from being distributed ratably among its creditors, executed to defendant the deed, a true copy of which is set out in the complaint," and other matters in said finding. In a case like the one at bar the question of fraudulent intent is one of fact, and not of law; and while a transfer or change cannot be said to be fraudulent merely on the ground that it was made without valuable consideration, yet if any transfer or incumbrance of property be made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, the same shall be fraudulent and void as to existing creditors. Section 3442, Civ. Code. The burden of proof is upon the plaintiff to show that the said deed was made for the purpose of hindering, delaying, or defrauding the creditors, or to prevent them from receiving an equal pro rata on their claims. At the time this deed was made, April 3, 1901, the defendant knew the insolvent condition of said mining company. He was a stockholder, owning one-third of all the shares of said mining company, and up to the very day before the said deed was made he was a director and the president thereof, and the evidence shows he resigned both positions April 2, 1901, so that this deed might be made to him, and the deed was made the next day. He was the largest creditor, and there was no consideration paid for the deed, other than the debt of \$44,000 the said mining company owed him. Both appellant and the mining company sought to keep the transfer a secret, because they feared the creditors whose claims they could not meet, and that if the transfer was made public it would cause trouble with the labor at the mine.

The appellant did not testify. But at a meeting held with some of the creditors a month after the deed was made he then for the first time informed them all the property of the mining company had been deeded to him for the purpose of having him take care of all the creditors, with the understanding that all the creditors should be protected and paid before he would collect his own indebtedness. But on April 17th appellant made a deed of conveyance of all the property to the Placer County Bank, being a creditor of said mining company to the amount of \$13,106.84. The said bank subsequently made a reconveyance to appellant, and he then gave it a mortgage on the same property to secure the indebtedness. The other creditors knew nothing of the deed to appellant, nor of the transaction with the Placer County Bank, and in no way ratified the deed from the mining company to appellant. Nothing whatever is said in the said deed to indicate that it was made for any purpose other than for the sole benefit of appellant. The rule is that a director of an insolvent corporation cannot receive to himself any preference or advantage over other creditors in the payment of his debt (*Bonney v. Tilley*, 109 Cal. 346, 42 Pac. 439); and surely the same rule would apply with equal force to one who is a large creditor of the corporation of which he is a director and the president, and who resigns to-day that he may to-morrow (secretly as to all other creditors) accept a conveyance to himself of the corporation's property.

Nor would such be a transfer coming under the provisions of section 3452 of the Civil Code, where a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another, because such action, when taken by a director, or one so lately holding that relation, would be taking an unfair as well as unlawful advantage of other creditors, and would be an attempt pure and simple to prevent a ratable distribution of the insolvent's assets among its creditors. The defendant does not stand as an ordinary common creditor; for, notwithstanding his resignation as director and president for the purposes for which tendered, he cannot escape the conclusion inevitably to be reached that he stands still in the same light the law views a director of a corporation when it forbids him making himself a preferred creditor, and any attempt at so doing, in our opinion, would subject him and his acts to the same prohibition as though he were still a director. A man cannot be permitted to so easily throw off his trust relations, and, as here, for the purpose of giving him an advantage over ordinary creditors, that he may take the property which he as a director had been holding in trust for all the creditors and apply it on his own debt

to their detriment. Under the circumstances in this case, that all the debts, or nearly so, owing by the corporation were contracted while defendant was a director and presumably contracted at his instance and request, as he was president, it seems to us the deed made to him on April 3d, the day after he had resigned, was just as fraudulent and void as if it had been made April 1st, and while he was yet a director. Could he thus divest himself of his trust relations, so that he might make legal the act which the law declares illegal while a director? I think not, for the same undue advantage which the law prohibits is still exercised. A director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or any other security, and may enforce the same like any other creditor, but always subject to severe scrutiny and under the obligations of acting in the utmost good faith. *Taylor on Corporations*, 634. Goodwin while a director could loan money to his corporation, and when such corporation had the use of his money is bound to repay him, and as long as the matter remained a question between Goodwin and the mining company he could enforce collection even while he remained a director. *Schnittger v. Old Home Consolidated Mining Company*, 144 Cal. 603, 78 Pac. 9. In this case just cited the rights of the other creditors were not involved. The officers of a corporation hold its property in trust for its stockholders, and incidentally for the creditors, and any transaction on the part of the directors which is tainted with fraud or in violation of the duties of their trust is voidable. *Snediker v. Ayers*, 146 Cal. 407, 80 Pac. 511.

The claim of the appellant that all the evidence in the case tends to show that the deed was made for the sole purpose of enabling him to protect and pay all the debts of the mining company does not seem to be sustained; but, on the contrary, we think it very clearly appears from all the evidence that appellant took the deed for the sole purpose of protecting and paying his own debt. It is true that after the creditors became aware of the deed and were clamoring for an adjustment of the indebtedness, and not until July 16th, more than three months after he took the deed, appellant did make an effort to settle with the creditors by having the net proceeds arising from the working of the mine and a certain first payment on a contemplated sale of the mine, paid into the Placer County Bank in the name of some one as trustee in trust for the creditors. But under the circumstances above detailed it cannot be said that this is any evidence tending to show that the deed was made for the benefit of all the creditors, and there is no evidence in the case indicating that the said mining company made the deed in question to appellant for any purpose other than to prefer

him as a creditor; and if for that purpose the deed cannot stand, under the doctrine that a director cannot use up the property of his corporation to pay his debt to the disadvantage of the other creditors. It is true there is testimony indicating appellant offered to give the creditors a second mortgage on the property described in the deed in question. It is true one or two of the witnesses had heard appellant say the deed was made for the benefit of all the creditors; but when the appellant absents himself from the trial, and does not testify in the case, this evidence, weak as it is in the first place, is entitled to no weight at all. For the purpose of properly determining the question here involved it seems to me that it is immaterial whether the evidence shows that the deed was authorized or ratified by two-thirds of the stockholders, for appellant was a stockholder and president when the determination was reached to convey all the property of the mining company to him. How could he have resigned for the purpose of accepting this attempted conveyance, if not a director at the time the transfer was determined upon? The meetings of the stockholders and board of directors were held in New York on April 2 and April 3, 1901, and it was then the transfer was determined upon.

**Assignments of error at the trial:**

The petition of involuntary insolvency was filed June 6, 1901. The plaintiff produced and offered in evidence, and they were admitted over defendant's objection, creditors' claims which had been presented and approved in the said insolvency proceedings. The objection to these claims is based upon the affidavits attached thereto which fails to show that the debt represented therein was contracted prior to April 3, 1901. The claim of Meblus, Drescher & Co. for \$5,149.81 was the first one offered. The testimony of P. C. Drescher shows that \$5,044.81 of this claim was due April 3, 1901. There were 24 of these claims. There is no evidence as to the contents or items of these claims, further than the testimony of Drescher, Curtis, and Shaw, and this shows that at least the larger amount of their claims accrued prior to April 3, 1901. The bill of exceptions admits that all these 24 claims were the same in substance as to when the debt was due and owing, and as to allowance and filing and other matters, except amounts, as that of Meblus, Drescher & Co. This being so, and \$5,089.81 of this claim having accrued prior to April 3, 1901, the objection of appellant is not well taken. This disposes of 24 of his exceptions.

The twenty-fifth, twenty-sixth, and twenty-seventh specifications of error were to the admission of the judgment roll in the case of John Dias v. Montauk Consolidated Gold Mining Company, a copy of the execution, and the original execution. The action was for personal damages. The judgment not having been recovered until June 5, 1901, the objec-

tion should have been sustained; but appellant could not have been injured by the introduction of this judgment roll. There was, therefore, no reversible error.

The witness Coles on redirect examination was asked whether the money gotten from the Placer County Bank was given to appellant for any of his individual accounts, and answered: "No, sir; not a dollar. Well, I can take a different view. It was all Mr. Goodwin's, because when I went to the bank and filed the security the bank gave me a line of credit, allowed us to increase our overdraft to \$15,000." Plaintiff moved to strike out this last answer, and the motion was granted. The answer was not responsive and was properly stricken out.

The introduction of the deed, the mortgage, and the deed of reconveyance, in the transaction appellant had with the Placer County Bank is assigned as error. This whole transaction had a tendency to show that the deed in controversy was not made for the benefit of the creditors as claimed by the grantees. The transfer of the property mentioned in this deed by the corporation to appellant must be judged by the terms of the deed and in the light of the contemporaneous and subsequent acts of the parties. These furnish the data for the determination of the intent and motives with which it was made. Bump on Fraudulent Conveyances, § 601. The acts of the appellant in attempting to prefer the Placer County Bank, shown by his transferring the property to a creditor and his subsequent mortgaging it to secure such creditor's debt, all have a tendency to show that he was not acting in good faith when he says this deed was made to enable him to take care of all the creditors of the mining company and pay all their claims, and a tendency to show, further, that the deed was not made for the benefit of all the creditors, but for the purpose to hinder, delay, and defraud such creditors. For this purpose the transaction with the Bank of Placer County was a legitimate inquiry, and therefore the deed, the mortgage, and the deed of reconveyance were properly admitted.

The claim of Baker & Hamilton offered in evidence by plaintiff was objected to on the same grounds as the other claims which had been proven in the insolvency proceedings, and, we think, rightfully admitted. Objection was made to the testimony showing the amount of the debt due Meblus, Drescher & Co. Drescher was asked to state the amount of their claim, and answered, "\$5,044.89." The objection was upon the ground that this was not the best evidence. He was simply asked the amount of his firm's claim, nothing more, and the question and answer were not subject to the objection made. Objection was made to the introduction of the amount of indebtedness shown by a memorandum made by the witness Kleinsorge at a meeting of creditors in May. This was error, as being

hearsay, but was not reversible error, inasmuch as the amount of the indebtedness was shown by the approved claims in the insolvency proceedings.

Plaintiff offered in evidence a mortgage on the property included in the deed in controversy to L. L. Chamberlain June, 1901, to secure the payment of a promissory note of \$3,692 given by defendant. Defendant objected on the ground the said mortgage was immaterial, irrelevant and incompetent. The objection was overruled and the mortgage admitted. The mortgage was material as tending to show that said deed was not made for the benefit of the creditors of the said corporation, but rather to hinder and delay them.

The witness Kleinsorge was asked about written instrument Defendant's Exhibit 2 for identification which had been presented to him at one time purporting to be an agreement whereby appellant agreed to sell to D. H. Coles and Dwight Treadway the property of the mining company upon certain conditions; said he did not remember when he received it. "I received it from Mr. Drescher, and I read it" and returned it to him. He was then asked by appellant: "Q. Did you advise him in relation to it?" The plaintiff objected on the ground that the question called "for the opinion of the witness and also for a communication between attorney and client. It is calling for his opinion as an attorney." The question was not objectionable upon the ground stated. Kleinsorge was the attorney for Drescher and other creditors, and this paper purported to relate to an agreement concerning the manner of paying the debts, and was no doubt presented to him for his advice by his client. To have answered whether or not he advised Mr. Drescher in relation would not have been any advantage to the defendant, for he would probably not have given any information as to what advice he gave, if any. Sustaining the objection was not reversible error.

Defendant offered in evidence ten promissory notes, of different dates and amounts, but aggregating \$33,850, purporting to be notes given by the said mining company to appellant, and all, with the exception of the one for \$5,000 due May 15, 1899, were shown by indorsements thereon to have been paid. Plaintiff objected to their introduction, on the ground that they were irrelevant, incompetent, and immaterial, and no authority having been shown to authorize the execution of the same, and the court properly sustained the objection. These notes could not have been material to show indebtedness due from the said mining company to appellant unless their issue and execution were authorized by the board of directors, and there was no evidence of such authorization. The defendant did offer in evidence a paper purporting to contain extracts from the minutes of meet-

ings of the board of directors wherein at least some of the said promissory notes appeared to have been authorized by the board and containing authorizations to borrow money. The minute book was not produced. And to this there was attached the affidavit of George C. Wilde under date of March 24, 1904, setting forth that he was the president of the Montauk Consolidated Gold Mining Company, and to the best of his knowledge and belief the said extracts are true extracts from the original minutes of the several meetings. But this instrument was not admissible as evidence, because not properly certified. Subdivisions 6, 7, § 1918, Code Civ. Proc.

Witness D. H. Coles, secretary of the said mining company, was asked by appellant in relation to the money the mining corporation had borrowed of appellant, testified the books he had in his hands were the original cash book and ledger of the corporation, and that prior to April, 1901, the corporation had borrowed money of appellant, and that he could tell from the books when the first loan was made. He kept the books and had made the original entries. He was asked: "What was the first money that was borrowed from William Dallas Goodwin? Does the book show that?" Plaintiff objected, because "premature, no foundation laid to show that anybody had any authority to borrow any money, and immaterial, and so forth." If it be conceded that the question was a material one, because the appellant had a right to show the corporation's indebtedness to him as tending to support his theory of the transfer to him of the corporation assets, still we think it necessary to first show the authorization of the corporation to borrow this money. This had not been shown, and therefore the objection was properly sustained. Coles was further asked if any other sums were borrowed from Goodwin for which no note was given, and the court sustained plaintiff's objection thereto, on the ground that, if there was money borrowed, it must have been a transaction by the board of directors, and a record made of it, such record constituting the best evidence. There was no such record presented and its absence was not accounted for. Coles further testified that he was the Coles mentioned in the paper offered purporting to be extracts from the minutes of the board of directors, and that he was the only Coles connected with this company, and was a director. He was then asked: "Who else was present besides you at the meeting of the board of directors?" (referring to the meeting of September 9, 1898). The question should have been answered; but, as it now appears that defendant did not offer in a legal way to show what took place at that meeting, the question as to who was present becomes immaterial. Further testifying, Coles said that in April, 1899, the said mining company borrowed of

said Goodwin \$10,000, and on October 17, 1899, the further sum of \$5,000. He was then asked: "Was or was not that the money of William Dallas Goodwin?" And answered: "It was." The answer was stricken out on plaintiff's motion on the ground that the witness did not know the source of production of the money. The ruling was correct; but at the same time the witness had just testified, without objection or motion to strike out, that he knew the money the company received from Goodwin belonged to him and his wife. Coles testified he was present at the meeting of the directors and stockholders in New York April 3, 1901, when the deed in question was made by the corporation to the appellant. He was then asked by the defendant: "State, if you please, the consideration of that deed." Plaintiff objected to the question on the ground that it was immaterial as to what the consideration was because the records must show a valid transaction, and, further, that the deed was not assented to by the proper quantity of stock. The minutes of the board of directors of that meeting were not produced, and not even an extract of the minutes of that meeting was offered. That was a very important meeting and lasted two days. The president resigned and a new one was elected. Appellant was present, and the minutes, if properly kept, disclosed the action taken by him. Whatever may have been the reason for omitting the introduction of the minutes of that meeting, its proper recitals could not be proved by an oral statement. If there was any consideration for this deed, defendant could have shown it in the proper way. Coles had testified that on April 3, 1901, the said mining corporation owned 60,000 shares of the capital stock of the Ribbon Gold Mining Company, par value, but did not know its value since about one year before April 3, 1901, when defendant asked him, "What was the value of the stock one year prior to April 3, 1901?" And again, "What was the value of this stock prior to April 3, 1901?" Plaintiff interposed the objection to both of these questions, and the court sustained the same. In the first place, it was not material as to what the stock was worth one year before the deed was made, and in the second question there was but a repetition of the first; for any answer the witness could have given would have been as to the value one year prior to April 3, 1901.

There were 24 assignments of error as to the admission of testimony, and, having carefully considered each one, we do not find any reversible error therein. We think the evidence sufficient to uphold every material finding, and that the judgment is amply supported by the findings.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

KIRKWOOD v. PALMER.

(Supreme Court of Colorado. March 5, 1906.)  
COURTS—APPELLATE JURISDICTION — DISTRICT COURT.

Under Sess. Laws 1891, p. 109, § 3, providing for appeals from the county court to the district court in probate cases, an appeal lies from a judgment in an action concerning property alleged to belong to the estate of a decedent and wrongfully withheld.

Appeal from District Court, Summit County; Frank W. Owers, Judge.

Action by Thomas Kirkwood, administrator, against Isaac C. Palmer. From a judgment of the district court dismissing an appeal from the county court, and from a judgment for defendant, plaintiff appeals. Reversed.

James Glynn, for appellant.

BAILEY, J. Appellant, who was plaintiff below, became involved in litigation in the county court, concerning certain property alleged to belong to the estate and said to be wrongfully withheld by defendant. In the county court judgment went against appellant and he appealed to the district court. After the appeal was taken defendant moved "to dismiss this case because it was improperly appealed." This motion was sustained, the action dismissed, and plaintiff prosecuted this appeal.

There is nothing in the motion nor in the court proceedings to show wherein the case was improperly appealed. Section 3, p. 109, of the Session Laws of 1891, in force at the time this appeal was taken, provides for appeals to the district court in such cases, and an inspection of the record as reproduced in the abstract shows that the statutory provisions concerning appeals was complied with. Consequently, we conclude that the appeal was not improperly taken. Therefore the judgment will be reversed, and the cause remanded to the district court for further proceedings.

Reversed.

GABBERT, C. J., and GODDARD, J., concur.

COOPER v. SHANNON.

(Supreme Court of Colorado. March 5, 1906.)  
1. WATERS AND WATER COURSES — WATER RIGHTS—FORFEITURE.

Where land was sold on execution against the owner entitled to a water right separate therefrom the fact that an irrigation company furnished his successors in title with water during the three succeeding years, and that the execution defendant did not apply for water for those years did not operate as a forfeiture of the execution defendant's interest and a reappropriation of the water right by the purchasers of the land at sheriff's sale.

2. SAME — IRRIGATION COMPANIES — BY-LAWS — CONSTRUCTION.

Where, although the by-laws of an irrigation company required application for the water

to be made in writing each year and that "any person entitled to purchase prior water for use on land entitled thereto, who shall for two successive years fail to pay for water for such land shall be deemed to have forfeited his right thereto," no affirmative action was taken by the company in such case, the by-law could not have the effect of vesting title to the water right in the company or vesting title thereto in another, if the company delivered the same amount of water to the other consumer, in the absence of action by which the owner of the right was duly notified.

### 3. APPEAL—FINDINGS OF COURT—CONCLUSIVENESS.

A finding by the trial court that there had been no abandonment of a water right will not be disturbed on appeal.

### 4. SAME—SALE OR TRANSFER OF WATER RIGHT.

Although a water right may be appurtenant to the land, it is property and may be transferred either with or without the land.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 159.]

### 5. SAME—DEED—CONSTRUCTION.

A water right being a distinct subject of grant and transferable either with or without the land, whether a deed conveys the water right depends on the intention of the grantor, which is to be gathered from the express terms of the deed, or when it is silent as to the water right, from the presumption that arises from the circumstances, and whether such right is or is not incident to and necessary to the beneficial enjoyment of the land.

### 6. SAME—CONVEYANCE—CHARACTER OF INSTRUMENT.

The Legislature of 1893, by direct enactment, requires that all the formalities of the conveyance of real estate shall be observed in the conveyance of water rights.

### 7. SAME—SHERIFF'S DEED—EFFECT.

The right to have water delivered at a stipulated price is a valuable right and where a sheriff's deed does not purport to convey the water right, there must be some intention to so convey found in the circumstances attending the conveyance, before such result can be claimed.

### 8. SAME.

Where a sheriff's deed did not purport to convey the water right, although he had the right to levy on the water right, but did not do so, neither the sheriff's nor the purchaser's intention can control, and where there is no act of the judgment defendant from which an intention to convey could be inferred, the water right is not conveyed.

### 9. SAME—ACTION TO QUIET TITLE—ISSUES.

In an action by a purchaser at sheriff's sale to quiet title to a water right alleged to have been appurtenant to the land, whether the defendant has more water than is actually needed for the irrigation of his land is entirely immaterial to the issue raised.

### 10. SAME.

Whether defendant is entitled to hold a water right for the reason that he is a mere tenant at will, is a question which cannot be raised by plaintiff, since even if defendant cannot own a water right such fact does not vest the title in the plaintiff.

### 11. SAME—FORFEITURE OF WATER RIGHT.

The mere failure of the owner of a water right to go to the irrigation company each season and pay the stipulated price for carrying his water does not entitle any other person to enter into a contract with the company for carrying such water and thereby become the owner of the water right.

### 12. SAME—STATUTES.

Mills' Ann. St. § 570, requiring ditch companies to furnish water whenever they have

water in the ditch unsold, and section 2297, providing that persons having purchased and used water shall have the right to continue to purchase such water, are inapplicable in a proceeding between individuals to which no ditch company is a party, and the question to be determined is whether a sheriff's deed included a water right.

Appeal from District Court, Jefferson County; James E. Garrigues, Judge.

Action by A. A. Cooper against Henry N. Shannon. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. W. Barnes, for appellant. John Hipp, for appellee.

STEELE, J. The warranty deed to Shannon, the appellee, for the N. W.  $\frac{1}{4}$  of section 34, township 2 S., range 69 W., did not purport to convey water rights; but the ditch company incorporated in 1886, the year after Shannon bought the land, recognized his right to the use of 20 inches of water, as a prior right, because he and his grantors had been using water from another ditch which the company incorporated in 1886 had purchased. The company, when it purchased the old ditch, agreed to recognize certain priorities, and Shannon's priority was one that it agreed to recognize, and the records of the company so show. On June 14, 1894, the sheriff of Jefferson county sold at execution sale all the right, title, and interest of Shannon in and to the said N. W.  $\frac{1}{4}$ , and on December 10, 1895, the said sheriff issued his deed to Eugene F. Conant therefor. The appellant, Cooper, holds the land through mesne conveyances from the purchaser at sheriff's sale. In 1902, McCain, from whom Shannon purchased the said N. W.  $\frac{1}{4}$ , executed a quitclaim deed to Shannon for the right to purchase the 20 inches of water from said ditch, reciting that he had sold the same to Shannon when Shannon bought the land. Shannon has been occupying the N. E.  $\frac{1}{4}$  of the same section for several years, and has been engaged in cultivating the land, which he holds as lessee. It is contiguous to the land he bought from Mr. McCain, and can be supplied with water for irrigation from the ditch that supplies water to the N. W.  $\frac{1}{4}$ . The action was brought by Cooper to quiet his title to the right to purchase 20 inches of water from the ditch. The court found that Cooper was not entitled to the 20 inches, and that Shannon had the right to purchase, and was entitled to the use of, the 20 inches on the N. E.  $\frac{1}{4}$  of said section. Cooper brings the case here by appeal.

It is claimed by the appellant: (1) The right of appellant to said 20 inches of water intervened as against appellee by reappropriation; and the right of appellee thereto was forfeited. (2) Appellee abandoned said water right, and appellant acquired the same by reappropriation. (3) The said water right is, and at all times has been, appurtenant to said N. W.  $\frac{1}{4}$  of section 34, and was conveyed

as such by the sheriff's deed to Eugene F. Conant, and by him to the appellant herein. (4) Appellee has no use for the said 20 inches of water and therefore cannot lawfully hold the right to its use as against appellant. (5) Appellee owns or holds no such interest in the N. W.  $\frac{1}{4}$  of said section 34 as would entitle him to own and hold the right to said 20 inches of water.

The appellee did not quit the N. W.  $\frac{1}{4}$  until some time during the year 1898, and did not apply for water during the years 1898, 1899, and 1900. The owners of the N. W.  $\frac{1}{4}$  did apply for water for these years, and water was furnished them, and water was used during these years on the said N. W.  $\frac{1}{4}$ . We are of opinion that the fact that the ditch company furnished water during the years 1898, 1899, and 1900 to the owners of the N. W.  $\frac{1}{4}$  and the fact that Shannon, who had lost his land in the year 1898, did not apply for the water for these years, did not operate as a forfeiture of Shannon's interest and as a reappropriation of the 20 inches by the purchasers of the land at sheriff's sale. Although the by-laws of the company require application for the water to be made in writing each year, and that "any person entitled to purchase prior water for use upon land entitled thereto, who shall for two successive years fail to pay for water for such land, shall be deemed to have forfeited his right thereto," no affirmative action was taken by the company; and in the absence of action by which Shannon was duly notified, the by-law of the company which provides that "any person who shall for two successive years fail to pay for water \* \* \* shall be deemed to have forfeited his right thereto," cannot have the effect of vesting title to the water right in the company, or of vesting title thereto in another, if the company delivers the same amount of water to the other consumer. Forfeitures are not favored by the law, and while we do not say that a ditch company may not, by apt words in their contracts or by-laws, provide that a water right shall be forfeited by failure to pay the price for the carriage of water, we do say that the words employed in the by-laws of this company do not so operate.

The court found that Shannon had not abandoned his water right. We shall not disturb that finding. As abandonment is a matter of intention, it is peculiarly within the province of a trial court to determine from all the facts and circumstances of each particular case whether abandonment has or has not taken place. We have repeatedly held, that: "Although a water right may be appurtenant to the land, it is the subject of property and may be transferred either with or without the land. *Strickler v. City of Colorado Springs*, 16 Colo. 61, 26 Pac. 313, 25 Am. St. Rep. 245. Being therefore a distinct subject of grant, and transferable either

with or without the land, whether a deed to land conveys the water right depends upon the intention of the grantor, which is to be gathered from the express terms of the deed; or, when it is silent as to the water right, from the presumption that arises from the circumstances, and whether such right is or is not incident to and necessary to the beneficial enjoyment of the land." *Arnett v. Linhart*, 21 Colo. 188, 40 Pac. 355; *Bessemer I. D. Co. v. Woolley*, 32 Colo. 437, 76 Pac. 1053, 105 Am. St. Rep. 91. Moreover, the Legislature of 1893 requires that all the formalities of the conveyance of real estate shall be observed in the conveyance of water rights. The right to have water delivered at a stipulated price is a valuable right, and as the sheriff's deed does not purport to convey the water right, there must be some intention to so convey found in the circumstances attending the conveyance. In passing upon this point the trial court held that there was nothing in the circumstances of the conveyance to show that it was the intention of Shannon to convey the water right. The deed was not a voluntary deed; it was the deed of the sheriff. He had the right to levy upon the water right, but did not do so; and the court's ruling is clearly correct that the sheriff's intention, or the purchaser's intention, could not control, and that as there was no act of Shannon's from which an intention to convey the water right could be inferred, the water right was not conveyed.

The appellant contends that it appears from the testimony that the appellee is the owner of a water right calling for 35 inches of water, which is more than sufficient to irrigate the land cultivated by him in the N. E.  $\frac{1}{4}$  of said section, and cites authorities which hold that "no right can be secured, either by diversion or appropriation, to more water than is necessary for the proper irrigation of land to which it is applied." This rule of law is one well recognized by the decisions of this court and of the court of appeals, but it is not a question that appellant can inject into this case. That question cannot be determined in a proceeding of this character, where a purchaser of land claims a water right as being appurtenant to land purchased at sheriff's sale. Whether the appellee has more water than is actually needed for the irrigation of his land, or has not enough with which to successfully cultivate his soil, is entirely immaterial to the issue raised. The question is: Did the sheriff by his deed, in involuntary conveyance, convey to appellant's grantor the appellee's water right? In the determination of that question we are not aided by determining either that the appellee has or has not more water than is necessary for the irrigation of his land.

The fifth and final proposition presented by the appellant is that the appellee is not the owner of land under the ditch; that he is a mere tenant at will of the N. E.  $\frac{1}{4}$  of said

section, and that his interest therein is not sufficient to entitle him to hold his water right as against appellant under the circumstances of the case. The appellee testified that he was occupying the N. E.  $\frac{1}{4}$  and had been an occupant of it for 18 years or more; that he is a lessee and that he cultivated it for several years. No reason is assigned in the brief of counsel why one who is the lessee of land may not own a water right, and we know of no reason why the lessee of land may not buy and hold a water right, or why a mere occupant of land may not become the owner of a water right, and use it himself or sell it to some one who will use it. Moreover, this question, we think cannot be raised by the appellant; for even if the appellee cannot own a water right for the reasons stated, such fact does not vest the title to the water right in the appellant. We do not regard the rulings of the court upon the trial as constituting reversible error. There was sufficient competent and unobjectionable testimony to sustain the judgment.

Counsel says: "The question of forfeiture and the intervention of the right of appellant, which we consider of the greatest importance in the case, the court passes over very lightly." The court says, in its opinion: "If Shannon forfeited the right to pay the company \$1.35 an inch to have it carried to him, the company would not on that account alone have the right to carry and deliver it to you, unless the water belonged to Mr. Cooper. I cannot see how, simply by Shannon's failure to go to the company each season and pay \$1.35 an inch to carry his water, anybody else could bob up and say, 'I will enter into a contract with you to carry Shannon's water for me, and thereafter I'll own the water.'" This, instead of being absolutely wrong, as counsel insists, is, we think, absolutely right. Counsel seems to think that much harm will come, from an affirmation of the judgment, to the ditch companies. He says: "If the judgment is affirmed, then, indeed, ditch companies are between the upper and nether millstones of sections 570 and 2297, Mills' Ann. St." Section 570 requires ditch companies to furnish water whenever they have water in the ditch unsold, while section 2297, provides that persons having purchased and used water shall have the right to continue to purchase such water. But the ditch company is not before us. We are to determine whether a sheriff's deed for land includes a water right; and we hold that it does not. The ditch company did nothing to forfeit appellee's water right, and we must hold that he still has the right to buy water for a beneficial use, and that the fact that he did not pay for nor apply for the water during the three years mentioned, did not work a forfeiture of his right.

The judgment is affirmed.

The CHIEF JUSTICE and CAMPBELL, J., concur.

## BOARD OF COM'RS OF PUEBLO COUNTY v. STRAIT.

(Supreme Court of Colorado. March 5, 1906.)

### 1. STATUTES—ENACTMENT CONFERENCE REPORT—CONSTITUTIONAL LAW.

The passage of the act of 1899 (Laws 1899, p. 331, c. 134), fixing the salary of the clerk of the district court of counties of the second class at \$2,000 a year, the adoption by ayes and noes, the names of those voting being entered on the journal, of the report of a conference committee recommending amendments to the original bill and the adoption of the report, but not recommending the passage of the act, was a sufficient compliance with Const. art. 5, § 22, providing that no bill shall become a law except by a vote of a majority of all the members of each house, nor unless on its final passage the vote be taken by ayes and noes and the names of those voting be entered on the journal, and section 23, providing that no amendment to any bill by one house shall be concurred in by the other, nor shall the report of any conference committee be adopted in either house except by a vote of a majority of the members elected thereto, taken by ayes and noes, and the names of those voting recorded on the journal.

### 2. SAME—AMENDMENTS.

Where a bill was passed by the House and then passed in the Senate after amendments being made, in which amendments the house refused to concur, the subsequent adoption by the House of the report of a conference committee including certain of the amendments adopted by the Senate was a sufficient concurrence in those amendments.

### 3. SAME—PRINTING AMENDMENTS.

Const. art. 5, § 22, providing that all substantial amendments to bills shall be printed for the use of members before the final vote is taken on the bill, does not apply to amendments recommended by a conference committee of the two houses.

Appeal from District Court, Pueblo County; N. Walter Dixon, Judge.

Action by L. B. Strait against the board of county commissioners of Pueblo county. From a judgment in favor of plaintiff, defendants appeal. Reversed.

E. E. Hubbell, John M. Waldron, and N. C. Miller, Atty. Gen., for appellant. H. Riddell, for appellee.

STEELE, J. The appellee (plaintiff in the district court) brought his action to recover certain moneys paid by him as clerk of the district court of Pueblo county to the county treasurer. Prior to 1899, the salary of the clerk of the district court of Pueblo county was fixed by the law of 1891 at the sum of \$2,500. By the act of 1899 (Laws 1899, p. 331, c. 134), the salary of the clerk of the district court of counties of the second class was fixed at the sum of \$2,000. Pueblo, for the purpose of fixing the salaries of public officers, is a county of the second class. During the years 1901, 1902, and 1903, the said clerk paid to the county treasurer the amount of fees collected by him as such clerk in excess of the expenses of his office and the sum of \$2,000. Claiming that the act of 1899 was unconstitutional and that the law of 1891 fixing the salary at the sum of \$2,500 had

never been repealed, he made the payments of these amounts under protest. Judgment was rendered in his favor for the sum of \$1,500, being the sum paid under protest during the years 1901, 1902, and 1903. From this judgment the board of county commissioners appealed.

The act of 1899, it is alleged, is unconstitutional and void, because the Legislature failed to observe the provisions of the Constitution in its passage. The specific objections are: (1) Said act was never assented to by the Senate and House of Representatives by a vote of a majority of the members elected thereto, taken in the manner prescribed by the Constitution. (2) Material parts of said act of 1899 were incorporated into it by the Senate as amendments, and were never concurred in by the House of Representatives in the manner prescribed by the Constitution. (3) By the adoption of the conference committee report material amendments to said bill were adopted which were never printed before the final vote on said bill was taken, as prescribed by the Constitution.

The bill (H. B. 143), originated in the House, where it was regularly passed, after being amended in the committee of the whole house on February 15, 1899. The bill was amended in the Senate. The House refusing to concur in the Senate amendments, a conference committee was appointed. The conference committee reported that it had had said bill under consideration, "and beg leave to submit the following report, and recommend that it be adopted: The following amendments are made to said bill as amended in the Senate." Then follow numerous amendments recommended by the committee. The report of the committee is entered in the House Journal of the eighty-fifth day, being March 29, 1899. At the afternoon session of the following day, March 30th, the report of the conference committee having been laid before the House, Mr. Dickerson's motion that the report of the committee be not concurred in and that another committee be appointed was lost by a vote of 12 for and 46 against the motion. The report of the committee was then adopted by a vote of 30 yeas, 10 nays. The names of those voting on the motion to not concur and on the motion to adopt the report were taken by ayes and noes, and the names of those voting entered upon the journal. On April 1st, the conference committee report was read in the Senate, and immediately thereafter the motion to adopt the report was carried by an aye and nay vote: For the report, 27; against the report, 0. The names of those voting being entered in the journal. Following the roll call on the motion to adopt the report of the conference committee, the House Journal recites: "A constitutional majority of all the members elected to the House of Representatives having voted in the affirmative, the bill is passed." Following the roll call on

the adoption of the report of the conference committee, the Senate Journal recites: "A majority having voted in the affirmative, the report was declared adopted." The only other recitals in the journals after these are those which state that the announcement was made that the bill was about to be signed, and was signed, in the presence of the members. In the determination of the questions involved it is necessary to consider sections 22 and 23, art. 5, of the Constitution.

Section 22 provides that "all substantial amendments made thereto, shall be printed for the use of members before the final vote is taken on the bill, and no bill shall become a law except by a vote of a majority of all the members elected to such house, nor unless on its final passage the vote be taken by ayes and noes, and the names of those voting be entered on the journal." Section 23 provides: "No amendment to any bill by one house shall be concurred in by the other, nor shall the report of any conference committee be adopted in either house except by a vote of a majority of the members elected thereto, taken by ayes and noes and the names of those voting recorded upon the journal thereof."

The House had refused to concur in the Senate amendments, and because of this disagreement a conference committee was appointed. The bill classified the counties and fixed the salaries of county and district officers; and the conference committee reported a bill that differed materially from the bill as passed by the Senate or the originally passed by the House. The journals contain no roll call upon the final passage of the bill unless the vote on the adoption of the conference committee report shall be regarded as the vote on final passage. We are, then, confronted with a situation which requires us to either approve or disapprove a practice of the legislative assembly in the passage of bills. To disapprove of this practice may lead to great confusion in governmental affairs, and although that fact should not, and would not, have a controlling influence, it should have great weight, and we should resolve any doubt in our minds in favor of the validity of the legislative procedure. Moreover, we should show great deference to the legislative construction of the Constitution, particularly with reference to its construction of the procedure provided by the Constitution for the passage of bills.

Finally, in speaking of the weight that should be given to the practical construction of the Constitution by officers acting under it, says: "The greatest deference is shown by the courts to the interpretation put upon the Constitution by the Legislature, in the enactment of laws, and other practical application of constitutional provisions to the legislative business, when the interpretation has had the silent acquiescence of the people, including the legal profession and the judiciary, and especially when injurious results

would follow the disturbing of it." Endlich on Interpretation of Statutes, § 527. "Greater weight is also given to the practical construction of forms of procedure than to that which concerns the substance of legislation. When there is a real doubt of the proper interpretation of a constitutional provision relating to the course of procedure, it should be solved in favor of the practical construction given it by the Legislature." Cooley's Constitutional Limitations, §6.

The provision of the Constitution, "Nor shall the report of any conference committee be adopted in either house except by a vote of a majority of the members elected thereto, taken by ayes and noes, and the names of those voting be recorded upon the journal thereof," undoubtedly refers to the final vote upon bills reported from conference committees, because all the solemnity attendant upon the passage of bills is required to be observed in the vote upon such report. If the report in this instance had been confined to the classification of counties and the amounts of salaries determined by either house, and had recommended that the bill as amended by the conference committee be passed, then there would probably be no question raised concerning the regularity of the legislative procedure; but the conference committee recommended a classification of the counties, and salaries for officers, differing materially from the bills passed by either branch of the General Assembly, and did not in terms recommend that the bill pass as so amended, but recommended that the report be adopted. We are not without serious doubts as to the correctness of the legislative practice, and we are not prepared to say that unaided by the legislative construction of the articles of the Constitution, our construction would have been the same; but it is our duty to resolve the doubt in favor of the validity of the act. Although the report of the conference committee does not recommend the passage of the bill as amended by the committee, the vote upon the adoption of the report was taken by ayes and noes, and the names of those voting were entered upon the journals of the respective houses, and both houses regarded the adoption of the report as the passage of the bill. The journal of one branch declared that the bill was passed. The bill was signed by the presiding officer of each house. The journals contain recitals showing that before signing, the presiding officer of each body announced that he was about to sign, and did sign, the bill in the presence of the body over which he presided.

Counsel state that it is the practice of conference committees to report all sorts of things, and amendments of bills are among their most usual acts. The bill under consideration dealt mainly with the amounts of the salaries to be paid public officers. As the two houses could not agree, it was the province of the conference committee to submit a report recommending amounts to be

fixed as salaries upon which the two houses could agree. And, as the very purpose of a conference committee is to effect a compromise, we are not prepared to say that the conference committee that had the bill now before us under consideration exceeded its legitimate powers or performed functions belonging to the body of the Legislature in recommending the fixing of salaries for officers differing in amount from those fixed by the bill of either house. And in at least two other instances at the same session of the General Assembly conference committees reported amounts differing from those fixed by the respective houses, and the reports of these committees do not recommend that the bills as amended by the conference committee be passed, but that the amendments be concurred in. An examination of various journals fails to show a uniform practice in the recommendations of conference committees. When an agreement has been reached the practice has been to call the roll, upon the motion to adopt or reject the report, and enter the names of those voting for and against the motion in the journal. The adoption of the report of the conference committee has, as far as we are advised, been regarded as the passage of the bill, and this whether the report recommended the passage of the bill, a concurrence in the amendments proposed, or merely the adoption of the report. The conference committee recommended that the bill, as amended by the Senate, be further amended; and as the house never concurred in the Senate amendments, but refused to so concur, it is insisted that as the house never gave its assent to the senate amendments, the bill was not constitutionally passed. The legislative practice, as shown by an inspection of the journals of several sessions, is to recommend amendments that change materially the bills as passed by the separate bodies of the General Assembly; and we are of opinion that the adoption of the report of this conference committee, which recommended that the bill as amended by the Senate be further amended, is the equivalent of a concurrence by the House in the Senate amendments and the assent to the amendments proposed by the conference committee.

As to the third objection, that relating to the printing of amendments made by the adoption of the conference committee report, we are of the opinion that the section mentioned (22) does not apply to amendments recommended by a conference committee, but does apply to the ordinary legislation, and means that all substantial amendments made to bills by either house shall be printed before the final vote is taken. Unless we adopt this view, or hold that a conference committee cannot propose amendments, the section which requires the vote by ayes and noes and the record thereof in the journal upon the adoption of the report of conference committees is meaningless, and the procedure through the conference committee is of no

greater effect than that through any other committee. In this matter also we should show great deference to the legislative construction. And an examination of the various journals shows that many of the important laws now upon the statutes have been passed in substantially the same manner as the bill under consideration. As our duty requires to resolve any doubt we may have in favor of the legislative procedure, we must uphold it in this instance.

The judgment is reversed.

(38 Colo. 302)

SQUIRES, Water Com'r, v. LIVESEY, et al. (Supreme Court of Colorado. March 5, 1906.)

WATERS AND WATER COURSES—DIVISION—INJUNCTION—PARTIES—REAL PARTIES IN INTEREST.

In a suit to enjoin a water commissioner from diverting water in a stream from the use of prior appropriators to the use of subsequent appropriators, the subsequent appropriators, being the persons really interested, are necessary parties, and their absence is fatal to the validity of the decree.

Appeal from District Court, Garfield County; John T. Shumate, Judge.

Suit for injunction by Samuel Livesey and others against Frank D. Squires, water commissioner for district No. 39, Garfield county, Colo. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

S. G. McMullin and H. A. Dubbs, for appellant. J. W. Dollison, for appellees.

GUNTER, J. Livesey, King, Armstrong, and Rothschild filed their complaint against appellant, Squires, water commissioner for district No. 39. The allegations, as far as pertinent to this ruling, were in substance as follows: Livesey owns a one-sixth interest in water priority No. 70, which is of 5 feet decreed to the creek and Newman ditch. Armstrong and Rothschild each own a one-twelfth interest in the same priority, and King owns 2.3 feet of priority No. 129, decreed to the same ditch. These claims are under a statutory water decree entered by the district court of Garfield county in 1889. In the same decree, Lemuel Stewart, Mrs. Moore, and others obtained priority No. 21 for 6 feet of water in the Roan Creek ditch, and in February, 1890, the same court entered a decree in favor of Hoppel, Chadwick, and others for the H., V. C. & S. ditch for 9.7 feet, subject to the former decree. The ditches are all on Roan creek, said county. The Roan Creek ditch is 3 miles above the mouth of the creek: the creek and Newman ditch is 5 miles further up, and the H., V. C. & S. ditch is 7 miles still further up the stream. Stewart et al. no longer have rights in the Roan Creek ditch, which they can lawfully loan or divert from the ditch or from the Roan creek either for the purpose of saving crops or for the more economical use of water. Stewart has attempted to loan to said Hoppel 2 feet

of the water decreed to the Roan Creek ditch, to be taken from the stream through the H., V. C. & S. ditch for the irrigation of Hoppel's land. Mrs. Moore has likewise attempted to loan to said Chadwick one-half a foot of water decreed to the Roan Creek ditch to be taken from the stream through the H., V. C. & S. ditch. In 1901, without the notice provided by session laws 1899, defendant Squires, water commissioner, pretending to act under said statute, turned into the H., V. C. & S. ditch  $2\frac{1}{2}$  feet of water decreed to the Roan Creek ditch, and refused to allow it to flow down the stream for those lawfully entitled thereto. His only authority was an order from Stewart and Mrs. Moore. This has injuriously affected plaintiffs, who, without avail, demanded of the defendant that he allow the water to flow down the stream. There is a shortage of water in the stream and only the prior appropriators will be satisfied. The plaintiffs require for their crops all the water decreed to them and all unused water of prior appropriators. Other facts are alleged not material to this ruling. The gist of the allegations of the complaint is: Stewart and Mrs. Moore have no right to loan their priorities in the Roan Creek ditch to Hoppel and Chadwick, and therefore that the defendant commissioner had no right to divert the water called for by such loan from Roan creek, but should have permitted it to flow down the creek to satisfy the priorities awarded the creek and Newman ditch. The prayer of the complaint was for an injunction restraining the defendant commissioner from diverting water in accordance with the loan from Stewart and Mrs. Moore to Hoppel and Chadwick. It will suffice to say, that the answer, while admitting certain allegations of the complaint, traversed others not so admitted. A replication was filed putting in issue certain allegations of the answer.

The court, upon the pleadings and certain admissions of fact, entered a decree perpetually restraining defendant from in any manner diverting water from said Roan creek, or causing to flow into or through the H., V. C. & S. ditch any of the water theretofore appropriated and decreed to the Roan Creek ditch, or in any manner preventing the water so appropriated to said Roan Creek ditch from flowing down and through the channel of said Roan creek for the use and benefit of those lawfully entitled thereto. From the facts thus far set out it sufficiently appears that the defendant, the water commissioner, had no real interest in the questions involved in the case, that is, the right of Stewart and Mrs. Moore to loan, and the right of Hoppel and Chadwick to borrow, the priority in the waters of Roan creek. The water commissioner had no higher duty to Stewart and Mrs. Moore, the lenders of the water right, and to Hoppel and Chadwick, the borrowers thereof, than to the plaintiffs in the case; he was simply the agent designated by the law for distributing, for purposes of irrigation,

the waters of the district, and it was not any part of his duty to appear for said lenders and borrowers and defend their interests in the case any more than it was his duty to appear for and defend the rights of the plaintiffs in the case. No fund has been provided him under the law with which to defend such litigation. While a proper party, he was merely a nominal party to the litigation; the parties really interested in the questions at issue were Stewart and Mrs. Moore, Hoppel, and Chadwick. If the decree rendered in this case is binding upon the four parties last named, then their interests have been adjudicated without their ever having had their day in court. The decree is certainly not binding on them because they have not had such day. If the decree has any effect at all its effect would be against the commissioner and not against such parties. Its effect would simply be to adjudicate by piecemeal important interests. That Mrs. Moore and Stewart and Hoppel and Chadwick being the real parties in interest to the controversy were necessary parties, and their absence from the litigation fatal to the decree is *stare decisis* in this jurisdiction. The nonjoinder of necessary parties it may be here observed was pointed out by the demurrer. The demurrer was overruled, and afterwards the answer came in, and the case was ruled as above stated.

In *Brown et al. v. Farmers' High Line Canal & Reservoir Company*, 26 Colo. 66, 56 Pac. 183, plaintiffs in error, 23 in number, filed their bill to restrain the defendant in error, the Farmers' High Line Canal & Reservoir Company, from compelling them to prorate water with its stockholders and others whose appropriations were subsequent to theirs. From the bill it appeared *inter alia* that the plaintiffs were the owners in severality of certain tracts of land under defendant's ditch, that they diverted definite amounts of water from the natural stream through defendant's ditch from 1872 to 1885, and applied the same to a beneficial use, that since they had continued such use and the payment of compensation to defendant for the carriage of their water until 1894 and 1895, when they were prevented from so doing by the wrongful acts of defendant. That the defendant had recognized the priorities of the plaintiff prior to 1894 and 1895. There were numerous stockholders of defendant whose priorities it was claimed were of a later date than the priorities of the plaintiffs. The defendant, however, claimed the right in time of scarcity of water in its ditch to compel the plaintiffs to prorate with other consumers notwithstanding their priorities were subsequent to plaintiffs'. The question of a defect of parties defendant was presented by demurrer and sustained. Plaintiffs stood upon their complaint, and brought the case here by error. The judgment below was affirmed. The court in ruling said: "Section 11 of the Code of Civil Procedure

provides that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. While it appears that the injury complained of results solely from the action of the defendant, it also appears that it is acting as the agent and in behalf of other stockholders and consumers of water under its ditch, upon the theory, as we have seen, that such stockholders or consumers are entitled to, or claim, the right to prorate in the water claimed by plaintiffs, when by reason of scarcity the ditch is not entitled to its full supply of water from the natural stream. The real controversy, therefore, is between them and the plaintiffs. To grant the relief demanded without their presence would deprive them of that which they claim, without giving them an opportunity to be heard. \* \* \* In this case the rights of the stockholders as among themselves, are directly involved, and their relative rights cannot be finally settled and their respective claims judicially determined in their absence. They are, therefore, necessary parties, and should have been joined as defendants." The court cites authorities, among them *Beasley v. Shiveley*, 20 Or. 508, 26 Pac. 846, and therefrom quotes approvingly the following: "A court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties it may dismiss the complaint or cause them to be brought in, as the exigencies of the case may require. \* \* \* The better practice in the circuit court is to order the necessary parties to be brought in, and that should always be done under ordinary circumstances. But we have no such authority, and could only in a proper case, and where the equities justify, remand the cause to the court below for that purpose."

In *Farmers' High Line Canal & Reservoir Company v. White*, 32 Colo. 114, 75 Pac. 415, the facts pertinent to the ruling were these. In 1860, the Golden Canal was constructed to divert the water of Clear creek for purposes of irrigation. In 1872, the structure was enlarged. In 1884, in statutory proceedings brought for that purpose a first priority was awarded the canal for 39.8 cubic feet of water as of date of original construction, and a second priority for 154 feet as of the date of the first enlargement. In 1885, the defendant, the Farmers' High Line Reservoir & Canal, was incorporated and acquired the rights of the canal. Plaintiffs were consumers of water which they had utilized through the canal before its purchase by the defendant company. Plaintiffs asserted a priority not later than 1872. It further appeared from the complaint that the defend-

ant company after it acquired the canal enlarged the same at different times and by divers methods claimed to have secured for carriage therein a large quantity of water in addition to that represented by its first two priorities and in times of scarcity, and when the water commissioner had cut out the later appropriation defendant company, entirely disregarding plaintiffs' priority, had compelled and threatened thereafter to compel plaintiffs to prorate the water of the first two appropriations in which they were owners with its stockholders whose rights attached later than the priorities of which plaintiffs were owners. All of its stockholders were not joined with the defendant company as parties defendant. The defect of the parties defendant—that is, the absence of the stockholders of defendant—was presented by demurrer, and in other appropriate ways in the court below, but such objection was overruled. The defendant answered over. This court held that such stockholders were necessary parties defendant, that their absence was not cured by answering over, and that their absence was fatal to the judgment of the court. This court in ruling said: "In *Brown v. Canal Co.*, supra, which in all substantial respects presents the same issues as the case in hand, it was held that the parties claiming the right to prorate are necessary parties and must be joined as codefendants with the ditch company. \* \* \* It was so palpably erroneous for the trial court, against defendants' objections to proceed to a decree without the presence of indispensably necessary parties that, for this mistake alone, the decree must be reversed. Their interests as consumers are manifestly affected. An attempt has been made to pass upon valuable rights and deprive parties thereof without an opportunity to be heard, and with no one before the court upon whom rested the duty of protecting the rights involved as against those making the assault. \* \* \* We are of the opinion \* \* \* the doctrine there enunciated by Mr. Justice Goddard is right and must be adhered to. Only a slight consideration will, we think, clearly demonstrate it. The controversy, as was there said, is not the one between independent ditch companies, but between appropriators or consumers of water from the same ditch. Certainly, plaintiffs would be the last ones to say that the defendant ditch company was under less obligation to protect their interests as water consumers than to guard the interests of their stockholders, who are also consumers. The defendant stockholders are concerned, not only as much in the ditch enterprise, but they also occupy the position of water consumers, and in that respect sustain towards the defendant company precisely the same relation that the plaintiffs do, and in such capacity are entitled to be heard upon the charges made in the complaint. The legal duty of defendant company is to all its water consumers, whether stockholders

or merely holding contracts from it for service as a carrier. In such a controversy as this it can no more represent water consumers who are stockholders than it can represent the plaintiffs who are water consumers and not stockholders. It ought not to take sides in the domestic dispute. This defect of parties defendant was sufficiently urged in the trial court by motion, by demurrer, by answer, by motion for nonsuit, and at every stage of the trial where it was proper to make the suggestion. The fact that defendant company answered over after demurrer does not waive the point, for the reason that its stockholders were necessary parties defendant, without whose presence the court ought not to have proceeded to a trial, and a decree that would be binding on them cannot be rendered in their absence. \* \* \* Had we affirmed this judgment, the defendants not made parties would not be bound by it, but might in a subsequent action, litigate the claim which plaintiffs have here asserted. Courts should not try actions piecemeal."

We conclude that Stewart and Mrs. Moore, Hoppel, and Chadwick were necessary parties to this proceeding, and their absence therefrom is fatal to the decree below and constitutes a sufficient reason for its reversal. Other points are made, some of them of interest, which we do not rule for two reasons, one, they may not arise upon a second trial, if one be had, two, we should not rule them in the absence of the parties really interested in them. When such questions are ruled they should have the opportunity to be present and to be heard.

Judgment reversed.

The CHIEF JUSTICE and MAXWELL, J., concur.

# AUSTIN v. VAN LOON.

(Supreme Court of Colorado. March 5, 1906.)

## TROVER AND CONVERSION—ACTION—ACCRUAL—LIMITATIONS.

Plaintiff delivered certain cattle to defendant, who agreed to herd and not to remove them from the state and to deliver them with their increase to plaintiff in G. county, Kan., on demand, for which services defendant was to receive a certain sum per head per month. Defendant, without plaintiff's knowledge or consent, removed the cattle to Colorado in 1896 and about October 5, 1897, plaintiff first demanded the cattle and their increase, and tendered the amount due defendant under the contract, which he refused. *Held*, that plaintiff's cause of action for conversion of the cattle, for the purpose of starting the statute of limitations, accrued, not on the date defendant removed the cattle from Kansas, but on the date of his refusal to deliver.

[Ed. Note.—For cases in point, see vol. 47. CENT. DIG. TROVER AND CONVERSION, §§ 186, 187.]

Error to District Court, Cheyenne County; H. G. Lunt, Judge.

Action by William E. Austin against Hen-

ry Van Loon. From a judgment in favor of defendant, plaintiff brings error. Reversed.

In November, 1897, plaintiff in error brought an action to recover from the defendant in error the value of certain cattle. His right of action was based upon averments in the complaint substantially as follows: That in May, 1890, in Gove county, Kan., he and defendant entered into a contract under and by virtue of which he delivered to the defendant certain cattle, who agreed to herd and keep them on the Smoky Hill river, above Russell Springs, in Kan., and not to remove them from that state, and to deliver them, together with the increase, to the plaintiff in the county of Gove on demand. For these services the defendant was to receive a specified sum per head per month; that the defendant, without the knowledge, consent or permission of the plaintiff, in the fall of 1890, removed these cattle from Kan., to the county of Cheyenne, in the state of Colorado, where the defendant now resides; that on or about the 5th day of October, 1897, in the county of Cheyenne, plaintiff demanded of the defendant the cattle and their increase, and then and there offered to pay the defendant the amount due him under the contract, and that defendant refused to deliver either the cattle originally delivered or their increase. The reasonable value of the stock is averred, and judgment prayed accordingly. To this complaint a demurrer was interposed, based upon several grounds, but we shall only consider the one to the effect that the action was barred by the statute of limitations, as that was the only ground passed upon by the trial court. It was held below that the statute of limitations barred the action, and the cause was dismissed. Plaintiff brings the case here for review on error.

H. M. Minor, for plaintiff in error. Talbot, Denison & Wadley, for defendant in error.

GABBERT, C. J. (after stating the facts). Counsel for defendant in error concede that this is an action in trover for the value of property converted, and contend that the conversion occurred when the cattle were removed to this state, and therefore the statute of limitations bars the action, for it was not commenced for more than six years after such removal. On behalf of plaintiff, counsel claim there was no conversion until after the demand upon defendant to deliver the cattle and his refusal to comply with that demand. The important question to determine is, whether or not the removal of the cattle, in the circumstances disclosed by the complaint, was a conversion thereof. A conversion, in the sense of the law of trover, consists either in the appropriation of a chattel by a party to his own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it to the ex-

clusion or in defiance of the rights of the owner, or in withholding the possession from the owner under a claim of title inconsistent with the title of the latter. 2 Greenleaf, § 642. None of these elements of trover are present in the case at bar, in so far as disclosed by the averments of the complaint. The defendant was the bailee of the cattle. He was to herd and keep them for an agreed compensation. He was in the rightful possession of them at the time they were removed. The plaintiff had no right to the possession until demand and tender of the amount due the defendant under the contract. The plaintiff, by the action of the defendant in removing the cattle, was not deprived of any dominion or control over them he did not theretofore possess. The defendant violated his contract, but in so doing he in no manner exercised control or dominion over or made use of the cattle different from what he would have continued to herd them on the range agreed upon. Such violation did not affect or change the condition of the cattle, nor did defendant thereby deny the plaintiff's title or evidence an intent to convert them to his own use. The status and rights of the parties, by the violation stated, so far as this case is concerned, were no different from what they would have been had defendant ranged the cattle below, instead of above Russell Springs, as agreed. A mere change in the range was in no sense an appropriation. The removal pleaded was a breach of the contract, with respect to the place the defendant should herd and keep the cattle, and nothing more, and did not amount to a conversion. *Sparks v. Purdy*, 11 Mo. 219; 28 Enc. 682; *Wood on Llm.* (3d Ed.) p. 421, § 184.

The statute of limitations does not begin to run in favor of a bailee until he converts the property to his own use. *Reizenstein v. Marquardt* (Iowa) 39 N. W. 506, 1 L. R. A. 318, 9 Am. St. Rep. 477. We are of the opinion there was no conversion until the refusal of the defendant to deliver the cattle to the plaintiff, and that the court erred in sustaining the demurrer to the complaint upon the ground we have considered.

The judgment of the district court is reversed, and the cause remanded for further proceedings not inconsistent with the views expressed in this opinion.

Reversed and remanded.

GODDARD and BAILEY, JJ., concur.

CITY OF CRIPPLE CREEK v. ADAMS.  
(Supreme Court of Colorado. March 5, 1906.)

1. MUNICIPAL CORPORATIONS—ESTABLISHMENT OF WATERWORKS—ISSUANCE OF BONDS.  
2 Mills' Ann. St. § 4403, subd. 6, authorizing municipalities to contract an indebtedness for the purchase or construction of water works for fire and domestic purposes, and for the construction or purchase of canals for sup-

plying water for irrigation in the municipality, when considered in connection with subdivisions 70, 72, and 73, and Mills' Ann. St. Rev. Supp. §§ 4430a-4430c, relating to the condemnation of property for the construction of waterworks, etc., authorizes a town to issue bonds for the purchase of water rights to secure water for its inhabitants.

**2. SAME—BONA FIDE PURCHASERS—FAILURE OF CONSIDERATION—DEFENSE.**

A municipal ordinance authorized the issuance of bonds. It stated the consideration on which they were to be issued as the payment of water rights, and averred how they should be authenticated. The bonds, containing an unconditional promise to pay a specified sum at a definite date, were issued pursuant to the ordinance. The municipality had power to issue them. *Held*, that the failure of the consideration for the bonds by reason of the failure of title to the water rights did not affect the rights of a purchaser for value, without notice, before maturity.

**3. SAME.**

Municipal bonds issued under authority of law possess the attributes of commercial paper and pass by delivery or indorsement, and are not subject to equities in the hands of a holder for value before maturity without notice.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1982-1990.]

**4. SAME.**

Municipal bonds issued to procure water works as authorized by law recited that they were issued for a valuable consideration, and that all acts required to be done precedent to and in the issue of the bonds to render the same valid had been performed as provided by law. The recital was not contradicted by a public record with notice of which the public was charged. *Held*, that the defense of failure of consideration was not available against a purchaser for value without notice before maturity.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1986.]

**5. SAME—ISSUANCE OF BONDS—VALIDITY.**

Bonds issued by a municipality for the purchase of water rights for the purpose of supplying water to its inhabitants are not within 2 Mills' Ann. St. §§ 4447, 4449, relating to annual appropriations and providing that no contract shall be made or expense incurred unless an appropriation shall have been previously made, and the passage of an appropriation ordinance before the issuance of the bonds was not necessary.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1926.]

**6. SAME—INTEREST—STATUTES.**

Under Mills' Ann. St. § 2252, allowing interest on moneys due on any instrument in writing, unpaid coupons on municipal bonds draw interest after maturity.

Error to District Court, Feller County; Louis W. Cunningham, Judge.

Action by Fred C. Adams against the city of Cripple Creek. Judgment for plaintiff. Defendant brings error. Affirmed.

H. H. Clark, for plaintiff in error. Chas. M. Brown, for defendant in error.

GUNTER, J. This was an action on certain coupons belonging to bonds issued by defendant city. There was a judgment against the defendant, and it brings the case here for review. The case was submitted below upon the pleadings and an agreed

statement of the facts. Therefrom the pertinent facts appear to have been as follows: In July, 1895, an ordinance, entitled "An ordinance to provide for the issue of bonds for the purpose of supplying water to the town of Cripple Creek, and to provide for the levy of a tax sufficient to pay the annual interest thereon, and extinguish the principal thereof," was passed by the board of trustees of defendant city, then the town of Cripple Creek. The ordinance authorized the issuance of bonds in the principal sum of \$50,000, in the name of the town of Cripple Creek, for the purpose of purchasing water rights, and securing to the inhabitants of said town water for their use. It further provided that "said bonds shall state on the face thereof the title of this ordinance and the title of the general statute of Colorado in pursuance of which the same are issued, and the corporate seal of the town shall be affixed thereto by the mayor and they shall be signed by the mayor and town treasurer and attested by the town clerk." The ordinance in all particulars, it is admitted, complied with the statute. It provided, *inter alia*, for the levy of special taxes sufficient to pay the annual interest on the bonds, and to create a sinking fund for the payment of their principal at maturity, and that it should be irrevocable until the indebtedness provided for therein should be fully paid. Pursuant to this ordinance the town authorities issued bonds in payment for water rights to be used for the purpose stated in the ordinance; that is, for supplying the inhabitants of said town with water. These bonds, except as to the number of the bond, are identical in form. Material parts of the bonds are the following: "The town of Cripple Creek, \* \* \* for value received, \* \* \* hereby promises to pay to bearer, two hundred and fifty dollars \* \* \* on the third day of July 1901, but said town of Cripple Creek reserves the right to pay the same at any time after the third day of July 1900, with interest thereon at the rate of eight per cent. per annum, payable semiannually, \* \* \*"

The bond contains this recital: "This bond is one of a series of bonds of like tenor and date, which the said town of Cripple Creek has issued for the purpose of purchasing water rights necessary to supply said town with water. In pursuance of an ordinance of said town of Cripple Creek duly and in due time, form and manner adopted, published and made a law of the said town, entitled, 'An ordinance to provide for the issue of bonds for the purpose of supplying water to the town of Cripple Creek, and to provide for the levy of a tax, sufficient to pay the annual interest thereon and extinguish the principal thereof, and under, by virtue of, and in accordance and in full and strict compliance with, the provisions of an act of the General Assembly of the state of Colorado,

entitled "An act in relation to Municipal Corporations," approved April 4th, A. D. 1877, as amended by the Acts of the said General Assembly approved March 2d, A. D. 1887, and April 6th, A. D. 1891'; and it is hereby certified and recited that all acts, conditions and things required to be done precedent to, and in the issuing of this bond, to render the same lawful and valid, have been properly done, happened and performed in regular and in due time, form and manner as provided by law. \* \* \* In testimony whereof, the said town of Cripple Creek has caused this bond to be sealed by its corporate seal, signed by its mayor, attested by its clerk, and countersigned by its treasurer, this 10th day of October A. D. 1895. Hugh R. Strele, Mayor. Attest: J. K. Hurd, Town Clerk. [Seal.] Countersigned: D. C. Weyland, Town Treasurer."

Coupons were attached to the bonds, all of which were in the following form: "\$10.00. On the third day of January A. D. 1896, The Town of Cripple Creek, in the County of El Paso and State of Colorado, will pay the ten dollars, in gold coin, at the office of its Treasurer in Cripple Creek, or at the Chemical National Bank of and in the City, County and State of New York, U. S. A., at the option of the holder, being six months interest on water bond. D. C. Weyland, Town Treasurer."

Ten of these bonds and the coupons belonging thereto were purchased by plaintiff for value, and without notice or knowledge of any alleged infirmity therein before the failure of the consideration therefor hereinafter mentioned. After the purchase of the bonds and coupons by plaintiff, the title to the water rights, in consideration of which they were issued, failed. It is not claimed that any actual fraud attended the transaction. The coupons so purchased are those upon which the judgment below was entered. It is contended by the defendant that such judgment should be reversed, and the grounds of such contention will be considered in the order presented in the briefs.

1. It is contended that the Legislature has not conferred upon towns or cities the power of incurring a bonded indebtedness for the purpose of purchasing water rights, that the bonds in this instance were issued for such purpose, and that such infirmity is apparent on the face of the bonds. Section 4403, subd. 6, 2 Mills' Ann. St., empowers towns and cities to contract an indebtedness on behalf of the city and upon the credit thereof by borrowing money or issuing bonds of the city for the purpose of purchasing or constructing water works for fire and domestic purposes, and for the purpose of the construction or purchase of a canal, or canals, or some suitable system of supplying water for irrigation in the city or town. As incidental to this power, and to make it effective the city has by express legislative enactment the right of condemnation, the power to

construct and purchase reservoirs, the power to provide pumps and conducting pipes and ditches, the power to take water from the public streams of the state, and the power to purchase water and water rights for the purpose of supplying themselves with water. 2 Mills' Ann. St. § 4403, subds. 70, 72, 73, also sections 4430a-4430c, Mills' Ann. St. Rev. Supp. The Legislature when it gave the municipalities of this state power to purchase or construct a system of water works undoubtedly intended to give them every power necessary to effectuate such general power. We judicially know that in many instances this general power would amount to nothing, unless there went with it the power to purchase water rights of earlier priorities than the city could acquire by diversion and appropriation. We think the town of Cripple Creek had authority under said section 4403, to issue bonds for the purchase of water rights, therefore, that such recitals in the bonds were not fatal to the bonds or coupons issued and attached thereto.

2. It is contended that the failure of consideration for the bonds, by reason of the failure of title to the water rights, in consideration of which they were issued, is fatal to the bonds. The town of Cripple Creek authorized the issuance of these bonds, stated the consideration upon which they were to be issued—that is, in payment of water rights—and stated how the bonds should be authenticated, in other words, by the ordinance, pursuant to which the bonds were issued, the town of Cripple Creek authorized the issuance of the bonds, and left to the board of trustees to determine the existence and sufficiency of the consideration for which the bonds should issue. It further told the public, by this ordinance, when it could put faith in the bonds; that is, when they should be authenticated by the signature of the mayor, clerk, and treasurer. The bonds when issued were an unconditional promise to pay a certain sum of money at a definite time. The coupons attached thereto were of like effect. The city had the power to issue them. Before the maturity of the bonds, or coupons, they were purchased by plaintiff for a valuable consideration, and without notice or knowledge of the infirmity therein. Municipal bonds are clothed with all the attributes of negotiable or commercial paper, pass by delivery or indorsement, and are not subject to equities (where the power to issue them exists) in the hands of holder for value, before due, without notice. Dillon's Municipal Corporations, vol. 1 (3d Ed.) § 486. "Such securities are made to raise money by their sale, and this object would be defeated if they were subject to equities (where the power to issue exists) in the hands of bona fide holders." Id., and authorities there cited. This was a sufficient reason for precluding the defense of a failure of consideration as against the bonds.

A further reason is, the recital of facts in the bonds. The recital in the bonds that they have been issued for a valuable consideration was purely as to a matter of fact, and the recital, "And it is hereby certified and recited, that all acts, conditions, and things required to be done precedent to, and in the issue of this bond to render the same lawful and valid have been properly done, happened, and performed in regular and due time, form, and manner as provided by law," when applied to the matter of consideration for the bonds was purely as to a matter of fact, and such recital as to such matter of fact is no where contradicted by a public record with notice of which the public is charged. *Chaffee County v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. Ed. 1040.

3. It is next contended that no appropriation ordinance had been passed before the bonds were issued, as required by sections 4447 and 4449, 2 Mills' Ann. St. The bonds and coupons involved are not within such statutes. *Leadville Illuminating Gas Company v. City of Leadville*, 9 Colo. App. 400, 402, 403, 49 P. 268.

4. The next contention made is that interest should not have been allowed upon the coupons after maturity. This exact question is ruled in *Lake County v. Linn*, 29 Colo. 446, 459, 68 Pac. 839; it being there held that the rule in this state that compound interest may not be recovered does not apply to unpaid coupons belonging to municipal bonds, and that such coupons under section 2252, Mills' Ann. St., draw interest after maturity.

The judgment below should be affirmed.

The CHIEF JUSTICE and MAXWELL, J., concur.

# WILSON v. PEOPLE.

(Supreme Court of Colorado. Feb. 5, 1906.)

## ELECTIONS—VIOLATION OF ELECTION LAWS—CRIMINAL PROSECUTION—JURISDICTION.

Act March 17, 1891 (Mills' Ann. St. Rev. Supp. § 4189a), provides that the repeal or revision of any statute or part thereof shall not extinguish any penalty which may have been incurred thereunder unless the repealing act shall so expressly provide. Act April 5, 1905 (Laws 1905, p. 188, c. 100), in relation to registration, constituted a complete and original act designed to create a new and distinct system of registration, and provided that "all acts and parts of acts inconsistent with the provisions of this act, as well as the penalty thereunder, are hereby repealed." *Held*, that a prosecution for a violation of the provisions of the election law of 1894 (Laws 1894, p. 68, c. 8), brought before the passage of act of 1905, relating to the registration of electors, could not be maintained after the enactment of the statute of 1905.

Gunter and Steele, JJ., dissenting.

En Banc. Error to District Court, Pueblo County: J. H. Voorhees, Judge.

E. H. Wilson was convicted of a violation

of the election law, and he brings error. Reversed.

On January 14, 1905, the plaintiff in error (defendant below) was indicted for the violation of the provisions of the election law of 1894 relating to the registration of qualified electors. On April 5, 1905, an act known as the "Booth Registration Law" was approved, and went into effect from that date, which covered the entire subject of registration, and which provided, *inter alia*, that "all acts and parts of acts inconsistent with the provisions of this act as well as the penalty thereunder are hereby repealed." On the 20th of April, 1905, his counsel filed a motion to dismiss the indictment and discharge the defendant upon the ground that, the latter act having repealed the former and all penalties incurred thereunder, there was no law under which the indictment could be prosecuted or any punishment administered. This motion was overruled. Thereafter, on the 2d day of May, 1905, the cause was tried to a jury. Upon the trial the defendant, in various ways, presented objections to the jurisdiction of the court to proceed with the trial, which were overruled. A verdict of guilty was returned, and defendant sentenced to imprisonment in the penitentiary for not less than three, nor more than five years. To this sentence this writ of error is prosecuted.

Lyman I. Henry and F. R. McAlinee (John M. Waldron, special counsel), for plaintiff in error. S. Harrison White, C. S. Essex, N. C. Miller, Atty. Gen., and I. B. Melville, Asst. Atty. Gen. (C. D. Hoyt, of counsel), for the People.

GODDARD, J. (after stating the facts). The controlling question, and the only one argued by counsel, is whether a prosecution for a violation of the provisions of the law of 1894 can be maintained notwithstanding the enactment of 1905 above referred to. It is manifest from a comparison of these acts that the latter is not amendatory of the former, but is within itself a complete and original act designed to create a new and distinct and different system of registration independent of, and clearly intended by the Legislature to be a substitute for, all prior acts upon the subject. The rule of construction that applies in such cases is well settled, and, as stated by Mr. Justice Field in the case of *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153, is this: "When there are two acts on the same subject, the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of

that act." To the same effect are the following, among other cases that might be cited: *Keese v. City*, 10 Colo. 112, 15 Pac. 825; *Edwards v. D. & R. G. R. R. Co.*, 13 Colo. 59, 21 Pac. 1011; *People v. Ames*, 27 Colo. 126, 60 Pac. 346; *City of Mt. Vernon v. Evans Brick Co.*, 204 Ill. 32, 68 N. E. 208; 28 Am. & Eng. Enc. Law (2d Ed.) 731, and cases cited in note 4. In *People v. Ames*, supra, this court, in considering the question whether the act of 1899, prescribing the duties of the state board of equalization, repealed section 5 of the act of 1891, which appertained to the same subject, used this language: "Section 5 of the earlier and section 2 of the later act both refer to the same subject. The last covers the whole subject-matter of the first, does not purport to amend it, invests the board with new powers, plainly shows that it was intended as a substitute for the earlier section, and expressly provides that all parts of acts in conflict with it are repealed. For these reasons, we are of opinion that section 2 of the act of 1899 (Laws 1899, p. 158) operates as a repeal of section 5 of the act of 1891 (Laws 1891, p. 294)."

It follows, therefore, that the act of 1894 went out of existence for any and all purposes upon the approval of the act of 1905, unless the right to prosecute for penalties incurred thereunder is preserved by the statute, approved March 17, 1891 (section 4189a, Mills' Ann. St. Rev. Supp.), known as the "general saving clause," which provides, *inter alia*, that: "The repeal [or] revision \* \* \* of any statute or part of a statute, or section or part of a section of any statute shall not have the effect to release, extinguish, alter, modify or change in whole or in part, any penalty \* \* \* either civil or criminal which shall have been incurred under such statute, unless the repealing [or] revising \* \* \* act shall so expressly provide, and such statute \* \* \* shall be treated and held as still remaining in force for the purpose of sustaining any proper action or prosecution \* \* \* for the enforcement of such penalty," etc. It has been universally held that this law provides a rule of construction applicable to future statutes when not inconsistent with the object, language, or manifest intent of the latter. In other words, if any language be employed in the repealing statute which evidences an intention on the part of the Legislature to abolish or extinguish the penalties provided by, and incurred under, the statute repealed, such intention will prevail, notwithstanding the saving clause statute, because one Legislature has no power to limit or control a succeeding one in the exercise of its constitutional functions. Only when the repealing statute is silent, does the general saving statute operate. *State v. Showers*, 34 Kan. 269, 8 Pac. 474; *Davidson v. Witthaus* (Sup.) 94 N. Y. Supp. 428; *McCann v. City* (Sup.) 65 N. Y. Supp. 308; *Files v. Fuller*, 44 Ark. 273; *Endlich on Int. of Stats.* § 365; 2 *Lewis' Suther-*

*land on Stat. Const.* § 355; 1 *Id.* § 287; *Pannell et al. v. Louisville, etc., Co.*, 113 Ky. 630, 68 S. W. 662, 82 S. W. 1141. In *Files v. Fuller*, supra, the court, referring to a general saving statute of that state, said: "This statute has very little importance, save in hermeneutics, and has been rarely invoked, for no Legislature has power to prescribe to the courts rules of interpretation, or to fix for future Legislatures any limits of power as to the effect of their actions. Any subsequent Legislature might make its repealing action operate in pending suits as effectually as if no such statute existed, and the courts are quite free yet to consider what the subsequent Legislature did in fact intend, or had power to do." In *McCann v. City*, supra, the effect to be given to a saving clause statute passed by the Legislature of New York in 1892, which is substantially the same as ours, was under consideration. The court in referring to the statute remarked: "This is in the nature of a general saving clause. \* \* \* It is suggested that the Legislature of 1892 had no power to trammel or impair the action of subsequent Legislatures; but, as was said in the case of *People v. England*, 91 Hun, 155, 36 N. Y. Supp. 534, in considering the effect of this very section of the statutory construction act upon acts passed at sessions of the Legislature in subsequent years: 'The Legislature by the act of 1892 laid down a rule of statutory construction applicable to all future statutes. The act did not attempt to interfere in any manner with future legislation, but simply prescribed a rule of construction applicable when not inconsistent with the general object of the subsequent statute, or the context of the language construed, or other provision of the repealing law indicating a different intent.'" In *Davidson v. Witthaus*, supra, in commenting upon the same statute, the court used this language: "The Legislature of 1892 could not fetter the Legislature of 1901 (Cooley Const. Lim. [7th Ed.] p. 174 et seq.), and I think that the statutory construction law is not an attempt at so vain a thing. This statute is a rule of construction, applicable when not inconsistent with the general object of a subsequent statute, or the context of the language construed, or other provision of a repealing law indicating a different intent." In *Pannell et al. v. Louisville, etc., Co.*, supra, several actions to recover penalties for violations of the provisions of the Kentucky statute regulating the sale of leaf tobacco were consolidated. Pending the consolidated action, this statute was repealed, and in the repealing act it was provided: "that no penalty provided in said act (act repealed) shall hereafter be recoverable in any court of this commonwealth." In the Court of Appeals the appellee contended that, notwithstanding this provision, the action might be continued by virtue of section 465 of the saving statute (Ky. St. 1903) which provided

that "no new law shall be construed to repeal any former law as to any act or any penalty incurred or any right accrued under it." Judge Hobson, who delivered the opinions, holding the latter act inoperative, said: "But what one Legislature provides, another may repeal; and the act of March 20, 1902, not only repeals the former statute under which these proceedings were instituted, but, in terms, provides that no penalty under that act shall hereafter be recovered in any court of the state. It is settled that, in order to enter judgment for a penalty, there must be a statute in force at the time authorizing the court to enter the judgment, and that, if the act is repealed pending the action, the court is without power to give judgment, and the action must be dismissed. \* \* \* We are, therefore, without authority to proceed further."

These decisions, and we have found none holding otherwise, clearly establish the rule that the intention of the Legislature, in whatever form of language it may be expressed in a subsequent repealing statute, must prevail notwithstanding the rule of construction declared by a previous saving act. Counsel for appellee insist that the words "as well as all penalties thereunder are hereby repealed" are not sufficient to indicate an intention of the Legislature to abolish or destroy the right to prosecute for penalties incurred under the repealed act, and, furthermore, if held sufficient to indicate such an intention, they are unconstitutional and void because no reference is made thereto in the title of the act. It is a well-settled canon of construction that every word in a law must be given some meaning, and effect is to be given, if possible, to every clause and section (*McClain v. People*, 9 Colo. 193, 11 Pac. 85; *Board v. Wilson*, 15 Colo. 90, 24 Pac. 563; *Crozer v. People* (Ill.) 69 N. E. 489; *Browne v. Turner*, 174 Mass. 150, 54 N. E. 510), and that the intention of the Legislature, if it can be ascertained, governs whenever doubts arise as to the meaning of words employed. *Carlisle v. Pullman Co.*, 8 Colo. 320, 7 Pac. 164, 54 Am. Rep. 553. It is therefore incumbent upon us to ascertain and give effect to the purpose sought to be accomplished by the Legislature by the use of the words employed in the repealing section of the act of 1905. If only the repeal of the prior statute was intended, the words "as well as all penalties thereunder" are mere surplusage, and must be treated as a formula signifying nothing. We are not permitted to so treat them. As we have already seen, effect must be given, if possible, to each word and clause of the statute, and we are not at liberty to disregard any of the language unless "it be impossible to attribute a rational purpose to it when considered in connection with the context." *County Court v. Schwarz*, 13 Colo. 291, 22 Pac. 783. What, then, is the force and significance of the word "repealed" when used in reference to the penalties incurred under the act repealed?

The Century Dictionary defines the word "repeal": "To revoke, abrogate as a law or statute. It usually implies a recalling of the act by the power that made or enacted it. To give up, dismiss. To call back, recall, revoke, retract." Among the definitions given to the word by Webster is "to revoke, to rescind or abrogate by authority, as by act of the Legislature," and as synonyms of the word "repeal" he gives the following: "To abolish; to revoke, rescind, recall, annul, abrogate, cancel." The plain purpose of the word, therefore, as used by the Legislature, was to manifest an intention to abolish and annul the right to prosecute for any and all penalties incurred under the act of 1894. This obvious intention must prevail, whatever may be our opinion as to the propriety or expediency of the purposes effected thereby. With these we have no concern. It rests with us to declare the law as we understand it.

The further objection that, if the phrase under consideration is held sufficient to indicate an intention to take the same out from under the provisions of the "general saving statute," it is unconstitutional, because no reference is made thereto in the title, is, we think, untenable. In considering a similar objection in *Trackman v. People*, 22 Colo. 83, 85, 43 Pac. 662, the following language is used: "It is not necessary, in order to conform to this constitutional requirement, to state in the title the effect of the subject-matter of the act in repealing some prior law, since the repeal of a prior law is necessarily connected with the subject-matter of the new law on the same subject, and a repealing section in the new statute is valid, notwithstanding the title is silent as to such repeal." Our conclusion is that the Booth act, which took effect and was in force from and after its passage, superseded all prior acts upon the subject of registration, and extinguished the right to prosecute the plaintiff in error for the offenses charged in the indictment. It follows that the trial in the court below was without authority of law. The sentence and judgment of the court is therefore reversed, and the cause remanded, with directions to dismiss the action.

Reversed.

STEELE and GUNTER, JJ., dissent.

GUNTER, J. (dissenting). January, 1905, plaintiff in error was indicted under the election law of 1894. April 5, 1905, the Booth registration law (Laws 1905, p. 188, c. 100) went into effect. May, 1905, plaintiff in error was tried upon the indictment, convicted, and sentenced to the penitentiary. The case is here for review.

The sole contention of plaintiff in error is that the enactment of the Booth law repealed the law of 1894, and all penalties thereunder, and therefore worked his discharge. The facts pertinent are: The in-

dictment charged plaintiff in error with corruptly and feloniously making false answer, under oath, for the purpose of securing the registration of an unqualified elector. The indictment was drawn under section 17 of the act of 1894 (Laws 1894, p. 83, c. 8), which section reads as follows: "Except as otherwise provided in this act any person who shall make false answer, either for himself or another, or who shall violate or attempt to violate any of the provisions of this act, or knowingly permit another to violate the same, or any public officer or officers upon whom any duty is imposed by this act or any of its provisions, who shall willfully neglect such duty, or who shall willfully perform it in such a way as to hinder the objects and purposes of this act, shall be deemed guilty of a felony, and on conviction thereof shall be punished by imprisonment in the penitentiary not less than one year nor more than five years, and if he be a public officer shall forfeit his office." Section 18 of the Booth act reads as follows: "Any person who shall make false answer, either for himself or another, or who shall violate or attempt to violate any of the provisions of this act, and knowingly permit or encourage another to violate the same, or any public officer or officers or other persons upon whom any duty is imposed by this act or any of its provisions, who shall willfully neglect such duty, or who shall willfully perform it in such a way as to hinder the objects and purposes of this act, shall, excepting where some penalty is provided by the terms of this act, be deemed guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one year, nor more than five years, and if he be a public officer, shall also forfeit his office." It seems to us, the simple reading of the two sections is convincing that section 18 does not, in substance, change section 17. There is no provision in the Booth act which has such effect. The Booth act, § 25, reads: "All acts or parts of acts inconsistent with the provisions of this act, as well as all penalties thereunder, are hereby repealed."

Plaintiff in error was convicted under section 17, Act 1894. It is, in effect, conceded that this conviction should stand unless section 17 was repealed by the Booth act. The Booth act only repeals "acts and parts of acts inconsistent with" its provisions, and the penalties under such inconsistent provisions. Section 17 is not inconsistent with section 18, or any other part of the Booth act. It has in effect, and almost literally, been re-enacted in section 18 of that act. Pertinent is the following from *Holden v. Minn.*, 137 U. S. 483, 490, 491, 11 Sup. Ct. 143, 146, 34 L. Ed. 734: "These provisions were not repealed by the act of April 24, 1889. In respect to the first and second sections of that act, it is clear that they

contain nothing of substance that was not in sections 11 and 12 of chapter 118 of the General Statutes of 1878. And it is equally clear that the provisions of an existing statute cannot be regarded as inconsistent with a subsequent act merely because the latter re-enacts or repeats those provisions. As the act of 1889 repealed only such previous acts and parts of acts as were inconsistent with its provisions, it is inaccurate to say that that statute contained no saving clause whatever. By necessary implication previous statutes that were consistent with its provisions were unaffected." In *Lewis v. Stout*, 22 Wis. 234, the court in an opinion by Dixon, Chief Justice, said: "It is a general rule in the construction of statutes, that a statute that revises the subject-matter of a former statute, works a repeal of such former statute without express words to that effect. The act of March 31, 1800, to provide for letting the public printing by contract, seems to be a substitute for the previous act on the same subject; and this rule would no doubt govern in its construction but for the language of the fifteenth section. That section provides that 'All acts and parts of acts, inconsistent with the provisions of this act, are hereby repealed.' This language seems to indicate very clearly that if there were any parts of the former act not 'inconsistent' the same were not to be repealed." See, also, *People v. Durick*, 20 Cal. 94, 96 *Callaghan v. Jennings*, 16 Colo. 471, 27 Pac. 1055, also, we think, supports the conclusion we have reached. To sum up, it seems to us the law, under which this plaintiff in error was convicted, is not inconsistent with, therefore not repealed by, the Booth act of 1905. If this be true, his conviction should stand. This conclusion we believe to be supported by principle and authority, and further, it avoids implying to a coordinate branch of the government—the legislative—either negligence or corrupt motives in the passage of the Booth act.

We think the judgment of the lower court should be affirmed.

STEELE, J., concurring.

(35 Colo. 159)

In re MOYER.

(Supreme Court of Colorado. June 6, 1904.)

1. HABEAS CORPUS—WRIT—NATURE.

The purpose of proceedings in habeas corpus is to determine whether or not the person instituting them is illegally restrained of his liberty.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 1.]

2. SAME—RETURNS—PURPOSE—SCOPE.

As the return to a writ of habeas corpus is not treated as an answer to the application, but is merely a response to the writ itself, the sufficiency of such return is to be determined by the allegations thereof, without regard to the statements of the petition for the writ.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, §§ 66, 71.]

### 3. CONSTITUTIONAL LAW — DEPARTMENTS OF GOVERNMENT—EXECUTIVE POWERS.

Const. art. 4, § 5, provides that the Governor shall be the commander in chief of the military forces of the state, except when they are called into actual service of the United States, and that he shall be empowered to call out the militia to suppress insurrections. Section 2 vests in him the supreme executive power of the state, and Laws 1897, p. 204, c. 63, § 2, declares that when an insurrection in the state exists or is threatened, the Governor shall order out the National Guard to suppress it. *Held*, that the Governor having declared that a state of insurrection existed in a county, and having ordered out the militia to suppress it, his determination of the existence of such insurrection was not subject to review by the courts.

### 4. HABEAS CORPUS—ARREST PENDING INSURRECTION.

The Governor of a state having lawfully declared that a state of insurrection existed in a county, and having directed the adjutant general to suppress the same with the aid of the National Guard, a person arrested by such military force for aiding and abetting in such insurrection was not entitled to his discharge on habeas corpus for failure of such military authorities to surrender him to the civil authorities of the state for trial pending the insurrection; it being the intention of the adjutant general to deliver him to the civil authorities for trial as soon as the insurrection was suppressed.

### 5. CONSTITUTIONAL LAW — DEPARTMENTS OF GOVERNMENT—INFRINGEMENT.

The Governor of the state, in employing the militia to suppress an insurrection, acts in a civil capacity merely as the chief civil magistrate of the state, so that the arrest of an insurrectionist by the military and its refusal to surrender him to the civil authorities for trial prior to the suppression of the insurrection was not a contravention of Bill of Rights, art. 2, § 22, providing that the military shall always be in strict subjection to the civil power.

Steele, J., dissenting.

Application for a writ of habeas corpus by Charles H. Moyer. Writ denied.

On behalf of Charles H. Moyer a petition was presented, representing that he was illegally restrained of his liberty in the county of San Miguel, by Sherman Bell and Buckley Wells. A writ of habeas corpus was issued, directed to these parties, who, on the day it was returnable, produced the petitioner in court, and at the same time made a return to the writ, whereby the jurisdiction of this court to further proceed in the matter was challenged. The averments upon which the claim of want of jurisdiction is based are to the effect that prior to the detention of petitioner, his excellency, Gov. Peabody, by proclamation, had determined and declared the county of San Miguel to be in a state of insurrection, and that by reason of lawlessness, disturbances, and threatened acts of violence, the civil authorities of the county were unable to cope with the situation. In pursuance of this proclamation, the Governor directed the respondent, Sherman M. Bell, adjutant general of the state of Colorado, to forthwith order out such troops as in his judgment might be necessary, and report to the sheriff of San Miguel county, and that he use such means as in his judgment might be right and proper to restore peace and good

order in the county, and enforce obedience to the Constitution and laws of the state. In pursuance of this order General Bell proceeded to the county of San Miguel in charge and command of members of the Colorado National Guard, and ever since has been, and now is, actively engaged in quelling the disturbances which called forth the proclamation and the executive order above referred to; that in the discharge of these duties he became convinced that petitioner had been, and if discharged from arrest would continue to be, an active participant in fomenting and keeping alive the condition of insurrection existing in the county; that he was and is a prominent leader of those engaged in the acts of insurrection and crime to suppress which the National Guard was called into requisition; that for these reasons he caused the arrest, apprehension, and detention of the petitioner in the county of San Miguel, and does now restrain, detain, and imprison him for the reasons and upon the grounds above set forth; that it is his purpose and intention to release and discharge petitioner from military arrest as soon as the same can be safely done with reference to the suppression of the existing state of insurrection in the county, and then surrender him to the civil authorities to be dealt with in the ordinary course of justice, after such insurrection is suppressed. It is further stated that the Governor has issued orders and instructions to General Bell not to surrender or release the military custody of petitioner during the existence and continuing condition of affairs in the county of San Miguel, as mentioned and set forth in the proclamation and executive order of his excellency. It is also stated that the respondent Buckley Wells is a subordinate military officer, under the direct command of Gen. Bell, and that his acts in the premises with reference to the arrest and detention of petitioner have been by virtue of express commands in that behalf issued to him by his superior officer. To this return is appended the certificate of Gov. Peabody to the effect that the matters and things set forth in the return are true, and that the arrest and present detention of petitioner were had and done in pursuance of the authority conferred upon him by the Constitution of the state; that the acts of Gen. Bell in arresting and detaining petitioner were done by his express sanction as Governor of the state and commander in chief of its military forces; and that the insurrection recited in his proclamation has not as yet been fully suppressed. To this return a reply was filed by petitioner in the nature of a general demurrer, to the effect that it is wholly insufficient in law to constitute any justification whatsoever, either for the arrest, imprisonment, or further detention of petitioner. The reply also alleges that neither on the date of the proclamation and order of the Governor, nor at any other time,

has there been a state of insurrection in the county of San Miguel.

Richardson & Hawkins, for petitioner. N. C. Miller, Atty. Gen., and John M. Waldron, I. B. Melville, and H. J. Hersey, Asst. Atty. Gen., for respondents.

GABBERT, C. J. (after stating the facts). Counsel for petitioner contend that on the facts above stated he is entitled to his discharge, because the Governor has no power to suspend the privilege of the writ of habeas corpus or declare martial law, or that, if he has such power, he has not assumed to exercise it. Special counsel representing the respondents controverts these propositions, and further contends that this court is without jurisdiction to proceed further than to deny the relief demanded, or remand the petitioner to their custody. The Attorney General claims that the Governor, independent of the questions of his power to declare martial law, suspend the privilege of the writ of habeas corpus, or the question of the jurisdiction of this court, is fully authorized, under the Constitution and laws of the state, to suppress insurrection and lawless conditions through the power of the military under his command, and that his subordinate officers actively engaged in suppressing such insurrection by seizing and holding those engaged in acts of violence or in advising and aiding such acts to suppress which the military was called out cannot be interfered with so long as conditions exist which require the action and the presence of the military to correct. Counsel *amici curiæ*, in their views on these several questions, are divided.

The purpose of proceedings in habeas corpus is to determine whether or not the person instituting them is illegally restrained of his liberty, and we shall proceed to determine whether or not, under the facts stated and the laws of this state, the petitioner is entitled to his discharge, without attempting to pass specifically upon the questions raised by his counsel. Before proceeding, however, to a discussion and determination of this question, two propositions are presented which should be disposed of. It is urged by counsel for petitioner that certain averments in the petition for the writ are not controverted by the return. The latter is not treated as an answer to the application, but rather as a response to the writ itself. The averments of the petition are made for the purpose of obtaining the writ, and the respondent, in his answer thereto, simply seeks to relieve himself from the imputation of having imprisoned petitioner without lawful authority, and this he does, or, rather, is required to do, under the law by statements in the return from which the legality of the imprisonment is to be determined, without regard to the statements of the petition for the writ. In short, he is not required to make any issue on the petition for the writ, but to answer

the writ. In *re Chipchase*, 56 Kan. 357, 43 Pac. 264; *Ex parte Durbin* (Mo. Sup.) 14 S. W. 821; *Simmons v. Georgia Iron & Coal Co.* (Ga.) 43 S. E. 780, 61 L. R. A. 739.

By the reply it is alleged that, notwithstanding the proclamation and determination of the Governor that a state of insurrection existed in the county of San Miguel, that as a matter of fact these conditions did not exist at the time of such proclamation or the arrest of the petitioner, or at any other time. By section 5, art. 4 of our Constitution, the Governor is the commander in chief of the military forces of the state, except when they are called into actual service of the United States, and he is thereby empowered to call out the militia to suppress insurrection. It must, therefore, become his duty to determine as a fact when conditions exist in a given locality which demand that, in the discharge of his duties as chief executive of the state, he shall employ the militia to suppress. This being true, the recitals in the proclamation to the effect that a state of insurrection existed in the county of San Miguel cannot be controverted. Otherwise, the legality of the orders of the executive would not depend upon his judgment, but the judgment of another co-ordinate branch of the state government. In *re Boyle* (Idaho) 57 Pac. 706, 45 L. R. A. 832; *Luther v. Borden*, 7 How. (U. S.) 1, 12 L. Ed. 581; *Ex parte Moore*, 64 N. C. 802; *Martin v. Mott*, 12 Wheat. (U. S.) 19, 6 L. Ed. 537.

By the Constitution the supreme executive power of the state is vested in the Governor, and he is required to take care that the laws be faithfully executed. Section 2, art. 4. To this end he is made commander in chief of the military forces of the state, and vested with authority to call out the militia to execute the laws and suppress insurrection. Section 5, *supra*. This authority is supplemented by Laws 1897, p. 204, c. 63, § 2, whereby it is provided that when an insurrection in the state exists or is threatened, the Governor shall order out the National Guard to suppress it. These are wise provisions, for the people in their sovereign capacity, in framing the Constitution, as well as the General Assembly, recognized that an insurrection might be of such proportions that the usual civil authorities of a county and the judicial department would be unable to cope with it. Through the latter, parties engaged in such insurrection might be punished, but its prompt suppression could only be secured through the intervention of the militia. Being vested with authority to employ the militia for a specific purpose, and it appearing from the return to the writ that the Governor has called it into requisition for that purpose, his action through his subordinates cannot be interfered with, so long as he does not exceed the power which, under the fundamental law of the state and the acts of the Legislature in conformity therewith, he is

authorized to exercise. *People v. District Court*, 29 Colo. 182, 205, 68 Pac. 242.

The crucial question, then, is simply this: Are the arrest and detention of petitioner under the facts narrated illegal? When an express power is conferred, all necessary means may be employed to exercise it, which are not expressly or impliedly prohibited. 1 Story on the Constitution, § 434. Laws must be given a reasonable construction, which, so far as possible, will enable the end thereby sought to be attained. So with the Constitution. It must be given that construction of which it is susceptible which will tend to maintain and preserve the government of which it is the foundation, and protect the citizens of the state in the enjoyment of their inalienable rights. In suppressing an insurrection it has been many times determined that the military may resort to extreme force as against armed and riotous resistance, even to the extent of taking the life of the rioters. Without such authority, the presence of the military in a district under the control of the insurrectionists would be a mere idle parade, unable to accomplish anything in the way of restoring order or suppressing riotous conduct. If, then, the military may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to. This is but a lawful means to the end to be accomplished. The power and authority of the militia in such circumstances are not unlike that of the police of a city, or the sheriff of a county, aided by his deputies or posse comitatus in suppressing a riot. Certainly such officials would be justified in arresting the rioters and placing them in jail without warrant, and detaining them there until the riot was suppressed. Hallett, J., in *Re Application of Sherman Parker*, (no opinion for publication). If, as contended by counsel for petitioner, the military, as soon as a rioter or insurrectionist is arrested, must turn him over to the civil authorities of the county, the arrest might, and in many instances would, amount to a mere farce. He could be released on bail, and left free to again join the rioters or engage in aiding and abetting their action, and if again arrested the same process would have to be repeated, and thus the action of the military would be rendered a nullity. Again, if it be conceded that, on the arrest of a rioter by the military, he must at once be turned over to the custody of the civil officers of the county, then the military, in seizing armed insurrectionists and depriving them of their arms, would be required to forthwith return them to the hands of those who were employing them in acts of violence, or be subject to an action of replevin for their recovery, whereby immediate possession

of such arms would be obtained by the rioters, who would thus again be equipped to continue their lawless conduct. To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence and until order is restored would lead to the most absurd results. The arrest and detention of an insurrectionist, either actually engaged in acts of violence or in aiding and abetting others to commit such acts, violates none of his constitutional rights. He is not tried by any military court, or denied the right of trial by jury; neither is he punished for violation of the law, nor held without due process of law. His arrest and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions which the Governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress. When this end is reached, he could no longer be restrained of his liberty by the military, but must be, just as respondents have indicated in their return to the writ, turned over to the usual civil authorities of the county, to be dealt with in the ordinary course of justice, and tried for such offense against the law as he may have committed. It is true that petitioner is not held by virtue of any warrant, but, if his arrest and detention are authorized by law, he cannot complain because those steps have not been taken which are ordinarily required before a citizen can be arrested and detained.

Nor do these views conflict with section 22, art. 2, of the Bill of Rights, which provides that the military shall always be in strict subordination to the civil power. The Governor, in employing the militia to suppress an insurrection, is merely acting in his capacity as the chief civil magistrate of the state, and, although exercising his authority conferred by the law through the aid of the military under his command, he is but acting in a civil capacity. In other words, he is but exercising the civil power vested in him by law through a particular means which the state has provided for the protection of its citizens. No case has been cited where the precise question under consideration was directly involved and determined, but in cases where the courts have had occasion to speak of the authority of the military to suppress insurrection and the means which may be employed to that end, it has been stated that parties engaged in riotous conduct render themselves liable to arrest by those engaged in quelling it. In *re Kemp*, 16 Wis. 382, 413; *Luther v. Borden*, supra; *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159.

The same rule necessarily applies to those found in the zone of the disaffected district who are aiding and abetting the insurrectionists; for such conduct, unless repressed, would result in the continuation of the insurrection, or at least render it more difficult

to suppress. We therefore reach the conclusion that, independent of the questions of the authority of the Governor to declare martial law, or suspend the privilege of the writ of habeas corpus, that the petitioner, on the showing made by the return, is not illegally restrained of his liberty. In reaching this conclusion we are not unmindful of the argument that a great power is recognized as being lodged with the chief executive, which might be unlawfully exercised. That such power may be abused is no good reason why it should be denied. The question simply is: Does it exist? If so, then the Governor cannot be deprived of its exercise. The prime idea of government is that power must be lodged somewhere for the protection of the commonwealth. For this purpose, laws are enacted and the authority to execute them must exist, for they are of no effect unless they are enforced. Neither is power of any avail unless it is exercised. Appeals of a possible abuse of power are often made in public debate. They are addressed to popular fears and prejudices and often given weight in the public mind to which they are not entitled. Every government necessarily includes a grant of power lodged somewhere. It would be imbecile without it. 1 Story on the Constitution, § 425; 1 Bailey on Jurisdiction, p. 309, § 296.

Many authorities have been cited by counsel for petitioner which it is not necessary to attempt to review. They are not in conflict with the conclusions reached in this case. They treat of the power of the President to declare martial law; to suspend the privilege of the writ of habeas corpus; of the authority of the military to arrest, try, and punish persons not actually in the military service; and when the military may or may not temporarily supersede the usual civil authorities. None of these questions are involved in the present case. In fact, counsel for petitioner practically concede that the questions of the authority of the Governor to declare martial law and suspend the writ of habeas corpus are not involved, because, they say, if he has such authority, he has not assumed to exercise it; but it is immaterial what power in this respect may be vested in the Governor, or whether he has, in fact, attempted to declare martial law or suspend the writ of habeas corpus. The petitioner was lawfully arrested by the military authorities while the work of suppressing the insurrection in San Miguel county was in progress. Such arrest being lawful, his restraint by respondents until it is suppressed is not illegal.

The writ is discharged, and the petitioner remanded to the custody of the respondents.

Writ discharged and petitioner remanded,

STEELE, J. (dissenting). No person who has the slightest claim to respectability should hesitate to approve the action of the

Governor in enforcing the law, and I am willing to uphold him and to applaud him so long as he keeps within the lines of the Constitution. But I am not willing to uphold him when, in my opinion, he breaks down the barriers erected by the people for their protection, nor am I willing to accord to the Constitution elastic properties for the purpose of sustaining him, nor to join in the establishment of a precedent which will not apply to other classes or other conditions when another Governor undertakes to exercise the same arbitrary power. I am not willing to concede the power claimed by the Governor and exercised by him, because, in my opinion, such power is not vested in him by the Constitution. The people could never have intended to erect such an engine of oppression. It follows, of course, that if the present executive is the sole judge of the conditions which can call into action the military power of the government, and can exercise all means necessary to effectually abate the conditions, and the judicial department cannot inquire into the legality of his acts, that the next Governor may by his edict exercise the same arbitrary power. If the military authority may deport the miners this year, it can deport the farmers next year. If a strike which is not a rebellion must be so regarded because the Governor says it is, then any condition must be regarded as a rebellion which the Governor declares to be such; and if any condition must be regarded as a rebellion because the Governor says so, then any county in the state may be declared to be in a state of rebellion, whether a rebellion exists or not, and every citizen subjected to arbitrary arrest and detention at the will and pleasure of the head of the executive department. We may then, with each succeeding change in the executive branch of the government, have class arrayed against class, and interest against interest; and we shall depend for our liberty, not upon the Constitution, but upon the grace and favor of the Governor and his military subordinates.

In no other case presented to this court have principles so important and far-reaching been involved. It was elaborately and ably argued, and the position of counsel was clearly defined, yet the court has evaded the fundamental questions presented, and has based its decision upon theories long ago determined by jurists and statesmen to be illogical and false. On the part of the petitioner it was urged that he was illegally restrained of his liberty; that a court of competent jurisdiction had ordered him released on habeas corpus; and that the military authorities had refused to release him and had refused to permit the civil authorities to serve process upon them. On behalf of the military officers it was said that they had been ordered by the Governor not to release upon writ of habeas corpus, and on behalf of the

Governor it was contended that he had declared the county of San Miguel to be in a state of insurrection and rebellion, and that under such conditions he had authority to enforce martial law and to suspend the privilege of the writ of habeas corpus. As these propositions strike at the very foundation of our government, as the court has evaded a consideration of them, and as I believe they present the only questions in the case, I shall discuss them, and ignore for the present a consideration of the opinion, with the observation that it establishes a precedent that is so repugnant to my notions of civil liberty, so antagonistic to my ideas of a republican form of government, and so shocking to my sense of propriety and justice, that I cannot properly characterize it.

We should have before us the facts. The Governor of the state, on March 23, 1904, by his proclamation, said:

Whereas, there exists in San Miguel county, Colorado, a certain class of individuals who are acting in conjunction with a certain large number of persons outside of said county, who are fully armed and acting together; and whereas, open and public threats have been made to resist the laws of this state and offer violence to citizens and property located in San Miguel county; and whereas, at divers and sundry other times various crimes have been committed in San Miguel county, by or with the aid and under the direction of said vicious and lawless persons; and whereas, threats, intimidations and violence are threatened and believed will be resorted to by said lawless class of individuals; and whereas, it is stated to me by the sheriff of said San Miguel county that these forces within and without said county are about to join forces within said San Miguel county, for the purpose of destroying property and inflicting personal injuries upon the citizens of said county; and whereas, by reason of such lawlessness and disturbances and threatened acts of violence, the civil authorities are unable to cope with the situation: Now, therefore, I, James H. Peabody, Governor and commander in chief of the military forces, by virtue of the power and authority in me vested, do hereby proclaim and declare the said county of San Miguel, in the state of Colorado, to be in a state of insurrection and rebellion."

In the petition for the writ of habeas corpus filed herein the said proclamation is set forth, and it is alleged that the petitioner, while he was in the county of Ouray, was arrested upon a warrant issued by a justice of the peace of said San Miguel county, and was conveyed to the county of San Miguel, where he gave bond in the penal sum of \$500 for his appearance before the district court of said county on May 10, 1904; that upon his discharge from the custody of the sheriff he was arrested by the adjutant general of the state, who was then in the county of

San Miguel as the commander of a portion of the National Guard of the state; that upon the 30th day of March, 1904, a writ of habeas corpus was issued by the judge of the district court within and for the county of Montrose, returnable on April 11, 1904; that upon said 11th day of April, no return having been made to the writ, the court ordered the discharge of the petitioner, but that, notwithstanding the order of the court, the said respondents refused to discharge him; that the petitioner is not guilty of any offense, has violated no law, and that no indictment, information, or complaint has been filed against him except the complaint mentioned under which he was admitted to bail; that the charge in the said complaint is without foundation, and that the said respondents have refused to file complaint against the petitioner, and have refused to inform him of the charge against him. This court thereupon issued a writ returnable April 21st following.

On the return day of the writ the respondent Sherman Bell produced the body of the petitioner. At the same time a return to the writ was made, in which the jurisdiction of the court is challenged. The return sets forth the proclamation of the Governor, and states that the respondent, having been so ordered by the Governor, proceeded to the county of San Miguel with a portion of the National Guard of the state; that upon his arrival at the county of San Miguel, he had good reason to believe and did and does in good faith believe, and upon due inquiry in the premises became personally and officially fully satisfied and convinced, that the petitioner had been, and if discharged from arrest would continue to be, an active participant in fomenting and keeping alive the said condition of insurrection and rebellion, and was and is a prominent leader of the bands of lawless men engaged in the acts of insurrection and crime mentioned in the proclamation of the Governor; and that in order to accomplish the suppression of said state of insurrection and rebellion, it was and is, in the judgment of said Governor and the respondent, absolutely necessary to arrest, detain, and for some time to come to restrain the body of the said Charles H. Moyer, in the course of an absolutely necessary step in the matter of suppressing said state of insurrection and rebellion; that the exigencies of the military situation imperatively require the further detention of said Moyer to prevent him from lending aid, comfort, direction, instructions, and commands to the said lawless persons.

The reply denies that there exists in the county of San Miguel a state of either insurrection or rebellion, and states that a large number of miners, having been deported from the county, had announced their intention of returning peaceably to their homes, and further announced that to that end they

would resist any further interference with their persons and would resist any attempt at their re-deportation; but that their mission in returning was one of peace, and no force whatever would be used by them, except in defense of their persons from attack by the mob; that this petitioner has neither been at any time, nor does he now, nor would he continue to be, an active participant either in fomenting or keeping alive any condition of insurrection or rebellion; and that he has at all times conducted himself in strict conformity to the laws of the land, and has advised, in his capacity as president of the Western Federation of Miners, that no act of lawlessness should occur upon the part of any member of said federation, to the end that no reflection might be cast upon said organization.

These facts present for determination the question: Is the petitioner, under the conditions shown to exist, entitled to the privilege of the writ of habeas corpus? If he is detained by due process of law, he is not entitled to a discharge under the writ. If he is not so detained, he is entitled to be discharged. If the privilege of the writ has been suspended by proper authority, generally or in his particular case, he is not entitled to his discharge during the period of suspension. The distinction is recognized between the suspension of the privilege of the writ and the right of a military officer to refuse obedience to its commands. Judge Dixon, when chief justice of the Supreme Court of Wisconsin, and during the period of the Civil War, said: "I agree that there is a plain distinction between the suspension of the writ in the sense of the clause of the Constitution, and the right of a military commander to refuse obedience when justified by the exigencies of war, or the ipso facto suspension which takes place when martial law actually exists. \* \* \* But this kind of suspension, which comes with war and exists without proclamation or other act, is limited by the necessities of war. It applies only to cases where the demands upon the officer's time are such that he cannot, consistently with his superior military duty, yield obedience to the mandates of the civil authorities, and to cases arising within districts which are properly subjected to martial law." In *re Kemp*, 16 Wis. 368.

The return does not justify the detention of the prisoner upon the ground that the military exigencies are such that the respondent cannot leave his command for the purpose of yielding obedience to the writ. Moreover, it is common knowledge that the commander of the army of the San Miguel, when executive functions did not require his attendance in other parts of the Union, has been at the capital much of the time. The return not showing a state of facts which justify a disobedience of the writ, the petitioner is entitled to his discharge unless the

return shows that he is held by due process of law. In the return it is stated that the respondent has been ordered by the executive head of the state to refuse to surrender the petitioner, upon writ of habeas corpus or otherwise; and his counsel contend that the Governor, under the Constitution, has the power to suspend the privilege of the writ, and that in this case he has virtually done so, although no proclamation that he has done so has been made, and although he does not expressly say so in the return. If the power to suspend the privilege of the writ is vested in the executive head of the state, it seems to me that it is not important how or in what manner it is exercised. But it is so clear that the power to suspend the privilege of the writ of habeas corpus is not lodged in the executive branch of the government that it seems like a waste of time to discuss the question. If there is any one question positively and finally settled, it is that the power to suspend the privilege of the writ of habeas corpus is solely a legislative power. It is based upon a very simple proposition, which is that, as the privilege of the writ is granted by law, it requires a law to suspend that privilege, and that the executive department cannot legislate.

But let us see what the jurists, the statesmen, and the text-writers have to say upon this subject. Bollman and Swartout had been arrested at New Orleans by Gen. Wilkinson, charged with having been engaged with Burr in a treasonable conspiracy against the United States. They were discharged by the Supreme Court of the United States upon the ground that there was not sufficient evidence to hold them upon the charge of treason. In the course of the opinion in that case, Chief Justice Marshall, in speaking of the power vested in the court to issue the writ of habeas corpus, said: "If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the Legislature to say so. That question depends on political considerations, on which the Legislature is to decide. Until the legislature will be expressed, this court can only see its duty and must obey the law." *Jennings v. Carson*, 4 Cranch, 23, 2 L. Ed. 531. Joseph Story, a justice of the Supreme Court, says, in his work on the Constitution: "It is obvious that cases of a peculiar emergency may arise, which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has upon various pretexts and occasions been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it; a very just and

wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst of purposes. Hitherto no suspension of the writ has ever been authorized by Congress since the establishment of the Constitution. It would seem, as the power is given to Congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge whether exigency had arisen must exclusively belong to that body." Story on the Constitution, § 1342.

Gen. Jackson had declared martial law at New Orleans, and had suspended, as a military necessity, the privilege of the writ of habeas corpus. The authority of Gen. Jackson was considered in the case of *Johnson v. Duncan's Syndics*, 3 Mart. (O. S.) 530, 6 Am. Dec. 675, by the Supreme Court of Louisiana. Judge Martin, one of the most learned jurists of his time, after citing the case of *Ex parte Bollman*, 4 Cranch (U. S.) 75, 2 L. Ed. 554, said: "Again, the power of repealing a law and that of suspending it (which is a practical repeal) are legislative powers. For *eodem modo, quo quid constituitur, eodem modo destruitur.*" Judge Derbigny, in his opinion in the same case, said: "The Constitution of the United States, in which everything necessary to the general and individual security has been foreseen, does not provide that in times of public danger, the executive power shall reign to the exclusion of all others. It does not trust in to the hands of a dictator the reins of government. The framers of that charter were too well aware of the hazards to which they would have exposed the fate of the republic by such a provision; and, had they done it, the states would have rejected a Constitution stained with a clause so threatening to their liberties. In the meantime, conscious of the necessity of removing all impediments to the exercise of executive power, in cases of rebellion or invasion, they have permitted Congress to suspend the privilege of the writ of habeas corpus in those circumstances, if the public safety should require it. Thus far, and no farther, goes the Constitution." And, having quoted from an English author, he says further: "And can it be asserted that while British subjects are thus secured against oppression in the worst of times, American citizens are left at the mercy of the will of an individual, who may, in certain cases, the necessity of which is to be judged of by himself, assume a supreme, overbearing, unbounded power! The idea is not only repugnant to the principles of any free government, but subversive of the very foundations of our own."

Caleb Cushing, who was nominated by President Grant for Chief Justice of the United States, said, while he was Attorney General of the United States, in an opinion to the Secretary of State: "And it may be assumed as a general doctrine of constitutional

jurisprudence in all the United States, that the power to suspend laws, whether those granting the writ of habeas corpus or any other, is vested exclusively in the Legislature of the particular state." 8 Op. Atty. Gen. 365.

In the year 1807 President Jefferson sent to the Senate, in confidence, a message detailing the circumstances attending the arrest of persons charged with treason. On the following day, Senator Giles, of Virginia, a friend and supporter of the President, moved the appointment of a committee to inquire whether it was expedient, in the condition of public affairs, to suspend the privilege of the writ of habeas corpus. Senator Giles forthwith reported a bill authorizing the suspension of the privilege of the writ for the period of three months, and the bill was immediately passed by the Senate, and sent to the House in confidence. The House declared by a vote of 123 to 3 that the message ought not to be kept secret, and a public debate on the subject occurred. I shall quote from the debate somewhat at length, for the reason that there appears to have been such a unanimity of sentiment on the subject by the statesmen of that period that we should accept their views as a guide for our action.

Mr. Burwell, of Virginia, is reported to have said: "He would ask gentlemen if they seriously believed the danger sufficiently great to justify the suspension of this most important right of the citizen, to proclaim the country in peril and to adopt a measure so pregnant with mischief, by which the innocent and guilty will be involved in one common destruction? He said this was not the first instance of the kind since the formation of the federal government. There had been already two insurrections in the United States, both of which had defied the authority of Congress, and menaced the Union with dissolution. Notwithstanding one of them justified the calling out of 15,000 men, and the expenditure of \$1,000,000, he had not heard of a proposition to suspend the writ of habeas corpus. What, then, will be said of us, if now, when the danger is over, firm in the attachment of the people to the Union, with ample resources to encounter any difficulty which may occur, we resort to a measure so harsh in its nature, oppressive in its operation, and ruinous as a precedent?

\* \* \* Nothing but the most imperious necessity would excuse us in confiding to the Executive, or any person under him, the power of seizing and confining a citizen, upon bare suspicion, for three months, without responsibility, for the abuse of such unlimited discretion. \* \* \* The people of the United States would have just reason to reproach their representatives with wantonly sacrificing their dearest interests, when, from the facts presented to this House, it seems the country was perfectly safe and the conspiracy nearly annihilated. Under these cir-

circumstances there can be no apology for suspending the privilege of the writ of habeas corpus, and violating the Constitution, which declares 'the writ of habeas corpus shall not be suspended, unless when, in cases of invasion or rebellion, the public safety may require it.' \* \* \* What, in another point of light, would be the effect of passing such a law? Would it not establish a dangerous precedent? A corrupt and vicious administration, under the sanction and example of this law, might harass and destroy the best men of the country. It would only be necessary to excite artificial commotions, circulate exaggerated rumors of danger, and then follows the repetition of this law, by which every obnoxious person, however honest, is surrendered to the vindictive resentment of the government. It will not be a sufficient answer, that this power will not be abused by the President of the United States. He, Mr. B. believed, would not abuse it, but it would be impossible to restrain all those who are under him. Besides, he would not consent to advocate a principle, bad in itself, because it will not, probably, be abused."

Mr. Elliott, of Vermont, said: "It is, indeed, difficult for me, consistently with the sincere and high respect which I entertain for the source from whence this measure originated, to express, in decorous terms, the hostility which I feel to the proposition. I am therefore disposed to consider it as an original proposition here—as a motion in this body to suspend, for a limited time, the privileges attached to the writ of habeas corpus. And, in this point of view, I am prepared to say that it is the most extraordinary proposition that has ever been presented for our consideration and adoption. Sir, what is the language of our Constitution upon this subject? 'The privilege of the writ of habeas corpus shall not be suspended, except when, in cases of invasion or rebellion, the public safety shall require it.' Have we a right to suspend it in any and every case of invasion and rebellion? So far from it, that we are under a constitutional interdiction to act, unless the existing invasion or rebellion, in our sober judgment, threatens the first principles of the national compact, and the Constitution itself. In other words, we can only act, in this case, with a view to national self-preservation. We can suspend the writ of habeas corpus only in a case of extreme emergency; that alone is *salus populi* which will justify this *lex suprema*. And is this a crisis of such awful moment? Is it necessary, at this time, to constitute a dictatorship, to save the people from themselves, and to take care that the Republic shall receive no detriment? What is the proposition? To create a single dictator, as in ancient Rome, in whom all power shall be vested for a time? No; to create one great dictator, and a multitude, an army, of subaltern and petty despots; to invest, not only the President of

the United States, but the Governor of states and territories, and, indeed, all persons deriving civil or military authority from the supreme Executive, with unlimited and irresponsible power over the personal liberty of your citizens. \* \* \* An eminent English author, and the most popular writer upon the subjects of legal science, considers its suspension as the suspension of liberty itself, declares that the measure ought never to be resorted to but in cases of extreme emergency, and says that the nation then parts with its freedom for a short and limited time, only to resume and secure it forever. Hence he compares the suspension of the habeas corpus act in Great Britain to the dictatorship of the Roman republic."

Mr. Eppes said: "By this bill we are called upon to exercise one of the most important powers vested in Congress by the Constitution of the United States. A power which suspends the personal rights of your citizens, which places their liberty wholly under the will, not of the Executive Magistrate only, but of his inferior officers. Of the importance of this power, of the caution which ought to be employed in its exercise, the words of the Constitution afford irresistible evidence. \* \* \* Well, indeed, may this caution have been used as to the exercise of this important power. It is, in a free country, the most tremendous power which can be placed in the hands of a legislative body. It suspends, at once, the chartered rights of the community, and places even those who pass the act under military despotism. The Constitution, however, having vested this power in Congress, and a branch of the Legislature having thought its exercise necessary, it remains for us to inquire whether the present situation of our country authorizes, on our part, a resort to this extraordinary measure. \* \* \* This government has now been in operation 30 years. During this whole period, our political charter, whatever it may have sustained, has never been suspended. Never, under this government, has personal liberty been held at the will of a single individual. Shall we, sir, suspend the chartered rights of the community for the suppression of a few desperadoes? \* \* \* I consider the provisions in the Constitution for suspending the habeas corpus as designed only for occasions of great national danger."

Mr. Nelson said: "This precedent, let me tell gentlemen, may be ruinous, may be a most damnable precedent—a precedent which, hereafter, may be most flagrantly abused. The Executive may wish to make use of more energetic measures than the established laws of the land enable him to do. He will resort to this as a precedent, and this important privilege will be suspended at the smallest appearance of danger. The effect will be that, whenever a man is at the head of our affairs who wishes to oppress or wreak

his vengeance on those who are opposed to him, he will fly to this as a precedent. It will truly be a precedent fraught with the greatest danger; a precedent which ought not to be set, except in a case of the greatest necessity. Indeed, I can hardly contemplate a case in which, in my opinion, it can be necessary."

Mr. Randolph said: "If the bill passes, we are told, it will be but temporary. \* \* \* As to the three months' continuance, I consider that as one of the most objectionable features of the bill; as a bait to the trap; as the entering wedge. If it is made reconcilable to the interests and feelings of this House to pass it for three months, do you think we will feel the same lively repugnance to it that we do now? No! It has been truly said that no man becomes perfectly wicked at once; and it may be affirmed, with equal truth, that a nation is never enslaved at once. Men must be initiated by degrees, and their repugnance must be gradually overcome."

Mr. Smille said: "I consider this one of the most important subjects upon which we have been called to act. It is a question which is neither more nor less than whether we shall exercise the only power with which we are clothed to repeal an important part of the Constitution? It is in this case only that we have power to repeal that instrument. A suspension of the privilege of the writ of habeas corpus is, in all respects, equivalent to repealing that essential part of the Constitution which secures that principle which has been called, in the country where it originated, the 'palladium of personal liberty.' If we recur to England, we shall find that the writ of habeas corpus in that country has been frequently suspended. But under what circumstances? We find it was suspended in the year 1715, but what was the situation of the country at that time? It was invaded by the son of James II. There was a rebellion within the kingdom, and an army was organized. The same thing happened in the year 1745. On this occasion it was found necessary to suspend it. In later times, when the government had grown more corrupt, we have seen it suspended for an infinitely less cause. We have taken from the statute book of this country this most valuable part of our Constitution. The convention who framed that instrument, believing that there might be cases when it would be necessary to vest a discretionary power in the Executive, have constituted the Legislature the judge of this necessity, and the only question now to be determined is: Does this necessity exist?"

Mr. Dana said: "I have been accustomed to view the privilege of the writ of habeas corpus as the most glorious invention of man.

\* \* \* There is another principle, which appears to me highly objectionable. It authorizes the arrest of persons, not merely by

the President or other high officers, but by any person acting under him. I imagine this to be wholly without precedent. If treason were marching to force us from our seats, I would not agree to do this. I would not agree thus to destroy the fundamental principles of the Constitution, or to commit such an act, either of despotism or pusillanimity. Under this view of the subject, I am disposed to reject the bill, as containing a proposition on which I cannot deliberate."

Annals of Congress, 9th Congress, 2d Session, pp. 402-424.

And the House of Representatives, by a vote of 113 to 19, refused to refer this bill to a committee, but upon first reading thereof indefinitely postponed it; and of the 19 members who voted against the motion very many were opposed to the bill.

In February following another debate occurred, at which time Mr. Broom, of Delaware, is reported to have said: "In ordinary times, the laws which already exist may be sufficient, for in such times there is no temptation to transgress the limits of constitutional or legal privileges; but in times of turbulence and commotion, the mere formal recognition of rights will afford too feeble a barrier against the inflamed passions of men in power, whether excited by an intemperate zeal for the supposed welfare of the country, or by the detestable motives of party rancor or individual oppression. I could have wished that circumstances had never occurred which would make it necessary to fortify, by penal laws, the constitutional privilege of habeas corpus, and that the whole nation, from the first to the last, had regarded it with such religious veneration that no officer, either military or civil, would have dared to violate it. But recent circumstances have proved that such a wish would have been in vain, and have demonstrated, more powerfully than any abstract reasoning, the necessity and importance of further legislative provision. This privilege of the writ of habeas corpus has been deemed so important that, by the ninth section of the first article of the Constitution, it is declared that it shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it. Such is the value of this privilege that even the highest legislative body of the Union—the legitimate representatives of the nation—are not intrusted with the guardianship of it, or suffered to lay their hands upon it, unless when, in cases of extreme danger, the public safety shall make it necessary. The suspension of this privilege upon slight pretenses, it was easily foreseen, would destroy its efficacy, and if it depended on the mere will of Congress, it would become, in the hands of the majority, the most certain and convenient means to accomplish the purposes of party persecution, or to gratify political or personal rancor or animosity. \* \* \* In England, this inestimable privilege has

been for ages the proud theme of exultation; there they worshipped it as a talismanic wand which could unbar the gates of the strongest prison and dissolve in an instant the fetters of the captive. It was to Englishmen as a wall of fire by night, shielding them from the arbitrary sway of tyrannic power. \* \* \* Yet, however important these rights may be, a few moments' reflection will satisfy us that, without the writ of habeas corpus, they could avail but little. The rights may exist as abstract rights, but the writ of habeas corpus affords the most important, if not the only means of exercising them. In vain does the law proclaim that no man shall be imprisoned contrary to law, if a party has no access to a tribunal to decide the question of legality. In vain does the law promise a trial by peers, if the imprisoned party can have no access to a tribunal where he may demand such trial. In short, without the writ of habeas corpus, rights of personal liberty, however solemnly proclaimed, would exist but in name. This writ of habeas corpus is coeval with the rights which it secures. It existed by force of the common law until the subtleties of lawyers had nearly refined it away, when it was aided by the statute of Charles, and has since been found fully adequate to produce the desired effect. If, then, this privilege has been productive of the most salutary effects in England, in guarding the liberty of the subject, we have the strongest proof that we can require of its importance to us, except our own experience. It is true, we live under a form of government where the sovereignty is acknowledged to belong to the people; but let us not vainly imagine that we have no necessity for laws restrictive upon men in power. Under the fair semblance of republicanism has often been practised the most detestable tyranny, and the mild laws of a Republic have too often afforded a shelter for knaves and tyrants, instead of a shield for the virtuous and oppressed. \* \* \* For my own part, I wish to live under a government of laws, and not of men; for, however pure and upright be the intentions of our military commanders, however virtuous, and even unsuspected, be their conduct, I can never agree that my right to personal liberty shall depend on their forbearance and discretion. I know not whether these men that have been arrested are innocent or guilty of the treason with which they are charged, but, whether innocent or guilty, they must be arrested and tried according to law. However atrocious the crime which has been committed, the punishment must be according to law; for, in transgressing the limits of the law to revenge upon a criminal the wrongs of society, we are guilty of injustice both to society and the criminal."

And Mr. Randolph said: "I make no profession of sympathy for the men who have been denounced as traitors. I argue on the supposition that they are traitors. There is

no need of much exertion on behalf of good men. Attacks on the liberty of the people are, as has been stated before, made always in the persons of the vile and worthless. But when precedent is once established in the case of bad men, who, like pioneers, go before to smooth the way, good men tremble for their safety. \* \* \*" Mr. Randolph concluded by begging pardon "for detaining the House so long, but he could never be indifferent on a subject like this. The House were now to decide if the constitution were only pen, ink, and paper, and to be set aside at the whim of every military commander, or whether it were unalterable by fate, and if he who dared to violate it should rue the consequences."

Annals of Congress, 9th Congress, 2d Session, 502, 538.

Accompanying the message of the President was a letter from Gen. Wilkinson, in which he stated that he had delivered one person over on habeas corpus, but that he had evaded the writ as to the other two, and, recognizing that he had violated the law, said that he should look to Congress for indemnity. A day or two later the President sent a second message to Congress, in which he stated that the persons arrested at New Orleans had arrived at the seat of government, and that immediately upon their arrival he had delivered to the proper authorities all evidence in his possession, and had directed that proceedings be instituted against them at once.

This debate should be very instructive. It was participated in by members from nearly every state, and, being at a time so early in our history, should be regarded as contemporaneous with the Constitution. The Congress, composed as it was of the ablest men of the times, would not consent to the proposition of suspending the writ of habeas corpus for the period of three months, on the ground that it would create, not only a dictator in the person of the President, but a horde of petty tyrants through the country, and because the necessity for so doing was not so great and imperious as to justify them in taking that course. From the debate we learn that at no time before had the privilege of the writ been suspended; that in the opinion of the members of this Congress the General of the Army had violated the law in not turning over to the civil authorities those engaged in rebellion against the government; that the writ should not be suspended by Congress unless the nation itself was in danger; and that unless the privilege of the writ was suspended the military could not arrest and hold citizens on suspicion.

During the period of the Civil War, John Merryman was arrested by military authority, upon vague and indefinite charges, without any proof, so far as it appeared. When a writ of habeas corpus was served requiring the officer to produce the body before the

Chief Justice of the United States, in order that inquiry might be made as to the legality of the imprisonment, the officer answered that he had been authorized by the President to suspend the writ of habeas corpus, and on that ground refused obedience to the writ. The Constitution of the United States contains this provision: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." In the Constitution of our state the following provision is found: "*That* the privilege of the writ of habeas corpus shall *never* be suspended, unless when in *case* of rebellion or invasion the public safety may require it." The slight difference between the federal and our state Constitution is shown by the italics. The provision is found in our Bill of Rights, and the conjunction "*that*" connects the opening sentence, which is: In order to assert our rights, acknowledge our duties, and proclaim the principles upon which our government is founded, we declare." The adverb "*not*," of the federal law, is replaced by the more positive adverb "*never*," in ours, and the plural of the noun "*case*" is used in the national Constitution; while in ours the singular appears. Otherwise the sections are identical. In construing this section of the federal Constitution, the Chief Justice of the United States held that the power of suspending the privilege of the writ was solely a legislative power. He quoted from Blackstone, Hallam, Marshall, and Story; related the incident occurring in the administration of Jefferson; reviewed the history of the struggles of the English-speaking people which ended in the enactment of the thirty-first chapter of Charles the Second—an act, as he declares, of great and inestimable value, because it contains provisions which compel courts and judges, and all parties concerned, to perform their duties in a manner specified in the statutes; and closes by saying: "I can only say that if the authority which the Constitution has confided to the judiciary department and judicial officers may thus, upon any pretext or under any circumstances, be usurped by the military power at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officer in whose military district he may happen to be found." *Ex parte Merryman*, Taney, 246, Fed. Cas. No. 9,487.

The decision of the Chief Justice was assailed by many able lawyers of the time, and the Chief Justice was himself denounced as a sympathizer with the Rebellion; yet, notwithstanding the great esteem in which the President was held by the people of the North, notwithstanding the fact that the life of the republic was in danger, loyal courts all over the North sustained the Chief Justice,

and decided that the Executive had not the power, under the Constitution, to suspend the privilege of the writ. And finally, in 1863, the question was settled. Thaddeus Stevens, the leader of the Union party, succeeded in passing through the House of Representatives a bill authorizing the President to suspend the privilege of the writ of habeas corpus, and to indemnify him or other officers in cases where damages were awarded for arbitrary arrest. The Senate amended the bill, and, after a conference between the two houses, it became a law. Thus the executive and legislative branches of the government recognized the principles contended for by the judicial department, and it is settled that Congress only has the power of suspending the privilege of the writ of habeas corpus, and that it is the sole judge of the conditions which require its suspension.

The language employed is so peculiarly applicable to the case at bar that I shall quote from some of the opinions of those judges who announce that the power to suspend the writ is legislative and not executive. In the case of *Ex parte Benedict*, Fed. Cas. No. 1,292, Judge Hall, of the United States Court for the Northern District of New York, held that the President of the United States is not vested with power to suspend the privilege of the writ of habeas corpus, at any time, without the authority of an act of Congress. In the course of the opinion he said: "Even in the midst of our present struggle, we should not forget the teachings and history of the past, and regard as trivial and unimportant, constitutional principles, the persistent violation of which led to the dethronement of kings, and the overthrow of long-established forms of government. We should not forget the '*lettres du cachet*' of the French monarchs, nor the illegal imprisonments under Charles I. In our efforts to read aright and profit by the terrible lesson which the present condition of our unhappy country presents, we should not forget what Hume, and Hallam, and Blackstone, and Marshall, and Story, and Kent have taught us." Quoting from Blackstone, he says: "'Of great importance to the public is the preservation of this personal liberty; for, if once it were left to the power of any, of the highest magistrate, to imprison whomever he or his officers thought proper (as in France it is daily practiced by the crown), there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life and property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly

hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous, engine of arbitrary government. And yet sometimes, when the state is in danger, even this may be a necessary measure. But the happiness of our Constitution is that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient; for it is the Parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reasons for so doing, as the Senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger." Judge Hall then speaks of the opinion of Attorney General Bates, whose views have been adopted, in large measure, by this court: "For that gentleman I entertain the highest respect. His purity of motive and character, his great legal acquirements, and his undoubted patriotism and ability are unquestioned; but, even in these respects, that excellent gentleman would not want his friend to claim more than that he was the equal of the learned Chief Justice of the United States. Placing their opinions upon the same footing, they would only neutralize each other, and then the deliberate opinions of Marshall and Story and Martin and other justices of the Supreme Court who concurred in the opinion of their chief in the case of *Ex parte Bollman*, 4 Cranch (U. S.) 75, 2 L. Ed. 554, supported, as they are, by unanswerable argument, are decisive of the question, and constrain me to decide that the President, without the authority of Congress, has no constitutional power to suspend the privilege of the writ of habeas corpus in the United States." And Judge Hall ordered the discharge of the prisoner.

In the case of *In re Kemp*, 16 Wis. 382, Chief Justice Dixon said: "I think the President has no power, in the sense of the ninth section of the first article of the Constitution of the United States, to suspend the privilege of the writ of habeas corpus. It is, in my judgment, a legislative, and not an executive, act; and the power is vested in Congress. Upon this question it seems to me that the reasoning of Chief Justice Taney in *Ex parte Merryman* is unanswerable." And Justice Cole, in the same case, said: "To suspend, annul, or take away a right given by law is, under our system of government, essentially a legislative function. To deprive a citizen of the privilege of the writ of habeas corpus is to take from him one of the highest and most sacred rights secured to him by the Constitution and laws of the land. It is a change of the law which, from the nature of things, belongs to the power which can make the law." Justice Paine, in answering the question,

"Where is the power to suspend the writ lodged?" said: "From its very nature it would not naturally be intrusted to a single man, and that man at the head of the military. It is a power dangerous anywhere. It delivers over the nation, for the time being, to the control of the executive. It makes him substantially what the Roman dictator was. No single officer should be allowed to assume such powers upon his own judgment only. The nation that is to be subjected to them should have some voice in determining when the necessity arises for their existence. And as in Rome there was no officer who could assume the power of a dictator upon his own judgment, but such officer had to be appointed by a vote of the Senate, so here the power to suspend the writ of habeas corpus would naturally have been intrusted to the Legislature, and not to the executive alone. There the Constitution has placed it. So the Supreme Court of the United States has declared. So it has been held by every judicial decision, and every elementary writer on constitutional law."

In *Griffin v. Wilcox*, 21 Ind. 370, and *Warren v. Paul*, 22 Ind. 276, the Supreme Court of Indiana said that the section of the Constitution authorizing the suspension of the writ of habeas corpus, in case of invasion or rebellion, was a delegation of power to the Legislature, and not to the executive authority.

In the Circuit Court of the United States in the District of California, and in the case of *McCall v. McDowell*, Judge Deady, delivering the opinion, said, with reference to the power of the President to suspend the writ of habeas corpus: "I do not propose to argue the question. There are some things too plain for argument, and one of these is that by the Constitution of the United States the President has not the power to suspend the privilege of the writ, and that Congress has. The power of the President is executive power—a power to execute the laws, but not to suspend them. The latter is a legislative function, and, so far as it exists, belongs naturally and by force of the Constitution exclusively to Congress. 1 Abb. U. S. 212, Fed. Cas. No. 8,673. A motion for new trial was argued before Justice Field, of the United States Supreme Court, and Judge Hoffman, and was denied.

In *Ex parte Moore*, 64 N. C. 802, the Chief Justice says: "I declare my opinion to be that the privilege of the writ of habeas corpus has not been suspended by the action of his excellency; that the Governor has the power, under the Constitution and laws, to declare a county to be in a state of insurrection, to take military possession, to order the arrest of all suspected persons, and to do all things necessary to suppress the insurrection, but he has no power to disobey the writ of habeas corpus, or to order the trial of any citizen otherwise than by jury. \* \* \* It may be

that the arrest and also the detention of the prisoner is necessary, as a means to suppress the insurrection. But I cannot yield my assent to the conclusion. The means must be proper, as well as necessary, and the detention of the prisoner as a military prisoner is not a proper means. For it violates the Declaration of Rights. 'The privilege of the writ of habeas corpus shall not be suspended.' Const. art. 1, § 21. This is an express provision, and there is no rule of construction or principle of constitutional law by which an express provision can be abrogated and made of no force by an implication from any other provision of the instrument."

Upon the subject of martial law the authorities do not appear to be divided. In nearly every case I have cited the question of the right of the President to declare a community to be under martial law was under consideration. In the case of *Johnson v. Duncan's Syndics*, decided in the year 1815, the Supreme Court of Louisiana decided that the military commander had no authority to declare and enforce martial law, and that his act in so doing was illegal and void. In a note to the case is the following: "The doctrine established in the first part of the opinion of the court in the above case is corroborated by the decision of the District Court of the United States for the Louisiana District, in the case of *United States v. Jackson*, in which the defendant, having acted in opposition to it, was fined \$1,000. In *Lamb's case*, Judge Bay, of South Carolina, recognized the definition of martial law given by this court, expressing himself thus: 'If by martial law is to be understood that dreadful system, the law of arms, which in former times was exercised by the King of England and his lieutenants, when his word was the law, and his will the power by which it was exercised, I have no hesitation in saying that such a monster could not exist in this land of liberty and freedom. The political atmosphere of America would destroy it in embryo. It was against such a tyrannical monster that we triumphed in our revolutionary conflict. Our fathers sealed the conquest by their blood, and their posterity will never permit it to tarnish our soil by its unhallowed feet, or harrow up the feelings of our gallant sons by its ghastly appearance. All our civil institutions forbid it, and the manly hearts of our countrymen are steeled against it.'"

This case was reported in the year 1816. But the case, above all others, which settles, until reversed, the question of the power of the military, is that of *Ex parte Milligan*, 4 Wall. (U. S.) 2, 18 L. Ed. 281. The case involved the right of a military commission to try a citizen of the state of Indiana under the act of Congress referred to herein. The opinion was written by David Davis, the associate, the friend, the appointee, of Lincoln. It is so logical, so patriotic, and so

convincing that I cannot conceive of a condition or change of thought that will cause its reversal; and it should, in my opinion, be a guide for all courts—a sure and safe guide, which, if followed, will protect the citizen and enforce the law. Judge Davis said, speaking of the Bill of Rights: "These securities for personal liberty thus embodied were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition, and, but for the belief that it would be so amended as to embrace them, it would never have been ratified. Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than 70 years, sought to be avoided. Those great and good men foresaw that troublesome times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measure to accomplish ends deemed just and proper, and that the principles of constitutional liberty would be in peril unless established by irrevocable law. The history of the world had taught them what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority. \* \* \* It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the army and society, and, as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this govern-

ment is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper, unobstructed exercise of their jurisdiction."

In another place Judge Davis says: "It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: That in a time of war the commander of an armed force (if, in his opinion, the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will, and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance: for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power,' the attempt to do which by the King of Great Britain was deemed by our fathers such an offense that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish. \* \* \* Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right be conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to their trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war, how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the

President, or Congress, or the judiciary, disturb, except the one concerning the writ of habeas corpus. \* \* \* The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuse of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could well be said that a country, preserved at the sacrifice of the cardinal principles of liberty, is not worth the cost of preservation. Happily it is not so."

It seems to me that everything has been said that can be said, and that the expounders of the Constitution have laid out a path that leads to peace and security; and I have quoted from these authorities for the purpose of demonstrating that the civil liberty of these great men and the civil liberty of Colorado to-day are of different species. But it is said that the Governor has greater powers under our Constitution than the President has under the national Constitution; that because he is given power to suppress insurrection and repel invasion, power sufficient to accomplish the purpose is necessarily implied; that the executive is the sole judge of the means to be employed; and that the Bill of Rights must give way when the Governor is engaged in exercising this power. It was because of the fear that the guarantees of personal liberty would be denied by implication that the bill of rights was made a part of our Constitution, and it was the intention of the people when they adopted the Constitution to declare their rights in such plain English that they could not be construed away nor frittered away by implication or evasion. The authority is overwhelming that the position of the Governor cannot be sustained; that the power of suspending the privilege of the writ of habeas corpus is legislative and not executive; that martial law can only prevail in places where the civil law is overthrown by force, and that it exists only so long as it is necessary to reinstate the courts; that martial law cannot prevail where the courts are open and exercising their functions; that the judicial department will take notice whether the courts are open or have been overthrown by superior force. This court has not undertaken to declare that the position taken by the Governor and his special counsel is correct, but has said that the right of the Governor to declare and enforce martial law and to suspend the privilege of the writ of habeas corpus is not involved. The court would have sustained the

Governor, under the authorities, if it were possible to do so, but, finding it impossible to sustain him under the authorities, it has sustained him in spite of them. All courts are in duty bound to sustain the co-ordinate departments of the government, when they can be sustained, and I should sustain the executive department if any doubt lingered in my mind as to the right of the head of that department to exercise the great power that he asserts. But I believe that the Constitution has been "unnecessarily assailed and rudely violated" by the head of the executive department, and I further believe that this court has removed the landmarks which our fathers have set; and my duty requires me to withhold my approval.

This leads us to a discussion of the opinion in the case. The holding of the court that the respondent is not required to deny the allegations of the petition, but to answer to the writ, which requires him to show by what authority he detains the prisoner, I do not regard as very important in view of the disposition made of the case. The Chief Justice of the United States, in the *Merriman Case*, appears to have considered the averments of the petition in deciding the case; and I shall, for the purposes of this, consider one or two facts stated in the petition which I think have a bearing upon the case. The petitioner was not in the county of San Miguel at the time it was declared to be in a state of insurrection and rebellion. He did not go to the county of San Miguel voluntarily, but was taken there by the sheriff upon a warrant charging him with a misdemeanor. The petition alleges that the charge was unfounded, and that it was made and the warrant issued for the purpose of taking him to the county of San Miguel to enable the military authorities to detain him. He was allowed bail, but was, on the following day, arrested by the military officers. If it be true that such acts were committed in this case and we are precluded from making an investigation of the facts, then any person in any part of the state can be carried into the county where it is alleged an insurrection exists and kept there without bail until the commanding officer chooses to release him. This was done in Illinois by the federal officers, and the legality of the arrest was passed upon by the Supreme Court of that state in the case of *Johnson v. Jones*, 44 Ill. 143, 92 Am. Dec. 159. The court said: "It is a fearful power that is claimed for the government by the counsel for the appellee, and one which no free government ought to possess. Even in England, in the latter part of the last century, when secret political societies were formed hostile to the government and in league with the French revolutionists, or supposed to be so, although the country was at war with France, yet, while the high Tory administration of Mr. Pitt arrested, prosecuted, and punished with a pitiless

vigor, it acted only through the ordinary agencies of the civil courts, and made no use of the military arm under the pretense that the offending persons were belligerents or public enemies. If this plaintiff was guilty of the charges made in the plea he merited arrest and a severe punishment, but he should have been punished in conformity to law. It is to be remembered that the question before us is one of power simply on the part of the executive, and not of deserving on the part of the plaintiff. If the President could rightfully arrest him by military force and consign him without process or trial to a fortress in the harbor of New York, he could do the same thing to any other person in the state of Illinois, however innocent of crime. \* \* \* As no charge is made, no judicial investigation had, it is left entirely to the caprice of the government to determine what persons shall be seized. The power to thus arrest being once conceded, every man in the state \* \* \* would hold his liberty at the mercy of the military officer in command." In a separate opinion by Justice Breese, it is said: "I cordially concur in the sentiment that the Constitution of the United States was designed by its framers, and has been hitherto so understood by the people, to be the same protecting instrument in war as in peace; that a state of war does not enlarge the powers of any one department of the government established by it, nor has any one of these departments any right to urge "necessity," or "extraordinary emergencies," as a plea for the usurpation of powers not granted. The first is the tyrant's plea, and the other places the dearest rights of the citizen at the mercy of a dominant party, who have only to declare the "emergency," which they can readily create, pretexts for which bad men are keen to find and eager to act upon." And the marshal who made the arrest was held liable for damages.

So it seems to me that when one alleges that he is not an insurgent, that he was not in the county where the insurrection is alleged to exist, but that he was carried there by force for the purpose of being placed in the custody of military authorities—conceding everything in the opinion to be a correct statement of the law—there is power in the civil authority to examine the question and determine whether the petitioner is, in fact, guilty. It is held by the court that as the Governor, under the Constitution, is empowered to suppress insurrection or repel invasion, that the recitals in his proclamation that an insurrection exists cannot be controverted, because it becomes his duty to determine as a fact when a condition exists that demands the exercise of his power, and that the judicial department cannot substitute its judgment for that of the executive department in matters calling for the exercise of discretion. As I have before stated, I do not regard the proclamation as of great

importance. It does not seem to me to be necessary to proclaim an insurrection before undertaking to suppress it, and I am satisfied that a proclamation is not a condition precedent to the exercise of the power. An insurrection may or may not exist notwithstanding the proclamation of the Governor: as an insurrection may continue long after the Governor declares it to have been suppressed, so it may cease long before his declaration of peace. The proclamation may determine the status of the militia, and may be necessary for the purpose of ordering them to the scene of insurrection; and the Governor has, in my opinion, the undoubted power to call out the militia at such time to enforce such laws as in his judgment is proper for the protection of persons and property, and it is entirely probable that the act of the Governor in calling to his aid the military arm of the government cannot be questioned, but when it comes to superseding the civil power and exercising martial law, to disobeying the writ of habeas corpus or other process of the court, to detaining citizens upon suspicion, then the question of whether an insurrection exists is not to be determined by the Governor's proclamation. If such is not the law, then, as Justice Breese says, it "places the dearest rights of the citizen at the mercy of the dominant party, who have only to declare the 'emergency,' which they can readily create, pretexts for which bad men are keen to find and eager to act upon." I therefore do not assent to the doctrine announced.

The doctrine announced in the other parts of the opinion I regard as establishing a more dangerous precedent, of more far-reaching consequences, if possible, than the preceding one. And in order to properly discuss that branch of the case, we should keep constantly before us the words of the Supreme Court of the United States. "The Constitution \* \* \* is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false." *Ex parte Milligan*, 4 Wall. (U. S.) 2, 18 L. Ed. 281. The court then, as prefatory to a discussion of questions involving various provisions of the Constitution, says that: "Laws must be given a reasonable construction, which, so far as possible, will enable the end thereby sought to be attained. So with the Constitution." The sentence is rather obscure. If the court means that it will not be presumed that the Legislature intends what is unreasonable, then I agree with it; but if it means that the dearest right preserved by our Constitution—freedom from

arbitrary arrest and imprisonment—can be argued away, as impliedly repealed by the authority given to the Governor to execute the laws and suppress insurrection, I do not agree with it. The court has not construed the Constitution. It has ignored it; and the result is that it has made greater inroads on the Constitution than it intended, and that not one of the guaranties of personal liberty can now be enforced. The Supreme Court of the United States, speaking of the Bill of Rights, says: "So jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition, and, but for the belief that it would be so amended as to embrace them, it would never have been ratified. Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than 70 years, sought to be avoided."

The court then proceeds to give to the Constitution what it terms a reasonable construction. After declaring that the petitioner can be restrained of his liberty, without warrant and on suspicion only, until such time as the military authority declares the insurrection at an end, it says: "Nor do these views conflict with section 22, art. 2, of the Bill of Rights, which provides that the military shall always be in strict subordination of the civil power. The Governor, in employing the militia to suppress an insurrection, is merely acting in his capacity as the chief civil magistrate of the state, and although exercising his authority conferred by the law through the aid of the military under his command, he is but acting in a civil capacity. In other words, he is but exercising the civil power vested in him by law through a particular means which the state has provided for the protection of its citizens." This was the argument advanced by Attorney General Bates more than 40 years ago, but it has not found its way into the reported decisions of the courts. When the court says that because the Governor is the head of the executive department of the state, that when he takes command of the military forces he is still at the head of the civil power, and that the section of the Bill of Rights that declares "that the military shall always be in strict subordination to the civil power" has no other meaning than that the military shall always be under the command of the Governor, it is simply annulling that section of the Bill of Rights. The section referred to must have some meaning. It can have no meaning if it is construed as the court construes it. I think it has a meaning. The language used is not obscure or ambiguous. It undoubtedly means that the civil power shall control at all times, in war and in

peace. The Supreme Court of the United States has said that the attempt to make the military independent of and superior to the civil power by the King of Great Britain was deemed by our fathers such an offense that they assigned it to the world as one of the causes which impelled them to declare their independence. *Ex parte Milligan*, 4 Wall. (U. S.) 2, 18 L. Ed. 281.

Again, the court says: "To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence and until order is restored would lead to the most absurd results." This sentence inflicts a fatal wound upon civil liberty, suspends indefinitely the privilege of the writ of habeas corpus, annuls that section of the Constitution which declares that no person shall be deprived of liberty without due process of law, and characterizes the declaration of the Supreme Court of the United States as an absurdity. I say this because the opinion declares that the Governor is the sole judge of the conditions which impel him to call forth the militia, and to withdraw it, and of the necessity to imprison and detain; and this without regard to the guilt or innocence of the person imprisoned. This was the doctrine the Supreme Court had in mind when it declared: "No doctrine involving more pernicious consequences was ever invented by the wit of man." A Union Congress declined to invest the beloved Lincoln with such enormous power, and, although it authorized a suspension of the privilege of habeas corpus, it declared the superiority of the civil power by requiring the release of prisoners unless indictment was returned within a limited time.

Again, the court says: "If, as contended by counsel for petitioner, the military, as soon as a rioter or insurrectionist is arrested, must turn him over to the civil authorities of the county, the arrest might, and in many instances would, amount to a mere farce. He could be released on bail, and left free to again join the rioters or engage in aiding and abetting their action, and if again arrested, the same process would have to be repeated, and thus the action of the military would be rendered a nullity." Expressed otherwise, the statement is that we should deny the prisoner one constitutional right because, unless we do, he may take advantage of another. Is it the law of this land that one who has committed a bailable offense shall not be admitted to bail, because he may repeat the offense? I think not. I know it is not.

Again, the court says: "The arrest and detention of an insurrectionist, either actually engaged in acts of violence or in aiding and abetting others to commit such acts, violates none of his constitutional rights. He is not tried by any military court, or denied the right of trial by jury; neither is he punished for violation of law, nor held with-

out due process of law. His arrest and detention in such circumstances are merely to prevent him from taking part or aiding a continuation of the conditions which the Governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress." I know of no authority that vests in the Governor the power to arrest one who he may think will commit an offense. No such power is granted by the Constitution nor bestowed by statute. The courts of the state are open and in the unobstructed performance of their functions. Most persons would regard restraint of liberty for the period of nearly 90 days as a punishment; and when the court says that the petitioner, by his detention, loses none of his constitutional rights, it ignores, it seems to me, that section of the Constitution which provides that no person shall be deprived of his liberty without due process of law. For, suppose it should transpire that the petitioner is not guilty of any offense, would not his imprisonment without charge and for the purpose of preventing him from committing an offense be an injustice? The court has presumed that this man is an insurgent; the presumption of law is that he is innocent. He asserts that he is not guilty, and no one has charged that he is guilty. The only statement made which in any way implicates him is that of the Adjutant General, who says that he became convinced by inquiry that he was the leader of a band of lawless men. Moyer may be guilty of the most heinous offenses. It may be that he deserves to linger in prison the remainder of his natural life; but he is entitled to his liberty unless someone, in proper form and before a proper tribunal, charges him with violation of the law.

But the court says he is held by due process of law. Whatever war power the Governor may have, this power is not due process of law. Justice PaINE, of the Supreme Court of Wisconsin, in the case of *In re Kemp*, 16 Wis. 396, says: "The Executive, as such, can only execute the politics of the nation; that is, he executes the laws. Undoubtedly the Constitution and laws do in many instances trust matters to the discretion of the Executive. In such instances no other department can control the exercise of that discretion, but all are bound by it. But the difficulty in applying that doctrine in the manner attempted by the Attorney General is that the Constitution and the laws have not entrusted to the Executive, unless in cases where the writ of habeas corpus is legally suspended, any political discretion to imprison the people. On the contrary, that matter was deemed of such vital importance that the people regulated it in the fundamental law of their politics, and provided that "no person shall be deprived of his life, liberty or property without due process of law." The Constitution knows no 'political'

process, no political cause of imprisonment. There must be 'a process of law,' a legal cause of restraint. And the power to determine what is a legal imprisonment, and to discharge from any that is illegal, is, except when the writ is suspended, a power conferred on the judicial department."

Again, the court says: "If, then, the military may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to." The power to take the life of an insurgent does not include the power to take the life of a person not an insurgent. And if that be true, then by the process of reasoning that the court adopts, if the military authority may not take the life of one not an insurgent, they may not imprison a person who is not an insurgent. The question is: May the military authorities, when a county is declared to be in a state of rebellion, arrest any person, whether guilty or innocent, and detain him until the Executive declares that order has been restored? This question is not answered by the assertion that, as the military "may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to." The question can be answered in the affirmative in no other way than by declaring that the Executive has the power to suspend the privilege of habeas corpus, or by declaring that martial law prevails whenever the Executive so proclaims. The decision has applied the articles of war to conditions that do not justify their application. Whatever may be said of the deplorable condition in San Miguel county that resulted in foul assassinations, in murder and in plunder, so revolting to the law-abiding citizen, these conditions were past at the time the petitioner was taken there. The civil authorities of the county, with the aid of the military, had full possession and control; and if the petitioner was in any way implicated in the commission of these foul crimes it should have been so charged.

The court then says: "No case has been cited where the precise question under consideration was directly involved and determined, but in cases where the courts have had occasion to speak of the authority of the military to suppress insurrection and the means which may be employed to that end, it has been stated that parties engaged in riotous conduct render themselves liable to arrest by those engaged in quelling it." Chancellor Kent, at page 8 of volume 2 of his Commentaries, says: "It requires more than ordinary hardness and audacity of charac-

ter to trample down principles which our ancestors cultivated with reverence, which were imbibed in our early education, which recommend themselves to the judgment of the world by their truth and simplicity, and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a constitutional sanction."

What connection there is between the right of a military officer to arrest a person on suspicion only, and hold him without preferring any charge against him, because he fears he may commit an offense, and the right of an officer to arrest a rioter caught red-handed, I cannot comprehend. Although it is true, as stated by the court, that the precise point upon which the decision rests has never been determined by other courts, it is not because that point was not presented and urged by counsel, nor because the opportunity for so deciding was not afforded the judges; and it must be that the reason the point has not been sustained by some other court is that no other court could concede to the Executive all the power he would have if the privilege of the writ of habeas corpus were suspended, without determining that he had the power to suspend the writ. During the great Rebellion, when millions of soldiers were in the field, and when hundreds of persons in the loyal states were suspected of actively aiding those engaged in the rebellion, and arrested, the courts might have held that the necessity for putting down the rebellion carried with it the power to arrest and detain suspected persons, notwithstanding the guarantees of the Constitution, but not one of them did so. There is no dearth of authority in this country, or in England, directly contrary to the ruling of this court. I can find no middle ground to stand upon; and I most certainly cannot assent to the novel doctrine announced by this court. If one may be restrained of his liberty without charge being preferred against him, every other guarantee of the Constitution may be denied him. For, as said by the Supreme Court of Illinois: "It is undeniable, if the government had the right to arrest him without a warrant, and imprison him without a trial or charge of any criminal offense, it had an equal right to send his case before a court martial or military commission. The right to do the one necessarily implies the right to do the other, because both rest on the same theory of power to be exercised by the government in time of war. If it was lawful to arrest and imprison the plaintiff without any form of judicial investigation, it would certainly have been not less lawful to do the same thing upon the finding and sentence of a military tribunal. It can hardly be said that the laws of war could be applied to the plaintiff for the purposes of punishment, but not for the purposes of trial. *Johnson v. Jones*, 44 Ill. 150, 92 Am. Dec. 159. The constitutional

privileges are not, in the nature of things, separable. It was intended by our fathers that all should be inviolable except one, and that to be suspended by the Legislature only in case of great emergency. Martial law exists or it does not exist. When it exists, there is no civil law. Martial law and civil law cannot exist together. If the civil law can enforce one guarantee, it can enforce all. If the civil law is overthrown, it is powerless to enforce any right. When martial law does not prevail, unless the privilege of the writ of habeas corpus is suspended, every right guaranteed by the Constitution is enforceable, and the Constitution is violated, rudely violated, when one is deprived of liberty without due process of law.

Habeas corpus is the proper remedy to release from arbitrary arrest, and, unless its privileges have been suspended, one is not subject to arrest on suspicion merely, and detention beyond the time fixed by statute for return to the writ. As the privilege of the writ has not been suspended, as the courts are open, as martial law does not prevail, and as no charge has been preferred against the petitioner, he should be discharged. The greatness of this country consists in being able to protect, by the shield of its Constitution, the humble and the exalted, the pure and the wicked. We gave the wretches Guiteau, Prendergast, and Czolgosz trials by due form of law, and by so doing we strengthened the nation at home and abroad. Had we departed from the principles declared by our fathers, we should have lessened the liberty of every citizen and imperiled the title to all property. When we deny to one, however wicked, a right plainly guaranteed by the Constitution, we take that same right from every one. When we say to Moyer, "You must stay in prison because, if we discharge you, you may commit a crime," we say that to every other citizen. When we say to one Governor, "You have unlimited and arbitrary power," we clothe future Governors with that same power. We cannot change the Constitution to meet conditions. We cannot deny liberty to-day, and grant it to-morrow. We cannot grant it to those theretofore above suspicion, and deny it to those suspected of crime; for the Constitution is for all men—"for the favorite at court; for the countryman at plow"—at all times, and under all circumstances. We cannot sow the dragon's teeth, and harvest peace and repose. We cannot sow the wind, and gather the restful calm.

Our fathers came here as exiles from a tyrant king. Their birthright of liberty was denied them by a horde of petty tyrants that infested the land, sent by the king to loot, to plunder, and to oppress. Arbitrary arrests were made, and judges, aspiring to the smile of the prince, refused by "pitiful evasion" the writ of habeas corpus. Our people were banished; they were denied trial by jury;

they were deported for trial for pretended offenses; and they finally resolved to suffer wrong no more, and pledged their lives, their property, and their sacred honor to secure the blessings of liberty for themselves and for us, their children. But, if the law is as this court has declared, then our vaunted priceless heritage is a sham, and our fathers stood "between their loved homes and the war's desolation" in vain.

GABBERT, C. J. Although the petition for rehearing was voluntarily withdrawn by petitioner, I deem it appropriate, in view of the questions discussed in the dissenting opinion, to make the following observations:

That opinion, in my judgment, falls far short of a discussion of the questions upon which the decision of the court is based. In the first place, the question of deportation is not involved. In the second place, it is not held that the Governor has the power to suspend the privileges of the writ of habeas corpus or declare martial law. No opinion is expressed on either of these propositions, and hence all that is said in the dissenting opinion on these subjects, and the voluminous excerpts, are foreign to the questions involved. It is determined that petitioner was not entitled to his discharge, not because the privilege of the writ of habeas corpus was suspended, or the Governor had declared martial law, but for the reason that the Governor, through his subordinate officers, was exercising a power conferred upon him by the fundamental law of the state. No court has been more emphatic than this in declaring that the Constitution of the state is the paramount law; that each of the three co-ordinate branches of government derives its authority from that source; that the power of each is thereby limited and defined; that neither is superior to the other; that each acting within its proper sphere is supreme; and that neither can call the other to account for actions within its province, nor can one interfere with the other in the performance of functions delegated by the Constitution. The judiciary has no power to call out the militia or to direct its movements. This power and the conditions under which it may be exercised is by the fundamental law of the state vested in the Governor, and in him alone. If the judicial department should undertake to review the facts upon which the Governor acted, it would be a direct interference with his authority and an assumption of power on the part of the judiciary which does not exist. It would be just as logical to assume, in case the Legislature had suspended the privilege of the writ of habeas corpus (if clothed with that power by virtue of section 21 of article 2 of the Constitution), that the judiciary could inquire whether the conditions existed which justified the legislative department in taking such action, as to hold that the facts upon which the Governor acted

in declaring a state of insurrection, and in arresting the petitioner, were subject to review by the judicial department of the state. The Constitution has clothed the Governor with the power to take the steps he did, and he cannot be called to account by the judicial department for this action, nor can the latter inquire into or determine whether or not the conditions existed upon which he based his action. That is a matter which, in the circumstances of the case, the chief executive must determine for himself, and his subordinates, acting in obedience to his orders, must determine for themselves, and, when so determined, is conclusive.

A recent decision by the Supreme Court of the Philippine Islands is direct authority supporting this conclusion. Attention was directed to the case by a brief review in the December, 1905, number of "Case and Comment," from the publishers of which a copy of the opinion was obtained. The case is No. 2808, and entitled: "Feliz Barcelon v. David J. Baker, Jr., Colonel, etc., et al." Section 5 of the act of Congress known as the "Philippine Bill" provides: "That the privileges of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion, insurrection or invasion, the public safety may require it, in either of which events the same may be suspended by the President or by the Governor General, with the approval of the Philippine Commission, whenever, during such period, the necessity for such suspension shall exist." By virtue of this provision the proper authorities had suspended the privileges of the writ of habeas corpus in the province of Batangas, because of the existence of conditions which the section quoted was designed to cover. The petitioner was taken into custody and restrained of his liberty by the respondents, representing the legally constituted authorities of the province, and sought to be released by proceedings in habeas corpus, claiming that there did not exist in the province named, nor in any part thereof, rebellion, insurrection, or invasion in any form or degree, and that all the courts of law organized and provided by law for the province had been at all of the times in the petition mentioned in the full and complete exercise of their functions without interruption of any nature or kind. The respondents claimed that the court was without jurisdiction or authority to grant the writ of habeas corpus in the province of Batangas, for the reason that on January 31, 1905, the Governor General, with the approval of the Philippine Commission, had suspended the privileges of the writ in the province, basing such suspension upon the fact that organized bands in the province were in open insurrection against the constituted authorities, and were still in open resistance thereto. Counsel for petitioner contended that the judicial department of the government could consider an application for the writ of habeas corpus,

even though the privileges of the same have been suspended in the manner provided by law, for the purposes of taking proof upon the question whether there actually existed a state of insurrection, rebellion, or invasion. The question was thus squarely presented, whether the judicial department could investigate the facts upon which authorized officials acted in suspending the privileges of the writ in the province mentioned. On this proposition Mr. Justice Johnson, in the course of an able and instructive opinion, speaking for the court, said: "Inasmuch as the President or Governor General, with the approval of the Philippine Commission, can suspend the privileges of the writ of habeas corpus only under the conditions mentioned in the said statute, it becomes their duty to make an investigation of the existing conditions in the archipelago or any part thereof, to ascertain whether there actually exists a state of rebellion, insurrection, or invasion, and that the public safety requires the suspension of the privileges of the writ of habeas corpus. When this investigation is concluded, the President or the Governor General, with the approval of the Philippine Commission, declares that there exists these conditions, and that the public safety requires the suspension of the privileges of the writ of habeas corpus, can the judicial department of the government investigate the same facts and declare that no such conditions exist? \* \* \* If the investigations and findings of the President or the Governor General, with the Philippine Commission, is not conclusive and final as against the judicial department of the government, then every officer whose duty it is to maintain order and protect the lives and property of the people may refuse to act, and apply to the judicial department of the government for another investigation and conclusion concerning the same conditions to the end that they may be protected against civil actions resulting from illegal acts. \* \* \* Owing to conditions at times, a state of insurrection, rebellion, or invasion may arise suddenly and may jeopardize the very existence of the state. Suppose, for example, that one of the thickly populated governments situated near this archipelago, anxious to extend its power and territory, should suddenly decide to invade these islands, and should, without warning, appear in one of the remote harbors with a powerful fleet, and at once begin to land troops. The Governor or military commander of the particular district or province notifies the Governor general by telegraph of this landing of troops, and that the people of the district are in collusion with such invasion. Might not the Governor General and the Commission accept this telegram as sufficient evidence and proof of the facts communicated, and at once take steps, even to the extent of suspending the privileges of the writ of habeas corpus, as might appear to them to

be necessary to repel such invasion? It seems that all men interested in the maintenance and stability of the government would answer this question in the affirmative. But suppose some one who has been arrested in the district, upon the ground that his detention would assist in restoring order and repelling the invasion, applies for the writ of habeas corpus, alleging that no invasion actually exists; may the judicial department of the government call the officers actually engaged in the field before it and away from their posts of duty for the purpose of explaining and furnishing proof to it concerning the existence or nonexistence of the facts proclaimed to exist by the legislative and executive branches of the state? If so, then the courts may effectually tie the hands of the executive whose especial duty it is to enforce the laws and maintain order until the invaders have actually accomplished their purposes. The interpretation contended for here by the applicant, so pregnant with detrimental results, could not have been intended by the Congress of the United States when it enacted the law. It is the duty of the legislative branch of the government to make such laws and regulations as will effectually conserve peace and good order and protect the lives and property of the citizens of the state. It is the duty of the governor to take such steps as he deems wise and necessary for the purpose of enforcing such laws. Every delay and hindrance and obstacle which prevents a strict enforcement of laws under the conditions mentioned necessarily tends to jeopardize public interests and the safety of the whole people. If the judicial department of the government, or any officer in the government, has a right to contest the orders of the President or of the Governor General, under the conditions above supposed before complying with such orders, then the hands of the President or the Governor General may be tied until the very object of the rebels or insurgents or invaders has been accomplished." It is also urged on behalf of petitioner that the authorities vested with the power to suspend the privileges of the writ of habeas corpus "might reach a wrong conclusion from their investigations of the actual conditions, or might, through a desire to oppress and harass the people, declare that a state of rebellion, insurrection, or invasion existed, and that public safety required the suspension of the privileges of the writ of habeas corpus, when, actually and in fact, no such conditions did exist. We cannot assume that the legislative and executive branches will act or take any action based upon such motives." And, further, considering this proposition, the court said: "Can the judicial department of the government, with its very limited machinery for the purpose of investigating general conditions, be any more sure of ascertaining the true conditions throughout the archipelago, or in

any particular district, than the other branches of the government? We think not." In conclusion, the learned judge, in speaking of the functions of the three departments of government, said: "They are all joined together in their respective spheres, harmoniously working to maintain good government, peace and order, to the end that the rights of each citizen be equally protected. No one department can claim that it has a monopoly of these benign purposes of the government. Each department has an exclusive field within which it can perform its part within certain discretionary limits. No other department can claim a right to enter these discretionary limits and assume to act there. No presumption of an abuse of these discretionary powers by one department will be considered or entertained by another. Such conduct on the part of one department, instead of tending to conserve the government and the rights of the people, would directly tend to destroy the confidence of the people in the government, and to undermine the very foundations of the government itself." The gist of the decision is that the act of Congress vested the authorities named with the power to determine whether or not conditions existed which authorized the suspension of the privileges of the writ, and that their determination of the facts upon which they acted was conclusive and could not be inquired into by any other branch of the government. Many authorities are cited and quoted from which fully sustain this conclusion, and the opinion is particularly valuable because of the great number of authorities collated upon the subject.

The fundamental law of this state has vested the Governor with the exclusive power to call out the militia to execute the laws, suppress insurrection, or repel invasion. No other department of the government can exercise this power. The Governor alone must determine whether or not the conditions exist which authorize him to exercise the authority through the means indicated by the Constitution to suppress insurrection. The determination upon his part that such conditions do exist must necessarily be conclusive upon all persons and all other departments of government; otherwise, incongruous results and anarchy would follow. The militia might refuse to obey the orders of the chief executive; his subordinate officers might refuse to act because, in their judgment, the exigency did not exist upon which he based his actions; the courts could tie his hands and render him powerless; while the people in the disaffected district would be left at the mercy of the insurrectionists pending the settlement of a clash between different departments of government on the question of the existence of conditions in a locality which required the presence of the military to correct. When the chief executive decides that an insurrection exists, the courts are concluded

thereby, because that is a legal fact ascertainable only from his decision on that question. The same power which determines the existence of an insurrection must, also, decide when the insurrection has been suppressed. It has long been settled that the Governor cannot be enjoined from the performance of an executive act, and it is equally well settled that the judicial department cannot coerce him to perform such act. By the Constitution the calling forth of the militia is an executive act, and certainly, in face of these propositions, no one would claim that the judiciary could either enjoin or coerce that act; nor in case of failure to perform his duty in this respect, could any other department of the government assume to do that which the fundamental law of the state has conferred exclusively upon the Governor.

While the question is not involved or touched upon in the Philippine Case, it logically follows, from the conclusion there announced, that with the privilege of the writ of habeas corpus suspended, the legality of the arrest and imprisonment of one taken into custody by the lawfully constituted authorities cannot be inquired into. It must also follow that, when the Governor has exercised the power vested in him to call out the military to suppress an insurrection, the arrest and detention by the military of one taken into custody as an insurrectionist by the particular force which the Governor is authorized to employ to suppress an insurrection cannot be inquired into by the courts.

#### TURMES v. KIESNER.

(Supreme Court of Idaho. March 3, 1906.)

#### APPEAL — REVIEW — SUFFICIENCY OF EVIDENCE.

Evidence in this case examined and considered, and *held* sufficient to support the findings and judgment.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3983-3989.]

(Syllabus by the Court.)

Appeal from District Court, Canyon County; George H. Stewart, Judge.

Action by John Turmes against William Kiesner. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Estabrook and Hawley, Puckett & Hawley, for appellant. E. W. Wolfe and Richard Cunningham, for respondent.

**AILSHIE, J.** This action was commenced by the plaintiff to secure an accounting and settlement of a partnership business carried on between plaintiff and defendant for a period of 15 days. The court heard the proofs, and found therefrom the amount of business transacted by the firm, the amount of property and cash contributed by each member to the partnership business, and the amount received by each from the firm. The

conclusion of the court's finding is that there is due from defendant to plaintiff the sum of \$360.44 and the court thereupon entered judgment in favor of plaintiff and against defendant for that sum, together with costs. The appeal is from the judgment and order denying a new trial.

Appellant complains of the insufficiency of the evidence to support the findings and judgment. Our examination of the evidence convinces us that there is such a substantial conflict in the material facts as to bring this case within the uniform rule of this court that where there is a substantial conflict in the evidence the judgment will not be disturbed. A statement of the evidence in this case can serve no useful purpose, and we will not therefore recite any of it here.

We find no error in the rulings of the court in the admission of evidence. Judgment affirmed, and costs awarded to respondent.

STOCKSLAGER, C. J., and SULLIVAN, J., concur

#### LEMAN v. CUNNINGHAM.

(Supreme Court of Idaho. March 2, 1906.)

#### JUDGMENT — REVIVOR — STATUTE OF LIMITATIONS.

Where W. & Co. obtained a judgment against C. and others in Nebraska in April, 1895, before any part of said judgment was paid, C. moved to Idaho in 1897, and has continued to so reside until the commencement of this action. C. was in Nebraska in 1905, when service of an order or motion for revivor of said judgment was had upon him. Thereafter and on the 10th day of October, 1905, C. appeared in court by attorney when an order of revivor was made in said court. *Held*, that such order of revivor gave new life to the judgment, and the statute of limitations of this state does not begin to run until after such revivor, and that an action may be commenced in the courts of Idaho any time within six years after such order of revivor.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1767.]

(Syllabus by the Court.)

Appeal from District Court, Ada County; Geo. H. Stewart, Judge.

Action by Henry W. Leman, receiver of James M. Wanzer and William H. Chadwick, against Richard Cunningham to recover on a foreign judgment. Judgment for defendant, and plaintiff appeals. Reversed.

Hawley, Packett and Hawley, for appellant. E. W. Wolfe, for respondent.

**STOCKSLAGER, C. J.** Appellant, as receiver for J. M. Wanzer & Co., commenced his action in the district court of Ada county against respondent as defendant. It is shown by the complaint that a judgment was rendered against respondent and others and in favor of Wanzer & Co. on the 22d day of April, 1895, in the district court of Lancaster county, Neb., for the sum of \$1,782.78, no part of which was paid, and that a judg-

ment of revivor was given in said court on October 10, 1905, personal service of the conditional order of revivor having been made upon defendant Cunningham, he appearing by attorney at the time said judgment of revivor was entered. Defendant answered by general denial and further pleaded the statute of limitations under the provisions of section 4051, Rev. St. The record contains an agreed statement of facts as follows: (1) It is stipulated that plaintiff is the duly appointed qualified and acting receiver of the original owners of the judgment and is authorized to bring said action in this court. (2) That in August, 1889, at Lincoln, Neb., defendant became surety with others on an undertaking on appeal for one John C. Morrissey for the penal sum of \$2,000. (3) That on the 22d day of April, 1895, in the district court of Lancaster county, Neb., a judgment was rendered in favor of Wanzer & Co. and against this defendant and others for the sum of \$1,782.78 and costs. (4) That said judgment remained unpaid and unsatisfied of record, and still so remains, and that said judgment became dormant in said state on April 22, 1900, and that thereafter, on May 26, 1905, a conditional order of revivor was duly and personally served upon defendant Richard Cunningham at Lincoln, Neb., where he was remaining a few days on legal business as an attorney in a suit pending in said court, which said conditional order \* \* \* is attached hereto, marked Exhibit 2, and made a part hereof; and thereafter such proceedings were had in said court that an order of revivor of said dormant judgment was duly and regularly made and entered in said court on October 10, 1905, by which said dormant judgment was duly revived with costs of said revivor proceedings. \* \* \* (5) That defendant Cunningham was formerly a resident of the state of Nebraska, and left the state of Nebraska and abandoned his residence therein on August 20, 1897, and removed to Silver City in the state of Idaho, of which said state he became a resident and citizen, and has not been a resident or citizen of Nebraska since August 20, 1897; and that he has resided continuously at his home in Silver City in the state of Idaho ever since September, 1897. That he never concealed his residence nor departed therefrom except on three or four business trips in which he was not absent from the state of Idaho for more than 30 days in all since August 20, 1897. That he has resided continuously at his said home in Silver City, Idaho, and was there for more than eight years prior to the commencement of this action, and for more than seven and one-half years prior to the service on him of the said conditional order of revivor of said judgment, and prior to the commencement of the said proceedings for the revivor of the said dormant judgment. (6) That no part of said judgment has been paid either before or since the revivor thereof. \* \* \*

It is conceded, as well as apparent from the record, that the only question for us to determine is whether this action is barred by the provisions of section 4051 of our Rev. St. 1887. It says: "An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, must be commenced within six years." The important and controlling question is the effect to be given the order of revivor made by the Nebraska court on October 10, 1905. If it gives the old judgment new life in Nebraska, it has the same effect in this state. Learned counsel for appellant insist that the proceedings for the revivor of a dormant judgment in Nebraska has the same effect in that state as a new action to keep a judgment from becoming dormant in this state, whilst able counsel who represents the respondent urges that there is a wide distinction in the two remedies. He says Idaho provides a remedy for a new judgment, whilst in Nebraska, provision is only made for an order of revivor of the old judgment, and that all proceedings after revivor must date back to the original date, hence the order of revivor does not aid the appellant in this action, as the record shows that the judgment which appellant seeks to enforce against respondent is barred by the statute. In Nebraska the judgment is revived on motion after proper service on the defendant, and after giving him an opportunity to show why such motion should not be granted. In Idaho the remedy is by new action, proper service, and if no sufficient defense is interposed a new judgment is the result. Our attention is not called to any provision of the Nebraska statute providing for a new suit to revive or restore to life a dormant judgment, neither have we any provision in our statute providing for revivor of a dormant judgment. Each state has provided its own way of keeping a judgment alive, but Nebraska has gone further than Idaho in providing a way to restore it to life after it has become dormant. Our statute is a little harsher and more exacting on the judgment creditor.

I have examined a great many authorities cited in this case, but it seems that the construction given the Nebraska statute by the court of last resorts of that state, should have much weight in determining this case. If the order of revivor had the effect of giving new life to the dormant judgment in Nebraska, to such an extent that it might be enforced in that state against the property of respondent if he had any there, then we think it could be enforced against his property in this state, if the action is commenced here within the life of the order of revivor there. Packer v. Thompson, 25 Neb. 689, 41 N. W. 650, discusses a case very similar to the one at bar. The action was brought in the district court of Gage county on a judgment recovered against the plaintiff in error in the state of Iowa. Thompson secured a judg-

ment against Packer in the district court of Clayton county, Iowa, on the 21st day of May, 1866. In October, 1886, service was had on Packer while he was temporarily in the state of Iowa, and thereafter the judgment was revived, all of which is alleged to have been in fraud of his rights. A demurrer was sustained to the answer. Mr. Justice Maxwell, speaking for the court, says: "Does the answer state a defense? We think not. It is admitted that the Iowa court in the year 1886 obtained jurisdiction of the plaintiff in error by personal service. The fact that the judgment revived was recovered in 1866 can make no difference. If the plaintiff in error had remained in this state no action could have been brought here on the 1866 judgment, as it is expressly within our statute of limitations, and would be barred in five years. Code, § 10. Where, however, the plaintiff in error voluntarily went into the state of Iowa, and service was had upon him there, he must contest his rights in the tribunals of that state, and if a judgment of revivor is obtained against him there, and an action brought on such judgment in this state within five years from the time of its rendition, our statute of limitations will not constitute a defense. Neither can we retry the merits of the case in this state. If the facts as to the fraudulent character of the note and judgment are as the plaintiff in error alleges them to be, he should have brought such facts to the attention of the Iowa court, which no doubt would have protected his rights. So of the statute of limitations. The judgment being valid where rendered, is valid here, and the demurrer was properly sustained." In the case of *Horbach v. Smiley*, 54 Neb. 217, 74 N. W. 623, Mr. Justice Norval in discussing the priority of judgment liens on real estate, says: "It is true some of the judgments embraced in this class became dormant and, for a time, ceased to be liens upon the premises. *Flagg v. Flagg*, 39 Neb. 229, 58 N. W. 109. But these judgments were subsequently revived, which had the effect to reinstate the liens upon the real estate from the date of the order of revivor. *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365; *Cathcart v. Potterfield*, 5 Watts (Pa.) 153; *Norton v. Beaver*, 5 Ohio, 178." In *Brier v. Trader's Nat. Bank of Spokane*, 64 Pac. 831, Mr. Justice White of the Supreme Court of Washington, discussing a judgment of revivor, says: "It is not the mere lien that is revived; it is the judgment itself, and the lien as an incident of the revived judgment, if a certified copy is filed with the auditor, becomes operative in the same manner as if it was an original judgment. \* \* \* The very term 'revive' means to restore or bring again to life. When revived it becomes a new judgment, on which execution may issue as a personal liability, and it continues in existence for five years longer, from the date of the order of revival, and the lien thereof,

like the judgment, an incident thereto is a new creation, and dates from the order of revival. \* \* \* In *Bank of Commerce v. Wiltse* (Ind. Sup.) 53 N. E. 950, 954, 47 L. R. A. 489, Mr. Justice Baker, speaking for the court, said: "The primary meaning of 'revive' is to 'give life to again.' If it is a creative act to give life to dead matter once, it is no less a creative act to give life again to the same matter when it becomes dead. In the word 'revive' the syllable 're' indicates the use of old matter, and the syllable 'vive' means 'to give life to,' which is one of the primary meanings of the word 'create.'"

Counsel for respondent cites *Bankers' Life Ins. Co. v. Robbins*, 59 Neb. 173, 80 N. W. 484, in support of his theory that appellant only had an order of revivor and not a judgment in the Nebraska court, and quotes from the opinion in the above case as follows: "The statutory proceeding to revive a dormant judgment is a substitute for the common-law writ of *scire facias*. It is not the commencement of a civil action, but the continuation of an action previously commenced. The object in view is not to obtain a judgment, but to obtain permission of the court to execute a judgment already in existence." He also cites *Helper v. Davis* (Neb.) 49 N. W. 458, 13 L. R. A. 567, 29 Am. St. Rep. 457. In this case a judgment was recovered against defendant in January, 1879, in the state of Illinois. Soon thereafter he moved to the state of Nebraska. On the 12th day of October, 1888, the judgment in Illinois was revived in that state without jurisdiction of the person of the defendant. In December following this action was brought in the district court of Fillmore county upon the judgment so alleged to have been revived. The lower court made findings as above indicated, the important one being "that no personal service of the notice was had of said proceedings upon said defendant who then and now, and for eight years past has continually been a resident of Fillmore county, Neb., and he had no notice or knowledge in any manner of said proceedings. It is therefore considered by the court that said cause of action did not accrue within five years next before the commencement of this action, and is therefore barred by the statute of limitations. \* \* \*" The appellate court affirms this judgment but distinguishes between this case and the *Packer-Thompson Case*, *supra*, and reaffirms the latter case.

In our view of the case under consideration, it matters not what the final action of the district court of Nebraska may be termed, let it be an order reviving an old judgment, or let it be a new judgment, the object and purpose of the order is the same in either case. The effect is to continue in force in Nebraska a judgment against the defendant five years from the date of this order. Our statute would begin to run against the judgment or order of revivor from its date. This is not only true as shown by the decisions of

the court of last resort of Nebraska, but a long line of authorities from other states are in harmony with this conclusion. Why should it be otherwise? Respondent was twice given an opportunity in the courts of Nebraska to defend against this judgment, or the claim upon which it is founded, yet we find a judgment rendered in the first instance, and an order of revivor in the second, after respondent had had his day in court to show why the judgment should not be revived. When revived it is given new life, and our statute of limitations does not begin to run until after the date of the order of revivor.

The judgment is reversed, and cause remanded for further proceedings consistent with the views herein expressed. Costs awarded to appellants.

AILSHIE and SULLIVAN, JJ., concur.

## NORTH & DOUGLAS v. WOODLAND.

(Supreme Court of Idaho. Feb. 19, 1906.)

### 1. ANIMALS—CONTAGIOUS DISEASES—ACTION FOR DAMAGES.

In a civil action for damages, under Sess. Laws 1901, p. 151, § 21, scienter need not be alleged or proven where carelessness or negligence is averred.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, § 8:1.]

### 2. SAME—PLEADING.

In declaring the acts mentioned in the above section, punishable by fine, imprisonment, or both, the Legislature was exercising the police powers of the state, and in such case the complaint need not allege that the defendant knew the act complained of was unlawful.

### 3. SAME.

Under the provisions of sections 21, 23, p. 151, Laws 1901, and section 6886, Rev. St. 1887, a complaint that alleges that the injury complained of was the result of the careless and negligent acts of defendant is sufficient.

### 4. TRIAL—INSTRUCTIONS.

Where the instructions to the jury fairly state the law on all the issues involved, it is not error to refuse requests of defendant, even though they may be a repetition of the law of the case.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-650.]

### 5. APPEAL—REVIEW—DAMAGES.

Where a verdict is not in excess of the demand of plaintiff's complaint, and no error appearing in the admission of the evidence or instructions of the court, and there is any evidence tending to prove the amount of damages, this court will not examine the evidence to ascertain whether the verdict is excessive or not, where the defendant fails or refuses to submit evidence.

(Syllabus by the Court.)

Appeal from District Court, Bingham County; J. M. Stevens, Judge.

Action by North & Douglas against T. J. Woodland. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. W. Jones and Gray & Boyd, for appellant. Hansbrough & Adamson, for respondents.

STOCKSLAGER, C. J. This action is for the recovery of damages, plaintiffs alleging that defendant wrongfully and negligently permitted his sheep, which were infected with scab, and not in charge of a herder, to run upon the public highway and mix with the sheep of plaintiffs which were being driven along such highway, free from scab or other infectious disease, fat and in good condition and not upon quarantined ground; that because of such mixing and intermingling of sheep, the plaintiffs were compelled to dip those which came in contact with defendant's sheep and otherwise to treat them, to the injury of such sheep, and to plaintiffs' damage in the sum of \$477.55. Defendant filed a general demurrer which was overruled, whereupon he filed an answer and cross-complaint. The answer denies all the material allegations of the complaint. The cross-complaint sets up negligence on the part of plaintiffs in permitting the sheep to be mixed and commingled, alleging that by reason of the careless and negligent manner plaintiffs, their agents and employes, handled their sheep in driving along the highway, about 260 of plaintiffs' sheep escaped from their herd and entered through the fence and upon the feed ground of defendant and without defendant's knowledge or consent mixed with his sheep. Plaintiffs answered this cross-complaint denying the material allegations thereof. At the trial of the cause a jury was impaneled and a verdict was returned in favor of the plaintiffs for the sum of \$464.03, for which amount judgment was entered. The appeal is from the judgment, and from an order overruling a motion for a new trial. Counsel for appellants assigns 16 errors and urge all of them in their brief.

The first is that the demurrer to the complaint should have been sustained. They say: "The action is one *ex delicto* for damages and the right of plaintiffs to recover depends solely upon their proper allegation and proof of negligence on the part of defendant only." Again they say: "It was not alleged in the complaint that the sheep of defendant were quarantined because of their having any infectious disease, nor was it alleged that defendant knew, or had reason to believe, that his sheep had the scab or any infectious disease at the time the intermingling occurred, and for these reasons the attempted allegations of negligence on the part of the defendant is insufficient. It consists solely in the statement that defendant carelessly and negligently permitted the herds to get together and become mixed on the public highway, by reason of their being no herder with defendant's said sheep." This statement in the brief of learned counsel for appellant fairly states the issue involved in this action. In other words, if the doctrine of scienter is applicable, the demurrer should have been sustained; otherwise it was not error to overrule it. An examination and construction of the various statutory provisions of this state

relating to the privileges granted flock masters and their employes in handling their herds on the public domain and the public highways of the state, together with the restrictions cast upon sheep infected with what is commonly called "scab," or any other infectious or contagious disease, must necessarily determine the important question at issue, as the constitutionality of none of the provisions is questioned. It is apparent that all the legislation on this question has been with the view of entirely eradicating scab and other diseases from the flocks of the state, and whilst in some instances the remedy may seem harsh and even oppressive, nevertheless it is evident that such legislation has met with the approbation of those engaged in the sheep industry in this state or it would have been defeated, no other industry being interested in the subject-matter of such legislation. The first legislation we find bearing on this question is section 6886, Rev. St. 1887, it says: "Any person owning sheep infected with scab or any other infectious disease, who fails to keep the same secure from contact with other sheep or who moves or drives the same upon any highway, byway or across any range where other sheep are liable to range or be driven, without first obtaining a written permission of the sheep commissioner as provided in section 1221 of the Political Code, is guilty of a misdemeanor and must be fined in any sum not less than two hundred and fifty nor more than two thousand dollars." Section 1221 above referred to and section 6886, supra, were enacted by the 12th session of our territorial Legislature and were incorporated into the Revised Statutes of 1887. The conditions and penalties are practically the same. Section 1221, however, provides that: "The owner of any sheep infected with scab \* \* \* may move the same by first obtaining a written permission of the sheep commissioner of the county wherein he wishes to move them, which permission must state the manner in which they are to be moved, and the place to which they are to be moved and the route designated; but the sheep commissioner must not give permission to any person to move any sheep so infected across any range where healthy sheep are accustomed to range. \* \* \*" These two sections seem to have been sufficient for the purpose for which they were intended until the 6th session of our state Legislature (1901) when an act entitled: "An act to suppress contagious and infectious diseases of sheep to create the office of sheep inspector and deputy state sheep inspectors \* \* \* and repealing all acts in conflict," was enacted. Section 9 (page 145) of this act provides: "Whenever, upon an examination of any bands or herds of sheep kept or herded in any county of the state of Idaho, the deputy sheep inspector of such county or district thereof shall find such sheep, or any portion of them, affected or infected with the scab or

scabies, or any other infectious or contagious disease, the entire band or herd shall be considered as infected and treated as such and he shall immediately quarantine the same and forthwith notify the owner or person in charge of such sheep, in writing. \* \* \*" Section 21 (page 151) of the same act provides "Any person or persons owning or having under their control sheep or bands of sheep which have become infected with the scab or other infectious or contagious disease, for a period of fifteen days without reporting the fact to the deputy sheep inspector of such county or district thereof where such sheep are situate, in writing, shall be guilty of a misdemeanor. \* \* \*" Section 23 provides: "In any action or proceeding, civil or criminal, arising under this act, and all persons having any interest in sheep or controlling the same, and concerning which said action or proceeding is had, shall be deemed the owner of said sheep, and shall be liable, jointly and severally, for such violation. Any herder or shepherd or other person in charge of sheep may be sworn to give any deputy sheep inspector any and all information as to the condition of the sheep in his charge, to the best of his knowledge, on being requested so to do by the deputy, and upon refusing to do so shall be guilty of a misdemeanor. \* \* \*"

This is all the legislation we find bearing directly upon the question under consideration, and it only remains for us to ascertain from the language of the several sections quoted just what was intended by the law makers. There can be no question of the intent of the Legislature in the passage of all acts relative to scabby sheep; there is no other infectious or contagious disease known to exist among sheep in this state; hence it is conclusive that all legislation is aimed at the eradication of this pest. It is also beyond question that all efforts have been toward the one common purpose of confining the disease to the band where discovered, and by a system of thorough dipping to eradicate it when discovered as quickly as possible. The quarantine law was enacted with this object in view. That parties owning or being in possession of sheep infected with scab should report such fact to the deputy inspector of the county or district within fifteen days, only bears out the conclusion that prompt and heroic efforts are to be made by all parties concerned to effectually eradicate the disease from the flocks of the state. If the provisions of our law relative to scab are to be construed as urged by counsel for appellant, the entire system is a farce. It would be very convenient for the owner of a band of sheep not to discover scab until a convenient season, and then have 15 days thereafter in which to report such discovery to the deputy inspector for his county or district. The law requires the owner of sheep, as well as any one in charge thereof, to report their condition if scab or other infec-

tious or contagious disease is discovered to the sheep inspector within 15 days after such discovery, thus enjoining upon the owner and his employees constant care and watchfulness over their flocks. Again, it is a well known fact that no one has the opportunity of discovering scab so readily as the herder or person in daily charge of the sheep, and when it develops it will not be long before he knows it. It has none of the characteristics of what is commonly called "Texas fever." That disease is never apparent in the native Texas cattle, but other cattle coming in contact with Texas cattle, or herded on a range over which they have passed may become inoculated; not so with the scab; it is not difficult to detect; it leaves its marks on every sheep affected, and any practical herder is soon aware of its presence and may find it if he make the effort. As we view it, the object and purpose of our law is to make the owner and herder diligent and careful and report any evidence they may have of the existence of scab in their flocks, and provides a severe penalty for neglecting to do so. When we ask the reason for the legislation there is but one answer and that is the complete eradication of the disease from the flocks of the state. It is a part of the public policy of the state and comes within the exercise of its police powers. The law presumes that every man knows the condition of his sheep and requires him to report the existence of scab within 15 days after it makes its appearance—not 15 days after he has reported it to some one else other than the authorized sheep inspector—and were it otherwise, as is said by counsel for respondents, "a person could drive his scabby sheep upon the public highways and herd and drive them upon the public domain where other sheep without infection were herded and driven; they could infect all the ranges within the state with scab, and all the sheep upon them, and when arrested or a civil action was brought for damages, they could escape the consequences of their wrongful acts by merely saying that they had no notice or knowledge that the sheep were infected with scab." This statement is undoubtedly true, and we think the Legislature intended to overcome the difficulties above suggested by section 21. Sess. Laws 1901, p. 151. It would be practically impossible for the inspector to inspect the innumerable number of sheep within his territory; they are usually kept as far from civilization and the public highways of the state as possible from early spring until late fall, then if not on feed grounds, off on the desert and away from habitations. If the duty of discovering scab and quarantining devolved upon the inspector, the law would be a nullity, and sheep upon the public range would be constantly exposed to scab winter and summer. The law was intended to make each owner the guardian of his own flocks, and even goes so

far as to impose the duty and add a penalty upon the herder or person in charge.

In discussing a law similar to ours, the Supreme Court of Oregon, in *State v. Sterritt*, 24 Pac. 523, which was an indictment returned by the grand jury charging the defendant with "unlawfully moving sheep infected with scab from place to place without first having obtained a traveling permit therefor." The information did not charge that the defendant knew the sheep were infected with scab at the time of their removal, and for this reason defendant demurred to the sufficiency of the indictment. This demurrer was overruled. The court say: "The first objection insisted upon was that the indictment failed to allege knowledge of the defendant that the sheep had the scab at the time of their removal. In a very large class of offenses, and mainly those that were classed as mala in se at common law, guilty knowledge is necessary to complete the offense, and it must be alleged. But in that other class, wrongs which are forbidden by statute, and more especially those offenses which are made punishable in furtherance of the public policy of the state, such as the exercise of the police powers, the collection of revenue, and the like, are punishable whether the offender had guilty knowledge or not. This distinction was lately sustained in this court in *State v. Chastain*, 23 Pac. 963, and is adhered to. The offense under consideration belongs to the latter classification, and is punishable whether the accused party knew the sheep were diseased or not. \* \* \*" If a criminal action can be maintained under the statute of Oregon, upon which the above prosecution was based, without alleging and proving guilty knowledge, why may not a civil action for damages be maintained under section 21, supra, without such allegation and proof; we can see no valid reason why not. The authorities cited by appellant do not reach the issue involved here.

In *Patee v. Adams* (Kan.) 14 Pac. 505, the court considered and discussed a case wherein the defendant in good faith purchased in the market at Kansas City certain cattle, shipped them to Manhattan, in Kansas, where they were unloaded into the stockyards of the Union Pacific Railway and were immediately seized by virtue of a process issued by a justice of the peace, the possession being withheld from defendant, he having no opportunity to examine the cattle, even if the "Texas, splenic, or Spanish fever" could be detected by an examination as readily as scab, the defendant was in no wise to blame, as it is shown that plaintiff's cattle were diseased by the cattle of defendant whilst they were in the custody of the officer. The court instructed the jury that "if the defendant knew, or had reason to know, or could by ordinary diligence have known, that the cattle were diseased, \* \* \* you will find

for the plaintiff." This instruction is upheld by the court. It is said in the opinion: "Doubtless, the Legislature has the authority to dispense with the necessity of alleging and proving knowledge; but before a party who is without fault, or without knowledge that his cattle can cause injury, can be held liable, the legislative design to create such liability should be 'plainly pronounced.'"

Under the head of "Proof of Scienter—When Necessary," learned counsel for appellant cite volume 2, Am. & Eng. Ency. of Law, 364. The text says: "If domestic animals are rightfully in the place where they do the injury complained of, the owner will not be liable unless he had knowledge of the vicious propensity of such animal; and in an action for such injuries, knowledge on the part of the owner must be alleged and proved." Cases are cited by the author under this text from a large number of states, but an examination of them discloses that they follow the subject laid down in the text, and only refer to the vicious or dangerous character of domestic animals and the duty of the owner thereof in protecting the public from injury therefrom. Our attention is also called to pages 381, 382, same book, and under the same heading we find this text: "In those jurisdictions where stock is allowed to run at large, and statutes have been enacted making the owners of diseased or distempered cattle liable for any communication of such disease, it is generally held that scienter on the part of the owner of such diseased cattle should be alleged and proved." One of the cases cited here and really the one upon which counsel for appellant seems to place the most reliance, is *Patee v. Adams*, supra; the author says: "The theory of the statute (Kansas) is that the liability arises upon the negligence of the party who drives, or causes to be driven, the cattle that communicate the fever; and how can negligence be attributed to those who go into a market in the state and purchase such cattle when they have no notice, and no facts exist by which they would be chargeable with notice that the cattle had the fever, or were liable to communicate it? The rule of the common law in such cases is that knowledge is indispensably necessary to a recovery." This author also cites *Barnum v. Vandusen*, 16 Conn. 200, where defendant's sheep trespassed upon plaintiff's land and communicated to plaintiff's sheep a disease known as "hoof distemper," there being no sufficient justification for the trespass, it was held that, "in order to recover damages it was not necessary to show that defendant had knowledge of the diseased state of his sheep but that such evidence was competent to enhance the damages," etc. Other authorities are cited, but they do not convince us that the doctrine announced in *State v. Sterritt* is not the correct one in cases of the character of the one under consideration.

It is next insisted by counsel for appellant

that plaintiff was guilty of contributory negligence resulting in the loss complained of herein. For this reason they cannot recover. The complaint alleges, among other things, that said sheep were allowed to become mixed and to get together by reason of the negligence and carelessness of the defendant as aforesaid, and without any fault of the plaintiffs. Evidence was submitted on the question. The first witness was C. A. Valentine. He says: "Mr. Woodland had one band of sheep on the west and one on the east side of the road; there was no one with the band on the west side when we got there, and their sheep had been coming out onto the road. \* \* \* There is a lot of willows growing, and we could not see them until we got close to them, and they started coming out on the road and getting into our sheep. \* \* \* After we had them mostly all cut off and going back to their feed ground then Mr. Woodland and two or three of his men came over from on the east side; no one was with this band on the west side." Willard Christianson testified: "It took us about 15 minutes to separate the sheep. Mr. Woodland's sheep were right along the road when I first saw them there. The feed ground extends right up to the road, and there was no one with the sheep when the mixup began." It is shown by the evidence that as soon as the men in charge of respondent's sheep discovered the sheep of appellant near the highway through which they were driving respondents' sheep, they used every effort within their power to prevent the mixup. It was clearly the duty of appellant to have some one in charge of his sheep at all times, especially when they were being fed and held near the highway through which other sheep were privileged to pass whether they were diseased or not. It was shown that the fence was not sufficient to keep them from passing back and forth from the feed grounds to the highway, and with ordinary diligence on the part of appellant his sheep could have been kept back from the highway whilst respondents' sheep were passing through. This duty he owes to the public who have license to the use of the highway, and, in our opinion, it was his negligence in not having a herder in charge of his sheep that resulted in the mixup, and consequently the damage resulting therefrom to respondents. Mr. Douglas, one of the respondents, testified to a conversation with appellant the day following the mixup, as follows: "I said, 'Mr. Woodland, you know better than I do how those sheep have been run, and you know whether they have scab and if you will guaranty me that those sheep will not break out, I will take them out. And he said, 'I will advise you not to take the sheep out.' I said, 'What will you do with the sheep?' 'I will take care of them,' he says, 'and dip them twice and turn them over to you clean, so you can put them in your herd and go any place with them.' Q.

I will ask you to state whether or not at that time Mr. Woodland told you he had scab in his sheep?" Appellant's counsel objected to this question on the ground that "it was not alleged in the complaint that the defendant knew or had reason to know that his sheep had the scab, also because the question is leading." The court overruled the objection and the witness answered. "Mr. Woodland told me that he had scab and had had it for some time and directed me to leave them in there and he would dip them twice and turn them back to me." There was no error in this ruling of the court. The evidence was material to respondents to establish a reason for leaving their sheep with appellant's. It is also shown by this evidence that appellant not only knew at the time of the mixup that his sheep had the scab, but had known it for some time prior thereto, and this evidence is in no wise contradicted. This being true, appellant should have been unusually diligent in holding his sheep on his feed grounds and especially keep them from passing through the fence upon the highway where clean sheep were likely to be driven at any time.

Errors are assigned, based on the instructions given the jury, and the refusal of the court to give certain requests of appellant. We have carefully examined the instructions given by the court, and, in our view of the case, we think they fully state the law. We find no error in the record; and the judgment is affirmed, with costs to respondents.

AILSHIE and SULLIVAN, JJ., concur.

SHARKEY et al. v. CANDIANI et al.

(Supreme Court of Oregon. May 1, 1906.)

1. REFERENCE—SPECIAL ORDER OF REFERENCE  
—TAKING TESTIMONY IN ANOTHER COUNTY  
—JURISDICTION OF THE PERSON—WAIVER.

Under B. & C. Comp. § 827, authorizing a court, when a suit is at issue on a question of fact, to refer the cause, and also to appoint a special referee to take the testimony of witnesses residing more than 20 miles from the place of holding court, where the referee appointed, without an order of special reference, went to another county, and there, over plaintiffs' objection and exception, took the testimony of defendants' witnesses, plaintiff waived the irregularity by cross-examining the witnesses before the referee; the want of jurisdiction being only of the person.

2. MINES AND MINERALS—MINING CLAIM—PATENT—CONCLUSIVENESS AS AGAINST ADVERSE CLAIMANTS.

A patent from the United States for a mining claim is conclusive of all the facts necessary to establish the validity thereof as against one claiming adversely to the patentee.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 130.]

3. SAME—VEIN OR LODGE LOCATION—NOTICE—SUFFICIENCY—STATUTORY REQUIREMENTS.

Under Laws 1898, p. 18, § 10, providing that locations or attempted locations of mining claims not complying with the provisions of the act shall be void, an attempted location is void, where the notice thereof does not contain "the

number of linear feet claimed along the vein or lode each way from the point of discovery, with the width on each side of the said vein or lode," and "the general course or strike of the vein or lode as nearly as may be," as required by section 1 of the act. Id., p. 16, § 1.

4. SAME.

The statute was designed as a guide only to determine the rights of conflicting claimants, thus permitting the proper marking of a location at any time before adverse rights attach.

5. SAME.

Under said Laws 1898, p. 16, § 1, and under Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, p. 1424], prescribing the length of mining claims on veins or lodes, it is the discovery by a qualified person of a lode or vein of mineral-bearing rock in place on the vacant land of the United States, and the appropriation thereof by posting a notice, and recording the same when so required, and by marking on the ground the boundaries so that they may be readily traced, that initiates a valid mining claim.

6. SAME—DISCOVERY OF LODGE—INSUFFICIENT LOCATION—VALIDATING SAME BY SUBSEQUENT DISCOVERY.

Where no vein of mineral-bearing rock in place is discovered prior to posting notices of location of mining claims, a subsequent discovery validates the prior insufficient location, if no adverse rights have accrued.

7. SAME—ABANDONMENT OF CLAIM—NEW LOCATION.

Where the validity of mining claims is established by a patent therefor, until abandonment thereof by the patentees, so as to render the premises a part of the unappropriated public domain, no location can be made thereon by other parties.

8. ESTOPPEL—ACQUIESCENCE—PERMITTING EXPENDITURES.

Where certain of plaintiffs in possession of mining claims were experienced miners, and knew the method generally adopted of marking on the ground the boundaries of mining claims, of which defendant was ignorant, and for 18 months saw defendant working on an adjoining and conflicting claim, congratulated him on his progress, and made no objections until he had expended about \$8,000 and discovered valuable ore, when it was found he was trespassing on plaintiffs' claims, an estoppel might arise; the means of information not being equal to the respective parties to prevent plaintiffs from asserting their right to the premises in conflict on the ground of abandonment.

9. MINES AND MINERALS—LOCATION OF CLAIM—ABANDONMENT—TRANSFER OF TITLE.

An abandonment results from a mere exercise of the will, and, so far as it relates to a vested estate in real property, is ineffectual to transfer the title.

10. SAME.

The possible fluctuations in value in mining claims resulting from sudden discoveries of paying ore demand a different rule from that which usually governs vested estates in land, and necessitates immediate assertion of inchoate rights in such claims, when, by the exercise of reasonable diligence, the locators thereof might ascertain that their premises are being invaded.

11. SAME—POWERS OF CO-TENANT.

One of plaintiffs, as superintendent and managing partner, represented another of plaintiffs in supervising the property. Held, that though such agent could not, ordinarily, without special authority from all the co-tenants, abandon any greater interest than he alone possessed, yet the kind of property in controversy and the inability to decree an undivided interest therein to defendant by reason of lack of identity in boundaries of the conflicting claims show that such superintendent possessed sufficient authority from all the co-tenants to bind them by his culpable negligence in permitting defend-

ant to take, hold possession of, and improve, their property for so long a time.

**12. SAME—ACTIONS TO DETERMINE CONFLICTING CLAIMS—EVIDENCE.**

In an action to determine title to conflicting mining claims, evidence examined, and held to show that a certain monument was intended to mark the northwest corner of a certain location, instead of the northwest center end.

Appeal from Circuit Court, Lane County; J. W. Hamilton, Judge.

Action by Frank C. Sharkey and others against C. F. Candiani and others. Decree for defendants, and plaintiffs appeal. Affirmed.

This cause having been reargued, the opinion heretofore announced, which has not been published, will be changed to accord with the view now entertained. This is a suit by Frank C. Sharkey, Louis Zimmerman, Fred E. Sharkey, and N. B. Standish, against C. F. Candiani, Caesar Marco, and J. J. Tyler, to determine the right of possession of certain mineral land. The complaint states that the defendants secured a survey of what they designated as the "Doctor" lode in the unorganized mineral district of Blue River, Lane county, and applied for a United States patent therefor, whereupon plaintiffs interposed an adverse claim to a part of the premises included in such survey, and instituted this suit, alleging, *inter alia*, that they were in possession of the Louise and Lucky Boy No. 4 quartz mining claims, which were prior locations, the validity of which had been maintained, detailing the manner thereof and showing wherein the Doctor lode conflicted with such claims. The answer having denied the material allegations of the complaint averred that plaintiffs had abandoned all interest in the premises inconsistent with the boundaries of the Doctor lode, and that by reason of their conduct they ought to be estopped to assert any claim thereto, setting out the facts which, it is asserted, constituted the alleged impediment which the law raises to preclude the maintenance of this suit. The allegations of new matter in the answer having been denied in the reply, the cause was referred, and from the testimony taken the court found that the defendants, by reason of plaintiffs' conduct, were entitled to the possession of the premises in dispute, and having rendered a decree in accordance therewith, the plaintiffs appeal.

Zera Snow, for appellants. L. Bilyeu and C. A. Hardy, for respondents.

MOORE, J. (after stating the facts). It is contended by plaintiffs' counsel that an error was committed in refusing to strike from the transcript much of the testimony given by defendants' witnesses, because it was taken out of the jurisdiction of the trial court, without an order to that effect. The statute authorizes a court, when a suit is at issue upon a question of fact, to refer the cause, and also to appoint a special referee for the purpose of taking testimony

of witnesses residing more than 20 miles from the place of holding court. B. & C. Comp. § 827. This suit was begun and tried in Lane county, and the referee appointed therein, without an order of special reference, went to Multnomah county, where, over objection and exception of plaintiffs' counsel, the testimony of defendants' witnesses was taken. These witnesses, however, were cross-examined before such referee by plaintiffs' counsel, who thereafter, in Lane county, offered testimony in rebuttal thereof. In *Brush v. Mullany*, 12 Abb. Prac. (N. Y.) 344, it was insisted that a referee appointed in one county in New York could not, without special appointment, take the testimony of witnesses in any other county of that state; the court holding that an objection interposed on that ground went to the jurisdiction of the referee, and intimating that it was doubtful whether or not an indictment for perjury would lie against any of the witnesses who were sworn before him outside the county in which he was appointed. In that case, however, a default by all the defendants having been entered, the cause was referred and the testimony taken in their absence, thus precluding the implication of a waiver. In *Blevins v. Morledge*, 5 Okl. 141, 47 Pac. 1068, an objection was interposed that a trial before referees was conducted outside the jurisdiction of the court, and it was held untenable where the point was not raised in the court below. It is fairly to be implied from the decision in that case that an objection to the taking of testimony by a referee, outside the jurisdiction of the court appointing him, could be waived by the parties. In New York a reference ordered by a court of special and limited jurisdiction requires the reference to take the testimony within such jurisdiction. *Bonner v. McPhail*, 31 Barb. (N. Y.) 106. Where, however, attorneys stipulate that a referee appointed by a surrogate in a county of that state may take the testimony of witnesses in another county therein, and an order to that effect is entered, it cannot be subsequently attacked, on the ground of a want of jurisdiction, by a party who appeared before the referee in such other county and there participated in the proceeding had therein before such referee. In *re Davenport* (Sur.) 74 N. Y. Supp. 740. In the case at bar, though plaintiffs' counsel objected and excepted to the taking of the testimony by the referee in Multnomah county, they nevertheless participated therein by cross-examining the witnesses produced by the defendants. To strike from the transcript the testimony so taken would be to permit plaintiffs to speculate on securing a decree in their favor, but, failing in this respect, now to insist that an error was thereby committed, would be allowing them to take advantage of an irregularity which, in our opinion, they voluntarily waived; the want of jurisdiction being only to the person.

Considering the case on its merits, the

transcript shows that prior to November, 1899, the plaintiffs and J. W. Moore and G. A. Dyson, as tenants in common, were in possession of the Louise and Lucky Boy No. 4. and other quartz-mining claims in the Blue River district upon which improvements have been made of the value of about \$40,000; the property being treated as one mine, which is known as the "Lucky Boy Group," and was under the supervision of the plaintiff Frank C. Sharkey as managing partner. A statement of the means adopted by plaintiffs to secure a title to their claims is not deemed essential, for a patent from the United States having been executed to them therefor, except as to the premises in conflict, is conclusive of all the facts necessary to establish the validity thereof as against a party claiming adverse rights. *Anderson v. Bartels*, 7 Colo. 256, 3 Pac. 225; *Iron Silver Mining Co. v. Campbell*, 17 Colo. 267, 29 Pac. 513; *Uinta Tunnel Co. v. Creede Mill Co.*, 119 Fed. 164, 57 C. C. A. 200; *Last Chance Mining Co. v. Bunker Hill, etc., Co.*, 131 Fed. 579, 66 C. C. A. 299; *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Calhoun Gold Mining Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200. The defendant Candiani having been advised by Zimmerman to go to the Blue River mining district and secure a quartz claim, accepted from him a letter of introduction which, in November, 1899, he presented at the mines to Frank C. Sharkey, who showed him and his associate, one G. B. Perelli, every attention possible. After remaining plaintiffs' guests several days, Candiani and Perelli went to a tunnel on one of the claims, known as the "Gold Dollar," where they saw Dyson, who, in answer to their inquiry as to whether or not there was any mining property that could be secured in that vicinity, informed them that vacant public land could be found just above the place where he was working, showing them the northeast and northwest corners of the Gold Dollar claim. Perelli, going a few feet north of the boundary of such claim, prospected the ground, and returning to the tunnel wrote a location notice, calling the premises the "Doctor" claim. Dyson signed his name as a witness to the notice, which was posted on the stub of a tree on the claim selected. The day being very stormy, Dyson agreed to mark on the ground the boundaries of the Doctor claim, and Candiani and Perelli in a day of two thereafter left the mines without informing the superintendent of the location they had made. Candiani, on returning to Portland, however, told Zimmerman that he had established a claim joining the Gold Dollar. In the winter of 1899 or 1900, Dyson and Standish made some markings of the Doctor claim, for which service Candiani sent the former by Zimmerman \$10 in payment thereof, but when this money was delivered, Zimmerman did not know that Dyson had indicated any line on the Doctor claim.

The statute of this state in force when Candiani attempted to establish the Doctor lode required the locator of a mine, before the expiration of 90 days from the date of posting the notice of selection of mineral land, to sink a discovery shaft upon his claim to the depth of 10 feet, or deeper, if necessary, to show a vein of mineral deposit in place. Laws 1898, p. 17, § 3. No work having been done on the Doctor claim within the time prescribed, Candiani returned thereto and posted thereon another notice, of which the following is a copy, to wit: "Notice is hereby given that Charles F. Candiani, a citizen of the United States of America, conforming to the mining laws thereof, and of the state of Oregon, and the local rules, regulations and customs of miners, has located, and by this notice do relocate, claim known as the Doctor lode or mining claim, said claim being discovered on the 18th day of November, 1899, and do claim 960 feet on this lead, lode or vein, bearing mineral in place, by 600 feet in width, the same being 300 feet on each side of the center thereof, together with all dips, spurs and angles and all other veins or lodes the top or apex of which lie within said boundaries, situate in Blue River Mining District, county of Lane, state of Oregon, said location being described and marked on the ground as follows, to wit: From this notice of location running 300 feet in a westerly direction to a stake marked 'Southwest stake of Doctor lode;' thence 950 feet in a northerly direction to a stake marked 'Northwest stake of Doctor lode;' thence running 600 feet in an easterly direction to a stake marked 'Northeast stake of Doctor lode;' thence running 300 feet in a westerly direction to this notice of location. This claim is joining the northeast line of the Gold Dollar claim, and is the extension of the same, and I intend to hold and work said claim in accordance with the local customs and rules of miners and the mining laws of the United States and of the state of Oregon. Dated on the ground the 14th of February, 1900. Located February 14th, 1900. Discovered November 18th, 1899. C. F. Candiani." He also cut a tunnel into his mine, and prior to June, 1901, made other improvements on the property of the value of about \$8,000, when Frank C. Sharkey, having discovered that the Doctor lode conflicted with plaintiffs' mining claims, took possession of such tunnel and ejected Candiani from the premises, thereby precipitating a difficulty which resulted in this suit.

The statute of this state permits a citizen of the United States, or one who has declared his intention of becoming such, who discovers upon the unappropriated public domain, a lode of mineral-bearing rock in place, to locate a claim on the vein by posting thereon a notice which shall contain: "First, the name of the lode or claim; second, the name or names of the locator or locators; third,

the date of the location; fourth, the number of linear feet claimed along the vein or lode each way from the point of discovery, with the width on each side of the said vein or lode; fifth, the general course or strike of the vein or lode as nearly as may be." A locator is also required to define "the boundaries upon the surface of each claim so that the same may be readily traced. Such boundaries shall be marked within thirty days after posting such notice by six substantial posts, \* \* \* or by substantial mounds of stone, \* \* \* one such post or mound of rock at each corner and at the center ends of such claims." B. & C. Comp. § 3975. "Any and all locations or attempted locations of quartz-mining claims within this state subsequent to the thirty-first day of December, 1898, that shall not comply and be in accordance with the provisions of this act shall be null and void." Id., § 3984. An examination of the last notice posted by Candiani will show that it fails in many respects to comply with the statutory requirements, and evidently omits to designate the eastern boundary of the Doctor claim. The trial court, inter alia, found, and we think the conclusion is fully warranted by the testimony: "That no markings of the Doctor claim for the purpose of marking out on the ground the boundaries thereof was ever made until the time of the survey for patent, other than such as was made by Dyson and Standish in December, 1899." Though our statute has prescribed certain conditions which must be performed in order properly to locate a mining claim, and provided that a failure to comply therewith should annul every attempted location, the enactment was evidently designed as a guide only to determine the rights of conflicting claimants, thus permitting the proper marking of a location at any time before adverse rights attach. *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 652; *Jupiter Mining Co. v. Bodie Mining Co.*, 4 Mor. Min. Rep. 411; *North Noonday Min. Co. v. Orient Mining Co.*, 9 Mor. Min. Rep. 529; *Crown Point Mining Co. v. Crismon*, 39 Or. 364, 65 Pac. 87.

Unappropriated lands of the United States containing valuable deposits of mineral are subject to exploration, occupation, and purchase, under regulations prescribed by law, so far as the same is applicable and not inconsistent with the acts of Congress. Rev. St. U. S. § 2319 [U. S. Comp. St. 1901, p. 1424]. In commenting upon legislation which the act of Congress of July 4, 1866, authorizes, Mr. Lindley, in his work on Mines (2d Ed. § 249), says: "If the state may prescribe any additional or supplemental rules, increasing the burdens or diminishing the benefits granted by the federal laws in land of the public domain, it is simply because the government, as owner of the property, sanctions, expressly or by implication, the exercise of such powers." This author, in discussing the necessity for a substantial

compliance with the requirements of the acts of Congress in respect to securing public land containing valuable mineral deposits, and of legislation by the states supplemental thereto, which are treated as conditions precedent to the completion of a valid location, further observes: "The order in which the several acts required by law are to be performed is nonessential, in the absence of intervening rights." Id. § 330. In *Sisson v. Sommers*, 24 Nev. 379, 55 Pac. 829, 77 Am. St. Rep. 815, it was held that a failure substantially to comply with the provisions of a statute of Nevada, which required a locator of a mining claim to sink a discovery shaft within a prescribed time after posting a notice of location, forfeited the rights of the locator, whether or not the statute contained a clause to that effect. In deciding the case, the court, referring to the federal and to the state laws and to the rules and regulations of miners relating to the steps necessary to be taken to secure a mining claim, say: "Failure to comply with such laws and rules works a forfeiture, whether the laws and rules provide for forfeiture for noncompliance or not, and the mining claim becomes subject to location by any qualified locator." As a forfeiture results from a failure substantially to comply with the requirements of a state statute prescribing the method to be pursued to obtain a mining claim, whether or not such statute so declares the penalty, the clause of our law (B. & C. Comp. § 3984), providing that any attempted location of a quartz-mining claim that shall not be in accordance therewith shall be null and void, adds nothing to the enactment which would be so construed in the absence thereof, in case of adverse claimants.

State legislation, supplemental to the acts of Congress, which prescribes the method to be pursued by a locator as a condition precedent to making a valid appropriation of the public lands of the United States, containing valuable mineral deposits, is designed as a rule of evidence only, to determine the rights of an adverse claimant of the premises, under a subsequent location thereon of a mining claim. This must, upon principle, be the object of such laws, otherwise the enactments, in case no adverse claim is interposed, would be an interference with the primary disposal of the soil by a state which is inhibited by the enabling act by which it became a part of the Union. Congress has impliedly invited miners to adopt rules and regulations and, in the same manner, requested state and territorial Legislatures to enact laws protecting the rights of claimants of mineral lands, which rules and laws are recognized, when not in conflict with the federal statute, and enforced by the courts in cases involving a contest. The right of the defendants to the Doctor claim depends upon acts of the plaintiffs, constituting an alleged equitable estoppel, tanta-

mount to an abandonment, and, as the plaintiffs did not make a subsequent location of the premises, we do not think they are in a position to insist upon a strict performance of the state statutory requirements by the defendants whose rights, if they exist, must rest upon the alleged abandonment.

It is the discovery by a qualified person of a lode or vein of mineral-bearing rock in place, on the vacant land of the United States, and the appropriation thereof, evidenced by posting a notice, and recording the same when so required, and by marking on the ground the boundaries so that they may be readily traced, that initiates a valid mining claim, the right to the continued possession of which is maintained by annually performing the work prescribed for its development, until a patent has been secured. Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, p. 1424]; Laws Or. 1898, p. 16, § 1; B. & C. Comp. § 3975; Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990; Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 590, 28 L. Ed. 1113; O'Reilly v. Campbell, 116 U. S. 418, 6 Sup. Ct. 421, 29 L. Ed. 669. It is very doubtful if either Perelli or Candiani found a vein of mineral-bearing rock in place, within the Doctor claim, prior to posting the respective notices thereon, but the testimony shows that the latter, after February 14, 1900, discovered a lode therein, and if no adverse rights have accrued, the subsequent discovery validates the prior insufficient location. Zolters and Highland Chief Co. v. Evans, 4 Mor. Min. Rep. 407; Patchen v. Keeley, 19 Nev. 404, 14 Pac. 347. Thus, in Brewster v. Shoemaker, 28 Colo. 176, 63 Pac. 309, 53 L. R. A. 793, 89 Am. St. Rep. 188, it was held that when the location of a mining claim was void, because no mineral had been found within its boundaries, a subsequent discovery of precious metal therein, made after filing the certificate of location, but before the rights of adverse parties had attached, would sustain the location. In deciding that case, Mr. Chief Justice Campbell, speaking for the court, says: "The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided only all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim and refile their location certificate, or file a new one." The patent plaintiffs secured for that part of the Louise and the Lucky Boy No. 4 mining claims, not a conflict with the Doctor lode, having established the validity of the former claims as hereinbefore stated, no subsequent location could be made thereon unless they abandoned their rights thereto so as to render the premises in dispute a part

of the unappropriated public domain. They did not make a location subsequent to defendants', so as to initiate a new right and thus to take advantage of the invalidity of the defective notice, or for any other reason, and hence the only questions to be determined are the alleged abandonment and the identity of the premises embraced therein.

It will be remembered that Dyson and Standish, two of the co-tenants, made some markings on the ground to evidence part of the boundaries of the Doctor lode. All the co-tenants, except Moore and Zimmerman, were at the mines and saw Candiani working on the Doctor claim, to which for 18 months they made no objections, but congratulated him on the progress he was making in cutting the tunnel, until he had expended about \$8,000 and discovered valuable ore, when it was ascertained that he was trespassing on their property. The testimony shows that when Candiani first went to the mines Zimmerman informed him of the number of mineral claims plaintiffs possessed and told him about how they were situated with respect to each other. Dyson and Standish were pioneers in the Blue River district, and at the time Candiani first posted a notice on the Doctor lode, they were in possession of the Louise and the Lucky Boy No. 4 mining claims. The latter claims were originally surveyed in 1896, the center line "brushed out" and stakes set at the corners, but the country where these mines are situated is mountainous and the surface covered with dense brush and timber. We think it fairly inferable from the testimony that until June, 1901, when the "Lucky Boy Group" was surveyed for a patent, that neither of the respective parties nor their predecessors in interest knew that the Doctor lode conflicted with either of plaintiffs' mining claims. Candiani was a novice in mining, while Dyson and Standish, and most of the other co-tenants claiming the Louise and the Lucky Boy No. 4, were experienced in extracting ores and must have known the method generally adopted of marking on the ground the boundaries of mining claims, of which Candiani was ignorant. The means of information were, therefore, not equal to the respective parties, and this being so, an estoppel may arise to prevent the plaintiffs from asserting their right to the premises in conflict, on the ground of abandonment. Abandonment, it is true, is generally understood to mean the intentional relinquishment of a known right. Oviatt v. Big Four Mining Co., 39 Or. 118, 65 Pac. 811. The rights of the plaintiffs and of their predecessors in interest to that part of the Louise and of the Lucky Boy No. 4 mining claims, which is in conflict with the Doctor lode, were inchoate when Candiani first attempted to locate a vein thereon, and hence they were susceptible of abandonment, which is equivalent to a relinquishment to the United States of all interest therein. An abandonment results

from a mere exercise of the will, and so far as it relates to a vested estate in real property is ineffectual to transfer the title. *City of Philadelphia v. Riddle*, 25 Pa. 259. Experience in the mining regions teaches that locations of mineral-bearing rock are frequently made on public land for speculative purposes only, and are often considered of little value until paying ore is discovered in the immediate vicinity, when, without any expense to the locators, they may become of immense worth. Such possible fluctuations in value demand a different rule from that which usually governs vested estates in land, and necessitates immediate assertion of inchoate rights in mining claims, when, by the exercise of reasonable diligence, the locators could have discovered that their premises were being invaded. Dyson, Standish, and Frank and Fred Sharkey, who are experienced miners and should have known the location of the boundaries of the Louise and of the Lucky Boy No. 4 mining claims, ought to be estopped to assert that they had any interest therein in conflict with the claim of Candiani as originally indicated on the ground. To allow them to assert an adverse claim to that part of the Doctor lode now in controversy, as it should be surveyed, would be violative of every principle of equity and result in rewarding them for encouraging the development of the property. Zimmerman, who owns five-twelfths of the Lucky Boy group of mines, resides in Portland, and though he knew Candiani had located a mine in the Blue River district, he was not aware that it conflicted with either claim in which he was interested. Frank C. Sharkey, as superintendent and managing partner, however, represented Zimmerman and also his predecessor in interest, Moore, in supervising the property, and, though such agent could not, ordinarily, without special authority from all the co-tenants, abandon any greater interest than he alone possessed (*Beers v. Sharpe*, 44 Or. 386, 75 Pac. 717; *Conn v. Oberto*, 32 Colo. 313, 76 Pac. 369), the character of his employment and the kind of property in controversy induce the conclusion that he possessed sufficient authority from all the co-tenants to bind them by his negligence in permitting Candiani to take, hold possession of, and improve their property for such a length of time.

This brings us to a consideration of the boundaries of the Doctor lode as they should be established. The evidence shows that October 26, 1898, F. C. Sharkey and Geo. A. Dyson located a quartz-mining claim, known as the "Gold Dollar," the description of which, as given in the notice, is as follows: "Commencing at this tunnel and notice and running in a southerly direction towards Main Quartz Creek and situated about 400 feet west of the Lucky Boy ledge, and was formerly known as the Jo. Andrews claim." Until the plaintiffs secured a survey for a patent, June, 1901, they evidently thought

that the Gold Dollar claim was located west of and parallel with the Lucky Boy group, for when Candiani and Perelli first went to the district with a view of securing a claim they were informed by Dyson that unappropriated mineral land of the United States could be found at the northerly end of the Gold Dollar claim, the corners of which, on that line, were evidenced by stakes which he pointed out to these visitors. The survey referred to disclosed that the side lines of the Louise and of the Gold Dollar claims extended north 40° 30' west, and north 13° 30' west respectively, and that the north center end of the latter claim was situated about 480 feet southerly from the northwest corner of the Louise claim and on or near the western boundary thereof. The Lucky Boy No. 4 claim is a northerly extension of the Louise, and the Doctor lode, as surveyed, is a northerly extension of the Gold Dollar claims, the side lines of which are 260 and 683 feet respectively. Dyson, as plaintiffs' witness, testified that, having been employed by Candiani to mark on the ground the boundaries of the Doctor lode, he placed a center end notice on the stub of a tree a few feet north of the boundary of the Gold Dollar claim; that he put up stakes at the northeast and northwest corners of the latter claim for the southeast and southwest corners, respectively, of the Doctor lode; that, going northerly about 900 feet, he put up another center end notice, and also nailed to a tree another stake on which he wrote, as near as he could remember, "Northwest center end stake of the Doctor mine," and signed the names of Candiani and Perelli as locators; that, having done the writing found on the stake, he was able to read it, saying the word "center" is what he put on it. The stake last referred to was torn down, identified by the witness, offered in evidence, and is sent up for our inspection. There is written on the upper line thereof, with a lead pencil, the following: "N. W.," and a word that is illegible, but appears to begin with the letter "C" and to have the letter "t" therein. The second line is, "of Doctor Mine"; the third, "Perelli;" and the fourth, "Candiani." A re-examination of the testimony convinces us that when Dyson and Standish originally indicated on the ground the boundaries of the Doctor lode, it was their intention to extend the side lines of the Gold Dollar about 900 feet, so as to include the claim attempted to be located by Candiani and Perelli. Standish appeared as plaintiffs' witness, but he did not attempt to corroborate Dyson's testimony to which reference has been made. In the absence of such supporting declaration under oath, and from the fact that the Doctor lode was intended and attempted to be located as an extension of the Gold Dollar claim, we think Dyson's testimony should be disregarded, and conclude that the surveyor properly treated the tree having the

stake so marked thereon as the northwest corner instead of the northwest center end.

The decree heretofore rendered will be changed to conform with the views now expressed, thereby affirming the decree of the court below; the defendants to recover their costs and disbursements in both courts.

STATE ex rel. GIBSON et al. v. RICHARDSON, County Judge, et al.

(Supreme Court of Oregon. April 17, 1906.)

**1. MANDAMUS — ALTERNATIVE WRIT — AMENDMENTS — POWER OF TRIAL COURT — JUDICIAL DISCRETION.**

Under B. & C. Comp. § 612, prescribing what shall constitute the pleadings in mandamus proceedings, and providing that they are to have the same effect, and to be construed and may be amended in the same manner as pleadings in an action, an amendment of an alternative writ of mandamus is authorized while a cause remains in the trial court, and its action in granting leave so to amend is within its discretion, and will not be disturbed except in cases of an abuse thereof.

**2. EVIDENCE — JUDICIAL NOTICE — COURTS — RECORD — PRIOR HEARING.**

A court will take judicial knowledge of the facts which it has acquired at a prior hearing of the cause.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 63, 64.]

**3. APPEAL — REMAND — LEAVE TO ANSWER.**

The rule that whenever the Supreme Court does not make a final disposition of a cause on appeal from an order overruling a demurrer to the complaint, but remands the same to the court below, the latter may determine in the first instance whether or not defendant shall be permitted to answer, applies only to suits in equity.

**4. SAME — AMENDMENTS AFTER REMAND.**

When a judgment in a law action is reversed on appeal, and the cause remanded for a new trial or for further proceedings, the court below possesses power to allow reasonable amendments to be made to the pleadings, and its action in this respect will not be disturbed, except for an abuse of discretion.

**5. SAME — MANDAMUS — PEREMPTORY WRIT AMENDMENTS.**

B. & C. Comp. § 536, provides that in affirming or reversing a judgment the Supreme Court may, if necessary and proper, order a new trial. By section 555 an appeal in equity from a decree rendered on an issue of fact brings up the case for trial anew in the Supreme Court on the transcript and evidence accompanying it, while appeals in law actions are tried in the Supreme Court on bills of exceptions disclosing alleged errors set out in the transcript, the conclusion reached, when remitted being entered in the court below as its judgment. By section 114 a demurrer to a complaint interposes an issue of law, the determination of which constitutes a trial by a court. *Held*, that where on appeal a judgment sustaining a demurrer to an alternative writ of mandamus and dismissing proceedings to compel the doing of certain acts by a county court was affirmed, the order of affirmance concluding, "It is further ordered that the cause be remanded to the said court below, and that a judgment be there entered and docketed in accordance therewith," the trial court was not precluded from allowing the alternative writ of mandamus to be amended.

**6. PLEADING — STRIKING OUT AVERMENTS.**

The striking out of averments in an answer to an alternative writ of mandamus was

not error, where evidence of the facts stated in such averments could have been admitted under the remaining allegations.

**7. CONSTITUTIONAL LAW — SPECIAL PRIVILEGES OR IMMUNITIES — LOCAL OPTION LAW.**

Const. art. 1, § 20, prohibiting the passing of any act granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens, is not violated by Laws Or. 1905, pp. 41, 47, c. 2 (local option law), as the act does not grant any special privileges or immunities to any citizen or class of citizens, though, when put in operation, it may deny to some persons rights theretofore enjoyed of selling intoxicating liquors as a beverage.

**8. SAME — INTOXICATING LIQUORS — SALE.**

The sale of intoxicating liquors as a beverage is not a privilege guarantied to the citizens of the United States.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 631.]

**9. ELECTIONS — RIGHT OF SUFFRAGE — CONSTITUTIONAL GUARANTIES.**

Organic Act, art. 2, § 1, providing that all elections shall be free and equal, is not violated by Laws 1905, p. 47, c. 2 (local option law), as no qualified elector is thereunder prevented from freely voting to adopt or reject the local option law, or deprived of having his vote counted as cast, and hence, if he exercises his right of suffrage, his opportunity is equal to that of all other persons voting.

**10. INTOXICATING LIQUORS — LOCAL OPTION — DECLARING RESULT OF ELECTION.**

Const. art. 7, § 12, providing that the county court shall have the jurisdiction pertaining to probate courts and boards of county commissioners, and such other powers and duties, etc., as may be prescribed by law, requires such court to perform the obligations imposed upon it by Laws 1905, p. 47, c. 2, § 10, requiring it, if a majority of the votes at a local option election cast in an entire county, etc., be in favor of prohibition, to make an order declaring the result of such vote, and absolutely prohibiting the sale of intoxicating liquors as a beverage within the prescribed limits; such section making the declaration by the county court of the result of a majority vote for prohibition and the interdiction of the sale of intoxicating liquors as a beverage in pursuance thereof a ministerial act.

**11. MANDAMUS — MINISTERIAL ACTS — COURTS.**

In discharge of the obligations imposed on it by said section 10, the county court exercises neither discretion nor judgment, and hence mandamus lies to compel a compliance with the requirements of such section.

**12. STATUTES — TITLE — EXPRESSING SUBJECT.**

Under Const. art. 4, § 20, providing that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, the validity of laws adopted at the polls must be determined like enactments by the legislative assembly, by the test of the Constitution as modified by the amendment thereto.

**13. SAME.**

Const. art. 4, § 20, provides that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. Laws 1905, pp. 41, 47, c. 2 (local option law), entitled "An act to propose by initiative petition a law providing for election in any county, or any precinct therein, or any subdivision of a county, consisting of any number of entire and contiguous precincts of such county, to determine whether the sale of intoxicating liquors shall be prohibited in such county or subdivision thereof or in such precinct, \* \* \* declaring what shall constitute a subdivision of the county within the meaning of this law, \* \* \* providing for the issuance by the county court of orders prohibiting the sale of intoxicating liquors within

certain limits, and declaring the duties of such courts in reference thereto," operates to make the county the utmost limit and a precinct the smallest territory in which the local option law may be put into operation; a majority vote in the entire county in favor of prohibition, when carried into effect, preventing the sale of intoxicating liquors as a beverage in any precinct of the county, though a majority of the qualified electors in such precinct may have voted against the law, while if in any precinct a majority vote in favor of prohibition is cast, though a majority of the votes cast in the other parts of the territory may be against interdiction, the provisions of the act are required to be enforced in such precinct in which such majority vote was cast in favor thereof. *Held*, that the title was a fair index of the subject-matter of the act, and that the same did not contravene said article 4, § 20.

Appeal from Circuit Court, Malheur County; George E. Davis, Judge.

Special proceedings by the state, on the relation of W. L. Gibson and others, against B. C. Richardson, county judge, and others. From a judgment allowing a peremptory mandamus, defendants George W. Blanton and G. R. Glover, county commissioners, appeal. Affirmed.

For former report, see 81 Pac. 368.

This is a special proceeding, instituted by the state of Oregon, on the relation of W. L. Gibson and others, against B. C. Richardson, as county judge of Malheur county, and G. W. Blanton and G. B. Glover, as commissioners thereof, to compel them as the county court of that county to declare the result of an election held therein, November 8, 1904, to determine whether the sale of intoxicating liquors as a beverage should be prohibited in Nyssa precinct in that county. At a former trial of this cause, a judgment dismissing the proceedings was affirmed (*State ex rel. v. County Court of Malheur County*, 81 Pac. 368), and on the return of the mandate the relators, over objection, secured an amended alternative writ of mandamus, showing an alleged legal right in themselves to have the act hereinbefore specified performed. The answer of the defendant Richardson states that at all times since the votes so cast were canvassed he has been and now is ready, willing, and anxious to make the order which is sought to be enforced, but that his codefendants were opposed thereto. The answer of the defendants Blanton and Glover denies the material allegations of the amended alternative writ, and for a further defense thereto sets out the several steps attempted to be taken pursuant to the provisions of the local option liquor law, and alleges wherein such proceedings failed to comply therewith. In consequence of which defects they were absolved from performing the duty resulting from their office. For a further defense it is alleged that the local option act contravenes certain clauses of the Constitution of this state. The court, upon motion, struck out all the averments of the first affirmative defense, except the allegations that the notices of election were not printed until within

16 days prior to November 8, 1904, and that neither the sheriff nor the county clerk of Malheur county ever entered in the records thereof their compliance with the provisions of the local option law, respecting the issuing of notices or the posting thereof. The court also sustained a demurrer to the second affirmative defense, relating to the violation of the clauses of the organic law of this state by the adoption of the act in question. A reply put in issue the remaining allegations of new matter, and, the cause having been tried, the court made findings of fact and of law, as stated in the amended alternative writ, and thereupon allowed a peremptory mandamus, from which judgment the defendants Blanton and Glover appeal.

Geo. W. Hayes, for appellants. Geo. F. Martin and C. M. Van Pelt, for respondents.

MOORE, J. (after stating the facts). It is contended by defendants' counsel that, as no further proceedings were ordered in remanding the cause on the former appeal, the court erred in permitting, over objection, the alternative writ of mandamus to be amended. In the early practice, when some particular act was sought to be enforced, a mere letter from the sovereign power was issued, addressed to the person upon whom the duty devolved, commanding him to perform it. No return was originally allowed to the order, a disobedience of which subjected the offender to punishment. As mandatory proceedings became more general, the common-law courts, relaxing the ancient rule, permitted a return to the writ, which had taken the place of the king's letter; but the facts therein stated could not be traversed. If the return, though false, disclosed an adequate legal reason for not performing the act commanded, the proceedings were dismissed, and the petitioner's remedy was thereupon limited to the maintenance of an action to recover the damages which he had sustained by reason of the sham statement. A return was first permitted to be traversed by St. 9 Anne, c. 20, in cases involving a contest for a municipal office, and later the facts so stated were allowed to be controverted in all cases by St. 1 Wm. IV, c. 21, thereby avoiding the necessity of bringing an action for a false return. Pursuant to the rules governing the early practice in mandamus proceedings, any mistake therein of substance was fatal and could not be corrected; but after the passage of the statutes mentioned the rigor of the ancient mode of procedure was abated, so as to allow amendments to the alternative writ, when by doing so justice would be promoted, provided no new or different cause of action was thereby substituted, and this modern rule now generally prevails in this country. *Merrill, Mandamus*, §§ 5, 293, 294. Though the courts will not ordinarily permit a peremptory writ of mandamus to be altered (*High, Ex. Legal Rem.* § 519), the practice of amending an alternative

writ thereof, provided no new or different cause is thereby stated, is quite general. 18 Enc. Pl. & Pr. 753; *State v. Gibbs*, 7 Am. Rep. 233; *State v. Bailey*, 7 Iowa, 390; *Union Pacific Ry. Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428.

The statute of this state, recognizing the wisdom of the rule thus outlined, prescribes what shall constitute the pleadings in mandamus proceedings, and, referring thereto, contains the following provision: "They are to have the same effect and to be construed, and may be amended in the same manner, as pleadings in an action. Either party may move to strike out, or be allowed to plead over after motion or demurrer allowed or disallowed, and the issue joined shall be tried and the further proceedings thereon had in like manner and with like effect as in an action." B. & C. Comp. § 612. These liberal provisions authorize an amendment of an alternative writ of mandamus while the cause remains in the trial court, and its action in granting leave so to amend is a matter wholly within its discretion which will not be disturbed, except in cases of an abuse thereof. *Highway Commissioners v. People*, 38 Ill. 347; *Stevens v. Miller*, 3 Kan. App. 192, 43 Pac. 439. Our statute regulating the practice on appeal provides that, in affirming or reversing a judgment, this court may, if necessary and proper, order a new trial. B. & C. Comp. § 556. Observing the rule that a court will take judicial knowledge of the facts which it has acquired at a prior hearing of the cause (16 Cyc. 851; *Mill's Estate*, 40 Or. 424, 67 Pac. 107), we have examined the record pertaining to the order affirming the judgment on the former appeal and find that it concludes as follows: "It is further ordered that the cause be remanded to the said court below, and that a judgment be there entered and docketed in accordance herewith." Does the language here quoted show such a final disposition of the cause as to preclude the trial court from allowing the alternative writ to be amended?

In *Powell v. Dayton, etc.*, Ry. Co., 13 Or. 446, 11 Pac. 222, a demurrer to the complaint therein was overruled, and the defendants appealed. In disposing of the cause, Mr. Justice Thayer says: "The case is too important to be determined upon demurrer, and the appellants would have been allowed to answer over, if the decision of the lower court had been affirmed. We have therefore concluded to reverse the decree appealed from and remand the case with leave to the respondents to amend their complaint." The remittitur having been sent down, the plaintiffs filed an amended complaint to which a demurrer was interposed and overruled, whereupon the defendants again appealed (s. c. 14 Or. 22, 12 Pac. 83); their counsel insisting that, in case the decision of the lower court was sustained, their clients should be given leave to answer over. In disposing of such contention, Mr. Justice

Strahan, after referring to the former practice in this court in such cases, remarks: "We therefore announce it as a rule of practice in such cases that whenever this court does not make a final disposition of the cause, but remands the same to the court below, it will be open for that court to determine in the first instance whether the defendant shall be permitted to answer or not." In *Fowle v. House*, 29 Or. 114, 44 Pac. 692, which was a suit to enforce a mortgage, a demurrer to the complaint was sustained, and the suit dismissed, whereupon the plaintiff appealed. At the trial in this court the complaint was found to be insufficient, and the decree affirmed. The mandate having been sent down, the motion of plaintiff's counsel to recall it was denied (s. c. 30 Or. 305, 47 Pac. 787), because the cause was remanded for further proceedings.

It will be observed that the cases adverted to were suits which were dismissed because the complaints were respectively held to be insufficient on demurrer. An appeal in equity, from a decree rendered on an issue of fact, brings up the cause for trial anew in this court upon the transcript and evidence accompanying it (B. & C. Comp. § 555), and a final decree in such cases is usually rendered in this court. A mandate is thereupon sent to the court below, to be entered, however, as our decree, and not as that of the court a quo. When, on appeal from a decree in equity, the cause is sent back, because the complaint is considered insufficient or the evidence inadequate to support a material averment, no final decree is rendered in this court, except to set aside the decree of the court below and to require further proceedings to be had therein. The rule, therefore, as promulgated in *Powell v. Dayton, etc.*, Ry. Co., *supra*, applies only to suits in equity. Appeals in law actions are tried in this court on bills of exceptions, disclosing alleged errors set out in the transcript (B. & C. Comp. § 555), and the conclusion here reached is, when remitted, entered in the court below as its judgment. When a judgment, rendered on an issue of fact in a law action, is reversed on appeal, a new trial is generally ordered, unless the court below should have sustained a motion for a judgment of nonsuit, because of an entire lack of evidence. *Durbin v. Oregon, etc.*, Ry. Co., 17 Or. 5, 17 Pac. 5, 11 Am. St. Rep. 778; *McPherson v. Pacific Bridge Co.*, 20 Or. 486, 26 Pac. 560; *Coughtry v. Willamette St. Ry. Co.*, 21 Or. 245, 27 Pac. 1031; *Eastman v. Monastes*, 32 Or. 291, 51 Pac. 1095, 67 Am. St. Rep. 531; *Abbott v. Oregon R. & N. Co.* (Or.) 80 Pac. 1012. A reversal of the judgment in each of the cases last cited was a final disposition of the cause. Where, however, a judgment in a law action is reversed on appeal, and the cause is remanded for a new trial or for further proceedings, the court below possesses power to allow reasonable amendments to be made to the pleadings, and its action in this respect will

not be disturbed, except for an abuse of discretion. *Henderson v. Morris*, 5 Or. 24; *Baldock v. Atwood*, 21 Or. 73, 26 Pac. 1058; *Talbot v. Garretson*, 31 Or. 256, 49 Pac. 978; *Lleuallen v. Mosgrove*, 37 Or. 446, 61 Pac. 1022; *York v. Nash*, 42 Or. 321, 71 Pac. 59.

A demurrer to a complaint interposes an issue of law, the determination of which constitutes a trial by a court. B. & C. Comp. § 114; *Hume v. Woodruff*, 26 Or. 373, 38 Pac. 191. When such a trial results in sustaining a demurrer, and the plaintiff declines to amend the complaint, in consequence of which a judgment is rendered against him, and he appeals, an affirmance of the judgment leaves nothing further to be considered, and hence, the ordering of a new trial, as prescribed by statute (B. & C. Comp. § 556), would be useless. When a judgment or decree given under such circumstances is affirmed on appeal, and the cause is remanded, if the plaintiff seeks to correct his error by amending the complaint, his payment of or responsibility for the costs and disbursements incurred should be a sufficient punishment for his mistake, and his application so to amend ought to be allowed, if it is reasonable and meets the approval of the trial court. We believe that a fair interpretation of the rules of practice prevailing in this state authorized the court to allow the alternative writ of mandamus to be amended in permitting which no error was committed.

Considering the case on its merits, no exceptions were taken to the findings, nor was any request made for any other decision upon a question of fact, and as the findings made by the court show a compliance with the requirements of the several provisions of the local option act, thereby supporting the judgment rendered, the only questions to be considered are the action of the court in striking out parts of the answer, and in sustaining a demurrer to the other parts thereof. The averments which were struck out are lengthy, and an examination of them convinces us that no error was committed in their elimination; for evidence of the facts thus stated could have been admitted under the remaining allegations, and hence the new matter so set out will not be detailed.

It is insisted by defendants' counsel that the local option law violates section 20, art. 1, of the Constitution of this state, which is as follows: "No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens"—and that, having sought to raise this and other constitutional questions by averments of new matter in the answer, an error was committed in sustaining the demurrer interposed thereto. An examination of the provisions of the act in question fails to show that any privileges or immunities are attempted to be granted thereby. The law, when put into operation, may deny to some persons rights theretofore enjoyed, of selling intoxicating liquors as a beverage; but the act does not

grant any special privileges or immunities to any citizen or class of citizens. If it did, however, it would not contravene common right, because the sale of such liquors for the purpose specified is not a privilege guaranteed to the citizens of the United States. *Sandys v. Williams* (Or.) 80 Pac. 642.

It is maintained that the act under consideration is violative of section 1, art. 2, of the organic law of the state, which is as follows: "All elections shall be free and equal." No qualified elector was prevented by any means whatever, so far as disclosed by the transcript, from freely voting to adopt or reject the local option law, or deprived of having his vote counted as cast, and if he exercised the right of suffrage on this particular occasion, his opportunity was equal to that of all other persons voting, and hence the act does not contravene the clause of the Constitution invoked to defeat it. 10 Am. & Eng. Enc. Law (2d Ed.) 583.

It is insisted that section 10 of the act (Laws 1905, p. 47, c. 2) violates subdivision 3 of section 23, art. 4, of the Constitution, which is as follows: "The legislative assembly shall not pass special or local laws in any of the following enumerated cases, that is to say: \* \* \* (3) Regulating the practice in courts of justice"—and that it contravenes sections 1 and 12, art. 7, of the fundamental law of the state, which, so far as involved herein, are as follows, respectively: "The judicial power of the state shall be vested in a \* \* \* county court \* \* \* having general jurisdiction, to be defined, limited, and regulated by law, in accordance with this Constitution." "The county court shall have the jurisdiction pertaining to probate courts, and boards of county commissioners, and such other powers and duties, and such civil jurisdiction not exceeding the amount of value of five hundred dollars, and such criminal jurisdiction not extending to death or imprisonment in the penitentiary, as may be prescribed by law. But the legislative assembly may provide for the election of two commissioners to sit with the county judge, whilst transacting county business in any or all the counties, or may provide a separate board for transacting such business." The section of the act thus challenged requires the county court, if a majority of the votes cast in an entire county, or in any subdivision thereof as a whole, or in any precinct, at an election called for that purpose, be in favor of prohibition, to make an order declaring the result of such vote and absolutely prohibiting the sale of intoxicating liquors as a beverage within the prescribed limits. It will be observed that this section makes the declaration of the result of a majority vote for prohibition and the interdiction of the sale of intoxicating liquors as a beverage in pursuance thereof, by the county court, a ministerial act. *State ex rel. v. County Court of Malheur County* (Or.) 81 Pac. 368. We think the part of

section 12, art. 7, of the Constitution, which vests the county court with "such other powers and duties \* \* \* as may be prescribed by law," requires such court to perform the obligation thus imposed upon it by section 10 of the act, in the discharge of which it exercises neither discretion nor judgment, and hence mandamus lies to compel a compliance with the requirements of this clause of the act.

It is contended that the title of the local option act contravenes section 20, art. 4, of the Constitution, which, so far as deemed important, is as follows: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." It is argued that the title of the act in question implies an intention on the part of the framers of the statute that it should be local in its operation, so that qualified electors in each community could, for themselves, determine whether or not the sale of intoxicating liquors as a beverage should be prohibited therein, and that no intimation is given in the inscription of the act that an aggregation of precincts in which, as a whole, a majority of the voters who were in favor thereof could impose prohibition upon a precinct in which a majority of the qualified electors was opposed thereto. The object of the constitutional inhibition in question is to prevent matters wholly foreign to the subject-matter specified in the title from being inserted in the body of the act. *Simpson v. Bailey*, 3 Or. 515; *McWhirter v. Brainard*, 5 Or. 426. In laws proposed by initiative petitions pursuant to an amendment of our Constitution, it would seem that the method frequently adopted by members of the Legislature of securing votes for the passage of a bill by promises of reciprocal support of other measures could not be pursued, and hence one of the reasons assigned for requiring every bill introduced in the legislative assembly to comply with the requirement of section 20, art. 4, of the organic act of the state, so that it may stand on its own merits, the purpose of which, to be valid, must be fairly disclosed in the title, would have no application to the consideration of an act which, like the local option law, resulted from a vote of the people. The validity of laws adopted at the polls must be determined like enactments by the legislative assembly, by the test of the Constitution as modified by the amendment thereto. Though the argument that a proposed measure must depend upon its own merits may not apply to acts initiated by petitions, a valid reason for requiring that the subject-matter of laws to be adopted or rejected at the polls should be stated in the title nevertheless exists. The majority of qualified electors are so much interested in managing their own affairs that they have no time carefully to consider measures affecting the general public. A great number of voters undoubtedly have a

superficial knowledge of proposed laws to be voted upon, which is derived from newspaper comments or from conversation with their associates. We think the assertion may safely be ventured that it is only the few persons who earnestly favor or zealously oppose the passage of a proposed law, initiated by petition, who have attentively studied its contents and know how it will probably affect their private interests. The greater number of voters do not possess this information and usually derive their knowledge of the contents of a proposed law from an inspection of the title thereof, which is sometimes secured only from the very meager details afforded by a ballot which is examined in an election booth preparatory to exercising the right of suffrage. It is important, therefore, that the title to laws proposed in the manner indicated should strictly comply with the constitutional requirement.

An examination of the provisions of the act under consideration shows an evident intent to make a county the utmost limit and a precinct the smallest territory in which the local option law may be put into operation, and, as the greater necessarily includes the less, a majority vote in the entire county in favor of prohibition, when carried into effect, prevents the sale of intoxicating liquors as a beverage in any precinct therein, though a majority of the qualified electors in such precinct may have voted against the law. Between these extremes of territory another district may be created which is known as a subdivision of a county, composed of two or more entire and contiguous precincts, and the adoption of local option in a subdivision as a whole, when declared as such by the county court, necessarily puts the law into operation in each precinct forming an integral part of the subdivision, through a majority of the votes cast in one of the precincts embraced therein may have been opposed to prohibition. In an election held in a county as a whole, or in a subdivision thereof, if any precinct embraced therein cast a majority vote in favor of prohibition, though a majority of the votes cast in the other parts of the territory may be against interdiction, the provisions of the act are required to be enforced in the precinct in which a majority vote was cast in favor thereof. *Laws Or. 1905*, pp. 41, 47, c. 2, §§ 1 and 10. The title in question, so far as it relates to the objection urged, is as follows: "An act to propose by initiative petition a law providing for election in any county, or any precinct therein, or any subdivision of a county, consisting of any number of entire and contiguous precincts of such county, to determine whether the sale of intoxicating liquors shall be prohibited in such county or subdivision thereof or in such precinct, \* \* \* declaring what shall constitute a subdivision of the county within the meaning of this law, \* \* \* providing for the issuance by the county court of orders prohibiting the sale

of intoxicating liquors within certain limits and declaring the duties of such courts in reference thereto." We think the title is a fair index of the subject-matter of the act, and that the last clause of the inscription quoted is sufficient to call attention to and give adequate notice of the provisions of the law, making it applicable to the territory specified under the particular circumstances hereinbefore mentioned.

Believing that no error was committed as alleged, the judgment should be affirmed; and it is so ordered.

(48 Or. 100)

### STRAUHAL v. ASIATIC S. S. CO.\*

(Supreme Court of Oregon. April 17, 1906.)

#### 1. TORTS—JOINT WRONGDOERS—LIABILITY.

Where an action is based on tort alleged to have been caused by several defendants jointly, a right of action exists against any or all of the wrongdoers, independent of contract.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Torts, § 29.]

#### 2. PLEADINGS—COMPLAINT—AMENDMENT—NEW CAUSE OF ACTION.

In an action for wrongful death alleged to have been caused by defendants jointly, it was not error to allow an amendment to the complaint, averring employment by one of them alone, where such allegation of employment would merely show that deceased was rightfully on a certain barge at the time of the accident, and that the defendant alleged in the amendment to have been the employer owed him the duty of providing a safe place in which to work, and that the other defendant, whose steamship the barge was employed in coaling, owed him the duty of not increasing the hazard of his employment by its negligence.

#### 3. NEGLIGENCE—LIABILITY—EVIDENCE.

In an action for wrongful death of plaintiff's intestate, caused by the overturning of a coal barge owned by defendant lumber company, on which deceased was employed, and which was in the joint possession of such company and defendant steamship company, being loaded by the latter either in its own way or as directed by a barge master furnished by the lumber company, evidence that the party who hired the barge was the superintendent of water lines of both the steamship company and defendant navigation company, and that the coal was taken from the latter company's bunkers to be carried on the barge to a vessel of the steamship company, was not sufficient to make the navigation company liable for the defective condition of the barge or the negligent manner in which it was loaded or discharged.

#### 4. SAME—CONCURRENT NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action for wrongful death, evidence examined, and held to tend to show that the accident by which deceased lost his life was caused by the concurrent negligence of both defendants.

#### 5. SAME—JOINT LIABILITY.

Evidence tending to show that the accident by which deceased lost his life was caused by the concurrent negligence of defendant steamship company in loading and discharging a coal barge chartered by it of defendant lumber company and of the latter in furnishing an unseaworthy barge and in not keeping her free from water and in sending deceased to work at a place known to it, but not to him, to be dangerous, without warning him of the danger, brought the case within the rule that where an injury is the result of the concurring negligence

of two or more persons, though acting separately, either or all are liable.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 18.]

#### 6. TORTS—JOINT LIABILITY—CONCURRING NEGLIGENCE.

To make tort-feasors liable jointly, there must be some sort of community in the wrongdoing, and the injury must be in some way due to their joint work; but it is not necessary that they be acting together or in concert, if their concurring negligence occasions the injury.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Torts, § 29.]

#### 7. MASTER AND SERVANT—ASSUMPTION OF RISK—SUFFICIENCY OF EVIDENCE.

In an action for wrongful death of plaintiff's intestate, drowned by the overturning of a barge whereon he was at work, evidence that, while deceased was standing on the wharf, he was asked by defendant's superintendent if he wanted to work, and, on replying in the affirmative, was directed to defendant's barge master, who put him to work on a hand pump on the deck of a barge; that deceased had no experience in working on water crafts, and was not informed by either the superintendent or barge master or any one else that the barge was in danger of turning over, or that there was any unusual risk or hazard in working thereon; that though the danger was apprehended by stevedores engaged in unloading the barge, and was several times mentioned by them in the hearing of the deceased, it did not appear that he understood the purport of their remarks or was conscious of the danger—was insufficient to show assumption of the risk by deceased.

Appeal from Circuit Court, Multnomah County; J. B. Cleland, Judge.

Action by B. D. Strauhal, as administrator, against the Asiatic Steamship Company and others. From a judgment for defendants, plaintiff appeals. Reversed.

This is an action by the administrator of Otto Pannier, deceased, against the Oregon Railroad & Navigation Company, the Oregon Round Lumber Company, and the Portland & Asiatic Steamship Company, jointly, to recover damages for the death of his intestate, alleged to have been caused by the negligence of the defendants. The complaint, after alleging the death of Pannier, the appointment of plaintiff as his administrator, and the incorporation of the several defendants, avers that between the 24th and 28th days of December, 1904, the defendants were in the sole and exclusive use and possession of the river barge Monarch, which they were using in coaling river crafts of the Oregon Railroad & Navigation Company, and the steamship Arabia, belonging to the steamship company; that they carelessly and negligently loaded upon the barge a large amount of coal in excess of what it could safely carry in its then condition and caused and permitted such coal to be loaded thereon in an improper manner so as to strain and weaken the barge, and render it unsafe; that while it was in such unsafe condition the defendants caused it to be taken to the Arabia and proceeded in a careless and negligent manner to unload and remove the coal therefrom, by reason of which the barge

\*Rehearing denied.

filled with water, capsized and the plaintiff's intestate, who was working thereon, drowned; that the barge was old, decayed, and weak and not sound nor safe for the use to which it was being put; that after it had been taken alongside the Arabia, the deceased was employed by the defendants to assist in pumping the water from it and was so engaged at the time of the accident; that he was not accustomed to working on barges and had no knowledge or intimation that the barge in question was unseaworthy or had been improperly loaded or was then being negligently or unskillfully unloaded, or that there was any particular danger in his employment; that the place where he was put to work was one of extreme danger and known to be such to the defendants, notwithstanding which they neglected to inform him thereof. The defendants answered separately. The Portland & Asiatic Steamship Company alleged that at the times mentioned in the complaint it leased of the defendant, the Oregon Round Lumber Company, for the purpose of transporting coal to the steamship Arabia, then lying in the harbor, the barge Monarch in charge of a barge master whose duty it was to superintend the loading and unloading thereof, to operate the pumps and to keep the barge free from water; that the barge was properly loaded and towed alongside the Arabia, but being in an unseaworthy condition, was taking water rapidly; and that the lumber company employed the deceased to operate the hand pump thereon, and while so engaged it capsized without any fault or negligence of the answering defendant. The Oregon Round Lumber Company denied the allegations of the complaint and pleaded that, at the time it rented the barge to the defendants the Oregon Railroad & Navigation Company and the Portland & Asiatic Steamship Company, it was in good seaworthy condition; that its codefendants had the sole and exclusive charge and management thereof and of its employé in charge, and so improperly and negligently loaded and operated the barge that it was greatly strained and weakened and caused to take water faster than it could be removed by the pumps; that the deceased was employed by it to pump water from the barge with knowledge of its weakened condition and that it was liable to capsize at any time and therefore assumed the risk incident to such employment. The Oregon Railroad & Navigation Company, likewise, denied the material allegations of the complaint and for an affirmative defense pleaded substantially the same facts as are set up by its codefendant, the steamship company. Upon the issues thus tendered, the cause went to trial before the court and a jury.

The plaintiff gave testimony tending to show that on December 24, 1904, Capt. Conway, superintendent of water lines of the Oregon Railroad & Navigation Company and

the Portland & Asiatic Steamship Company, chartered of the defendant the Oregon Round Lumber Company the barge in question for use in coaling the steamship Arabia then in port and belonging to the steamship company; that the barge was what is known as a "model" barge, and was equipped with a steam siphon and hand pump for use in removing the water; that at the time the barge was hired Conway was informed that he would have to be careful in loading and unloading it or it would open up and take water, and at his request the lumber company sent a man along as barge master, whose duty it was to report to his employer if the barge was not handled properly and to see that it was safely moored and kept free from water. The barge was taken by the lessee to the Albina Dock, and from 120 to 130 tons of coal loaded on the forward deck by the employés of the steamship company on the 24th. The 25th and 26th being holidays no work was done on either of those days, but on the morning of the 27th the loading was resumed and completed about noon of the 28th. During the morning of the 28th the barge master observed that it was taking water faster than it could be pumped out and about 11 o'clock attempted to reach the office of the lumber company by telephone to advise its officers of the condition of the barge, but was unable to do so. About noon on the 28th, and while the barge master was at his lunch, the barge was, by direction of the steamship company, towed from the coal bunkers to the Arabia and made fast. At this time there was a large quantity of water in the hold and it was taking water freely. When the barge master returned from his lunch he noticed a considerable list to port and that the barge was in a dangerous condition, and thereupon telephoned as soon as he could to the office of the lumber company, and O'Reilly, the superintendent, responded to the call and reached the barge between 3 and 4 o'clock in the afternoon. At that time it was in a critical condition. It had several feet of water in the hold and was leaking badly and the stevedores had taken from 25 to 30 tons of coal from one corner and as a consequence it had listed so that the water was washing the deck on the offshore side and midships. O'Reilly objected to the manner in which the barge was being unloaded, and in consequence thereof the stevedores commenced taking coal from the opposite side and the load was so shifted as to put the barge on an even keel, but the water was gaining on the pumps and O'Reilly telephoned for a steamer to assist in pumping. About this time, and while the barge was in this condition, he noticed the deceased standing on the wharf and asked him if he wanted to work, and being answered in the affirmative, O'Reilly directed him to report to the barge master, who put him to work at the hand pump on

the forward deck. He worked there for about 45 minutes when the barge suddenly turned over, throwing him into the water and drowning him. The deceased, so far as the evidence shows, had no experience in working on water crafts and was not informed or advised by O'Reilly, who hired him, or the barge master, who put him to work, or any one else, that the barge was in danger of turning over, or that there was any unusual risk or hazard in working thereon. The danger seems, however, to have been apprehended by the stevedores who were unloading and was several times mentioned by them in the hearing of the deceased, but it does not appear that he understood the purport of their remarks or was conscious of the danger. At the close of the plaintiff's testimony, he was permitted to amend his complaint so as to conform to the evidence, by changing the allegation that the deceased was employed by the defendants jointly to an averment of his employment by the defendants, the Oregon Round Lumber Company, alone. The defendants thereupon separately moved for nonsuits, which motions were sustained by the court, and the plaintiff appeals.

E. B. Dufur and H. H. Riddell, for appellant. Ralph W. Wilbur, for respondent Oregon Round Lumber Company. Arthur C. Spencer, for respondents Oregon R. & N. Co. and Portland & A. S. S. Co.

BEAN, C. J. (after stating the facts). It was not error to allow the amendment to the complaint. It did not substantially change the cause of action. The action is not based on contract, but on tort, alleged to have been caused by the defendants jointly, and in such case a right of action exists against any or all of the wrongdoers, independent of contract. *Wabash, etc., Ry. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791. The allegation of employment was merely to show that deceased was rightfully on the barge at the time of the accident and that the lumber company, his employer, owed him the duty of providing a reasonably safe place in which to work or of warning him of the danger incident to the employment, and the steamship company, the duty of not increasing the hazard of his employment by its negligence. There is no evidence in the record connecting the defendant the Oregon Railroad & Navigation Company in any manner whatever with the accident which resulted in the death of plaintiff's intestate, and therefore its motion for nonsuit was properly allowed. It is true Capt. Conway, who hired the barge, was the superintendent of water lines of both the Oregon Railroad & Navigation Company and the steamship company, and it is possible, although not clearly shown from the testimony, that the coal was taken from the bunkers of the former company, but this was not sufficient to make it liable for the condition of the barge or the manner in which it

was loaded or discharged. The barge belonged to the defendant lumber company, was in the joint possession of it and the defendant steamship company and was loaded by the latter either in its own way or as directed by the barge master, a point upon which there is some conflict in the testimony, and there is evidence tending to show that it was not seaworthy and was improperly loaded. The witness Seaman, who had known the barge for six or eight months prior to the accident, was master of her for a time about the 1st of December, and who inspected her at the request of the officers of the lumber company, testified that she was an old craft; that her keel was broken in one place, and appeared to be rotten in others; that the two main braces had been pulled from the sides for about three inches and in his opinion the barge was not seaworthy for more than 300 tons, and he furthermore testified that he saw her the day of the accident after she had been loaded and that the load was not evenly distributed and so put an unusual strain on the barge. Dewyl, another witness, who had known the barge for 10 years or more and was foreman of her for some time, testified that he saw her as she was being towed from the dock to the Arabia and that she was loaded too heavily amidships; that such a load had a tendency to loosen the hog chains, open the seams and cause her to take water. When the barge was made fast to the Arabia, the water was coming in faster than it could be removed by the pumps and there was a considerable list to port. The steamship company, however, commenced discharging the coal from the starboard bow, which necessarily increased the list. When O'Reilly reached the barge he complained of the manner in which it was being discharged, and the foreman gave directions to have the coal removed as evenly as could be done and it was shifted so as to put the barge on an even keel, but by that time there was such a quantity of water in her that it was too late to keep her from capsizing.

There was evidence, therefore, tending to show that the accident by which the deceased lost his life was caused by the concurrent negligence of the steamship in loading and discharging the barge and of the lumber company in furnishing an unseaworthy barge, and in not keeping her free from water and in sending the deceased to work at a place known to it, but unknown to him, to be dangerous, without warning him of the danger. And this brings the case within the established rule that where an injury is the result of the concurring negligence of two or more persons, although acting separately, either or all are liable. *Smith v. Rines*, 2 Sumn. 338, Fed. Cas. No. 13,100; *Pirie v. Tvedt*, 115 U. S. 43, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; *Wabash, etc., Ry. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791; *Con. Ice Machine Co. v. Keifer*, 134 Ill. 481, 25 N. E. 799, 10 L. R. A. 690, 23 Am. St. Rep. 688; *Hawkes-*

worth v. Thompson, 98 Mass. 77, 93 Am. Dec. 137; Cuddy v. Horn, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178; Slater v. Mersereau, 64 N. Y. 138; Brown v. Cox Bros. & Co. (C. C.) 75 Fed. 689; Flaherty v. Northern Pac. Ry. Co. (Minn.) 40 N. W. 100, 1 L. R. A. 680, 12 Am. St. Rep. 654; Village of Carterville v. Cook, 16 Am. St. Rep. 250, notes; Gulf, Colo. & Santa Fé Ry. Co. v. Bell, 8 Am. Neg. Rep. 159, 164, notes. In Smith v. Rines, supra, Mr. Justice Story says with reference to actions of this character: "Nothing is more clear, than the right of the plaintiff to bring an action of this sort against all the wrongdoers, or against any one or more of them, at his election. There is no principle, upon which the defendant has a right, in any courts of justice, to say, that the action shall be several, and not joint; and thus to take away the right of election, which the plaintiff has by law, to make it joint." And in Pirie v. Tvedt, supra, Mr. Chief Justice Waite says: "A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way." Judge Seaman says in Brown v. Cox Bros. & Co., supra, that the creation of a joint liability in tort does not depend upon proof that the same act of wrongdoing was participated in by both tort-feasors and that they were in concert and had a common intent or were engaged in a joint undertaking: "But the rule under which parties become jointly liable as tort-feasors extends beyond acts or omissions which are designedly co-operative, and beyond any relation between the wrongdoers. If their acts of negligence, however separate and distinct in themselves, are concurrent in producing the injury, their liability is joint as well as several. Each becomes liable because of his neglect of duty, and they are jointly liable for the single injury inflicted because the acts or omissions of both have contributed to it." Smith v. Day, 39 Or. 531, 64 Pac. 812, 65 Pac. 1055, is not in conflict with this doctrine. In that case the defendants were acting independently of each other, without concert or common purpose, and the injury was not due to their concurring negligence, although it may have been a common result to which the act of each contributed. To make tort-feasors liable jointly there must be some sort of community in the wrongdoing, and the injury must be in some way due to their joint work, but it is not necessary that they be acting together or in concert if their concurring negligence occasions the injury. "Where the negligence of two or more persons directly concurs to produce an injury to another," holds the Supreme Court of Illinois in Con. Ice Machine Co. v. Keifer, supra, "although one may have undertaken one part of the particular work and another another part, and the negligence occurs in the performance of each of the several parts of the work which directly contri-

butes to produce the injury, all will be liable."

We are of the opinion, therefore, that the action can be maintained against the lumber company and the steamship company jointly. In such action a plaintiff may recover, if at all, against both or either of the defendants as the proof may warrant. Thompson v. Clay St. Ry. Co., 66 Cal. 163, 4 Pac. 1165; Winslow v. Newlan, 45 Ill. 145; Carpenter v. Lee and Lowe, 5 Yerg. (Tenn.) 265.

It is contended that the deceased assumed the increased risk due to the condition of the barge at the time he went to work thereon, but there is no proof that he was conscious of the danger, or had knowledge of the fact.

The judgment is reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

#### CHAVES et al. v. MYER et al.

(Supreme Court of New Mexico. Feb. 2, 1906.)

#### 1. DESCENT AND DISTRIBUTION—ACTION BY HEIRS—RECOVERY OF SHARE.

The complaint examined, and held sufficient to allege that plaintiffs were the owners of the fund loaned by the defendant Myer to the defendants Lucero.

#### 2. APPEAL—REVIEW—QUESTIONS NOT RAISED BELOW.

Questions not presented to the court below in the proper way, nor to this court by assignment of error, are not the subjects of review by this court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2968-2982.]

#### 3. TRUSTS—FOLLOWING TRUST FUNDS—EQUITABLE REMEDY.

The equitable remedy given a cestui que trust to follow trust funds into property, in which they may have been fraudulently invested by his trustee, is not taken away by statutory provisions affording a remedy by attachment or garnishment; but the legal and equitable remedies are to be considered concurrent.

#### 4. SAME.

Nor is such equitable remedy defeated by the fact that the cestui que trust might sue the trustee and his bondsmen and enforce his claim by levy; the rule being well settled that the defrauded party has his option either to hold the trustee personally liable, or to follow his money into the property in which it has been reinvested.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 516.]

#### 5. SAME.

Nor is the remedy of the defrauded cestui que trust to realize out of such property purchased with his funds affected by the fact that the agreement between the trustee and the owner of such property which led up to the diversion of such funds was an illegal one; the cestui que trust having been no party to such agreement.

—(Syllabus by the Court.)

Appeal from District Court, Bernalillo County; before Justice Benjamin S. Baker.

Action by Elias Chaves and Emilia Chaves de Armijo against Ben Myer and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

William B. Childers, for appellants. Summers Burkhart, for appellees.

POPE, J. This is a suit brought by the appellees, Elias Chaves and wife, alleging in their complaint substantially as follows: That on November 17, 1902, plaintiffs recovered a judgment in the district court of Bernalillo county against the defendant Myer, individually and as administrator of the estate of Rafael Armijo, deceased, for the sum of \$2,207.58, upon which judgment on November 28, 1902, execution was issued with return of nulla bona dated January 27, 1903. A certified copy of the judgment is attached to the complaint. The complaint, after alleging that the defendant Myer is insolvent, avers that the judgment was for the distributive share of the estate of the said Rafael Armijo to which plaintiffs are entitled. It is further alleged that on March 6, 1900, the defendants Maria A. de Lucero and J. Blas Lucero, her husband, executed and delivered to the defendant Myer a mortgage upon certain real estate in Bernalillo county, which mortgage was duly recorded March 7, 1900. A copy of the mortgage is attached to the complaint. An inspection of this shows that it runs to Myer personally, and upon the following conditions: "Whereas the said parties of the first part (Maria A. de Lucero and J. Blas Lucero) have received of the said party of the second part (B. Myer) two thousand and eight dollars, said sum having been paid to the said second party in his capacity of administrator de bonis non of the estate of Rafael Armijo, dec., to which said estate said sum of two thousand and eight dollars is belonging: Now, therefore, if within the time of limitation under the laws of the territory of New Mexico, regulating the administration of estates and the liability of administrators, no claim or demand shall be made against Ben Myer as administrator of said estate nor any proceedings be entered against him, then this indenture shall be null and void and of no effect, otherwise to remain in full force." It is further alleged that at the time of the execution and delivery of this mortgage Myer, as administrator of the Armijo estate, had in his hands the sum of \$2,008 which "in equity and good conscience belonged" to plaintiffs, and which they were entitled to receive from said defendant as their distributive share of said estate, which said Myer and said J. Blas Lucero well knew; but that the said J. Blas Lucero, contriving to defraud plaintiffs out of said sum of money, caused said mortgage to be executed and delivered to the said Myer to induce him, and did thereby induce him, to procure from the probate court of Bernalillo county an order authorizing him to pay over to the said J. Blas Lucero the said sum of \$2,008, and to pay to him, the said Lucero, under said order the said sum of money. It is further alleged that, while

ed as aforesaid, it was in truth and in fact executed for the purpose of securing the payment of any judgment which these plaintiffs might obtain against said Myer for the distributive share of said estate, and for no other purpose, except as above stated to induce Myer to turn over to said Lucero the above named sum in his hands as administrator and to enable the said Lucero to get possession of the same. It is further alleged that said order allowing the payment of said sum on said mortgage was obtained without notice to plaintiffs, although Myer and Lucero well knew that plaintiffs were claiming said sum, and that thereafter plaintiffs appealed from said order of the probate court to the district court, when said order was vacated and set aside and the judgment of November 17, 1902, above referred to, was entered. The complaint also alleges that plaintiffs have requested Myer to bring suit to foreclose said mortgage, but that he has refused so to do, and complainants pray that said mortgage be foreclosed to satisfy said judgment of \$2,207.58. To this complaint the defendant Myer answered, in effect admitting all of its allegations. The defendants Lucero demurred upon the ground, first, that said complaint does not state a cause of action against defendants; and, second, upon the ground that these defendants are not necessary or proper parties to the action. The court overruled the demurrer; and, the Luceros electing to stand thereon, judgment was entered granting the relief prayed. Whereupon the last-named defendants prosecute their appeal to this court.

The assignments of error and the briefs and arguments point out a number of respects in which, it is alleged, the complaint fails to state a cause of action. It is urged, first, that there is no sufficient allegation that the sum of money advanced by Myer to Lucero belonged to the plaintiffs, and that there could not be any such allegation, for the reason that no particular sum could belong to any designated legatee in advance of a final settlement of the Armijo estate. We are of opinion, however, that the allegation that the sum held by Myer as administrator, and subsequently loaned to the Luceros, "in equity and good conscience" belonged to plaintiffs, and that they "were entitled to receive [it] from said defendant as their distributive share of said estate" sufficiently alleged ownership, especially when taken in connection with the recital and finding in the judgment attached to and made a part of the complaint to the effect that "the said Ben Myer as such administrator has settled all claims against said estate except those of said appellants" (Elias Chaves and wife, the plaintiffs herein). It is further contended that the amount paid over to the Luceros was a part of the \$2,207.58 which the judgment recites belongs as a matter of fact to the Luceros as their part of the Armijo estate. We find nothing in the record to sustain this view. On the con-

trary, it is clearly averred that the sum here in controversy was a fund belonging to the plaintiffs by reason of the fact that all other claims, both in the nature of debts and bequests, had been paid.

It is said, further, however, that, conceding the liability of the defendant J. Blas Lucero, no such liability exists against the wife, Maria A. Lucero; there being no allegation that she knew of or participated in the fraud. No such point was apparently made in the court below, however. The only grounds of demurrer there urged were, first, that the complaint "does not state a cause of action against defendants"; and, second, "defendants are not necessary or proper parties to the action." As was said in *Crabtree v. Segrist*, 3 N. M. (Gild.) 500, 6 Pac. 203: "It does not appear that either of these points was raised or insisted upon at the trial, and we are therefore of opinion that they cannot be presented and urged before us. The general rule that only such assignments of error can be presented to the appellate court as were brought to the attention of the trial judge, so as to permit of their correction by him, is strengthened in this territory by the statutory provision that 'no exceptions shall be taken in an appeal to any proceeding in the district court, except such as shall have been expressly decided in that court.'" But, independent of this consideration, it is clearly averred that Mrs. Lucero joined in the note and mortgage made to Myer in exchange for plaintiffs' legacy. She admits in her mortgage that the whole amount was paid to her and to her husband, and that the same belonged, when received by them, to the Armijo estate. Under the other facts averred in the case this sum was wrongfully paid to and received by both, and no reason occurs to us why the lien given to secure the repayment of this amount should not be foreclosed as against both. It is further to be noted that the complaint does not ask nor does the decree award a general judgment against either, but is confined to a provision for the sale of the property mortgaged.

It is also urged that the suit cannot be maintained because an adequate remedy existed at law, in that the plaintiffs could have sued out garnishment upon the Luceros and thus have held the amount loaned them to respond to the judgment secured. We are unable to concur in this view. The suit here brought is for the purpose of impressing a trust upon the mortgage security taken by Myer in exchange for plaintiffs' money, and is designed to realize the amount by foreclosure of the lien. The character of the action is one peculiarly of equity cognizance as a part of the original chancery jurisdiction. The remedy by attachment or garnishment or both is not a common-law one, but rests upon statute. It is well settled that the fact that statute may have given an additional remedy does not oust the courts of

pre-existing inherent equity jurisdiction affording the same result, in the absence of words in the statute prohibitive of such concurrent jurisdiction. Thus in 1 Pomeroy's Eq. Juris. § 276, it is said: "There is still another principle affecting the equitable jurisdiction which remains to be considered in all its relations, namely, whenever a court of equity, as a part of its inherent powers, had jurisdiction to interfere and grant relief in any particular case or under any condition of facts and circumstances such jurisdiction is not, in general, lost, or abridged, or affected, because the courts of law may have subsequently acquired a jurisdiction to grant either the same or different relief in the same kind of cases, and under the same facts or circumstances. \* \* \* In other words, the exclusive jurisdiction to grant purely equitable reliefs, as well as the concurrent jurisdiction to confer legal reliefs, is still preserved, although the common-law courts may have obtained authority to award their remedies to the same parties upon the same facts." And in section 278, among the classes of cases instanced in which this principle has been applied, are "suits to recover a fund impressed with a trust or where a trust relation in view of equity exists between the parties where the plaintiff might recover the same sum by an action of assumpsit for money had and received or like legal action"; and also section 280, where it is said that "a statute authorizing a garnishment by a proceeding at law, does not take away nor abridge the equity jurisdiction to enforce an equitable attachment or sequestration by suit under the same circumstances." We are of opinion, however, that the remedy by garnishment would fall very far short of being equally plain, adequate, and complete with that of foreclosure. The one would be to seek a judgment against the Luceros upon the incoming of their answer, to be followed by an effort to find unincumbered property out of which such judgment might be realized, while the other gives the direct remedy of foreclosure upon property already subject to a lien. We consider this point, therefore, as entirely untenable.

It is further urged that the amount for which judgment was rendered was excessive, in that it could at most have been only for the amount of the trust fund diverted, whereas judgment was rendered foreclosing the lien to pay the entire amount of the judgment secured. We do not find it necessary to decide this question, for the reason that the assignments of error raise no point as to the amount of the judgment. It has been distinctly held by this court that it will not consider questions not raised by the assignment of errors. *Maxwell v. Tufts*, 8 N. M. 401, 45 Pac. 979, 33 L. R. A. 854; *Lamy v. Lamy*, 4 N. M. (Gild.) 29, 12 Pac. 650.

It is further urged that the form of mort-

gage is purely a personal security to Myer, that it could be enforced only by him, and the plaintiffs' redress was by a suit against Myer and his bondsmen. We do not consider this position well founded. The theory upon which the action was brought was that Myer, a trustee, had invested the trust funds in another form of property, to wit, a real estate mortgage, which latter he was holding in his own name in disregard and defiance of his trust. A court of equity will not permit an administrator under such circumstances to dictate terms. He cannot divert trust funds and say to the defrauded cestui que trust: "Your only remedy is to sue me and secure the satisfaction of your claim by levy, if perchance, I still have the property purchased with your money." On the contrary, the ancient equitable principle is that the cestui que trust under such circumstances has the option either to hold the trustee personally liable or to follow his money into the property which the trustee has in violation of his trust secured. In *Oliver v. Piatt*, 3 How. 401, 11 L. Ed. 622, it was said by the court, speaking through Mr. Justice Story: "It is a clearly established principle in that [equity] jurisprudence that whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the cestui que trust has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a bona fide purchaser, for a valuable consideration without notice, and, if the trustee has invested the trust property or its proceeds in any other property into which it can be distinctly traced, the cestui que trust has his election either to follow the same into the new investment or to hold the trustee personally liable for the breach of trust."

The general principle is thus stated in 2 Pom. Eq. Juris. § 1051: "A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form. If the person having money or any kind of property belonging to another in his hands wrongfully uses it for the purchase of lands, taking the title in his own name, or if a trustee or other fiduciary person wrongfully converts the trust fund into a different species of property, taking to himself the title, or if an agent or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name, in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while it is in the hands of the original wrongdoer, but as long as it can be followed and identified in whosoever hands it may come, except in those of a bona fide purchaser for value and without notice; and the court will enforce the constructive trust for the benefit of the beneficial owner or original cestui que trust who has thus been defrauded." And in 2 Story Equity Juris-

prudence, § 1258, it is said: "The general proposition, which is maintained at law and in equity upon this subject, is that if any property, in its original state and form, is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust or give the agent or trustee converting it, or those who represent him in right (not being bona fide purchasers for valuable consideration without notice), any more valid claim in respect to it than they, respectively, had before such change. An abuse of a trust can confer no rights on the party abusing it or on those who claim in privity with him. This principle is fully recognized at law in all cases where it is susceptible of being brought out as a ground of action or of defense in a suit at law. In courts of equity it is adopted with a universality of application."

It is further urged that under the terms of the mortgage default had not occurred justifying a foreclosure. The condition of the mortgage, whether viewed from the standpoint of the actual language used, or as illuminated by the allegation that said mortgage was executed "for the purpose of securing the payment of any judgment which plaintiffs might obtain against Myer for their distributive share of the estate, and for no other purpose," was satisfied by the allegations of the complaint, which show that a claim had been against Myer, as administrator, the propriety and seasonableness of which had been established, prior to the bringing of this suit, by a judgment of the district court.

Finally it is argued, and with special emphasis, that upon the allegation of the complaint the mortgage is void as against public policy, and cannot be enforced. It is urged that the allegation to the effect that the mortgage was given to induce the administrator to procure from the probate court an order allowing him to pay over to Lucero the amount in hand belonging to appellees is tantamount to an allegation of a conspiracy to embezzle that sum of money in the hands of the administrator and to defraud appellees out of their interest in the estate, and that a court of equity will leave the transaction where it finds it and will refuse to grant any relief, even to the innocent defrauded owner of the fund misappropriated. We are unable to acquiesce in this view. Considering first the character of the agreement between Myer and Lucero, we incline to the opinion that the allegations of the complaint, when fairly construed, are simply to the effect that before the defendant Myer would loan to Lucero the fund in his hands belonging to appellees he exacted from the Luceros the mortgage in question; and, having secured it, he thereupon procured an order of the probate court permitting such loan. Whatever may be said of the transaction as a usurpation of power by the administrator, we believe there would be little difficulty in holding that it fell short of being such an

agreement as upon principles of public policy would be debarred from enforcement, even by Myer himself. But, however this may be, we are unable to subscribe to the view that, where by fraud between two parties there is effected the substitution of a mortgage for cash belonging to an innocent third party, the latter is debarred from realizing on such security, which is practically his. It would be using the law as a means of fraud, rather than of its prevention, to hold that the funds of a person in the hands of a trustee may be converted by a corrupt agreement between the trustee and a third party, and yet the cestui que trust be absolutely remediless to realize on the security, simply because the agreement to which he was in no sense a party, and for which he may have been in no sense to blame, was corrupt. Bereft of his property by the fraud of others, and deprived of his right to reclaim it or its equivalent because they, not he, had been dishonest, he would, indeed, have reason to say that the law was a mere sham, and that the courts were without efficiency to redress private wrongs. We have not overlooked the numerous authorities cited by appellants to the effect that the law will not lend its aid to the enforcement of an immoral agreement or one in contravention of public policy, and from this rule of law there can be no dissent. The extent to which the cases go is, however, to enforce the rule against the parties to the wrong, not against the innocent victim of it. We find no support in the authorities nor in morals for the contention that one may wrong another, and then set up the wrong as a defense, when called to account.

The judgment of the lower court is affirmed.

MILLS, C. J., and MANN, McFIE, and PARKER, JJ., concur. ABBOTT, J., not having heard the argument, took no part in this decision.

(12 N. M. 338)

#### JOHNSTON v. BACA et al.

(Supreme Court of New Mexico. Jan. 31, 1906.)

##### 1. ATTORNEY AND CLIENT—AGREEMENT FOR SERVICES—TRANSFER.

An attorney at law cannot transfer to another, without the consent of his client, an executory agreement, whereby he undertakes to supply professional services and ability.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 151.]

##### 2. BILLS AND NOTES—DEFENSES—EVIDENCE.

In the case at bar, irrespective of the statute (section 3021, Comp. Laws 1897, which provides that in a suit by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite party shall not obtain a judgment on his own evidence, in respect to any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence), the defendants have not proved by a preponderance of the evidence that the note sued on was not to

become due and payable until all the suits were finally disposed of.

(Syllabus by the Court.)

Appeal from District Court, Valencia County; before Justice Ira A. Abbott.

Action by Florence P. Johnston, administratrix, against Roman L. Baca and others. Decree for plaintiff, and defendants appeal. Affirmed.

This suit was originally brought by Florence P. Johnston, as administratrix of George W. Johnston, deceased, and as administratrix de bonis non of the estate of Thomas A. Finical, also deceased, against Roman L. Baca and the other defendants. The action was based upon a promissory note for \$2,500, dated April 16, 1900, payable on or before one year after date, and bearing interest at the rate of 12 per cent. per annum from maturity until paid, with 10 per cent. additional on amount unpaid, if placed for collection in the hands of an attorney. The note was payable to Johnston and Finical, and was signed by all of the defendants, who to secure its payment executed and delivered a mortgage on certain real estate. The complaint was in the usual form and demanded judgment for the amount due on the note and for a foreclosure. The defendants, in an amended answer filed by them, admitted the execution and delivery of the note and mortgage, and alleged that the consideration therefor was for legal services to be rendered in the district court and Supreme Court in three certain cases; that afterwards Finical died and Johnston retired from the practice of law; and that they were compelled to employ one E. W. Dobson to represent them in the three cases under an agreement, as they allege, to pay him what his services were reasonably worth. Appellants also aver that there was a verbal understanding with Johnston and Finical that the note was not to become due until after the legal services were completed. In the reply plaintiff admitted that the note was given on account of legal services rendered or to be rendered, and that Finical died in February, 1901, and that Johnston afterwards became ill and retired from practice, but denied all of the other affirmative matters set up in the answer, denying specifically that there was a failure of consideration, or that the defendants employed E. W. Dobson, Esq., as their attorney in the cases, and alleged that Johnston, as surviving member of the firm of Johnston & Finical, employed said Dobson to perform the services which their late firm agreed to attend to as consideration for said note and mortgage, and that said Dobson had performed them, with the knowledge and acquiescence of the defendants, and that said services were reasonably worth the amount specified in the promissory note. A copy of the agreement between Johnston and Dobson was attached to and made a part of the complaint, and shows that Dobson and

the payees of the note were each to receive a moiety thereof. Mr. Dobson filed an intervening petition, but, as he has not joined in the appeal, it will be unnecessary for us to refer to it. The case was tried in the district court, a jury being waived, and judgment was rendered in favor of the plaintiffs for the amount of the note and interest and attorney's fees, and a decree was entered foreclosing the mortgage. From this judgment and decree, appellants appealed.

A. B. Renehan, for appellants. McMillen & Reynolds, for appellee.

MILLS, C. J. (after stating the facts). The errors relied on by the appellants in this appeal are condensed by their attorney into two, to wit: (1) That an attorney cannot transfer an executive agreement whereby he undertakes to supply professional ability and knowledge without the consent of the other contractual party; and (2) that the consideration for the note and mortgage sued on failed, first, because of the abandonment of the object of the employment by Johnston and Finical, and, second, because the stipulated work had not been done under the contract, and that therefore the plaintiffs have no cause of action.

As to the alleged error numbered 1, we think that it correctly states the law, but, in the findings of facts made by the trial court, that court finds that the contract for the employment of Dobson by Johnston "was made with the acquiescence, direction, and consent of said defendants," consequently we shall have to search the record to see if there is evidence to sustain this finding. The evidence discloses that Johnston wrote one of the defendants, R. L. Baca, Esq., who seems to have acted for them all, at Santa Fé, saying that, some 10 days before he had written him, he had to give up the practice of law on account of his health, reminding him that he (Johnston) and Finical held the note for fees in the case, and stating that he desired to make arrangements with some one to go on with the case upon a division of the fee. Other letters and telegrams are in evidence; one dated July 1, 1901, from Johnston to Baca, saying that he had turned over the matter to Mr. Dobson, as per request; and a telegram from Mr. McMillan to Mr. Baca, which reads as follows, to wit: "Johnston sick, Dobson has charge of case." Mr. Dobson testified that Mr. Johnston told him that he was going to quit the practice of law on account of his health, that he had three cases in which Mr. Baca and the other members of his family were interested, and "that Mr. Baca had suggested or agreed that he turn the cases over to me to be completed." Transcript of Record, p. 70. And on page 71. Transcript of Record, he testified that: "Mr. Baca came down from Santa Fé and came up to see me, and asked me if Mr. Johnston had turned over those papers to

me, and I told him that he had." And further on the same page he testified: "I told Mr. Baca that I had this arrangement with Johnston. He did not object to it or did not complain." On cross-examination of Mr. Baca, by the intervener, Mr. Dobson, the following questions and answers were given: "Q. Don't you know, as a matter of fact, that before Mr. Johnston brought the cases to me that you had intimated that you were willing I should represent you in these cases? A. Yes, sir. Q. Before he turned the papers over didn't you express the desire to have me employed to succeed him? A. Yes. I expressed a desire." The record further shows that Mr. Dobson fought the cases with great ability and determination. We think that this documentary and verbal testimony amply sustains the finding of the court "that said contract was made with the acquiescence, direction, and consent of said defendants." In fact we cannot conceive how it would have been possible for the court to have made any other finding, and, as the defendants had knowledge of and consented to the change of attorneys, the first alleged error is disposed of and falls to the ground.

This leaves only the last part of the second alleged error for us to consider, to wit: That, because the stipulated work had not been done under the contract, the plaintiffs have no cause of action. It will be observed that the note is in the form of many of those used in this territory, except that it is payable in gold coin. It is a negotiable instrument, payable on or before one year after date, and bears interest at the rate of 12 per cent. per annum from maturity until paid, and provides for an attorney's fee of 10 per cent. on amount unpaid if placed for collection in the hands of an attorney. There are no restrictions in it. The mortgage also is in the ordinary form of those used in this territory, and contains no restrictions regarding foreclosure. It is an axiom of law that in all civil cases the burden of proof is on the party holding the affirmative of any issue. In the trial below, when the plaintiff introduced the note and mortgage in evidence, a prima facie case was made, and the plaintiff was entitled to judgment as prayed for, unless evidence was introduced by defendants to defeat the claim. At this point the burden of proof shifted to the defendants, and it became necessary for them to prove by a preponderance of the evidence the affirmative matter set up in their amended answer, viz., that the note did not become due and payable until all of the suits which Johnston & Finical were to attend to on behalf of the defendants should be finally disposed of. In making this proof we think that appellants have failed. Mr. R. L. Baca testified, as appears on page 58 of the Transcript of Record, as follows: "Q. What did he, or the firm, agree to do? A. The firm agreed to take care of these three cases for \$2,500 in the district court and in the Supreme

Court of New Mexico, and for that purpose I was to give them security for their labor and work that they were to render, and that this security would never be demanded of me until the entire three cases were entirely adjudicated." And again, on page 67, Transcript of Record, Mr. Baca testified, in response to a question, as follows: "A. We will take care of these cases for \$2,500. You give me the security for the work we are to perform, and you can make a mortgage on the property, signed by the different parties and members of your family, so that we may be secured, and, when the cases are over, why then payment will be due." We do not think that this testimony is enough to vary the terms of the note sued on, or that by it the defendants proved by a preponderance of the evidence the affirmative matter set up in their answer, that the note was not to be paid until the suits were finally ended. In addition, our Legislature has, and we think wisely, provided that "in a suit by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence." Section 3021, Comp. Laws 1897. The testimony of Mr. Baca as to all matters occurring before the death of Mr. Johnston, being uncorroborated, is not, in any event, sufficient to overturn the presumption raised by the possession of this unpaid note by the administratrix.

There is no error in the record, and the judgment of the court below is therefore affirmed, and the cause is remanded to the district court of Valencia county, for further proceedings; and it is so ordered.

POPE, McFIE, MANN, and PARKER, JJ., concur. ABBOTT, J., having heard the case below, took no part in this decision.

### MILLER v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 5, 1905.  
Rehearing Denied Jan. 6, 1906.)

#### 1. CRIMINAL LAW—APPEAL—REVIEW.

When the evidence reasonably supports a verdict, the judgment rendered thereon will be sustained, even though the greater number of witnesses may have testified favorably to the other side.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1251; vol. 15, Cent. Dig. Criminal Law, §§ 3074-3077.]

#### 2. WITNESS—CREDIBILITY—INTEREST.

It is not error to ask a witness for the defendant any question which is reasonably calculated to disclose his interest in the result of the trial; and where a witness has signed an affidavit for a change of venue the prosecution may ask him in relation thereto. It is then the province of the jury to say as to whether he has an interest in the outcome of the case and as to whether such interest, in any degree, influenced his testimony.

#### 3. CRIMINAL LAW—DISCREDITING WITNESS—PROCEEDINGS FOR CONTEMPT.

One, George Hodges, was indicted with the defendant. On the trial the defendant asked that the witnesses be excluded from the courtroom, and the court made the desired order, and also stated to the defendant and his counsel that if they expected to use Hodges as a witness he should be excluded from the courtroom also. Hodges remained outside for a short time, and then, with the consent of the defendant and his attorneys, returned to the courtroom and listened to the trial. He was, by the defendant, offered as a witness. When his testimony was concluded, the court, in the presence of the jury, ordered him to be taken into custody to answer for contempt in violating the order of the court in returning to the courtroom when the witnesses had been excluded; the court stating at the time that he would dispose of the matter after the trial was over. *Held*, that as the witnesses were excluded at the request of the defendant, and the court's order was violated with his knowledge and consent, all of which was known to the jury, he cannot complain of the action of the court looking toward the punishment of a witness for violating such order.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3007, 3008.]

#### 4. WITNESS—CRIMINAL CASE—EXAMINATION BY COURT.

A trial court may, in its discretion, ask proper questions of witnesses in a criminal, as well as a civil, case for the purpose of eliciting the real facts. Courts are organized for the administration of justice, and so long as the court does not, by its questions or conduct, indicate its views as to the matters in issue, a defendant will not be heard to complain of any question asked by it which is reasonably calculated to elicit the truth. *De Ford v. Painter*, 41 Pac. 96, 3 Okl. 80, 30 L. R. A. 722.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 852-857.]

#### 5. CRIMINAL LAW—REMARKS OF JUDGE—HARMLESS ERROR.

It is not every improper remark of a trial court that will justify a reversal of a criminal case. If the remarks are such as might reasonably influence the jury against a defendant, a new trial should be granted; but if, after a full consideration of the entire record, it is clear that the verdict is right, and that, even if the remarks had not been made, the jury could not reasonably have returned a different verdict, the judgment will be affirmed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3085, 3125.]

(Syllabus by the Court.)

Error from District Court, Woods County; before Justice J. L. Pancoast.

Grant Miller was convicted of cattle theft, and brings error. Affirmed.

Temple Houston, W. W. S. Snoddy & Son, H. A. Noah, and D. P. Marum, for plaintiff in error. P. C. Simons, Atty. Gen., and D. C. Smith, Asst. Atty. Gen., for the Territory.

BURWELL, J. The defendant, Grant Miller, was convicted of stealing 13 cows, and was sentenced to serve a term of seven years in the territorial penitentiary. It is contended that the evidence did not justify the verdict. We have examined the transcript, and are satisfied that it is sufficient. In fact, it makes out a strong case against the defendant.

During the cross-examination of one of the

defendant's witnesses, the prosecuting attorney asked him if he was not a warm friend of the defendant, and he answered in the negative. He was also asked if he had not made an affidavit for the defendant for a change of venue, and during his examination on this point the court asked what caused him to take sufficient interest in the matter to lead him to make the affidavit. This was not error. The record clearly shows that the questions were asked for the sole purpose of enabling the jury to determine as to whether or not he had any feeling or interest in the result of the case. The admitting or excluding of this evidence was a matter largely within the discretion of the court. We cannot say that there has been an abuse of that power.

George Hodges was jointly indicted with this defendant. At the commencement of the trial all of the witnesses, at the defendant's request, were sworn, admonished, and excluded from the courtroom. Hodges, with the consent of defendant's counsel (with the exception of Mr. Marum, who subsequently stated to the court that he had nothing to do with it), returned to the courtroom, and heard the evidence and proceedings of the trial until he was called to testify as a witness for the defendant. The court asked counsel if the witness had not been present in the courtroom, and they said that he had. They further stated that they had conferred together and had concluded that he probably could not testify in any event, but that it was always the intention of counsel to test the question of his qualification. The court then informed counsel that the witness might testify, but that, if he did, he would be punished for contempt for disobeying the order of the court, as Mr. Hodges and counsel had been specifically informed that he should be excluded from the courtroom if he was to be used as a witness. He took the witness stand and testified, and when his testimony was concluded the court ordered the sheriff to take him into custody to be detained to answer for contempt in disobeying the court's instruction. Was the court's action prejudicial to the defendant? and, if so, can he complain? A defendant, when charged with crime, has the lawful right to try his own case, or he may be represented by counsel, for whose acts and conduct in the trial of his case he is responsible. In the light of the record it is fair to assume that the defendant knew that Hodges had been given permission by his attorneys to remain in the room; but whether he did or not is immaterial, as they were his representatives, and he was bound to take notice of what was transpiring in court in the trial of his cause. He knew that Hodges was in the room. He also knew that the court had referred to him, and stated that, if he was to be used as a witness, he should remain outside. The court acted in the utmost good faith in calling at-

tention to Hodges before the taking of evidence began, while the conduct of counsel merits disapproval. If they thought that they had a right and intended to use him, they should have insisted that he follow the admonition of the court; and if they let him remain in the courtroom after consultation together, under the honest belief that the law excluded him from testifying as a witness, by every rule of legal ethics he should not have been offered.

It is argued that the order of the court in directing Hodges to be held for contempt was calculated to weaken his testimony before the jury. But, whether calculated to weaken his testimony or not, the condition was brought about by defendant's own counsel, and the facts were known to the jury, and were such as to reasonably call for discipline; and there is no difference in principle between this case, on this point, and any other open, willful contempt of court committed during the trial of a criminal cause. It is the duty of trial courts to guard well their expressions, and to act with dignity and discretion, to the end that the jurors may not be influenced by anything except the evidence, and they should be left to make their own deductions therefrom. Attorneys also owe an equally high duty to the court. They should not be permitted to enjoy the benefits derived from questionable conduct unnoticed; for, if such were the case, then the services of the lawyer who acts from a high sense of duty would be unsought, and the lawyer who adopts unprofessional means would be able to render his client the more valuable service. A defendant is entitled to a fair and impartial trial; but this does not mean that the prosecution alone shall be fair, and the defendant left to take advantage of every cunning within his power. And where he, or those who represent him, with his knowledge, do wrongful acts, while engaged in his defense, which reflect discredit upon him or his witnesses, it is only just that he should suffer the consequent inferences flowing therefrom, should those facts become known to the jury. The court did not punish Hodges before the jury. It only ordered him held to answer for contempt, and stated that he would dispose of it after the trial, then in progress, had closed. Considering all that transpired, the defendant has no just ground of complaint.

It is next claimed that the court erred in asking certain witnesses questions during the trial. With this contention we cannot agree. The court may, in its discretion, ask proper questions of witnesses for the purpose of eliciting the truth; and it is not only proper, but conditions arise sometimes wherein it becomes its absolute duty, to do so. A court should never assume the attitude of a prosecutor, nor should it indicate to the jury by its manner or the form of its questions what it thinks of the merits of the case on trial;

but a case will not be reversed on this ground, except where there has been a clear abuse of judicial discretion.

The appellant next insists that during the trial of the case the court made remarks which were prejudicial to the defendant. Judging from what appears in the record, the trial was not a pleasant one. The feeling between the court and counsel for the defendant was somewhat strained throughout the entire hearing, and the court, on numerous occasions, criticised the conduct of defendant's attorneys, insisting, in effect, that they were endeavoring to make the trial as unpleasant as possible. There are some things in the record that point in this direction. But the court had the power, if this was true, to correct the wrong summarily, and it was not compelled to excuse the jury to do so. It, however, did not confine itself to reproof when deserved, but gave utterance reflecting upon the good faith of counsel where no offense ought to have been inferred. But we have read the entire record (which is a very long one, containing between 1,100 and 1,200 pages), and are firmly convinced that the defendant is guilty of the crime charged against him, and we cannot say that the court erred in any matter which probably affected the result of the trial.

We have not discussed separately all of the assignments of error, but have considered them all, and, after considering the entire record, have concluded that the judgment ought to be affirmed. It is so ordered. All of the Justices concurring, except PAN-COAST, J., who presided at the trial below, not sitting.

#### HUFF v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 5, 1905.  
Rehearing Denied Jan. 6, 1906.)

##### 1. CRIMINAL LAW—APPEAL—CONFLICTING EVIDENCE.

Where a verdict of conviction in a criminal cause is based upon conflicting evidence, and there is competent evidence tending to support each material averment contained in the indictment, this court will not attempt to weigh such conflicting evidence or determine the credibility of the witnesses, nor set aside such verdict.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3076, 3077.]

##### 2. SAME—WAIVER OF OBJECTIONS.

Where erroneous rulings and decisions of the trial judge are not excepted to at the time, and exceptions properly saved, such errors will be treated as waived by the party affected, and objections will not be considered for the first time in this court.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2656.]

##### 3. SAME—CONDUCT OF TRIAL.

Where the trial judge, in the course of the trial of a criminal cause, propounds such questions to a witness for the defendant as reflect upon his credibility, and then in the presence of the jury orders such witness under arrest, such action ordinarily constitutes reversible error. But where counsel for the defendant makes no objection to such examination or order of

arrest, and takes no exceptions to such action of the court, the error will be treated as waived by the defendant, and will not be available on appeal.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2118.]

##### 4. SAME — INSTRUCTIONS — GENERAL OBJECTIONS.

Where the charge to the jury consists of a series of specific instructions separately stated and numbered, a general exception to the entire charge will not be available, if the charge as a whole generally states the law correctly.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2025.]

##### 5. SAME.

Where a party desires the court to give any particular instruction, or to more definitely or fully state any proposition embraced in the charge, it is the duty of counsel to prepare and present to the court such desired instruction and request that it be given; and in the absence of such request this court will not consider an objection that an instruction, correct as far as it goes, does not fully state the law, or that the court failed to instruct upon any given proposition, where the instructions generally cover the subject-matter of the inquiry.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1996.]

(Syllabus by the Court.)

Error from District Court, Day County; before Justice J. L. Pancoast.

William Huff was convicted of stealing cattle, and brings error. Affirmed.

Harrison & Tracy, W. S. Wishard, and Appelget & Houston, for plaintiff in error. P. C. Simons, Atty. Gen., and Don C. Smith, Asst. Atty. Gen., for the Territory.

BURFORD, C. J. The plaintiff in error was convicted in the district court of Day county of the crime of stealing cattle, and was sentenced to seven years' confinement in the penitentiary. He filed a motion for new trial, which was overruled, and he now brings the cause to this court upon a petition in error. Numerous causes are urged in support of the application for a new trial, and we will give them such consideration as their merit demands.

The first contention is that the verdict is not sustained by the evidence. This is a fruitful field for the defeated litigant, and one that is rarely neglected, yet it is one into which appellate courts are as rarely required to venture. This contention imposes upon the appellate court the burden of reviewing and weighing all the evidence submitted upon the trial of the cause. The cases are indeed few in which a jury has returned a verdict of guilty, and the trial judge has approved the verdict and rendered a judgment of conviction, without any evidence reasonably tending to support such verdict. This court has laid down the rule in numerous cases—in fact, it has become the settled law of this territory—that the Supreme Court will not set aside a verdict of a jury upon controverted questions of fact, when there is evidence reasonably tending to support the verdict. This court cannot weigh conflicting

or contradictory evidence. There are so many considerations which must necessarily be taken into account in weighing evidence, or in determining the credibility of witnesses, which are apparent to the careful observer upon the trial of a cause, and which cannot be transferred to paper or conveyed to the appellate court, that experience has demonstrated that, unless there is an absolute absence or lack of evidence upon some material element of fact necessary to sustain the verdict, it is unsafe for a reviewing court to overturn the verdict of a jury. In the case at bar there is a sharp conflict in the evidence upon every material averment contained in the indictment. The accused not only attempted to establish an alibi, but he contested the ownership and description of the cattle alleged to have been stolen, and numerous other less important questions. The record discloses that there was some evidence reasonable tending to support every material averment and every fact necessary to warrant a verdict of conviction. While counsel in their argument contend that there is an absence of evidence upon some material points, their reasoning goes only to the weight and character of the evidence or the credibility of the witnesses. Under the rule announced by this court, we cannot interfere with the verdict of the jury.

The next objection pointed out in the brief of counsel for plaintiff in error is directed against the conduct of counsel for the prosecution. During the examination of a witness, counsel for the prosecution submitted this question: "Are you acquainted with Will Huff, alias S. A. Williams?" To which counsel for defendant made the following objection: "We object to the form of the question. We object to the word 'alias.' It is prejudicial." To which the court remarked: "Well, just leave the 'alias' out." The witness answered, "Yes, sir." There was no exception taken to the ruling of the court, nor any request made for a more specific ruling. It is a general rule of practice that an objection made and not ruled upon constitutes no available error, and a ruling of the court which is not excepted to at the time presents no question for review. A failure to except to the ruling of the court upon any question is an acquiescence in such ruling, and waives any objections to the action of the court. Nor is an objection alone sufficient to preserve a question for review on appeal or error. "To save an objection, an exception is necessary. This rule is as well settled as that requiring an objection to be made when the action deemed to be erroneous is taken. In the absence of an exception, errors committed by the trial court will be considered waived." 8 Enc. Pl. & Pr. 163.

The next objection is urged against a statement of counsel made during the progress of the trial. The record contains the following: Questions by counsel for the prosecution: "Q. If Mr. Steve Tucker swore upon this stand

that you parties all went out there from Cheyenne to this round-up about 1 o'clock, was that true or false? A. I don't know, sir. I didn't go from Cheyenne. Q. If he swore that you and Ed. Woods and John Reed and Jeff Chenoweth— By Counsel for Defendant: May it please the court, I object to any such hypothetical question as that. By Counsel for Prosecution: That is what he testified to. He testified he and John Reed and the other boys went out together. By the Court: Well, you can put your question. The jury will know. Q. If he swore here upon this stand and in this court that he, Steve Tucker, and you and John Reed and Joe Miller and Jeff Chenoweth and Ed. Woods went out to the round-up together, was that true or false? A. I didn't go from Cheyenne with him." It is insisted that the foregoing questions were improper, and that the statement made by counsel for the prosecution was a misquotation of the previous testimony; that the statement was untrue and prejudicial; and that the court should have sustained the objection to the question. We have examined the entire proceedings as disclosed by the record relating to this matter, and if there was any error committed, either by counsel or by the court, no exceptions were taken, and the error is not reviewable. *Peters v. United States*, 2 Okl. 116, 33 Pac. 1031; *Stutsman v. Territory*, 7 Okl. 490, 54 Pac. 707. While the style of examination here resorted to is not to be commended, or even approved, it does not constitute such prejudicial error as to warrant a court of appeals in setting aside the verdict, where the error has been waived by a failure to present proper objections and preserve proper exceptions. It has always been considered improper practice for counsel to ask a witness for his conclusion as to whether the testimony of another witness is true or false. Each witness must state the facts as he understands them to be, and, if the testimony is contradictory, it is within the exclusive province of the jury to determine the credibility of the witnesses and decide whom they will believe, and which testimony is true, or which is false. This right of the jury cannot be invaded under the guise of cross-examination, and one witness permitted to determine the truth or falsity of the statements of another; and when such practice is resorted to, whether objected to by adverse counsel or not, the court should, in order to avoid any possible prejudice, promptly correct such abuse. The real danger lies in the possibility that the jury, instead of drawing their own conclusion from an impartial consideration of the testimony as detailed by the witness, may accept the conclusion of a biased and prejudiced witness that another witness has testified falsely. Where two witnesses contradict each other, the jury, and they alone, must determine the truth or falsity of the testimony of either. Counsel should not urge these matters upon the attention of this court,

where they have not insisted upon a ruling by the trial court, and saved no exception to such action as was taken.

The next contention presented is that the court erred to the prejudice of the plaintiff in error, by ordering the arrest of the witness Tucker during the trial, and in the presence of the jury. It appears from the record that one Steve Tucker was called as a witness on behalf of the defendant, and testified to statements which, if true, would establish an alibi for the defendant. After he had been examined, cross-examined, re-examined and excused, but before leaving the stand, the following proceedings occurred: "By the Court: Did you say you were an uncle of the defendant? A. Yes, sir. By the Court: Didn't you testify in the trial at Mangum that you saw this defendant on the 7th at the round up on Beaver Dam? A. I don't remember that I did. By the Court: If you did testify to that as a fact, was it true or not? A. There was a question about that. By the Court: Did you see him there? A. I thought I did. By the Court: Well, sir, why have you testified you didn't, then? A. I said I didn't remember whether I did or not. By the Court: You think you did? A. I can't say. When I got there, there was a good many of the fellows there, and I wouldn't say for sure whether he was there or not. By the Court: Mr. Sheriff, you may take this man and take charge of him." Clearly this action by the court in the presence of the jury was erroneous, and apparently prejudicial. The form and effect of the questions propounded to the witness by the court would tend to cast a doubt upon the truthfulness of his answers and to discredit him with the jury.

The questions propounded by the court are also subject to another objection. They disclose the views of the court upon the weight of certain testimony, and a statement of the court as to what the witness has testified to previously, which the witness sought in his answer to contradict and explain. It is practically uniformly held that it constitutes reversible error for the trial judge, in the course of the trial and in the presence of the jury, to indicate his opinion upon the weight of the evidence or credibility of a witness, however inadvertent such remark may be, and it is universally the rule that a trial judge must not, by remark or action, during the course of a trial, discredit a witness in the presence of the jury. While the character and manner of examination by the court is, we think, the subject of criticism, the action of the court in ordering the arrest of the witness while on the witness stand, is, we think, such an infringement of the rights of the defendant as would warrant the reversal of the judgment and the granting of a new trial, if the error had not been waived by a failure to object or except to the action of the court. While the prisoner made no objection at the time, and

saved no exception either to the character of the questions propounded to the witness or the order placing him in custody, it is contended by counsel that the error is fundamental, and will be reviewed by the appellate court without exception, and several authorities are cited in support of this position. The authorities cited do not support the contention. Where the defect goes to the jurisdiction of the court, or the sufficiency of the charge to support the judgment, an appellate court will examine into such questions, although presented for the first time in said court, unless they have been waived by some express action of the accused. But errors occurring on the trial of the cause must be excepted to and presented in the motion for new trial, or they will be treated as waived by the accused. The proceedings here complained of come within the latter class.

The next objection argued is that the court erred in its instructions to the jury, and this objection embraces two complaints: First, that the court failed to sufficiently instruct the jury upon certain questions involved; and, second, that some of the instructions given were erroneous. The general rule is that if counsel for one on trial for crime desires a special instruction given, or one that is given shall be made more specific or comprehensive, then such counsel shall prepare the instructions desired, present it to the court in reasonable time, and request that it be given. In this case counsel presented no requests for instructions, and the ones given by the court, which are complained of as being insufficient, do not misstate the law, but are correct, and fully define the offense with which the prisoner was charged, and in the absence of a request for more specific instructions there is no available error.

That some of the instructions given are erroneous is the next proposition submitted. The instructions consist of 18 distinct propositions of law, each separately stated and numbered, and the twelfth contains this statement: "You are further instructed that the instructions herein given you must be considered as a whole. You are not to consider any single one or more of the instructions separately by themselves, but must consider all of the instructions given which bear upon any given proposition." The instructions as a whole were excepted to as follows by counsel for defendant: "The court will please note an exception to the instructions." And the foregoing is the only exception taken to the instructions. In the case of Glaser et al. v. Glaser et al., 13 Okl. 389, 74 Pac. 944, this court held that "where the charge to the jury consists of a series of specific instructions separately stated and numbered, a general exception to the entire charge will not be available, if any one of said instructions are correct." And this rule is also applicable in a criminal cause. *State v. Wilgus*, 32 Kan. 126, 4 Pac. 218. The exception taken is a general one to the whole charge, and does not make spe-

cific objection to any particular portion of the charge. The instructions as a whole embody the law as applicable to the case, and, while some particular portions might be improved upon, they contain no such erroneous statement of the law as was likely to mislead the jury. We have examined the entire record, and reviewed the evidence, the rulings of the court, and the instructions given, and we find no substantial error of which the prisoner is entitled to complain.

The judgment of the district court is affirmed, at the costs of the plaintiff in error, and the cause is remanded to the district court, with directions to proceed immediately to have the judgment of conviction executed. All the Justices concur, except PANCOAST, J., who tried the cause below, not sitting.

### LEWIS v. CUNNINGHAM.

(Supreme Court of Arizona. March 30, 1906.)

#### 1. PROCESS—SERVICE—AUTHORITY TO SERVE—STATUTES.

Rev. St. 1901, par. 1101, provides that when the sheriff is a party to an action, process may be executed by the coroner or constable of the county or by the United States marshal, or a deputy, or by a person appointed by the court. Paragraph 1319 declares that when the sheriff is a party to, or is interested in suit, the summons shall be served by any constable in the county, and paragraph 1327 provides that summons may be served by any disinterested person competent to make oath to the fact. *Held*, that paragraphs 1101 and 1319, did not require service on a sheriff who was a party to an action to be made by the persons designated in such paragraphs to the exclusion of the mode provided in paragraph 1327.

#### 2. APPEAL—DEFAULT—VACATION—REVIEW.

An order denying an application to set aside a default will not be reversed on appeal, unless it appears that the trial court's discretion has been abused.

#### 3. JUDGMENT—DEFAULT—VACATION—DENIAL—DILIGENCE—EVIDENCE.

Where a sheriff permitted three months to elapse after the entry of default in an action against him before moving to set aside the default, and did not then file his application until after judgment was rendered, affidavits that at the time summons was served he was extremely busy with the criminal business of the county and the cares of his office, and that he was constantly absent from his office on business, and entirely forgot and overlooked the matter, and the necessity of filing his answer in the case, until after the default had been entered, did not constitute a sufficient showing of diligence to require the trial court, in the exercise of discretion to set aside the judgment and open the default.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 300-303.]

Appeal from District Court, Cochise County; before Justice Fletcher M. Doan.

Action by Frances Cunningham against A. J. Lewis. From an order denying defendant's motion to set aside his default and the judgment entered thereon, he appeals. Affirmed.

Pickett & Bowman, for appellant. Charles Blenman, for appellee.

KENT, C. J. This is an action against the sheriff of Cochise county, to recover the value of certain property alleged to have been wrongfully seized by the sheriff, and for damages for the alleged wrongful detention thereof. The summons was served upon the sheriff by a disinterested person, on August 29, 1903. No appearance or answer having been filed, the default of the defendant was entered on September 30, 1903. On December 22, 1903, the case came on regularly for trial, and the defendant not appearing, evidence was introduced to sustain the plaintiff's claim, and judgment entered for the plaintiff for the sum of \$900 and costs. Thereafter, on the same day, a notice of motion to set aside the default and the judgment was filed. The motion was thereafter heard and denied by the court. From the order denying the motion the defendant has appealed.

It is claimed that the court did not obtain jurisdiction of the defendant, for the reason that the summons was served upon the defendant by an individual, and not by an officer designated by the statute, or a person appointed by the court, the contention of the appellant being that the sheriff by virtue of the office which he holds is not within the general provision which permits the service to be made by a disinterested person. The provisions of the Code (Rev. St. 1901) bearing upon the question are as follows: Paragraph 1101 provides: "When the sheriff is a party to an action or proceeding, the process and orders therein, which otherwise would be the duty of the sheriff to execute, must be executed by the coroner or constable of the county, or it may be executed by a United States marshal, or a deputy United States marshal, or a person appointed by the court." Paragraph 1319 provides: "When it appears from the complaint that the sheriff is a party to the suit, or is interested therein, the summons shall be served by any constable of his county." Paragraph 1327 provides: "The summons may be served by any disinterested person competent to make oath of the fact." We do not construe the provisions of paragraphs 1101 and 1319 as requiring service, when the sheriff is a party, to be made as therein provided, to the exclusion of the mode provided in paragraph 1327. The former paragraphs make it the duty of the coroner or constable to serve the process, and thus provide a means whereby such service may be had by an officer of the law. The language used is mandatory, but the requirement to be obeyed relates to the duty of the coroner or constable, and not to the method to be chosen in effecting the service. Service upon a sheriff, therefore, may be made in the manner provided in any one of the three paragraphs referred to.

It is further claimed that the trial court erred in not setting aside the default, and in not granting the motion for a new trial, it

appearing from the affidavits submitted on said motion that the defendant had a substantial and meritorious defense to the action. Such a motion is addressed to the sound discretion of the trial court, and its action in regard thereto is not to be disturbed on appeal unless it appears that such discretion has been abused. As we said in the case of *Copper King of Arizona against Johnson* (Ariz.) 76 Pac. 594: "Circumstances often surround the setting and trial of a case, properly cognizable by the trial judge, which may not always appear in the record, and which may properly have an influence in the determination of a motion of this character. The appellate court should, therefore, in its review of such action, recognize that such matters must rest largely in the sound discretion of the trial court, and upon such review should not disturb such action and the exercise of such discretion, unless it clearly appears that such discretion has been abused." In the case before us the time within which the defendant was required to appear and answer expired on September 21st; the default was not entered until September 30th. The fall term of the court opened on the first Monday in December. At that time, at the call of the trial calendar, as appears from the statement of counsel for the appellant, he gave notice in open court that he would file a motion to set aside the default. No such motion was filed, and thereafter, on the 22d of December, the case was called for trial, and upon evidence submitted by the plaintiff, the defendant not appearing, judgment was rendered, and not until after judgment was rendered was any motion made to set aside the default. The affidavits that were submitted to the trial court upon the motion to set aside the default fail to set forth any facts that afford a legal excuse for the want of diligence on the part of the defendant thus shown by the record. The affidavits state in substance that at the time of the service of the summons the defendant was extremely busy with the criminal business of the county, and with the cares of his office, and at that time and thereafter was constantly absent from his office on business, and that he entirely forgot and overlooked the matter in question and the necessity of filing his answer in the case, until after a default had been entered in the case. If it can be said that such excuse might well appeal to the discretion of the court, and be ground for opening the default, it affords no excuse for the failure to present such ground to the court, or to take action to set aside the default during the three months that elapsed from the time of the entry of the default until the trial of the action. The failure to exercise reasonable diligence in moving to set aside a default, or in preparation for trial, is proper ground for a refusal to set aside such default or judgment, even though it may appear that the defendant has a good defense upon the merits.

*Simon v. Hengels*, 107 Ill. App. 174; *Turner v. Threshing Co.* (N. C.) 45 S. E. 781; *Texas Fire Ins. Co. v. Berry* (Tex. Civ. App.) 76 S. W. 219; *O'Connell v. Friedman* (Ga.) 45 S. E. 638.

Upon the record before us, it does not appear that the trial court was not within the exercise of a wise discretion in refusing to set aside the default. The questions which we have considered are the only ones raised which we may properly consider on this appeal.

The judgment of the district court is affirmed.

SLOAN, CAMPBELL, and NAVE, JJ., concur.

#### LEWIS et ux. v. HERRERA.

(Supreme Court of Arizona. March 30, 1906.)

#### 1. DEEDS — EXECUTION — REQUISITES — ACKNOWLEDGMENT — CERTIFICATION — STATUTORY CONSTRUCTION.

Under Rev. St. 1901, par. 725, providing that every deed of conveyance of real estate must be signed by the grantor, be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration, no deed, unless executed as therein provided, will operate to effect a conveyance of real estate.

#### 2. FRAUDULENT CONVEYANCES — DEEDS OF GIFT—ACTION TO SET ASIDE.

Under Rev. St. 1901, par. 725, providing that every deed of conveyance of real estate must be signed by the grantor and be duly acknowledged, and paragraph 2698, providing that every gift, conveyance, or charge made by a debtor not upon valuable consideration, shall be void as to prior creditors, unless such debtor was in possession of property within the state, subject to execution, sufficient to pay his debts, where, before deeds of gift, theretofore executed, were acknowledged in compliance with such section 725, plaintiff became a creditor of defendant grantor, who was not then possessed of property within the territory subject to execution sufficient to pay his existing debts, such deeds were void as to plaintiff.

Appeal from District Court, Maricopa County; before Justice Edward Kent.

Action by Fred Herrera, receiver for the International Bank of Nogales, against R. Allyn Lewis and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Street & Alexander, for appellants. Selim M. Franklin, for appellee.

DOAN, J. On August 25, 1903, while R. Allyn Lewis and Leticia M. Lewis, his wife, were in Germany, Lewis signed and delivered to his wife a deed of gift, conveying to her certain real property in Phoenix, Ariz. The deed was not acknowledged until January 9, 1904. On December 29, 1903, Lewis signed and delivered to his wife another deed, conveying to her as a gift the same property, but with a more accurate description, which second deed was also acknowledged on January 9, 1904. Both deeds were recorded in Maricopa county, Ariz., on the 16th day of Janu-

ary, 1904. In November, 1903, Lewis became indebted to the International Bank of Nogales, which indebtedness was subsequently, in June, 1904, sued on by Fred Herrera, the receiver of the bank, and merged into a judgment against Lewis. On August 25, 1903, Lewis was solvent, but on January 9, 1904, was insolvent. The suit at bar was brought by Herrera, receiver, to set aside the deeds and subject the property therein described to an execution under this judgment. It is admitted that there is no fraud in fact, or no intent in the mind of Lewis to defraud his creditors in the transfer made. The district court rendered judgment for the plaintiff upon an agreed statement of facts, submitted by the respective parties, and set aside the deeds and adjudged them to be void and of no effect against the plaintiff Herrera, and as against the levy of and the sale under execution, under the judgment theretofore rendered in the case against Lewis in June, 1904. Appellant has assigned as error that: "The court erred in rendering judgment for the plaintiff upon said statement of facts, and in holding that the transfer of the property by the deed, executed in Germany in August, 1903, by the husband to his wife, did not carry immediately the whole title to the premises, and in holding that until the same was acknowledged and recorded it was a legal fraud upon the creditors of the husband, arising and becoming such creditors after the signing and delivering of the deed, and before the acknowledgment."

There is but one question presented in this case, and that is the operative effect of the deed from Lewis to his wife, dated August 25, 1903, as against the bank to which he became indebted in November following. The contention of the appellee herein is that under the laws of Arizona, no conveyance of real property is valid, as to third persons, unless it is signed by the grantor and duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration; that the deed of August 25th, therefore, did not become effective as an instrument to convey title until it was acknowledged on January 9, 1904. This case presents a simple question of statutory construction. Paragraph 725, Rev. St. 1901, reads: "Every deed of conveyance of real estate must be signed by the grantor, and must be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration." Paragraph 2698 reads: "Every gift, conveyance, assignment, transfer, or charge made by a debtor which is not upon consideration deemed valuable in law shall be void as to prior creditors, unless it appears that such debtor was then possessed of property within this territory, subject to execution, sufficient to pay his existing debts. \* \* \* " The provisions of paragraph 725, above cited, seem to us to permit of but one construction. When it says that every deed and conveyance

of real estate must be signed by the grantor and must be duly acknowledged before some officer authorized to take acknowledgments and properly certified to by him for registration, it is equivalent to saying that no deed, unless executed as therein provided will operate to effect a conveyance of real estate.

This construction has been followed in the interpretation of a similar statute in Alabama by the Supreme Court of that state in *Hendon v. White*, 52 Ala. 597; *Chadwick v. Carson*, 78 Ala. 116; *Watson v. Herring* (Ala.) 22 So. R. 28. The United States Supreme Court, in *Clark v. Graham*, 6 Wheat. 577, 5 L. Ed. 334, and the Supreme Court of Ohio, in *Smith's Lessee v. Hunt*, 18 Ohio, 260, 42 Am. Dec. 201, have also placed a like construction upon a similar statute. Neither the deed of August 25, nor of December 29, 1903, was effective to convey title, until acknowledged January 9, 1904; and before that date the bank became a creditor of the grantor, Lewis, and, as is admitted in the agreed statement of facts, Lewis was not then possessed of property within this territory subject to execution sufficient to pay his existing debts. The deeds, being deeds of gift, were both void as to the bank, and as to Herrera, the receiver, under the provisions of paragraph 2698, above cited.

The judgment of the lower court is therefore affirmed.

SLOAN and CAMPBELL, JJ., concur.

(14 Wyo. 479)

#### HARDEN v. CARD.

(Supreme Court of Wyoming. April 10, 1906.)

##### 1. EXCEPTIONS, BILL OF—SIGNING—FILING—TIME.

Rev. St. 1899, § 3743, requiring a party taking exceptions to reduce them to writing and present them to the court, or the judge thereof in vacation within the time given for allowance, and, if found true, that it shall be the duty of the court or judge to allow and sign the bill, whereupon it shall be filed with the pleadings as a part of the record, does not require that the signing or filing shall occur within the period granted for reducing the exceptions to writing.

##### 2. SAME—MOTION TO STRIKE—AFFIDAVITS.

A motion to strike a bill of exceptions because it was not presented within the time allowed and was incomplete when first presented on the last day of the time provided cannot be considered on affidavits of counsel explaining the condition of the bill when so presented, but must be decided on the bill itself and the recitals contained therein, authenticated by the signature of the trial judge.

##### 3. SAME—STATUTES—CONSTRUCTION.

The provisions of the Code with reference to a bill of exceptions and order granting time to reduce exceptions to writing and recitals in the bill as to its presentation and settlement should be liberally construed, to the end that a bill which the trial judge has signed may be sustained, if possible, rather than defeated.

##### 4. SAME—CORRECTION AFTER TIME.

Under Rev. St. 1899, § 3743, authorizing the court or judge, if a bill of exceptions presented for signing is not true, to correct it or suggest corrections to be made, and sign the

same after it is corrected, where it was impossible for plaintiff in error to complete his bill of exceptions within the time allowed, and the bill was presented on the last day allowed for its presentation and settlement in an incomplete state, the court had power to permit its correction and sign the same as though properly presented within the time.

#### 5. SAME—FILING.

A bill of exceptions is not properly filed as a paper in the case until allowed and signed.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 36.]

#### 6. COURTS — RECORDS — WITHDRAWAL FROM FILES—CORRECTION.

It is within the power of a trial court to permit a party to take a presented bill of exceptions temporarily from the files for the purpose of making suggested corrections.

#### 7. EXCEPTIONS. BILL OF—CONSTRUCTION.

Where a bill of exceptions stated that the motion for a new trial, which was therein set out in full, and appeared to be properly signed by counsel, was filed April 9, 1904, which was within the statutory period, it did not disclose that the motion was unsigned when filed.

#### 8. WRIT OF ERROR — REVIEW—MOTIONS—BILL OF EXCEPTIONS.

An order granting a motion to amend a motion for a new trial and denying a motion to strike such motion for a new trial cannot be reviewed, where the exception taken thereto is not preserved by a bill of exceptions.

#### 9. EXCEPTIONS, BILL OF—ALLOWANCE—RECORD.

A journal entry showing the allowance of a bill of exceptions is not required.

#### 10. WRIT OF ERROR — BILL OF EXCEPTIONS — CERTIFICATION—EFFECT.

A certificate of a trial judge that the bill of exceptions was presented within the time allowed but was found to be incomplete, whereupon leave was granted to complete the same, and on a subsequent day the defendant presented the foregoing bill as a completed bill of exceptions, and asked that the same be signed, filed, and made a part of the record, all of which was accordingly done, to which plaintiff objected and excepted, with the signature of the trial judge, sufficiently showed that the bill was "allowed."

#### 11. EXCEPTIONS, BILL OF—FILING.

It is insufficient that a bill of exceptions shows that it was filed before it was allowed.

#### 12. WRIT OF ERROR—BILL OF EXCEPTIONS—CERTIFICATION.

Where a bill of exceptions and original papers required to be sent to the Supreme Court by Supreme Court rule 11 (26 Pac. xii) were all fastened together, and the clerk certified that they constituted "all the papers filed in said case now on file" in his office, which certificate was dated after the allowance of the bill, it sufficiently showed that the bill was filed in the clerk's office after it was allowed.

#### 13. SAME — DISMISSAL — GROUNDS — BILL OF EXCEPTIONS — PREPARATION — PAGES — NUMBERING.

Failure of a plaintiff in error to number the pages of his bill of exceptions, as required by court rule 12 (26 Pac. xii), is not a ground for dismissal of the proceedings in error.

Error to District Court, Carbon County; David H. Craig, Judge.

Action by J. W. Card against Charles Harden. From a judgment in favor of plaintiff, defendant brings error. On motion to strike the bill of exceptions and dismiss the proceedings in error. Denied.

McMicken & Blydenburgh and N. E. Cortbell, for plaintiff in error. N. R. Greenfield, for defendant in error.

POTTER, C. J. This cause has been submitted upon a motion of the defendant in error to strike the bill of exceptions from the files, and dismiss the proceeding in error. The motion to dismiss is based upon the objections to the bill of exceptions; it being asserted that without a bill none of the questions raised by the petition in error could be considered.

Several objections are urged to the bill. The first and principal objection is that the exceptions were not reduced to writing and presented for allowance within the time given for that purpose. It appears by the order overruling the motion for new trial, entered October 11, 1904, that the defendant below, plaintiff in error here, was given until and including the first day of the next term of court to prepare and present his bill of exceptions. The next term of court following the making of that order convened March 13, 1905. It is recited in the concluding portion of the bill of exceptions, immediately preceding the signature of the district judge before whom the cause was tried, as follows: "And now on this 13th day of March, 1905, the same being the first day of the next succeeding term of this court, and within the time allowed by law and the order of this court, the defendant presents to the court his bill of exceptions herein. Said bill of exceptions being uncompleted, in this, that only a portion, probably a little more than one-half, of the evidence and exceptions having been transcribed. The defendant then asked leave to withdraw the same from the files of the court for the purpose of completing the same and attaching thereto a transcript of the remainder of the evidence and exceptions in said case, which leave was thereupon granted by the court; neither the plaintiff nor his counsel being present in court when said request was made or granted, and neither the plaintiff nor his counsel having any knowledge of such request or in any way consenting to the granting of the same. And now on this 16th day of May, 1905, the defendant presents to the court the annexed and foregoing bill of exceptions as the completed bill of exceptions in this case and asks that the same be filed with the papers in the case as a part of the record, but not spread at large upon the journal, all of which is accordingly done, and to all of which the plaintiff by his counsel now and here objects and excepts." There is also a pencil memorandum on the bill as follows: "Presented March 13th, 1905. D. H. C., Judge." At the foot of the bill appears a statement written with a lead pencil, over the signature of the attorney for the plaintiff below, dated May 16, 1905, admitting that the bill then signed contained substantially a correct transcript of the testimony and exceptions, but objecting to the bill being signed on the ground that it was not prepared and presented within the time allowed, and requesting the court to certify the facts

as to the time when said bill was presented, and its form when first presented on March 13, 1905.

The statute provides: "The party objecting to the decision must except at the time the decision is made; and time may be given to reduce the exception to writing, but not beyond the first day of the next succeeding term." Rev. St. 1899, § 3740. "When the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, or the exception is to the opinion of the court on a motion to direct a nonsuit, to arrest the testimony from the jury, or for a new trial for misdirection by the court to the jury, or because the verdict, or if a jury was waived, the finding of the court, is against the law or the evidence, the party excepting must reduce his exception to writing and present it to the court, or to the judge thereof in vacation, within the time given for allowance. If true, it shall be the duty of the court, if presented in open court, or the judge of the court before whom the cause was tried, if presented in vacation, to allow and sign it, whereupon it shall be filed with the pleadings as a part of the record, but not spread at large upon the journal. If the writing is not true, the court or the judge in vacation shall correct it, or suggest the correction to be made and it shall then be signed as aforesaid." Rev. St. 1899, § 3743.

It is not contended that the bill is rendered imperfect from the fact that it was not signed until after the expiration of the time allowed for its presentation. Our statutes above quoted do not require that the signing or filing shall occur within the period granted for reducing exceptions to writing. If the bill is presented within the time allowed, the court of judge may take a reasonable time before signing to examine the same, and make or suggest necessary corrections. That is the recognized doctrine even where the statute seems to require the bill not only to be tendered, but signed and filed within the limited time allowed. 3 Ency. Pl. & Pr. 474. When time has been given not beyond the period permitted by the statute, and the bill is seasonably presented, the court or judge has jurisdiction to settle, allow, and sign the same; and the fact that the signing does not occur until after the time allowed for presentation will not defeat a bill timely and properly presented. This rule is, we believe, well understood and unquestioned in this jurisdiction. Where the time of signing is not mentioned, it ought probably to be presumed that the act occurred at the date of presentation, or at least within the time allowed for presentation. But, as the statute does not require the bill to be signed within the time allowed for reducing it to writing and presenting it for allowance, and, in practice, a bill is perhaps seldom signed within such time, where the full time is taken by counsel for prepara-

tion, no substantial reason is perceived for resorting to the fiction of signing as of the date of presentation. That may be necessary under statutes differently worded. The statutes of the various states show such a marked dissimilarity on the subject of bills of exceptions, that the decisions of other states assist but slightly in determining the proper practice under our own statutory provisions.

It is, however, seriously contended that the bill was not presented within the time allowed, for the reason that it appears by the concluding certificate that it was in an incomplete condition when first presented, and that the time had expired when finally presented as completed on May 16, 1905. An affidavit of one of the attorneys for plaintiff in error has been filed in this court for the purpose of explaining the condition of the bill when presented on the first day of the March term, and justifying the failure of counsel to present it at that time in its present complete form. But that affidavit cannot be considered. The question raised must be determined upon the bill itself, and the recitals therein contained, which are authenticated by the signature of the trial judge. 3 Ency. Pl. & Pr. 513, 514; Van Horn v. State, 5 Wyo. 501, 40 Pac. 964; Bank of Chadron v. Anderson, 7 Wyo. 441, 53 Pac. 280. It is the settled doctrine in this state that the Code provisions with reference to bills of exceptions are entitled to receive a liberal construction. *Stirling v. Wagner*, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128. And the order granting time to reduce exceptions to writing has been liberally construed so as to preserve, rather than deny, the right of a party to present his bill of exceptions for allowance. *Conway v. Smith Merc. Co.*, 6 Wyo. 327, 44 Pac. 940, 49 L. R. A. 201; *Jones v. Bowman*, 10 Wyo. 47, 65 Pac. 1002. Upon the same principle, the recitals in the bill as to its presentation and settlement ought to be liberally, though reasonably, construed, to the end that the bill, which the trial judge has deemed proper to be signed, may be sustained, if possible, rather than defeated.

It is to be remembered that this is not a proceeding to compel the signing of a bill. Here the judge signed a bill, and the question is one of jurisdiction—whether he had or had not the right, upon the facts set forth in the bill, to sign it; and the presumption, if any, is in favor of the regularity of his act. It does not follow that because the judge might lawfully have refused to sign the bill as presented on the first day of the term, on account of its incompleteness, he would not be authorized to make or cause or allow to be made such necessary or proper additions as to constitute it a true bill, and then to sign it as corrected and completed. The statute contemplates that a bill may require correction before allowance and signing, and expressly permits the court or judge, if the writing be not true, as presented, to correct

it or suggest the correction to be made, and then to sign it. We observe nothing in the statute which requires that a bill presented in time shall be ready for signing before the expiration of the time granted for reducing the exceptions to writing. It may be conceded that it is the duty of a party desiring to preserve his exceptions to prepare and present a bill fairly and fully setting forth the facts upon which the rulings of the court excepted to were made; and that the draft so presented should state all the evidence, as he understands it, upon which the verdict or findings were based, where the exception is to the overruling of a motion for new trial on the ground that the verdict or findings are not supported by the evidence; and we think such a duty does rest upon the exceptant. It might even be conceded that where a presented bill confessedly lacks much of the material evidence, which is afterwards, and after the time allowed for presentation, inserted, but without the consent of the court, or, perhaps, with such consent, that a mandamus would not lie to require the allowance and signing of the bill, though we are not prepared to, nor is it necessary that we do, decide that question. It cannot, however, be doubted that, if all the facts are not set out in full or as the court or judge understands them, or if all the evidence is not embraced in the draft as presented, where it should be embraced to properly explain the exception, the court or judge may make or cause the necessary corrections to be made to conform the bill to the truth, not only by changing incorrect statements of fact, and striking out matters improperly included, but by adding omitted evidence. Such authority is clearly conferred by the statute. How far a judge ought to go in correcting a bill, rather than to refuse his signature, is not the question before us.

As it is not the duty of the judge to prepare a bill in the first instance, he might, perhaps, rightfully refuse to accept or correct a bill which, though it ought to contain all the evidence, admittedly lacks a large part of it, at least if there appears to be no reasonable excuse for such omission. But it is evident that counsel may in good faith insert in his proposed bill all that he deems essential to properly bring up his different exceptions, and, where the evidence is necessary, all that he understands the evidence to be; and yet opposing counsel, or the judge, or both, might find it incomplete by reason of the omission of material facts or evidence, which would result in material corrections and additions, and in such case we do not think that the authority of the court or judge to make such corrections in order to truly set forth the facts and exceptions, and then to sign the corrected bill, is to be questioned. In Ohio, where the statute as to bills of exceptions seems to be strictly construed, a mandamus to compel the signing of a bill

was denied, it appearing that, as submitted to opposing counsel within the time allowed, several exhibits which had been offered in evidence were omitted, though they were handed to opposing counsel in envelopes, and they were attached to the bill after the time allowed had expired. It was, however, said in the opinion: "If purporting to contain all the evidence, it should contain in the form of a bill of exceptions all the evidence which counsel presenting the bill claimed the evidence to be. It does not follow that the bill presented to counsel for examination should, in fact, contain all the evidence, for opposing counsel and the judge might add to the bill certain items of evidence omitted, or might strike from it certain matters improperly there; but this fact does not relieve the counsel from preparing and presenting to opposing counsel, within the time provided by law, a bill of exceptions complete and proper in form in that it shall contain, if it purports to contain all the evidence, all that he claims to be the evidence, and not a part merely." One judge dissented from the decision; such dissenting judge holding that the law had been substantially complied with. *State ex rel. v. Evans*, Judge, etc., 12 Ohio Cir. Ct. R. 245. In California it was said: "The draft to be prepared by the party should be full and fair. \* \* \* The mistakes and omissions of the draft may be corrected and supplied by the suggestions and order of the judge on the settlement of the bill, so as to make the bill, when settled, conform to the truth, and correctly set forth, so far as is material, what transpired on the trial or proceeding to be reviewed." *Sansome v. Myres*, Judge, 77 Cal. 353, 19 Pac. 577. See, also, *Hyde v. Boyle*, 89 Cal. 590, 26 Pac. 1092. The Supreme Court of Kansas say on this subject: "The power of the trial court to make such alterations, erasures, and additions in a prepared bill of exceptions presented for signature as may be necessary to make it speak the truth is undoubted, and has been declared by this court." *Swartz v. Nash*, 45 Kan. 341, 25 Pac. 873. To the same effect may be cited, among other cases, *Lum v. Hoag*, 30 Wis. 159; *Selbright v. State*, 2 W. Va. 591; *Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493.

Counsel for defendant in error has cited two cases from Indiana which might seem to sustain his contention upon the present motion, and that they tend to support it may be conceded, viz.: *Wysor v. Johnson*, 130 Ind. 270, 30 N. E. 144; *McFadden v. Owens*, 150 Ind. 213, 49 N. E. 1058. But the certificate attached to the bill in the case of *Wysor v. Johnson* stated explicitly what part of the bill as signed was first presented, which appeared to be only the first 288 pages of the bill that contained 822 pages; and it was not stated that any suggestion was made or consent given to correct the presented bill, but it was stated that, after the bill had been presented and so indorsed, it was left with

the official shorthand reporter, and was not again seen by or presented to the judge until nearly a year afterwards, "at which time all that part of the foregoing bill following page No. 288, to and including page No. 822, has been since attached thereto." Moreover, it seems that, under the statute of Indiana, the longhand manuscript of the stenographic report of the evidence is required to be filed with the clerk by the exceptant before incorporating the same into a bill of exceptions. *Citizens' St. R. Co. v. Sutton*, 148 Ind. 169, 46 N. E. 462, 47 N. E. 462. And it is held in that state, by reason of their peculiar statute, that there must be an affirmative showing that the whole bill was tendered to the judge within the time given.

The argument of counsel for defendant in error in support of the motion proceeds upon the theory that, when the bill was presented on the last day of the period allowed, it confessedly contained a mere fragment of the material evidence, and not all that counsel presenting it understood that it should contain, or that was intended to be embodied in it. We are of the opinion, however, that we are not at liberty to give that construction to the recitals of the bill. In its present condition the bill purports to contain a complete transcription of the official stenographic notes of the evidence; such notes appearing to have been transcribed after the death of the official stenographer by another person, and, as so transcribed, the evidence is written out in full, with questions and answers, objections and exceptions, and remarks of court and counsel as they occurred during the trial; and no question is raised as to the correctness of the transcription. While the certificate states that the bill was incomplete when presented, it does not identify any pages or portion of the bill which was then omitted. The statement that only a portion, probably a little more than one-half, of the evidence and exceptions had been transcribed, may refer to the transcription of the shorthand notes, which notes may or may not have been attached to or incorporated in the bill to be afterward transcribed; or it may mean that only a little more than one-half of the evidence was in any way incorporated in the bill. If it refers to a mere transcription of the notes, it does not negative the presence in the bill of the evidence not transcribed in narrative or other form. Assuming, however, that the court or judge found, on examination, that nearly one-half of the evidence had been entirely omitted from the bill, it does not necessarily follow that the party presenting it had willfully or knowingly omitted material evidence or facts which he deemed essential to explain his exceptions. For instance, the last nine pages of the purported evidence now in the bill might have been properly omitted, so far as any exception of the party presenting the bill is concerned, as it appears that those pages contain the testimony of two witnesses, which, on

motion of the defendant below, plaintiff in error here, was all stricken out, and was not, therefore, evidence upon which the jury or court acted.

Several exhibits, in the shape of contracts, bank checks, and letters, are in the bill as part of the evidence, and, as the originals of such exhibits are in the bill, instead of copies, it is apparent that they are not intended by the reference to evidence not transcribed. Taking the bill as it stands, and giving to the statements of the certificate all the force to which they are entitled, it is not shown thereby that the court was presented with what was admittedly the mere fragment of a bill, and we think it impossible to say, on the strength of the certificate, that the party presenting the bill had not in good faith set forth the facts as he or his counsel understood them, or that the bill, as presented, was not in such a condition as to authorize its correction by or at the suggestion of the judge. The reference to the withdrawal of the bill from the files for the purpose of correction indicates, perhaps, a misconception as to the nature or situation of a bill after presentation and before allowance. A bill is not properly filed as a paper in the case until allowed and signed, and, although the present bill bears the clerk's indorsement showing its filing on March 13, 1905, it has no other effect, probably, than to supplement the recital of the bill as to the date of presentation. It is clearly proper to permit a party to take a presented bill temporarily for the purpose of making suggested corrections. That is a matter within the control of the judge upon whom the duty rests of settling the bill. We are of the opinion, therefore, that the objection that the bill was not presented within the time allowed cannot be sustained.

Another objection urged against the bill is that the motion for new trial was unsigned by counsel when filed, and was not signed until the court permitted counsel to sign it after the expiration of the statutory period for filing the motion. It is sufficient to say in disposing of this objection that the alleged defect in the motion is not disclosed by the bill of exceptions. The bill states that the motion for new trial therein set out in full, and appearing to be properly signed by counsel, was filed April 9, 1904, which was within the statutory period. Our attention is called to a journal entry of May 31, 1904, to the effect that, upon defendant's application to amend motion for new trial, his counsel were granted leave to immediately sign the motion, and that the same was accordingly done in open court; and that the motion of plaintiff to strike from the files the motion for new trial because it was not subscribed as by law required was denied. The motion for new trial, however, referred to in that entry, is not identified, and neither the motion to amend, nor the motion to strike, are incorporated in the present bill, nor in any

other bill that has been brought into this record. The entry states that counsel for plaintiff excepted to the rulings, but such exceptions do not seem to have been preserved by a bill of exceptions. It is well settled that motions are not in the record on proceedings in error, unless embraced in a bill. The point is, therefore, not well taken.

A further ground of the motion to strike the bill is that there is no record that the bill was allowed. A journal entry showing the allowance of the bill is not required. *McBride v. U. P. Ry. Co.*, 3 Wyo. 183, 18 Pac. 635; *Hogan v. Peterson*, 8 Wyo. 549, 59 Pac. 162. And while the bill itself does not use the word "allowed," the certificate of the judge is, we think, equivalent thereto. It is also urged that the judge certified only as to the evidence, and not the exceptions. The signature of the judge to the bill allowing it and ordering it to be filed as part of the record authenticates all the statements of the bill.

The bill is also assailed on the ground that it is not indorsed as filed in the court below after it was allowed and signed. It is necessary that a bill should be filed after the allowance and signing thereof; and the fact that it appears to have been filed before its allowance on March 13th, when it was presented would not, we think, be sufficient. But under our present practice the original papers are sent to this court by the clerk of the court below upon an order of the clerk of this court. *Laws 1901*, p. 5, c. 3; rules 11, 12 (26 Pac. xii). And by rule 11 it is required that the clerk of the lower court shall authenticate such papers by certifying that they are all the original papers in the cause, or certain papers (naming them), as the case may be. In the case at bar the bill of exceptions is fastened together with all the other original papers, and the clerk has certified that they constitute "all the papers filed in said case now on file in my office," which certificate is dated September 25, 1905. It is apparent, therefore, that after being signed the bill was left with the clerk for filing, and his failure to indorse it as filed cannot invalidate it. It is sufficiently shown to have been filed in the clerk's office. *Board, etc., v. Shaffner*, 10 Wyo. 181, 68 Pac. 14.

The record is objected to because the pages are not numbered as required by the rules. But that is not a ground for dismissal in the first instance. The rules provide that the court may, of its own motion, or upon motion of the defendant in error, enter an order requiring the papers to be properly arranged, or the pages numbered within a specified time, and that for a failure to comply with such order the cause may be dismissed in the discretion of the court. See rule 12 (26 Pac. xii).

The motion to strike the bill of exceptions and dismiss the cause will be denied.

BEARD and SCOTT, JJ., concur.

## STATE v. MAYO.

(Supreme Court of Washington. April 13, 1906.)

### 1. CRIMINAL LAW—JURY—LIST OF JURORS—SELECTION—CAPITAL CASES.

Any right ever existing under Ballinger's Ann. Codes & St. § 6879, providing that a person charged with a capital crime shall have a list of the petit jurors returned delivered to him before trial, for such a defendant to have his jury selected from the list served on him, till it was exhausted, was taken away by later statutes changing the courts and the mode of drawing and summoning jurors, so that several departments of a court select their juries from the same general panel.

### 2. HOMICIDE—DYING DECLARATIONS.

That one had been informed by the doctor that he was about to die, and that he stated that he realized it, sufficiently shows that he realized he must die to authorize admission of his statements as dying declarations.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 430-437.]

### 3. SAME—IDENTIFYING ASSAILANT.

Dying declarations are admissible, though the description given does not identify the person who did the shooting as defendant; it being enough that they add a link in the chain of evidence.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 448-450.]

### 4. SAME—IMPEACHMENT.

A dying declaration may be impeached by showing that the person making it made other statements inconsistent therewith.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 460.]

### 5. SAME.

In impeaching a dying declaration by inconsistent statements, the attention of the witness may be directed to the matter desired to be introduced in evidence, and he may then state in his own words what the deceased said about it.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 460.]

### 6. CRIMINAL LAW—CHARGE IN WRITING.

To relieve the court of the duty of charging in writing, under *Laws 1903*, p. 120, c. 81, § 1, subd. 4, providing that on request of either party the charge must be in writing, provided that, when a stenographic report is taken, this shall be considered as a charge in writing, the stenographer must be one who is under the direction of the court, and can be required to furnish a copy of the instructions; and it is not enough that two stenographers, one employed on behalf of the prosecuting attorney, and the other by the defendant, are present taking a report.

### 7. SAME—LIMITING ARGUMENT.

It is a violation of defendant's constitutional right to defend to limit his time of argument to the jury to 1½ hours in a case the trial of which took 4 days, and in which 20 witnesses were examined and 500 pages of testimony taken.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1657.]

### 8. SAME—PRESUMPTION OF INNOCENCE—INSTRUCTIONS.

Defendant in a criminal case is entitled to an instruction on the presumption of innocence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1846.]

### 9. HOMICIDE—DYING DECLARATIONS—INSTRUCTIONS.

In a homicide case, the requested instruction: "Dying declarations are admissible from the necessities of the case, but they should be

received with caution, for the reason that the declarant has not been administered an oath, and an opportunity for cross-examination has not been afforded defendant, and that the declarant might be influenced against defendant; and for the further reason that the physical condition of the declarant might render the statement more or less unreliable. Circumstances surrounding the declaration should be weighed the same as those surrounding other evidence"—or one of similar import, should be given.

[Ed. Note.—For cases in point, see vol. 26. Cent. Dig. Homicide, §§ 403, 404.]

Appeal from Superior Court, Spokane County; Miles Poindexter, Judge.

James Mayo was convicted of murder, and appeals. Reversed.

Sullivan, Nuzum & Nuzum, for appellant. R. M. Barnhart and A. J. Laughon, for the State.

FULLERTON, J. The appellant was informed against in the superior court of Spokane county for the crime of murder in the first degree, convicted of murder in the second degree, and sentenced to a term in the penitentiary. From the judgment of conviction he appeals.

He first contends that he was denied substantial rights given him by statute by the manner in which the jury was impaneled, and a number of his assignments of error are based on rulings made by the court with reference thereto. These assignments, as they embrace but a common question, can best be considered together. The Code (section 6879, Ballinger's Ann. Codes & St.) provides that any person indicted or informed against for a capital crime "shall, on demand upon the clerk by himself or counsel, have a list of the petit jurors returned delivered to him at least twenty-four hours before trial." Pursuant to this statute, some three days before the time set for the trial of his case the appellant served upon the clerk a written demand for the list of jurors returned and then in attendance upon the court. The clerk in compliance therewith certified and served upon him a list of all those serving on the regular panel, some 53 in number, also a list of 36 more whom the court had ordered drawn from the jury list and directed to be summoned by special venire returnable on the morning fixed for the trial. The superior court of Spokane county consists of three departments, all three of which were engaged in trying causes by jury at the time the appellant's case was called for trial. On the call of his case some 24 of the jurors on the regular panel did not report for duty in the department in which the appellant was tried, being engaged in other departments, and the court, over his objection, ordered the trial to proceed without requiring them to be brought in, and also over objection directed that those summoned on the special venire and who had reported for the first time that morning be listed with the regular jurors.

The impanelling of the jury was then commenced and was proceeded with until the afternoon of the next day, when the judge presiding discovered that the jury could not be completed from the jurors then in attendance upon his department. He thereupon ordered 24 more names drawn from the jury list, and a special venire returnable forthwith issued for the jurors whose names were so drawn. Of these the sheriff summoned 6, and their names were written on ballots and placed in the clerk's box over the objection of the appellant. A juror who had been executed from attendance upon the court until that time also returned, and his name, over objection, was placed in the box. From this list, together with 12 of the regular panel who had been brought in from another department, the jury before whom the appellant was tried was finally completed.

It is the appellant's contention that the statute above cited confers on a defendant accused of a capital crime the right, not only to have the list of jurors returned and in attendance upon the court served upon him 24 hours before his case is set for trial, but the right to have the jury before which he is tried selected from the list so served upon him, or at least to have that list exhausted in an effort to secure a jury before additional jurors are added to the list. The statute in question was enacted before Washington was admitted into the Union as a state, and at a time when the court system and the method of drawing and summoning jurors differed widely from the present court system and the present method of drawing and summoning them. At that time we had a district court which held terms at stated intervals fixed by law. Jurors were drawn in advance of these terms to report at the commencement thereof. If a sufficient number did not report to form a panel of the required number, the sheriff summoned from the bystanders or the body of the county a sufficient number of persons to make up the number. From this panel the trial juries required in the cases pending before the court were drawn. But since statehood the changes from the old system have been radical, not only in the method of summoning trial jurors, but in the court system itself. Now there is in each county a superior court which has no terms, and is open for business at all times, except on nonjudicial days. In some counties the court is composed of more than one department, for each of which there is a separate judge. These several departments have equal powers, and all may engage in trials by jury at the same time. Each department selects its trial jury from the same general panel. These panels are drawn from lists prepared by the jury commissioners. On the second Saturday of each month the court orders the commissioners to draw from the jury list the names of such number of persons as he thinks will be required for jury service during the ensuing month, and a venire is issued

for the persons whose names are so drawn. The court is empowered, also, to order drawn and summoned by special venire returnable at such time as it may direct any additional number that the judge may think necessary from which to select a jury in any particular case. Nor does a single exercise of this power exhaust it. It may be resorted to until enough qualified jurors are so drawn. Moreover, this is the only way an exhausted panel may be now refilled in counties of the class to which Spokane belongs. It is no longer permissible to select from the bystanders or issue an open venire to the sheriff. Whenever the general panel is exhausted and additional jurors are required to complete a trial jury, they must be drawn from the jury list and a special venire issued for them, while under the old practice they were summoned from the bystanders by the sheriff.

From the foregoing it is apparent that the section of the statute relied upon by the appellant, while harmonious and consistent with the statutes and general practice in vogue at the time it was enacted, has been rendered practically obsolete by the later statutes and practice. While a person charged with a capital offense may still demand and may still have a list of jurors in service upon the court at the time his case is called for trial served upon him, yet it cannot be held that he has the right to have the jury which is to try his case selected exclusively from that list. Such a rule would make it impossible to try in one county two persons accused of capital crimes at the same time, no matter how many departments of the court there might be in that county. In fact, the rule would subordinate the business of the entire court to the demands of the particular case, and such we cannot hold to be the intention of the Legislature. The later statutes, in so far as they conflict with the earlier one, must be held to have superseded it, and consequently we must hold that, if it ever was the rule that a person charged with a capital crime had the right to have the jury before which he was to be tried selected from the panel in attendance upon the court at the time his case was called, the right has been taken away by the later statutes.

The information charged the appellant with having killed and murdered one William Crane by shooting him with a revolver. The state offered, and the court admitted in evidence, statements made by Crane after he had been wounded and just prior to his death concerning the circumstances of the shooting. These were admitted as dying declarations, and it is urged by the appellant that the court erred in so doing, first, because it was not made to appear that the declarant realized at the time they were made that he was about to die or must die from the injuries he received; and, second, because the description given of the person who did the shooting does not identify that person as being the defendant. As to the first objection,

the evidence shows that the declarant had been informed by the doctor in attendance upon him that he was about to die, and that he stated that he realized it. This was sufficient to comply with the rule. *State v. Baldwin*, 15 Wash. 15. The second objection is equally without merit. The admissibility of a dying declaration does not depend on its completeness. That it adds a link in the chain of evidence is all that is necessary. The declaration in this case did at least add a link to the chain of the evidence against the appellant. It described the circumstances under which the crime was committed, and made it possible to identify the person who committed the crime.

The appellant offered evidence tending to show that the deceased had made other statements after receiving the wound from which he died inconsistent with those contained in his dying declaration. The court at first refused to admit the statements at all, but afterwards allowed the appellant to introduce them after the manner of impeaching evidence; that is to say, by permitting the appellant to ask the witness if the injured person did not at a certain time and place say so and so concerning the manner in which he received the wound, instead of permitting the witness to be asked directly what the injured person said to him concerning that matter. That a dying declaration may be impeached by showing that the person making same made other statements inconsistent therewith is held by the great weight of authority. *People v. Lawrence*, 21 Cal. 368; *State v. Blackburn*, 80 N. C. 474; *McPherson v. State*, 9 Yerg. (Tenn.) 279; *Hurd v. People*, 25 Mich. 403; *Battle v. State*, 74 Ga. 101; *Felder v. State*, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777; *Morelock v. State*, 90 Tenn. 528, 18 S. W. 258; *Green v. State*, 154 Ind. 655, 57 N. E. 637; *Carver v. United States*, 164 U. S. 694, 17 Sup. Ct. 228, 41 L. Ed. 602. The only cases to the contrary cited to us are *Wroe v. State*, 20 Ohio St. 460, and *State v. Taylor*, 56 S. C. 360, 34 S. E. 939. It will be observed on examination, however, that none of these cases touch the precise point made here. While they maintain or dispute the doctrine that a dying declaration may be impeached, the method of impeaching it is not touched upon. Treating the question as one of first impression, we can see no reason for the restriction imposed by the court. In those jurisdictions which adhere most strictly to the rule that the inquiry made of the impeaching witness must embody the substance of the foundation question, and must be so framed as to admit of an affirmative or a negative answer, do so on the ground that otherwise hearsay evidence, not strictly contradictory, might be introduced, to the injury of the parties and in violation of legal rules. But no such reason can have force in a case of this kind. Here there is no preliminary or foundation question, nor, from the

nature of things, can there be any such question, and necessarily the impeaching evidence must be brought in in the form of original evidence. The state, moreover, cannot be prejudiced by permitting the general question to be asked. If the evidence supports the dying declaration, the state's case is that much strengthened. On the other hand, if they are contradictory, the defendant is entitled to them under the general rule above cited. But perhaps the better reason for adopting the rule contended for is that the jury are more apt to get a correct understanding of the supposed contradictory statements when they are detailed by the witness who heard them than they are when recited in the form of a question put by counsel with its necessary wealth of innuendo and other explanatory matter. To arrive at the truth is the aim of all evidence, and the courts should follow the methods which best conserve to that end. It seems to us that in cases of this kind that method would be to direct the attention of the witness to the matter desired to be introduced in evidence, and let him state in his own words what the deceased said concerning it.

At the conclusion of the evidence the appellant requested the court to charge the jury in writing. The court did not comply therewith, and the appellant excepted thereto, and assigns the action of the court as error. The statute (Laws 1903, p. 120, c. 81, § 1, subd. 4) provides that, "when the evidence is concluded, either party may request the judge to charge the jury in writing, in which event no other charge or instruction shall be given, except the same be contained in the said written charge; \* \* \* provided \* \* \* that whenever in the trial of any cause, a stenographic report of the evidence and the charge and instructions of the court is taken, the taking of such charge or instructions by the stenographic reporter, shall be considered as a charge or instruction in writing within the meaning of this section." While the record is silent on the question, it is said by counsel that there were two stenographers present taking a stenographic report of the evidence, one employed on behalf of the prosecuting attorney and the other by the defendant. These presumably took a stenographic report of the court's charge as it was delivered, and the question is whether their presence relieved the court from this obligation to charge the jury in writing when so requested. It is the appellant's contention that the stenographer present to relieve the court of this obligation must be an official stenographer, or at least one under the direction and control of the court so that a copy of the charge could be had if application to the court should be made therefor. It seems to us that this objection is well taken. If the court may refuse to charge in writing when requested merely because one of the parties has employed a private stenographer to report the

case on his behalf, then it may do so if it can discover that there is any person reporting the case, no matter for what purpose or on whose behalf. We think the stenographer referred to by the statute must be one who is under the direction of the court and who can be required to furnish a copy of the instructions when a copy is requested. This is not true of a stenographer employed by one of the parties to the suit to report the case on his own behalf. Such a stenographer is not under the control of the court, nor is he under any obligation, nor can he be required, to furnish a copy of any part of the proceedings either to the court or the opposing party. His duties are measured by his contract relations with the party who employed him. To say, therefore, that merely because there is a stenographer present reporting the case that the court need not charge in writing when requested is to practically annul the statute requiring the court on request to charge the jury in writing.

The court, against the objection and over the exception of the appellant, limited the time of argument to the jury to 1½ hours on each side. It is contended here that this was such a manifest abuse of discretion on the part of the court as to entitle the appellant to a new trial. It seems to us that this contention is also well taken. To appear and defend in person and by counsel is a right guaranteed to one accused of crime by the Constitution of this state, as well as by the federal Constitution; and it is not to be denied that a part of that right is the right to address the jury on the questions of fact the issues present for determination. This right, too, has always been regarded as one of the greatest value, not only to the accused, but to the due administration of justice, and any limitation of it which has seemed to deprive the accused of a full and fair hearing has generally been held error entitling the defendant to a new trial. *Williams v. State*, 60 Ga. 307, 27 Am. Rep. 412; *Jones v. Commonwealth*, 87 Va. 63, 12 S. E. 226; *White v. People*, 90 Ill. 117, 32 Am. Rep. 12; *People v. Green*, 99 Cal. 507, 34 Pac. 231; *People v. Keenan*, 13 Cal. 581; *Dille v. State*, 34 Ohio St. 617, 32 Am. Rep. 395; *Hunt v. State*, 49 Ga. 255, 15 Am. Rep. 677; *State v. Rogoway* (Or.) 81 Pac. 234; *State v. Tighe* (Mont.) 71 Pac. 3. In this case the trial consumed something more than four days. Over 20 witnesses were examined, and the evidence reported to this court makes a type-written volume of nearly 500 pages. The case was a capital one. The killing was done by one of a foreign race, against which the preliminary examination of the jurors disclosed there existed in the public mind a considerable prejudice. Under these circumstances we are clear that the limitation of 1½ hours was too restrictive to allow a full and fair discussion of the facts of the case; and hence was a violation of the defendant's constitutional rights.

The appellant specially requested the court to instruct the jury on the law relating to the presumption of innocence. This the court refused to do, either in the language submitted with the request or in its own language. This was error. The accused is entitled in every instance to an instruction on the presumption of his innocence. The court need not, of course, give the instruction in the language of the request unless it so desires; but, when requested to instruct as to the presumption of innocence, it should comply therewith in some form such as will correctly inform the jury as to the law pertaining thereto. *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481; 12 Cyc. 621, and cases cited.

The appellant also requested the following instruction: "Dying declarations are admissible from the necessities of the case, but they should be received with caution, for the reason that the declarant has not been administered an oath, and an opportunity for cross-examination has not been afforded the defendant, and that the declarant might be influenced against the defendant. And for the further reason that the physical condition of the declarant might render the statement more or less unreliable. Circumstances surrounding the declaration should be weighed same as those surrounding other evidence." This, or an instruction of similar import, should have been given. *State v. Eddon*, 8 Wash. 292, 36 Pac. 139.

The other instructions requested, and the exceptions taken to those given, require no special notice. In so far as the requests were pertinent, they were embodied in the general instructions given by the court, and no error was committed by the instructions given.

For the errors above set out, however, the case is reversed and a new trial granted.

MOUNT, C. J., and HADLEY, DUNBAR, CROW, and ROOT, JJ., concur.

#### SPALDING et al. v. LEWIS.

(Supreme Court of Washington. April 6, 1906.)  
TENANCY IN COMMON—MUTUAL RIGHTS—SALE TO THIRD PERSON.

Plaintiffs and defendant were cotenants, and defendant negotiated a trade of the land at \$27.50 per acre for stock in a corporation at par under which they would be required to pay a bonus. To this the plaintiffs objected, but agreed to accept \$25 per acre for their shares in stock at par, the defendant to pay the bonus. Both the land and the stock were considerably overvalued. *Held*, in an equitable action to compel defendant to share with plaintiffs in his contract on the ground that he concealed the fact that he sold the land for \$27.50 per acre, since they seek no damages, they must pay their share of the bonus, or abide by their own contract.

Appeal from Superior Court, Adams County; W. T. Warren, Judge.

Action by C. H. Spalding and another

against William O. Lewis. From a judgment in favor of plaintiff, defendant appeals. Reversed.

O. R. Holcomb, for appellant. Merritt & Merritt, for respondents.

PER CURIAM. The appellant and the respondents were the owners as tenants in common of a tract of land situated in Adams county containing 1,120 acres. The land was encumbered by mortgage in the sum of \$17,000. The appellant Lewis was desirous of selling the land, and his co-owners expressed to him their willingness to do so, provided a purchaser could be found who would take it on satisfactory terms. Later on Mr. Lewis is reported to the respondents that the land could be traded to one W. W. King for the shares of stock in the King Mercantile Company, a corporation doing a mercantile business. King owned of the corporation's stock shares of the par value of \$18,180, and offered to trade his entire holdings for the land and a bonus of \$4,280 in cash; he agreeing to assume the incumbrances on the land. As a basis for making the trade the land was valued at \$27.50 per acre, and the stock at its par value. Mr. Lewis says that after he received this proposition from Mr. King he made the same known to the respondents, telling them at the same time that Mr. King would not make the trade unless all of the stock he held in the corporation was taken up, and that it would be necessary to pay King the sum of \$4,280 in cash to consummate the trade. He says further that the respondents refused to advance any cash to further the trade or to take stock in excess of the amount they would receive for their interests in the land; but that after considerable negotiation they agreed that if the crop could be retained and the land valued at \$25 an acre they would trade their interests for the stock valued at par. He then says that he made the trade on the terms proposed by King, paying the cash bonus of \$4,280 out of his own funds, and afterwards accounted to the respondents for their interests in the property at the rate agreed upon, turning over to them shares of stock of the par value of \$7,333.33. The respondents, however, testify that the appellant told them while the trade was in process of consummation that all that King offered for the land was \$25 per acre in stock at its par value, and that nothing was said about the bonus of \$4,280, or the fact that the trade was actually being made on a basis of \$27.50 per acre; that they first learned these facts from King long after the trade, and that the appellant only admitted them when they went to him after learning the facts from King. They admit, however, that the appellant offered, in case they did not believe they had received their due share of the stock, to divide the whole number of shares received in the trade evenly between them if they would pay their proportion of the cash bonus given

King. The respondents brought this action on the theory that the appellant had actually received \$27.50 per acre for the land, instead of \$25 per acre for which he accounted and that they were entitled to an accounting for the difference. The trial court took this view of the case, holding that the appellant had failed to account for 1,830 $\frac{3}{4}$  shares, which at 60 cents per share, being the value per share found by it, amounted to \$1,120, in which sum it entered judgment in their favor.

The appellant complains of the action of the court, we think, justly. As we say it proceeded on the theory that the appellant had received \$27.50 per acre for the land, fraudulently concealed this fact from the respondents, and thereby induced them to part with their interest in the land at \$25 per acre. Had the land been worth \$27.50 per acre, or had the stock been worth par, there would doubtless have been some foundation for the court's conclusion, but neither of these conditions were true in fact. While the court excluded all direct evidence as to the value of the land, enough does appear to show that even \$25 per acre was considerably in excess of its real value. King says that both the land and the stock were valued for the purpose of the trade for more than either was worth; the appellant says the actual value received for the land was about \$22 per acre; and the respondents themselves in their complaint allege that the stock was worth but 80 cents on the dollar, yet they were willing, and did actually trade their interest in the land at a valuation of \$25 per acre for the stock at par. As to the stock, King says it was worth about 75 cents on the dollar; the appellant 50 or 60 cents, and the court itself found it to be worth but 60 cents. This being true it is plain that the judgment entered by the court is much too large, conceding that the respondents are entitled to recover at all. It is too large because it in effect compels the appellant to take stock at par for the cash he was compelled to pay to complete the trade, while it is conceded by all the parties, even the court itself, that the stock was worth much less than par. True the respondents seek to justify this by saying that the purchase by the appellant of the stock over and above what the land paid for was a separate transaction with which the respondents had nothing to do, but this is not the fact. It was all one transaction. The land and the money paid for the stock, and there is no means of finding out from the evidence in this record what part of the stock was purchased with money and what with the land. It must be remembered that the respondents are not entitled to recover on the principle that the appellant violated his contract with them. This he did not do. They agreed to take this stock at par in payment for their interests in the land at a valuation of \$25 per acre. This much they

received. They seek to recover more on the principle, as we have stated, that the appellant deceived them. But because he deceived them they are not entitled to make a new contract with him. They must confine themselves to an action of damages for the deceit, or an equitable proceeding to compel the appellant to permit them to share in the contract he actually made. The action they brought was of the latter nature, and the relief they can obtain in this action is the right to share in the contract as made. But the record shows that the appellant has been willing at all times to share with them the stock he received in the trade if they would assume their part of the burden. He offered before this suit was begun to transfer to them a full two-thirds of all the stock received on their paying two-thirds of the money he was compelled to pay in the trade. In his answer he repeated his offer, and he brought the stock into court, and tendered it again at the time of the trial. And since the respondents did not seek relief by way of damages they should have been compelled to accept the contract as made by the appellant, or abide by their own contract. The judgment of the court does neither, and hence must be reversed.

The order of the court will be therefore that the judgment appealed from be reversed, and the cause remanded with instructions to permit the respondents, if they so elect within 60 days after the remittitur reaches the trial court, to pay into court for the appellant two-thirds of \$4,280, and receive stock in addition to the amount they have already received sufficient to make two-thirds of the entire amount obtained in the exchange which is the subject of controversy in this action, and if they fail to pay said sum into court within the time named, that their action be dismissed, with costs to the appellant.

STATE ex rel. THOMAS et al. v. SUPERIOR COURT OF WHATCOM COUNTY et al.

(Supreme Court of Washington. April 6, 1906.)

1. EMINENT DOMAIN — USE OF LAND FOR A STREET—PUBLIC USE.

The taking of property for a public street is for a public use, though the street so established be in the form of a cul-de-sac, on either side of property belonging to the city.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 56.]

2. SAME—DEBT LIMIT—RIGHT OF OWNERS TO QUESTION.

Owners of land sought to be taken by a city for the purposes of a street cannot raise the question as to the limit of the city's indebtedness, for the property cannot be taken until actual compensation has been made.

3. MUNICIPAL CORPORATIONS—DEBT LIMIT.

An ordinance of a city, providing for the taking of land for a street, provided that an assessment should be made, as provided by law, for the purpose of raising the amount necessary to pay the damages awarded for the property taken, and that any part of the damages not

assessed against the property benefited should be paid from the general fund. The city took a penal bond from interested property owners, conditioned that it should not be called on to pay for the improvement. *Held*, that the city did not incur a liability for the damages awarded, and the question whether its debt limit had been exceeded was immaterial.

**4. EMINENT DOMAIN—PROCEEDINGS TO TAKE PROPERTY—NOTICE—SERVICE—SUFFICIENCY.**

Ballinger's Ann. Codes & St., § 4875, authorizes personal service on a defendant out of the state, which shall be equivalent to service by publication. Laws 1905, c. 55, § 5, provides that, on the filing of the petition to condemn land for a street, a summons shall be served on the persons made defendants, as in civil actions. *Held*, to authorize personal service on a nonresident defendant in such proceeding.

**5. PROCESS—PROOF OF SERVICE—SUFFICIENCY.**

An affidavit of proof of personal service on defendants averred that copies of the petition and summons were left with each of them. Another affidavit showed that the party who made the service was qualified. *Held*, proof of valid service.

Certiorari by the state, on the relation of John L. Thomas and others, against the superior court of Whatcom county and others, to review proceedings for the condemnation of property. *Affirmed*.

Black, Kindall & Kenyon, for plaintiffs.  
Dorr & Hadley, for respondents.

**CROW, J.** This is a certiorari proceeding instituted for the purpose of having this court review the orders of the superior court of Whatcom county in an action for the condemnation of private property. On April 10, 1905, the council of the city of Bellingham passed ordinance No. 139, entitled: "An ordinance providing for the laying off, widening and establishing of Prospect street, a public street and highway in the city of Bellingham, over and across portions of blocks 11, 12, 14, and 19, Central Whatcom; providing for the laying out, extending and establishing said Prospect street through block 7, New Whatcom, and providing for the taking and damaging of land and other property necessary therefor and for the ascertainment and payment of just compensation to be made for the private property to be taken and damaged for said purposes and for the assessment upon the property benefited for the purpose of making such compensations." Afterwards the city attorney, under authority of said ordinance, filed a petition in the superior court of Whatcom county, as required by section 3, c. 55, p. 86, Laws 1905, praying that just compensation be made for private property to be taken or damaged for the laying off, widening, extending, and establishing of Prospect street, as provided by said ordinance, and that a jury be impaneled for that purpose. Prospect street, as at present dedicated and opened, extends from the northern portion of the city of Bellingham in a southerly direction to Champion street, where it terminates near the center of the north line of block 7, hereinafter mentioned. Immediately south of Champion street, and abutting thereon, is block 7 of the city of New Whatcom, now a

part of Bellingham. This block, triangular in form, and subdivided into lots, is bounded on the north by Champion street, running east and west, on its southeasterly side by Bay street, running from northeast to southwest, and on its southwesterly side by Holly street, running from northwest to southeast. Bay and Holly streets intersect each other at the south angle of block 7, and respectively intersect Champion street at the east and west angles of said block 7. The city buildings and central fire station are located on Prospect street about one block north of Champion street. Block 7 lies between the end of Prospect street and the business center of the city, to which at present the most direct route of travel is around Champion and Bay streets. The city wishes not only to widen Prospect street, but also to extend it across said triangular block 7 to Bay street, thus making a wider and more direct thoroughfare to the business center. The city now owns the southwest 30 feet of lot 11 in block 7, directly in the line of the proposed extension of Prospect street. Ordinance 139 does not provide for any condemnation of said 30 feet, nor has any formal record of its dedication been made. If the street when extended is not opened through said 30 feet, one cul-de-sac will be formed in the north side and another in the south side of block 7 with said 30 feet lying between them. The relators own that portion of block 7 sought to be condemned south of the 30 feet owned by the city. The superior court made findings of fact and conclusions of law in favor of the city, and ordered a jury to be impaneled to fix values and assess damages.

The relators' first contention is that the proposed appropriation of their lands is not a public use. They insist that neither the ordinance nor the condemnation proceedings attempt to appropriate said southwest 30 feet of lot 7, and cannot be regarded as proceedings for that purpose; that no dedication of said 30 feet has been made; that the city is only endeavoring to create one cul-de-sac next to Champion street, and another next to Bay street; and that any appropriation for such a purpose cannot be a public use. We think these contentions are entirely without merit. The record shows a sincere intention upon the part of the city to actually open Prospect street entirely across block 7, and to condemn all private property that may be necessary for that purpose. The southwest 30 feet of lot 11, however, is not private, but public property. If it belonged to the county or state, it might perhaps be necessary to condemn it; but, as it belongs to the city its condemnation is unnecessary. Although no record of any formal dedication of said 30 feet has been made for street purposes, yet, if the city proceeds with the proposed improvement and pays the relators all damages that may be awarded them, we think that, in the light of the ordinance, the condemnation petition, the evidence, and the

entire record before us, it will be estopped from claiming that its own property has not been dedicated. 13 Cyc. 453, 454. But, suppose it be admitted, as contended by the relators, that the city is only creating a cul-de-sac, yet it would have authority to establish a thoroughfare in the form of a cul-de-sac on either side of its property, if it saw fit to do so. It would be a legislative function, with the exercise of which the courts could not interfere, for the city to determine that such additional access to its property was a public necessity. *Sheaff v. People*, 87 Ill. 189, 29 Am. Rep. 49; *People v. Kingman*, 24 N. Y. 559. But we think the city is not creating any cul-de-sac. The evidence shows beyond question that it is about to open a much-needed thoroughfare across block 7. There is no merit in the relators' contention that the use to be made of their lands sought to be appropriated is not public. The use of property for a street or highway is necessarily public, and the trial court could not find otherwise. "Highways.—One of the oldest and commonest of uses for which private property has been appropriated is the establishment of public highways. The appropriation of private property for the establishment of such highways has been held uniformly to be for a public use." 10 Enc. of Law (2d Ed.) 1072; *State ex rel. Schroeder v. Superior Court*, 29 Wash. 1, 69 Pac. 366; *C. R. I. & P. R. R. Co. v. Town of Lake*, 71 Ill. 333.

Upon the hearing, the trial court excluded evidence offered by the relators for the purpose of showing that the city of Bellingham, at the time of the institution of the condemnation proceedings, and at the time of the hearing, was indebted in excess of the constitutional limit, and they now assign error upon said ruling. The ordinance, in section 4, provides that an assessment shall be made in the manner provided by the act of the Legislature for the purpose of raising the amount necessary to pay the compensation and damages which shall be awarded for the property taken, and for the costs and proceedings, and that such assessment shall be made subject to the provisions of said act of the Legislature upon all the property especially benefited. The ordinance, in a later section, provides that: "Any part of the compensation, damages or costs that is not finally assessed against said property benefited shall be paid from the general fund of the city." The relators contend that by this last provision the city will necessarily incur an invalid indebtedness, having already exceeded its constitutional limitation. Any inquiry into the amount of the city debt is immaterial in this proceeding. The property of the relators cannot be taken by the city until actual compensation has been made. The relators are in no position to raise any question as to the limit of the municipal debt, nor are they justified in assuming that any unconstitutional indebtedness will be incur-

red. It is apparent, from the entire ordinance, that an intention exists on the part of the city to pay for property taken by special assessments made upon property benefited, and such intention brings this case within the rule laid down in *Winston v. Spokane*, 12 Wash. 524, 41 Pac. 888, and *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365. To meet any suggestion that the city's credit may be menaced by this proceeding, the council have not only provided in the ordinance for special assessments to pay for the lands to be taken, but the evidence shows they have also taken a penal bond from interested property owners conditioned that the city shall not be called upon to contribute any funds to the expense of the improvement. In *Faulkner v. Seattle*, supra, this court said: "It is also urged that, as the fund is not now in existence, and as the city is proposing to acquire rights of way and property rights prior to the creation of the fund, this would be a violation of the provision with reference to its debt limit; but that does not follow necessarily. There may be some method for immediate payment provided for property condemned, or an agreement possibly postponing and limiting payment to the fund contemplated under the contract for the construction of the works. If the city should wrongfully attempt to make payment for rights of way out of its general fund, the parties holding claims against that fund possibly could interfere; but it is not apparent that there is any intention to deplete this fund." The taking of the bond discloses that the city authorities have already adopted "some method for immediate payment for property condemned." The trial court committed no error in rejecting the evidence offered.

It appears that the relators, George A. Green and Annah S. Green, his wife, being nonresidents of the state of Washington, were first served by publication, and afterwards by personal service without the state. They only made a special appearance moving the court to quash such service. This motion being denied, they now assign error, and claim that the service by publication was insufficient for the want of a proper affidavit. This may be conceded for the purposes of this case. As to the personal service outside of this state, they claim (1) that no authority exists for any such service in a proceeding of this character, and (2) that, if such authority does exist, a valid personal service outside of the state has not been made. There is no merit in either of these contentions. Section 5, c. 55, p. 86, Acts 1905, provides that: "Upon the filing of the petition aforesaid, a summons returnable as summons in other civil actions, shall be issued and served upon the persons made parties defendant, together with a copy of the petition as in other civil actions." The Code of Civil Procedure (section 4879, Ballinger's Ann. Codes & St.) authorizes personal service on a defendant out of the state, and provides that

the same shall be equivalent to service by publication. We think these two sections authorize personal service on a defendant out of the state in this proceeding. Relators also object to the proof of service, because it does not show a copy of the petition and summons to have been served upon each of the relators, Green and wife. There are two affidavits making proof of service. In the first, it affirmatively appears that copies of the petition and summons were left with each of said relators. The second affidavit was made to show that the party who made the service was qualified. These two affidavits are sufficient proof of a valid service; none of their statements being denied by the relators. *Jennings v. Rocky Bar Gold Mining Co.*, 29 Wash. 726, 70 Pac. 136; *Hunter v. Wenatchee Land Co.*, 36 Wash. 541, 79 Pac. 40. The judgment of the superior court is affirmed.

MOUNT, C. J., and ROOT, HADLEY, FULLERTON, and DUNBAR, JJ., concur.

(43 Wash. 518)

MOSLEY v. DONNELL et ux.

(Supreme Court of Washington. April 5, 1906.)

FRAUDULENT CONVEYANCE—EVIDENCE—SUFFICIENCY.

Evidence that a husband was the only person who knew that plaintiff intended to make a trip for the purpose of seeking an investment for a sum of money; that his wife was introduced under an assumed name to plaintiff by a third person when he started on the trip; and that she procured a loan of the money on her mortgage of land in which she had no interest, and immediately afterwards transferred to her husband land which she owned, was sufficient to justify a judgment against both the husband and wife for the sum of money obtained, and setting aside the conveyance of the wife's property to the husband on the ground of fraud.

Appeal from Superior Court, Stevens County; Wm. A. Huneke, Judge.

Action by Edward Mosley against Albert Donnell and wife. From judgment in favor of plaintiff, defendant Albert Donnell appeals. Affirmed.

Robertson, Miller & Rosenhaupt and F. Y. Wilson, for appellant. Kellogg & Neal, for respondent.

MOUNT, C. J. Respondent brought this action against the defendants to recover the sum of \$600 alleged to have been fraudulently obtained from him by the defendants, and to set aside a deed of certain lots in the town of Northport from Louella Donnell to Albert Donnell, her husband, on the ground of fraud, and to subject said lots to the payment of plaintiff's claim. At the time the action was brought, a writ of attachment was sued out and levied upon the said lots. Summons was served upon the defendants by publication. The appellant Albert Donnell appeared specially and moved the court to quash the service of the summons. This motion was denied, and appellant then filed an answer,

denying the allegations of the complaint. The defendant Louella Donnell made no appearance, and judgment was entered against her by default. The cause was tried to the court without a jury, and findings were made in favor of the plaintiff, and a decree entered as prayed for in the complaint. The defendant Albert Donnell appeals.

The facts are substantially as follows: In the year 1903, all the parties hereto were residents of the town of Northport in this state. The plaintiff was a man 52 years of age. He and appellant were fellow workmen in the Northport smelter, where they had been employed for about two years. They met about their work every day. Appellant was married to the defendant Louella Donnell, who was a common prostitute in the town of Northport. The plaintiff had never met Mrs. Donnell. About the 1st of December, 1903, the plaintiff had accumulated about \$600 in money, which he desired to invest in farm lands in Lincoln county. He had informed the appellant of his intentions. About the 1st day of December, 1903, he went to the train at Northport, intending to go to Hartline in Lincoln county for the purpose of investing his money. An acquaintance met him at the depot and went on the train with him and introduced him to appellant's wife, stating that her name was Lou Blake Murray, and that she resided in Nelson, British Columbia. At her invitation plaintiff sat in the seat beside her from Northport to Spokane. On the way to Spokane Mrs. Donnell stated that she owned some timber land in Idaho, and was on her way to look at it, and invited plaintiff to go along with her. He consented, and they went to the land and looked it over. After they had examined the land, Mrs. Donnell proposed to borrow \$600 from the plaintiff, and stated that she would give him a mortgage on the land to secure the repayment of the money. Plaintiff relying upon her representations that she owned the land, made the loan, and took her note and mortgage for the \$600. Mrs. Donnell thereupon returned to Northport, gave her husband a part of the money, and deeded two lots in Northport to her husband without consideration, and departed for British Columbia. A day or two later the plaintiff discovered that Mrs. Donnell was the wife of the appellant, and that she had no interest in the land upon which she had given him a mortgage. The appellant, Albert Donnell, soon thereafter left Northport and went to British Columbia. Plaintiff thereupon brought this action.

Appellant contends, first, that the affidavit for publication is insufficient. The affidavit in this case is substantially the same as the one in *Goore v. Goore*, 24 Wash. 139, 63 Pac. 1092, which we held sufficient. Assignments are made that the evidence is not sufficient to support several of the findings of fact. Each of these assignments is argued separately in the brief. It is unnecessary for us to con-

sider them separately. The evidence is clear and positive to the point that the appellant's wife, by misrepresentation and fraud, obtained respondent's money. There is no direct and positive evidence that the appellant was a party to the fraud, but the circumstances surrounding the case point very closely to the fact that the appellant himself instigated the fraud, and was a party to it, and received a portion of the proceeds. He was the only person who knew that respondent had the money and was going to Spokane with it at the time stated. Appellant's wife went to the train that morning ahead of respondent, and was introduced as another person by a mutual friend. She obtained the money fraudulently, and came back to Northport, where she attempted to place her property there out of the reach of respondent by deeding it to her husband. She gave a part of the proceeds to her husband, and then left the state. The appellant soon followed. The appellant testified in the case in his own behalf, and his evidence, as we read it, is very unsatisfactory. It is equivocal and contradictory, and does not appeal to us as the evidence of an innocent person.

The trial court was abundantly justified in his conclusions, and we think the judgment entered is in accordance with the justice of the case.

The judgment is therefore affirmed.

DUNBAR, HADLEY, RUDKIN, CROW, FULLERTON, and ROOT, JJ., concur.

[42 Wash. 513]

VAN HORN et ux. v. O'CONNOR et al.  
(Supreme Court of Washington. April 5, 1906.)

FRAUD—ELEMENTS—STATEMENT OF OPINION.

Statements by a vendor of land and another to a purchaser who personally examined the land and dealt with the vendor at arm's length, that there were 240 acres under cultivation, that there were 25 or 30 acres more that could be put into cultivation, and not to exceed 50 or 60 acres of waste land out of the 320 acres in the tract, were mere statements of opinion, and not representations as to facts, on which a charge of fraud could be based.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 12, 13.]

Appeal from Superior Court, Lincoln County; W. T. Warren, Judge.

Action by F. M. Van Horn and wife against John O'Connor and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

J. T. Mulligan and H. N. Martin, for appellants. Merritt & Merritt, for respondents.

MOUNT, C. J. This action was brought by appellants, to recover damages from respondents on account of alleged false and fraudulent representations in regard to the sale of certain real estate. These representations are alleged to have been made by respondents O'Connor and Lee, and relied upon by appellants. Upon issues of fact made by

the pleadings, the cause came on for trial to the court and a jury. After the plaintiff F. M. Van Horn had given his testimony, the trial court took the case from the jury, upon motion of the respondents. This appeal is from the judgment of dismissal.

Mr. Van Horn's testimony was in substance that on June 7, 1904, he went with Mr. O'Connor to look at a half section of land owned by Mr. O'Connor in Lincoln county. They looked over the land on that day, when Mr. O'Connor represented that there were 240 acres of the land in cultivation. After looking at the land on that day, they returned to the town of Downs near by, where Mr. O'Connor introduced Mr. Van Horn to one F. C. Lee, and then told Mr. Lee that he and Mr. Van Horn had been out to look at the land, and said to Mr. Van Horn: "Mr. Lee can tell you as much about the Lyman place as I can. He has sowed the place and headed the place, and knows what there is of it." Mr. Lee thereupon told Mr. Van Horn, that there were 240 acres of the land under cultivation; that there were some 30 acres more which could be cultivated, and that there would be not over 50 or 60 acres of waste land. These statements corroborated what Mr. O'Connor had theretofore told Mr. Van Horn. No agreement upon the price of the land was reached that day. On June 10, 1904, Mr. O'Connor and Mr. Van Horn again went to examine the land. There was a fence around the whole section, but no dividing fence. They drove along the north line to about the center of the section, and then followed the supposed half-section line south to where Mr. O'Connor said the corner ought to be. They did not go as far as the south fence on that side of the section, because Mr. O'Connor said he thought the fence was beyond the line, and was built through the rocks for convenience in fencing, and that the bad land which was between them and the fence was not upon the half section. They did not find the corner of the half section. Mr. O'Connor thereupon said it must have been moved or taken away. After looking around at the land, they returned to Downs. On the way back Mr. O'Connor again said that there were 240 or 241 acres of land under cultivation, and 25 or 30 acres more which could be broken up, and which would make 270 acres of good farm land on the half section. After they returned to Downs, Mr. Van Horn asked Mr. Lee if he was to get anything out of the sale, and Mr. Lee told him, "Not from you. Mr. O'Connor pays me." In the evening of June 10th, Mr. Van Horn traded to Mr. O'Connor Spokane city property for the half section of land, at an agreed price of \$6,400. After he had purchased the land, Mr. Van Horn discovered that the fence on the south side of the half section was located upon the south line. The court refused to receive evidence as to how many acres of the land were tillable. On cross-examination, Mr. Van Horn stated that

he had never met Mr. O'Connor until about the 1st of June, 1904; that he was desirous of trading Spokane property for farm lands, and went to see Mr. O'Connor for that purpose, and had no other dealings or relations with him; that he had never met Mr. Lee until the 7th of June, 1904, and had no other dealings with him. Upon the facts as stated above, the lower court was of the opinion, that there were no confidential relations existing between Mr. O'Connor or Mr. Lee, and Mr. Van Horn; that the representations made were expressions of opinion about facts which were as open and obvious to the appellant as to the respondents, and that appellant had an opportunity to obtain the facts about which representations were made, and for that reason dismissed the action.

It is clear from appellant F. M. Van Horn's evidence that he obtained all the land which was shown him, and some which was stated did not go with the half section purchased. But the important and controlling question in the case is whether, after examining the land, appellant may complain because there is not as much tillable land as was represented by the respondents. This court has frequently held that, where representations are made as a matter of opinion, there is no liability for misrepresentations, where the parties are dealing at arm's length and the means of knowledge are as open to one party as to the other. *Hulet v. Achey* (Wash.) 80 Pac. 1105; *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559; *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811, and cases there cited. But, where the representations made are of material facts within the knowledge of the vendor, and entirely without the knowledge of the vendee, and where the circumstances are such as reasonably call for a reliance thereon, the rule is that the vendee may rely upon the representations of the vendor. *Daniel v. Glidden*, *supra*; *Lawson v. Vernon*, *supra*; *Baker v. Bicknell*, 14 Wash. 31, 44 Pac. 107; *Sears v. Stinson*, 3 Wash. St. 615, 29 Pac. 205; *Hanson v. Tompkins*, 2 Wash. St. 508, 27 Pac. 73. In the last-named case this court held that where the vendor represented that a tract of land contained 36½ acres, when as a matter of fact it contained only 26½ acres, the vendor was guilty of deceit, where he did not know but believed the representations were true. The same rule was followed in *Sears v. Stinson*, *supra*.

These cases are relied upon by the appellant; but it does not appear in either of them that the vendee to whom the land was sold had an opportunity to make an examination, or that he did so. On the other hand, it appears that the vendee relied wholly upon the representations of the vendor; and it further appears in *Hanson v. Tompkins* that it was the intention of the parties to convey 40 acres of land, and that a less number of acres was actually conveyed. The case of *Baker v. Bicknell*, *supra*, seems to be squarely in point, and decisive of the case before

us. According to the appellant's evidence, which must be taken as true on this appeal, both Mr. Lee and Mr. O'Connor represented that there were 240 acres of land in cultivation upon the half section. They stated at the same time that there were 25 or 30 acres more that could be put into cultivation, and not to exceed 50 or 60 acres of waste land out of the 320 acres. These two latter statements were clearly expressions of opinion and, being so, indicate that the exact number of acres in cultivation was also unknown to them, and that the statement that there were 240 acres in cultivation was more in the nature of an estimate than of a warranty. There appears to be no claim that the land under cultivation had ever been measured by the vendor, or that he or his agent, Mr. Lee, knew or claimed to know the exact number of acres. The appellant stated in one part of his examination that Mr. O'Connor said there were 240 or 241 acres, indicating again very clearly that Mr. O'Connor was merely estimating the number of acres. The land was open and plainly subject to inspection or measurement. The appellant viewed it twice. He was presumably competent to estimate the area before him as well as the respondents. The parties were strangers to each other, and dealing with each other as such at arm's length. Appellant does not claim that he received less land than he agreed to purchase, but only that a portion of it was not of the quality which he desired it should be.

The trial court saw and heard the complaining witness testify, and concluded from his own evidence that the representations made to him were mere expressions of opinion. We think the court was justified in so doing.

The judgment is therefore affirmed.

DUNBAR, CROW, HADLEY, RUDKIN, ROOT, and FULLERTON, JJ., concur.

#### SPOKANE TRACTION CO. v. GRANATH et al.

(Supreme Court of Washington. April 4, 1906.)

##### 1. MUNICIPAL CORPORATIONS—STREETS—IMPROVEMENTS—DAMAGES—SPECIAL BENEFITS.

The construction and maintenance of a bridge across a river, with one terminus almost immediately in front of defendant's property, and the grading of the street on which the property abutted, so as to make a thoroughfare past the same to and from the end of the bridge and to the city, furnishing an advantage of access to and from the business portions of the city, was a special benefit thereto, and to be so considered in assessing the damages to the property.

##### 2. SAME—WORK DONE UNDER AUTHORITY OF CITY—RIGHT OF OFF-SET.

Where work done by a railway company in the construction of a bridge across a river, and the grading of a street, incident to the making of an approach to the bridge, was under the direction, authority, and supervision of a city, and for the benefit of the latter as well as the railway company, the effect was the same as if the work were done by the city through a

contractor, exclusively for its own benefit, and the right to offset benefits to the property against damages thereto existed.

### 3. APPEAL—TRIAL—PRESUMPTIONS.

Where a case involving the amount of damages and special benefits to property, caused by street improvements, was tried by the court without a jury, it will be presumed that the evidence was considered and weighed with reference to those benefits, which under the law could be deemed special, and will be so reviewed on appeal.

### 4. MUNICIPAL CORPORATIONS — SPECIAL IMPROVEMENTS—DAMAGES TO LAND—IMPROVEMENTS ON LAND.

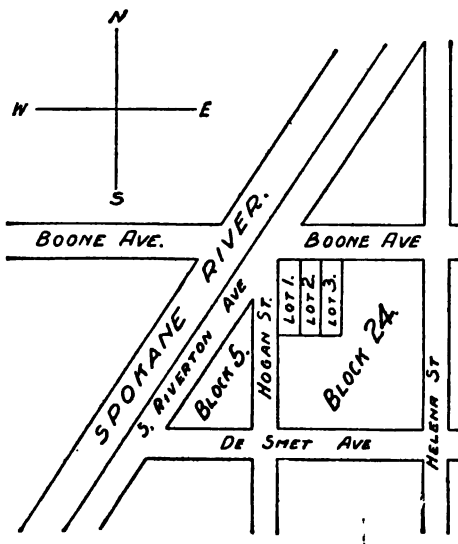
It does not necessarily follow that improvements on property will be damaged in the same proportion as the property itself by the grading or changing of the grade of a city street on which the property abuts.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by the Spokane Traction Company against Louis Granath and others. From the judgment, defendants appeal. Affirmed.

N. J. Thayer and A. E. Gallagher, for appellants. Graves & Graves and B. H. Klizer, for appellee.

ROOT, J. This action was brought by petitioner, a street railway corporation, to have assessed the amount of damages sustained by appellants by reason of damage to their property caused by improvements which respondent railway company intended to make. The contemplated improvements consisted of the erection of a high bridge upon Boone avenue over the Spokane river, and the grading of Boone avenue toward the east from said river in the city of Spokane. The property of appellant is situated on the south side of said avenue, abutting thereon, and close to the river. The following diagram will show the relative positions of the river, streets, lots, and blocks, referred to herein:



The grade as constructed by respondent on Boone avenue, east of the river and in front of appellants' property, varied in height from 13.5 feet to 5.4 feet; the highest point of the grade being near the bridge. Prior to the construction of the bridge and grade, appellants' property was on a level with Boone avenue, and with Helena and Hogan and South Riverside streets. The case was tried before the court, sitting without a jury, and findings of fact and conclusions of law were made and filed. A part of finding numbered 8 reads as follows: "Block 5 was damaged by the change in the grade of Boone avenue and the construction of the bridge, over and above the benefits accruing to it from said improvement, in the sum of \$1. Lot 1, in block 24, was damaged by the construction of the bridge and the grading of Boone avenue, over and above the benefits accruing to it from the improvement, in the sum of \$90. The fee-simple interest in lot 2, in block 24, was damaged by the construction of the bridge and the grading of Boone avenue, over and above the benefits it received from said improvements, in the sum of \$52.50, while the leasehold interest in said lot 2 was damaged in the sum of \$1." In a finding referring to the improvements upon block 5 and lot 1 of block 24, the court said: "These improvements were not depreciated in value over and above the benefit accruing from the improvement in any sum whatsoever, and therefore I have made no allowances for damages thereto in fixing the amounts above specified."

The principal contention made by the appellants is that the lower court permitted the benefits which accrued to appellants' property by reason of the construction of the bridge across the river to be offset against the damages caused to their property by reason of the grading and filling of the street in front thereof, urging that said benefits were not special, but general. It is shown that the construction of this bridge and the grading and filling of the street in front of said premises were parts of one and the same plan of the improvement in that vicinity. The city had granted the street railway company an ordinance, which required them, upon the construction of their bridge across the river, to maintain the same as a thoroughfare for the use of the public, and required them also to lay their tracks upon Boone avenue, east of the river, so that said tracks would be flush with the grade established for said street. In order to comply with this last-mentioned requirement, it was necessary for the railway company to fill in the street extending from the end of the bridge and past the property of the appellants, and further on to make a considerable cut in order to get a practicable grade from the end of said bridge to that portion of the street lying some distance from the river; there being quite a bluff or elevation extending along the river and some little distance there-

from. Appellants claim that the building of this bridge, and the opening and maintenance of the same for highway purposes, was a benefit to their property of the same character enjoyed by property owners generally in all that portion of the city, and for this reason could not be deemed "special," as that term is understood in connection with matters of this kind. We do not think this contention can be upheld. The construction and maintenance of a bridge across the river, with one terminus almost immediately in front of appellants' property, furnished an advantage of access to and from the business portions of the city that was of special value to said property. Doubtless many other pieces of property in that immediate vicinity were likewise specially benefited, but we think that the advantages and the increase of value which would of necessity come to this particular property by reason of the construction and maintenance of said bridge, as aforesaid, was such as to characterize these benefits as special, and such as should be offset against the damages. Not only was the bridge itself a special benefit, but the improvement consisted in so grading the street as to make a thoroughfare past appellants' property to and from the end of the bridge and to that portion of the city lying to the eastward. It is difficult to distinguish this from those cases occurring continually where property is being assessed for the improvement of streets in front of or adjacent thereto.

Appellants urge that the court was in error in permitting the respondent company to amend its petition by striking out the words "irrespective of benefits." Their contention appears to be that, as this work was being done, or to be done, by the railway company, it was not entitled to offset benefits against damages. But the record shows that the work was done by the railway company under the direction, authority, and supervision of the city, and for the benefit of the latter as well as the railway company. Under circumstances of this kind, it is in effect the same as if the work was done by the city through a contractor exclusively for its own benefit. This being true, the right to offset benefits cannot be questioned. *Kaufman v. Tacoma, etc., R. Co.*, 11 Wash. 632, 40 Pac. 137.

Appellants take exception to the action of the court in overruling objections made to questions asked by respondent relative to the benefits and damages, claiming that said questions were such as to call from the witness an estimate of the entire benefits, without reference to their being special or general. While the form of the questions may not have been the most accurate, yet we do not believe any prejudicial error was occasioned thereby. The case having been tried by the court without a jury, it may well be presumed that the court considered and weighed the evidence with reference to those benefits which

under the law could be deemed special, and it is so reviewed here.

It is urged that the court was in error in not making an allowance for damages to the improvements upon the lots and blocks in question, and it is claimed that damages should have been allowed to the owner of the improvements in the same proportion as was allowed as against the fee. We do not think the record shows any error in this particular. The trial court heard all the evidence and personally viewed the premises. It does not necessarily follow that the improvements would be damaged in the same proportion as the land itself. While the use of the improvements might depend much upon the condition and value of the land, yet, as an item of personal property, they could hardly be said to be injured by what took place in the street in front of the real estate, except in an indirect manner. We are not disposed to change the findings of the trial court in this particular.

In support of our conclusion as to what constitutes special benefits in cases of this character, we call attention to the following cases: *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 704, where this court, among other things, said: "It is generally held that only such benefits as are special and peculiar to the particular property can be taken into consideration. But the laying out or widening of a street may be a special benefit to the property abutting thereon, and this benefit may be offset against the damages to the owner whose land is taken therefor, although parties upon the opposite side of the street are similarly benefited and are not chargeable therewith, for the reason that none of their lands were appropriated, and no damages were claimed by them." *Hillbourne v. Suffolk*, 120 Mass. 393, 21 Am. Rep. 522, where it was said: "The advantages that an abutter may receive from his location on a highway laid out, altered, or widened, are none the less peculiar and special to him because other estates on the street receive special and peculiar benefits of a similar kind. *Allen v. Charlestown*, 109 Mass. 243. The ruling in that case, held to be bad, was that, if all the estates abutting on the street are benefited in a similar manner, the amount of his benefits cannot be deducted from the damages of any abutter." *Metropolitan, etc., Co. v. Stickney*, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773, where this language was employed: "If a piece of property is enhanced in value, such enhancement—or, in other words, benefit—to the property cannot be said to be common to any other piece of property. Each piece of property specially enhanced in value is thus specially benefited within itself and irrespective of the benefit that may be conferred by the improvement upon other properties. It follows necessarily that, where the benefits are designated as 'general benefits,' 'benefits common to other property,' and the like expressions, to be found in decided cases, it is meant those

general, intangible benefits which are supposed to flow to the general public from a public improvement. Thus, the paving of a street in a city may confer special benefits upon properties near it, by an increase in their value, and, at the same time, by the convenience afforded the general public, confer a general benefit. So, a railroad built through a town or through the country may be a general benefit, by affording additional facilities for travel and commerce, and thereby be a benefit to the community at large. But the effect of such general benefits upon any particular piece of property would be impossible of ascertainment and speculative, and it has always been held that such benefits are not to be considered, for that reason." *Kirkendall v. Omaha*, 39 Neb. 1, 57 N. W. 752, where the Supreme Court of Nebraska spoke as follows: "The word 'common' is ordinarily understood to apply to the general public, when not qualified by some word or phrase of limitation. The term 'general benefits,' when unqualified, should probably be accepted in the same sense as the term 'common benefits'; that is to say, when there is no limitation expressed, it should be deemed applicable to the general public, rather than as embracing, as general, but a limited part of the public. \* \* \* The term 'special benefits' implies benefits, such as are conferred specially upon private property by public improvement, as distinguished from such benefits as the general public is entitled to receive therefrom. \* \* \* If the improvement should result in an increase in the value to adjacent property, which increase is enjoyed by other adjacent property owners, as to the property of each exclusively, the benefit is special, and it is none the less so because several adjacent lot owners derive, in like manner, special benefits, each to his own individual property."

We think the findings of the trial court are sustained by the evidence, and that the conclusions based thereupon were correct.

No reversible error appearing in the record, the judgment of the superior court is affirmed.

MOUNT, C. J., and HADLEY, FULLERTON, DUNBAR, CROW, and RUDKIN, JJ., concur.

#### STATE ex rel. MATSON et al. v. SUPERIOR COURT OF SKAGIT COUNTY et al.

(Supreme Court of Washington. April 4, 1906.)

#### 1. CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWER TO JUDICIARY.

Drainage Law, § 12 (Laws 1895, p. 287, c. 115), providing for a finding by the superior court that a system of drainage is practicable and conducive to the public welfare, and will increase the value of the lands sought to be drained, does not delegate legislative authority, as the court does not propose the system, but acts on the system adopted by the commission-

ers, and then determines whether the proposed use of land sought to be taken is public, which, under Const. art. 1, § 16, is a judicial question.

#### 2. SAME — DELEGATION OF ADMINISTRATIVE POWER.

Drainage Law (Laws 1895, pp. 271-296, c. 115), requiring the jury, in proceedings to establish a system of drainage, to ascertain separately the damages and benefits to each tract of land not taken and the value of the land to be taken, and providing that a transcript of the proceedings shall be certified to the county auditor, who proceeds as directed by section 16 to make the assessments, does not impose on the court and jury the duty of making an assessment in violation of Const. art. 7, § 9, authorizing the Legislature to vest in municipal authorities the power to make assessments for improvements.

#### 3. STATUTES—TITLE—SUFFICIENCY.

Laws 1905, pp. 360-365, c. 175, entitled, "An act to amend sections 3, 9 and 24 of an act entitled 'An act to provide for the establishment of drainage districts,' etc., amends sections 3, 9, and 24, and also section 5. *Held*, that the amendment to section 5 was invalid because not included in the title within Const. art. 2, § 19, providing that no bill shall embrace more than one subject, which shall be expressed in the title.

#### 4. SAME—INVALIDITY IN PART—EFFECT.

The invalidity of section 5, Laws 1905, pp. 360-365, c. 175, amending the drainage law, because not included in the title, does not affect the validity of the remaining sections within the title; section 5, relating to the election of drainage commissioners and their bonds, not being dependent on the other sections relating to petitions for the establishment of drainage districts and the cost of maintenance of drainage systems.

#### 5. OFFICERS—DE FACTO.

Drainage commissioners entered into the possession of their offices and on the discharge of their duties. They gave bonds in the sum of \$2,100 each, while Drainage Law, § 5 (Laws 1895, p. 275, c. 115), provided for bonds in the sum of \$5,000 each. *Held*, that the commissioners were de facto officers, and their acts could not be questioned by certiorari to review their proceedings to establish a drainage district.

#### 6. DRAINS—PETITION—AMENDMENT.

A petition for the establishment of a system of drainage may be amended for the purpose of permitting the drainage commissioners to propose a change in the system as originally proposed, provided notice of the amendment be given to defendants and a hearing had on such amended petition.

#### 7. SAME—JUDICIAL QUESTION.

In proceedings to establish a system of drainage, the question before the court is whether the system proposed by the drainage commissioners is feasible, and the fact that some other system might be more feasible does not deprive the court of the power to approve the proposed system.

#### 8. NAVIGABLE WATERS — NAVIGABILITY — OBSTRUCTIONS.

A slough, dry during the greater portion of the year, except during high tide, at which time it was navigable for a short distance for small craft and floating logs, was meandered. *Held*, that the slough was not navigable to such an extent as to require the consent of the federal government for the construction of a dam at its mouth.

#### 9. DRAINS—PETITION—SUFFICIENCY.

Drainage Law, § 2 (Laws 1895, pp. 271-296, c. 115), provides that the petition for the organization of a drainage district shall contain a description of the proposed system of drainage, designating the outlet, route, and branches and termini. Section 9, as amended by Laws 1905, p. 362, c. 175, provides for the filing

of a petition showing that the proposed system of drainage is necessary to drain the lands described, together with specifications for its construction, with plans and draughts of artificial appliances. Section 14 provides that, in case the damages for the right of way amounts to more than the benefits, the proceedings shall be dismissed. Section 18 provides for the construction of the improvement. Section 19 provides for the manner of doing the work, and prohibits any change in the system except on the consent of the owners benefited. *Held*, that the commissioners must in their petition for the establishment of a drainage system submit an entire system, with plans and specifications, together with the cost of the improvement.

**10. SAME — DEFECTIVE PETITION—RIGHT OF COMMISSIONERS.**

Where a petition for the establishment of a drainage system is insufficient for failing to contain an entire system, with plans and specifications, etc., the commissioners may exercise their option of dismissing the proceedings, or taking leave to amend.

Certiorari by the state, on the relation of Charles Matson and another, against the Superior Court of Skagit county and others to review the proceedings for the establishment of a drainage district. Reversed.

Benton Embree, for plaintiffs. Million & Houser, for defendants.

**CROW, J.** This is a certiorari proceeding, instituted for the purpose of having the court review the orders and proceedings of the superior court of Skagit county in approving and establishing a drainage system, and calling a jury to assess damages to the lands of the relators and other property owners for rights of way for the ditches necessary for said system, and to assess against lands to be benefited within said district the costs and expenses of establishment and construction. On October 4, 1905, a petition was filed in the superior court of Skagit county by Daniel Sullivan, Erasmus S. Johnson, and William A. Walters, commissioners of drainage district No. 16, as plaintiffs, against Charles Matson and Bertha Matson, his wife, the relators herein, and also against all other property owners and persons interested, as defendants. Said petition contained a full description of all lands within said district, and alleged that the commissioners proposed to construct for the benefit of all such lands a system of drainage consisting of eight ditches; that a survey and plat of said district had been made, showing the owners of property, the drainage system proposed, and lands necessary to be condemned for rights of way, which plat was attached to said petition and made a part thereof; that the lands within said district were marshy and covered with water; that the proposed improvement would be conducive to the public health, convenience, and welfare, and would increase the value of all lands within said district as estimated for the purpose of public revenue; that said lands were valuable for agriculture; that said system of drainage was necessary so that said lands could be cultivated at a profit; that the names of owners whose lands

were to be benefited, the number of acres owned by each, the maximum amount of benefits per acre, were as set forth in said petition in detail; that for the purpose of carrying on said proposed improvements it would become necessary to appropriate certain strips of land belonging to the various owners therein named, and that the estimated values of said lands, and the estimated damages, irrespective of benefits to be derived by each tract, were as set forth in said petition. Said commissioners prayed an adjudication that said proposed system would constitute a public improvement, that the lands sought to be appropriated were necessary therefor, and asked that a jury be called to assess all benefits and damages to lands not taken, and also the compensation to be paid for lands taken for right of way. The original petition alleged no plans, details, or specifications for the construction of said improvement disclosing the exact character of the work further than the same might be shown on the plat attached as an exhibit. No draughts of any artificial appliances or equipment necessary in aid of said improvement, together with its estimated cost, were filed with said original petition. The attached exhibit was a large plat of the entire district, showing the Samish river as the western boundary, the North Samish river, also called the "Edison slough," as a portion of the northern boundary; also showing on the western margin of the district a large slough known as "McTaggart slough," tributary to the Samish river, and further within the district a second slough, known as the "Sullivan slough," tributary to the McTaggart slough; and also showing, near the central portion of the western boundary of the district, another slough, known as the "Johnson slough." All of these sloughs were available for use as reservoirs in said system, but the exact method of their proposed use was not stated, defined, or detailed. The plat further shows two main ditches, one, known as the "Johnson slough ditch," beginning on the eastern boundary of the district and running directly west into the Johnson slough, connecting with the Samish river, the other, known as the "North Samish river ditch," commencing near the lower line of the district, running in a northerly course through its central portion, for a distance of a mile, and thence in a northerly and northwesterly direction into the Edison slough. Another ditch, known as the "Sullivan slough ditch," was to commence about one-half mile south of the Johnson slough ditch, which it crossed, and run in a northerly direction into the Sullivan slough, McTaggart slough, and Samish river. All other proposed ditches, five in number, were spurs or tributary to these main ditches. The two main ditches, the Johnson and the North Samish river, as originally proposed, were to cross each other at the southwest corner of section 4, on the south line of the land of the relators.

The plat does not show the width or depth of the proposed ditches, or the character of the work, nor does it provide for any boxes or flumes with flood tide gates where the ditches connect with said sloughs. The district is composed of lands below the level of high tide, protected by dikes. These dikes would obstruct the flow of drainage water from ditches and sloughs into the Samish river at low tide, were it not that boxes or flumes may be placed in the ditches and sloughs where they cross the dikes; the gates of said boxes and flumes closing during high tide and opening during low tide, so that the drainage from the district may be carried away.

The relators, Matson and wife, moved the court to require the commissioners to make their petition more definite and certain by setting forth or annexing thereto draughts, specifications, and plans of the boxes or flood tide gates to be maintained in the North Samish river and various sloughs. This motion being sustained, the commissioners filed as an exhibit a single draught or general plan for a box or flume. No specifications were attached thereto, but the draught was drawn upon a scale disclosed thereon. By stipulation this draught was accepted as an amendment to the petition. The commissioners further amended their petition by inserting an additional paragraph, stating the sizes of the proposed ditches, by giving their respective proposed widths and depths. By said amendment they further alleged that a box with a flood tide gate would be maintained in the North Samish river where a dam is now constructed; that, if necessary, a box with a flood tide gate would be placed at the mouth of the North Samish river ditch; that a box with a flood tide gate would be maintained at the mouth of the Johnson slough; that one or more boxes as may be necessary would be maintained in a dam across the mouth of McTaggart slough; that the estimated amount of earth to be removed in constructing the North Samish river ditch from the point where it crosses the Johnson ditch to its mouth will be 25,000 yards, at an approximate cost of \$3,500; that the approximate cost and estimate for the construction of all the other ditches, and the remaining portion of the North Samish river ditch, will be \$1,500; that the costs of the proceedings were estimated at \$500; that the costs of procuring right of way were estimated at \$500; and that that part of the proposed Sullivan slough ditch, from the Sullivan slough to the Johnson ditch, was to be abandoned and not constructed. The relators thereupon demurred to this amended petition, which demurrer being overruled the issues were completed by answer and reply, and a hearing was had on December 4, 1905. The court on December 11, 1905, made findings of fact in favor of the commissioners, and ordered a jury to be impaneled to estimate the values

of the lands to be taken, and separately determine the damages and benefits to lands not taken. Prior to the entry of this order the commissioners asked leave to further amend their petition by alleging their intention of constructing a dam across the Johnson slough ditch, immediately west of its junction with the North Samish river ditch. The trial court did not immediately grant this request, but directed the commissioners to notify all defendants of their proposed amendment. Afterwards, on December 20, 1905, the matter came on further for hearing upon the question of the allowance of the amendment, and, all parties having been notified and the relators appearing by their attorneys, the amendment was allowed. Thereupon a new hearing was had, at which it was stipulated that the evidence theretofore introduced should be considered by the court and additional evidence might be offered. On both hearings the main contest was over that portion of the proposed North Samish river ditch lying north of its junction with the Johnson slough ditch. No estimate of the cost of this ditch, or, in fact, any of the ditches, was made by the engineer who had prepared the plat. At the hearing the attorney for the commissioners, without further amending their petition, stated that it was not their present intention to construct or complete any of the proposed system, except that portion of the North Samish river ditch north of its junction with the Johnson ditch. Nevertheless an order was made for the condemnation of the right of way for all the proposed ditches and spurs, except that portion of the Sullivan slough ditch which had been taken out by the first amendment of the petition. No showing was made as to the cost or size of the boxes or flumes at the various sloughs. At the close of all the evidence the relators moved for a dismissal of the proceeding, which motion being denied an order calling for a jury was again made, except that a modification was entered by authorizing the amendment of said proposed system by the construction of said dam across the Johnson slough ditch. Thereupon the relators applied to this court for a writ of certiorari to review the proceedings of the superior court.

Drainage district No. 16 was organized and all these proceedings have been had under the provisions of the act of 1895. Sess. Laws, pp. 271-296, c. 115; Ballinger's Ann. Codes & St. §§ 3715-3754. The relators contend this act is unconstitutional because (1) it attempts to confer upon the court powers, and to impose upon it duties, which are in no sense judicial, but legislative; (2) that it imposes upon the jury and the court the duty of making assessments upon lands benefited by reason of the improvement, and that this also calls for the exercise of legislative, and not judicial, functions. In support of the first contention, the relators insist that the provision in section 12 of the drainage law, for a

finding by the superior court "that said improvement is practicable and conducive to the public health, welfare and convenience, and will increase the value of said lands for the purpose of public revenue," is a delegation of legislative authority. We do not think this contention can be sustained. The statute nowhere provides, nor does it contemplate, that the court shall initiate, devise, or propose the system of drainage. Such system or proposed improvement is first adopted by the commissioners and set forth in their petition. The Constitution of this state (article 1, § 16) makes it a judicial question, to be determined by the court, whether any purpose for which private property is sought to be taken is a public use. In arriving at this determination, the court is required by the statute to first judicially ascertain whether the proposed improvement is practicable, conducive to the public health, welfare, and convenience, and will increase the value of the lands for the purpose of public revenue. This being done, the court then further finds whether the proposed use of the lands sought to be taken is public. The court does not originate, devise, or adopt any system or plans, although it may incidentally approve those proposed by the commissioners. The relators have cited the case of *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106, which we do not think applicable, as the authority there conferred upon the court by statute was to create a municipal corporation, and was held to be a delegation of legislative powers. In further support of their contention, they cite a large number of decisions from various courts, which, upon examination, show that the various statutes declared to be unconstitutional attempted to confer upon the courts power to incorporate villages or other municipalities, or to determine what lands should be added to or withdrawn from municipal corporations already organized. The Supreme Court of Ohio, in the well-considered case of *Zanesville v. Zanesville Telephone, etc., Co.*, 64 Ohio St. 67, 59 N. E. 781, 52 L. R. A. 150, 83 Am. St. Rep. 725, sustained as constitutional a statute which is subject to more severe criticism in this regard than the one now before us.

The relators further contend that the law of 1895 is unconstitutional for the reason that it imposes upon the court and jury the duty of making an assessment in violation of article 7, § 9, of the Constitution. We do not think the relators' construction of the statute is warranted by its language or provisions. All the jury is required to do is to ascertain separately the damages and benefits to each tract of land not taken, and also the value of the land to be taken. The court does not impose any assessment, but a transcript of the proceedings is certified to the county auditor, who proceeds as directed by section 16, and the ditch commissioners afterwards, by the provisions of the same section, designate when assessments shall become due and pay-

able. They take the steps necessary to make the assessment, and collect the tax. We see no merit in the contention of the relators that the statute is unconstitutional in any respect.

It appears that, when the district was organized, the ditch commissioners gave bonds in the sum of \$2,100 each; whereas section 5 of the original act of 1895 provides for bonds in the sum of \$5,000 each. On the morning of the first trial the commissioners filed new bonds in the sum of \$5,000 each, which were approved. The relators contend that the district organization, and all prior proceedings of the commissioners, were void by reason of their failure to qualify as required by law. The Legislature of 1905 (Sess. Laws, pp. 360-365, c. 175) attempted to amend section 5 of the act of 1895, so as to require a bond of \$500, instead of \$5,000, and the respondents now rely upon such amendment. The relators, however, contend that said amended section (5) in the act of 1905 is unconstitutional, for the reason that it is not included in the title as contemplated by article 2, § 19, of the Constitution. The title of the act of 1905 reads as follows: "An act to amend sections 3, 9 and 24 of an act entitled, 'An act to provide for the establishment and creation of drainage districts and the construction and maintenance of a system of drainage, and to provide for the means of payment thereof, and declaring an emergency,' approved March 20, 1895, the same being sections 3717, 3723 and 3738 of volume 1 of Ballinger's Annotated Codes and Statutes of Washington, and declaring an emergency." It will be seen that by this title the Legislature only contemplated an amendment of sections 3, 9, and 24; no amendment of section 5 being mentioned. Sections 3, 9, and 24 were amended in the body of the act, and also section 5. In a case exactly parallel to this, the Supreme Court of Kansas held such an amendatory act to be unconstitutional as to the section not mentioned in the title, but constitutional as to the other sections amended, where the several sections were not dependent the one upon the other. *State ex rel. v. Bankers, etc., Ass'n*, 23 Kan. 499. Section 5, as sought to be amended by the act of 1905, is in no wise dependent upon the other sections, nor are any of them dependent upon it. We therefore hold that, as to the attempted amendment of section 5, the act of 1905 is unconstitutional, and that as to the remaining sections it is valid. From this holding it follows that the original section 5, as contained in the act of 1895, is still in effect, and the bonds to be given by the commissioners should each be \$5,000. Nevertheless the commissioners were de facto officers, and, having entered into the possession of their offices and upon the discharge of their duties, their acts were not invalid, nor could they be questioned by the relators in this collateral proceeding. 28 Am. & Eng. Enc. of Law, 355; 8 Am. & Eng. Enc. of Law, 786, 787. We have passed upon the consti-

tutionality of the act of 1905 for the reason that we will hereinafter base an argument on section 9, as amended therein.

The relators contend that after the original petition had been filed no amendments changing the system proposed by the commissioners could be allowed. We think this objection is entirely too technical; for, while any system proposed by an original petition or an amended petition, upon which a hearing is finally had, should be either adopted or rejected by the court, there is no reason why the petition might not be amended for the purpose of permitting the commissioners to propose a change in the system, provided notice of such amendment be given to all of the defendants, and a full hearing be had on such amended petition. It certainly would save time and expense to amend, instead of compelling the petitioners to dismiss and commence an entirely new proceeding.

Upon the hearing there seems to have been considerable contention on the question as to whether the proposed system was more or less feasible than some other system which might have been proposed. The mere fact that some system not proposed might be feasible does not deprive the court of authority to approve the system actually proposed. If it be feasible and proper, even though it might appear that a system not proposed would in some respects or to some degree be more feasible. The question before the court is whether the system proposed is feasible and substantially complies with the requirements of the statute.

The evidence shows that a dam has been placed across the mouth of the Edison slough, which the relators contend is a navigable stream. It appears that this slough is meandered, but it also appears that during the greater portion of the year it is dry, except during high tide, at which time it is navigable for a short distance for small craft and floating logs. The dam was evidently built to keep out the high tide, so that the slough might be utilized as a reservoir to receive and hold water from the drainage system until it could be discharged during low tide. The dam was constructed without any authority from the United States government, and the relators contend that it cannot be used in the drainage system, as its removal might be ordered by the government authorities. We do not think the evidence shows this North Samish river or Edison slough to be navigable to such an extent as to require the consent of the United States government to its obstruction by a dam.

The objections raised by the relators, which we consider of the most vital importance, are those wherein they contend that the court erred (1) in overruling their demurrer to the amended petition; and (2) in finding that all the lands, real estate, and premises sought to be appropriated and acquired for the purpose of rights of way are necessary for the construction of the improvements

sought to be made by the commissioners. From an examination of the entire drainage act of 1895 and the amendments thereto, we conclude it to be the duty of the commissioners of the district to originate and select the proposed system of improvement which is to be submitted to the court, and the act contemplates that they shall submit an entire system complete in all its details for the approval or disapproval of the court. We think the petition in this regard, even as amended, is insufficient. From an examination of section 2 of the statute it will be seen that, when it was proposed to organize the district, the petition for such organization was required to contain a brief description of the proposed system of drainage, designating the point of outlet, the route over which it is to be constructed, together with the proposed spurs and branches, and the termini thereof. Section 9, as amended in 1905 (Laws 1895, p. 277, c. 115, amended by Laws 1905, p. 362, c. 175), provides for the filing of a petition with the superior court which shall show that such proposed system of drainage is necessary to drain all of the lands described in the petition, and that all lands sought to be appropriated for said right of way are necessary to be used in the construction and maintenance of the improvements. The petition must set forth the route and termini of this system, with a complete description thereof, together with specifications for its construction with all necessary plats and plans thereof, with draughts of any artificial appliances or equipments necessary in aid thereof, together with the estimated cost of the proposed improvements and other facts and data. We think that at no time has the petition, even as amended, given a complete description of the proposed improvement, with specifications for its construction. There can be no misunderstanding as to what the word "specifications" means in this connection. It is here applied to a public improvement, and its use, together with the use of the words "necessary plats and plans," and the further words providing for draughts of any artificial appliances or equipment necessary in aid of the improvement, together with the estimated cost thereof, indicate that such a system, with plans and specifications, is to be prepared and submitted in the petition as will enable the commissioners in the event of its approval and adoption to proceed by contracting for and constructing the improvement without change. There has been no system with plans and specifications, draughts, and drawings submitted here which would enable the commissioners to proceed with this improvement unless they are to prepare further details, plans, and specifications after the court and jury have acted. By section 14 it is provided that in case the damages or amount of compensation for the right of way, together with the estimated cost of the improvement, amount to

more than the maximum amount of benefits which will be derived from said improvement, the court shall dismiss the proceedings. The estimated cost of the improvement mentioned in this section undoubtedly means the estimated cost as shown by the petition.

There is no showing here of the estimated cost. The engineer who made the plan never made any such estimate, nor was he able to testify what the probable cost would be. The only evidence upon this point was given by one of the commissioners who was not shown to be an expert or competent to testify, and he made no estimate of the cost of the entire system. Section 18 provides that after the filing of the certificate with the county auditor the commissioners of the drainage district shall proceed with the construction of the said improvement, evidently meaning the improvement proposed by the petition. Section 19 provides that the work shall begin at the outlet thereof and shall be completed towards the terminus of the system with all expedition possible, evidently contemplating that the entire system as proposed by the petition shall be speedily completed. But here it is conceded that the commissioners intend to construct only a portion of one ditch. It is further provided by section 19 that no change shall be made in the proposed improvement except on the written consent of all the landowners to be benefited thereby. Without their consent substantial changes can only be made by filing a new petition setting forth such proposed changes, and further proceedings must be had upon such petition. This evidently contemplates that the original system proposed in a petition and approved by the court shall be followed at all times, and that a substantial modification can be made only in the manner provided by the statute. Farnham, in volume 2 of his work on Waters and Watercourses, at section 205, says: "To make a drainage improvement of any benefit, it must be constructed on a plan that will be effective to the accomplishment of the end in view. Taxpayers have a right to demand that before the enterprise is entered upon it shall have been determined to be practicable, and that the general character of the improvement shall be designated. When they are entitled to pass upon the question whether or not the improvement shall be made, they can exercise no intelligent judgment until they know the plan; and, if they are entitled to no voice in the matter, they may make effective opposition in case the plan is defective. They also have a right to have the plans fixed so that no departure from them shall be effected during the progress of the work. The courts will not interfere with a plan which has been adopted in good faith, and which will effect the intended object, although it may not be the best that could be devised." This language is taken from the chapter on drainage which includes systems of the character here in-

involved, although it is also applicable to sewerage in cities and other municipalities. In section 210 Mr. Farnham says that "knowledge of what is to be done is a necessary ingredient in passing judgment upon the feasibility of any plan for public improvement. Therefore it is desirable that the details of an intended improvement should, so far as possible, be worked out and stated in a formal manner before the proposition of its adoption is submitted to the voters, or to the authorities to whom the matter is committed. The taxpayer has a right to have this done in order that he may know whether to acquiesce in the proceeding, or to take steps to contest it." In section 211 he also lays down the doctrine that the cost of the improvement must be estimated. This seems to be contemplated by the statute of 1895. In section 212 Mr. Farnham also says the route should be described; in section 213 that the dimensions shall be fixed. We think these principles announced by Mr. Farnham are in direct harmony with the provisions of the statute which we are now considering. In short, our construction is that a duty devolves upon the commissioners to have a full and complete system prepared by a competent surveyor or engineer and draftsman, whom they are authorized by section 10 to employ, and that this system shall be complete, shall contain plans, specifications, details, and estimates, so that, if approved by the court, contracts may be made and the work performed in accordance therewith. It then devolves upon the court to pass upon the practicability of this improvement as contemplated by section 12, and determine whether the use to be made of the lands sought to be appropriated is a public use, and to impanel a jury to assess the damages and benefits and fix the value of the lands taken. Thereafter it becomes the duty of the commissioners, if the action is not dismissed, to proceed with the improvement in accordance with the plans submitted to and approved by the court, without any substantial change. The petition in this case does not comply with the requirements of the statute, nor does the proof seem to be sufficient to support the findings. The trial court erred in its findings and in ordering that a jury be impaneled to assess the damages and benefits and ascertain the value of the property. It is not necessary that this action should be dismissed and the district dissolved, as demanded by the relators. We see no reason why the respondents should not be permitted to exercise their option of dismissing and commencing a new proceeding, or taking leave to amend their petition herein within such reasonable time as they may be able by an amended petition to submit to the court a proper system in accordance with the views herein expressed.

It is ordered that the rulings and orders of the trial court be reversed, and that this

cause be remanded for further proceedings in accordance with this opinion.

MOUNT, C. J., and RUDKIN, FULLERTON, ROOT, DUNBAR, and HADLEY, JJ., concur.

ATTEBERY et al. v. O'NEIL et al.

(Supreme Court of Washington. April 3, 1906.)

1. MORTGAGES—MORTGAGEE AS BONA FIDE PURCHASER—NOTICE—RECORDS.

The recording of a mortgage executed by a grantee and his daughter at about the time of the execution of the deed, gives no notice to a mortgagee in a subsequent mortgage executed by the grantee of any claim on the part of the children of the grantee as heirs of their deceased mother, and on purchasing the premises on a foreclosure of his mortgage he is, in the absence of actual knowledge of the claim of the children at the time of the execution of the mortgage, a bona fide purchaser freed from any claim of the children.

2. SAME—POSSESSION.

The occupation of land by minor children with their father is not notice of a claim on the part of the children as heirs of their deceased mother, and a mortgagee in a mortgage executed by the father who purchases the premises at a foreclosure sale is, in the absence of actual knowledge of the claim of the children at the time of the execution of the mortgage, a bona fide purchaser freed from any claim of the children.

3. SAME—DUTY OF PURCHASER TO EXAMINE TITLE.

A purchaser must exercise due diligence to ascertain the status of his grantors at the time they acquired and conveyed the property, but he is not required to go outside of the record to ascertain whether any grantor had an equity in the premises before the acquisition of the title, and whether he was married or single when the equity was acquired.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 477-494.]

Appeal from Superior Court, Spokane County; C. H. Neal, Judge.

Action by Cora Attebery and others against B. F. O'Neill and others. From a judgment granting relief to plaintiffs, both parties appeal. Reversed, with directions to dismiss action.

Mark F. Mendenhall, Wm. E. Richardson, and Harry A. Rhodes, for plaintiffs. A. E. Gallagher and W. J. Thayer, for defendants.

PER CURIAM. On the 13th day of September, 1884, the Northern Pacific Railroad Company agreed to convey the south half of section 31, township 21 N., range 45 E., W. M., in Spokane county, to Adelbert H. Wheeler, by written contract of that date. On the 9th day of October, 1884, said railroad company agreed to convey lots 3 and 4 of section 5, township 20 N., range 45 W., W. M., in Whitman county, to Thomas Coakley, by a like written contract. Coakley thereafter assigned his contract to Wheeler, and Wheeler assigned both contracts to M. M. Cowley, as security. On the 26th day of June, 1887,

Wheeler agreed to convey the lands embraced in both contracts to Hardin T. Attebery, in consideration of 60 bushels of wheat per acre, to be delivered in six annual installments of 10 bushels to the acre each. At the instance of Wheeler, this contract was entered into between Attebery and Cowley, to whom the railroad contracts had been assigned. Some time thereafter the indebtedness due from Wheeler to Cowley was paid or taken up, and at the request of the former the railroad contracts and the wheat contract were assigned by Cowley to Ham & Son. During the years 1888-1890, something over 13,000 bushels of wheat were delivered by Attebery to Ham & Son under the above contract. In the latter part of the year 1890, D. T. Ham, the surviving partner of the firm of Ham & Son, agreed to accept \$4,500 in cash in lieu of the balance of the wheat to be delivered under the wheat contract, and Attebery, the other party to the contract, agreed to pay that amount. The necessary assignments were thereupon executed to enable Attebery to obtain title from the railroad company, and on the 26th day of February, 1901, the lands embraced in both contracts were conveyed to Attebery by the railroad company. At or about the same time Attebery and Samantha Attebery, his daughter, mortgaged the premises to the Deming Investment Company, for about \$5,000, to enable them to make payment to D. T. Ham in satisfaction of the wheat contract. Upon the execution of the wheat contract in 1887, Attebery, his wife, and three daughters entered into possession of the lands described therein. In December, 1888, after the delivery of the first installment of wheat under the wheat contract, amounting to 4,200 bushels, the wife of Attebery and the mother of the present plaintiffs died intestate. It does not appear that any administration was ever had upon her estate. Some time prior to March 20, 1893, Attebery remarried, and on that day he and his second wife mortgaged the above-described lands to the defendant O'Neill, to secure the payment of the sum of \$1,891.50. This mortgage was regularly foreclosed, and the defendant O'Neill now holds and claims the land under and by virtue of a sheriff's deed. The plaintiffs brought this action as heirs at law of their deceased mother, to recover an undivided one-half interest in the property, and for an accounting of the rents and profits. The court below awarded them an undivided seven eighths of the property, and a like proportion of the net rents and profits. From this judgment both parties have appealed.

The two principal questions presented on the appeal are: (1) Did the mother of the plaintiffs have an interest in the property in controversy which passed to her children by operation of law upon her death? and (2) Is the defendant O'Neill a bona fide purchaser

for value without notice? The conclusion we have reached on the last question is decisive of the case. The court below found that the defendant O'Neil had full notice and knowledge of the right, title, and interest of the plaintiffs as heirs of their deceased mother, at the time of the execution of the mortgage under which he claims title, but with this finding we cannot agree. It is not claimed that O'Neil knew the former Mrs. Attebery, or knew that she or her children had or claimed any interest in the property, until long after the execution of the mortgage under which he now holds. Nor did he have record notice. The only instrument of record affecting the title, aside from the deeds to Attebery, was the mortgage executed by Attebery and his daughter to the Deming Investment Company. The record of this mortgage was no notice of any claim on the part of the children, for as to them it was without the chain of title. The utmost notice it imported was that Attebery was unmarried at the time of its execution. Nor is there any merit in the contention that the residence of the plaintiffs upon the land with their father gave notice to third parties of any claim they might have to the premises. The occupation of land by minor children with their parents is entirely consistent with the full, legal, and equitable title in the parents, and is not of itself any notice of a claim on the part of the children. The court would perhaps have been justified in finding that the defendant O'Neil knew that the plaintiffs were the children of Hardin T. Attebery, by a former wife, but this would not be sufficient to charge him with notice of their claim to the property. A purchaser must, no doubt, exercise due diligence to ascertain the status of his several grantors at the time they acquired and conveyed the property, but he is not bound to go outside of and beyond the record to ascertain whether any such grantor had an equity in the premises before he acquired his title, and whether he was married or single when such equity was acquired. If such were the case, records and deeds would be of little avail, and the evils resulting from the adoption of such a rule would far outweigh any benefits to be derived from it. If a grantee is unmarried at the time he acquires title to the property, and the record discloses no equity in him prior to the conveyance, a purchaser is under no obligation to look beyond this, and if he parts with his money in good faith and without notice of any latent equity, the law will protect him.

We are, therefore, of the opinion that the defendant O'Neil is a bona fide purchaser for value without notice, and that he took the title free from any claim or equity that the plaintiffs or their deceased mother may have had in the premises.

The judgment is therefore reversed, with directions to dismiss the action.

(42 Wash. 484)

SHINE et al. v. CULVER et al.

(Supreme Court of Washington. March 31, 1906.)

## 1. APPEAL—REVIEW—PLEADING—AMENDMENTS.

The action of the court in allowing amendments to pleading will not be disturbed in the absence of an abuse of discretion.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3825.]

## 2. REPLEVIN—ADMISSIBILITY OF EVIDENCE.

Where, on the issue of the ownership of personalty, in an action for the possession thereof, it was necessary for a party to show that a third person through whom he claimed title had title, evidence showing that the third person's claim was fraudulent was admissible.

## 3. EVIDENCE—SECONDARY EVIDENCE—GROUNDS FOR ADMISSION.

Where a party claimed that personalty was conveyed by a deed conveying land, and the adverse party had obtained possession of the deed which was not recorded, and he failed to produce it at the trial, though required to do so, parol evidence of the contents of the deed was admissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 596.]

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by P. C. Shine and others against George E. Culver and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Charles V. Roberts and P. C. Shine, for appellants. Jas. A. Williams and Denton M. Crow, for respondents.

MOUNT, C. J. Appellants brought this action in the court below to recover possession of a certain lot of stone cutter's tools, and for rent for the use of the tools. The complaint alleged ownership and right of possession in the plaintiffs. The defendants answered, denying the allegations of the complaint, and alleged ownership and possession in themselves. Upon these issues the case was tried to the court and a jury. A verdict was rendered in favor of the defendants, and a judgment entered thereon. Plaintiffs appeal, and allege that the court erred in permitting respondents to amend their answer at the time of the trial. The application to amend appears to have been made and served several days before the trial. The appellants were, therefore, not taken by surprise, and no request for a continuance was made on account of the amendment. Amendments of the kind here allowed are largely discretionary with the trial court, and its action in that respect will not be disturbed in the absence of an abuse of such discretion. *Bishop v. Averill*, 19 Wash. 490, 33 Pac. 726; *Jones v. Western Manufacturing Co.*, 32 Wash. 375, 73 Pac. 359. No abuse of discretion appears in this case.

Appellants next allege that the court erred in admitting certain evidence tending to show that the title of the property in Robert Russell was fraudulent. Appellants claim title through Russell. In order to maintain

their title, it was necessary to show that Russell was the owner. Respondents denied that Russell was the owner, and alleged that his claim of ownership was fraudulent. Any evidence which tended to show that such claim was fraudulent was competent to defeat appellants' claim of ownership. It was, therefore, not error to receive the evidence.

Appellants allege that the court erred in refusing to strike certain evidence as to the contents of a quitclaim deed. Respondents claim title to the tools through appellant Shine. It appears that Mr. Shine sold a certain interest in a stone quarry to respondents by a quitclaim deed, and respondents testified that a part of the tools in question were sold along with the quarry, and that the quitclaim deed recited the fact that the tools were conveyed with the land. This, however, was denied by Mr. Shine. It also appears that Mr. Shine had obtained possession of the deed, which had not been recorded, and had retained the same prior to the trial. He was required to produce the deed at the trial, and failed to do so. The trial court thereupon permitted oral evidence of its contents. The evidence was clearly competent under the circumstances, and the court did not err in refusing the motion.

Appellants next complain that the court erred in refusing to exclude Mr. Williams, respondents' attorney, from the trial of the case, upon the alleged ground that Mr. Williams had previously been attorney for Mr. Shine in litigation between the same parties concerning these same tools. We find nothing in the record to justify this contention. It is true that Mr. Williams had previously represented Mr. Shine in another action between other parties in which a part of these tools were in question. But at that time Mr. Williams was representing these respondents particularly, and Mr. Shine by courtesy. There was no showing of any inconsistency in Mr. Williams now representing these respondents in this action as against Mr. Shine and his co-appellants. No exceptions were taken to any of the instructions given to the jury, and the case seems to have been fairly tried, and there is ample evidence to support the verdict of the jury. This is a second trial upon substantially the same issues, and a second verdict in favor of respondents.

There appears to be no error in the record, and the judgment is therefore affirmed.

DUNBAR, ROOT, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

CROW, J., having been of counsel, took no part.

#### STATE v. KOCH.

(Supreme Court of Montana. Feb. 19, 1906.)

CRIMINAL LAW—PLEA OF NOT GUILTY—DIRECTING VERDICT—QUESTION FOR JURY.

Const. art. 3, § 16, guarantees to an accused a trial by jury, section 29 declares that the

provisions of the Constitution are mandatory unless declared otherwise by express words, and section 23 provides that in prosecutions for misdemeanors the jury in a justice's court shall consist of not more than six persons, and that the right to a trial by jury may be waived in the justice or district court by default of appearance, or by consent as may be prescribed by law. Pen. Code, § 2105, provides that upon the trial of any offense questions of law shall be decided by the court and those of fact by the jury. Section 2906 authorizes the court to advise a verdict of acquittal where the evidence does not warrant a conviction. *Held* that, though the evidence conclusively shows defendant's guilt, the court cannot on a plea of not guilty instruct the jury to convict.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1713.]

Appeal from District Court, Fergus County: E. K. Cheadle, Judge.

Harry Koch was convicted of murder, and he appeals. Reversed.

Huntoon, Worden & Smith, for appellant. Albert J. Galen, Atty. Gen., and W. H. Poorman, Asst. Atty. Gen., for the State.

BRANTLY, C. J. The defendant was by information charged with the crime of murder. Upon his plea of not guilty he was tried and found guilty of voluntary manslaughter and sentenced to a term of 10 years in the state prison. He has appealed from the judgment and an order denying him a new trial.

The circumstances attending the homicide are the following: On February 15, 1904, the date of the homicide, the defendant and three others were engaged in a game of cards in a saloon owned and conducted by one Joseph D. Vander, in the village of Stanford, Fergus county. The play had begun early in the morning, and had continued until about 2 o'clock in the afternoon. A "treat" went with each game. During the day, beginning before breakfast, the defendant had been drinking, and at the time of the killing was somewhat intoxicated. A short time before 2 o'clock Vander and one Louis Seguin began playing the same game at another table near by; Vander sitting just back of the defendant with his face in the opposite direction. Other persons were present, to the number of perhaps a dozen, looking on. Presently Vander turned in his chair, called the attention of the defendant to the hand he (Vander) held and asked him whether it was good for four points. After looking at it the defendant said it was. Vander bantered him to play it against Seguin. The defendant finally bet \$20 with Seguin that he could make four points with it, and took and played it against Seguin's hand, but lost. Seguin took the money. Immediately thereafter there was considerable talk among those present as to the value of the hand, and whether it was possible, if played against one who understood the game and holding Seguin's hand, to make four points with it. It was in fact a trick hand, dealt to catch and fleece the unwary. Having learned that he had been defrauded of his money, de-

defendant became angry. He accused Vander of taking part in the fraud, and finally became so affected by his feelings that he wept. Some of the state's witnesses testify that he repeatedly threatened to get even with or kill some of those who had robbed him. However, after the lapse of "some minutes" he left the saloon, went across the street to his hotel, obtained his rifle, and came back, pumping a cartridge into the chamber as he approached the saloon. Upon entering he saw no one there; the proprietor and the others who had been present having left because they anticipated trouble. The saloon proper consisted of one large room in front, with the bar at the left near the front door. At the rear were two other rooms in a lean-to, built of logs, into which access was obtained by doors leading from the saloon. One room was used for a coalshed, the other for a bedroom. Two of the persons present had gone into the bedroom. Two others, Vander and one Geer, had gone into the coalshed. The doors of both of these rooms were closed. The others who had been present, except one Leroy and one Simpson, had gone to another saloon about 50 feet down the street. Of the latter, Leroy was standing on the sidewalk in front of the building, and Simpson was inside near the bar. Whether he was concealed behind the bar the evidence does not show. Upon entering and finding no one in the room, the defendant partially raised the rifle and fired it through the door into the coalshed, almost instantly killing Vander, who happened to be in range beyond the door. There is some evidence tending to show that the instant before the shot was fired, Vander opened the door of the coalshed slightly and looked to see what the defendant was doing. After the shot was fired the defendant started to go out, but, observing a bottle on the bar, struck it with his rifle, breaking it, and saying that it was the cause of his trouble. He thereupon went to the other saloon, where, after firing his rifle again, he was overpowered and arrested. He says that he was then informed for the first time, upon inquiry for the reason of his arrest, that he had killed Vander. The defendant was sworn as a witness. He denied making any threats against Vander, or that he threatened to kill anyone. He denied, also, that he knew that Vander or any one else was in the coalshed at the time he fired the rifle into it, and also that he entertained any ill will toward Vander. He stated that his purpose in getting the rifle was to "bluff" the man who got his money, and that, though he had been drinking during the day, he was perfectly conscious of what he was doing. In other respects the story of the tragedy as told by him agreed throughout with the detailed statements of the state's witnesses. There was evidence that the previous character of the defendant for peace was good. Upon these facts the court, among other instructions, submitted to the jury the following:

"Under the charge contained in this information you may find the defendant guilty of murder in the first degree, murder in the second degree, or you may find him guilty of voluntary manslaughter, or of involuntary manslaughter; but you cannot find him not guilty." While other errors are assigned upon the instructions, they are based upon alleged conflicts and inconsistencies arising out of the giving of the foregoing instruction, and for present purposes it will not be necessary to notice them.

The question submitted is whether or not the paragraph quoted is erroneous, in that it explicitly tells the jury that they cannot, upon the facts detailed by the evidence, acquit the defendant, or, in other words, that they must at any rate find the defendant guilty of involuntary manslaughter. Contention is made by counsel for defendant that, no matter what may be the condition of the evidence, the court may not, in a criminal case, where the defendant has entered a plea of not guilty, direct a verdict. The effect of the instruction, it is said, leaves no option to the jury to find the defendant not guilty of involuntary manslaughter, and to this extent invades the province of the jury by directing a verdict. It is said by the Attorney General that it is the province of the court to declare the law and of the jury to find the facts, and that, such being the case, it must follow that whenever, in a criminal prosecution, the facts are admitted or not disputed, and it appears therefrom that the defendant is guilty, the court may direct the jury to render a verdict accordingly, since there is nothing for decision but a question of law; otherwise, it must follow that in criminal cases the jury are the judges of both law and facts. Assuming that the facts set forth above show conclusively that the defendant was guilty of involuntary manslaughter, upon the theory that at the time the shot was fired he was engaged in the commission of an unlawful act, to wit, disturbing the peace (Pen. Code, § 753); does it follow that the court could properly assume that, as a matter of law, he was guilty of involuntary manslaughter? The Constitution declares (article 3, § 16): "In all criminal prosecutions the accused shall have the right to \* \* \* a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. \* \* \* " "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Const. art. 3, § 29. The guaranty contained in this provision is general in its terms and of universal application, including misdemeanors as well as felonies, and unless there is some exception by express provision found elsewhere, or some principle of construction by which an exception may be made, it must be construed to mean exactly what it says, and it must follow that the question of the guilt or innocence of the defendant must be

submitted to, and determined by, the jury, however clear and unimpeached or free from suspicion the evidence may be. There is no exception expressly provided for anywhere in the Constitution, such as that in clear cases wherein the facts are admitted or undisputed, the court may direct a verdict of guilty. It is true that in section 23 of the same article it is provided that in prosecutions for misdemeanors the jury in a justice's court shall consist of not more than six persons, and that the right to a trial by jury may be waived in the justice's or district court by default of appearance or by consent in such manner as may be prescribed by law; but even in such cases the right to a trial by such a jury as is provided for therein is guaranteed by section 16, and cannot be taken away.

It is of little importance what significance may be attached to the word "trial" as used in other connections. Manifestly, it is here used in its broadest and most comprehensive sense, and includes all proceedings in the progress of the case after the issues are made up, down to and including the rendition of the verdict. *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026. If this is the correct conclusion as to the meaning of this term, the functions of the court or judge are fully discharged when the case is correctly submitted to the jury and they are left to determine the rights of the defendant. This must be the correct meaning of the term, else we must read into the section an exception to this effect: "Provided, that in all cases in which the undisputed facts establish the guilt of the defendant, the court may direct the jury to return a verdict of guilty or take the case from the jury and pronounce judgment." In either case the result would be the same, for, whether the court or judge should direct the jury to return a verdict or take the case from the jury and enter judgment, the determination is made by the court and not the jury. From these considerations alone it seems to us that in the case at bar the district court clearly invaded the province of the jury. If it be said that this conclusion involves the further conclusion that in all criminal cases the jury are the judges of the law as well as the facts, the only reply proper and possible is that it is this court's province to construe the Constitution as it is, and not by construction to insert in it provisions which the people through their representatives thought it proper to omit. We are aware that the Legislature has declared (Pen. Code, § 2105) that, upon the trial for any other offense than libel, questions of law are to be decided by the court and questions of fact by the jury, that, although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are, nevertheless, bound to receive as law what is laid down as such by the court, and that this court has held in the case of

*State v. Welch*, 22 Mont. 92, 55 Pac. 927, that, where there is a total absence of proof, it is the duty of the court to direct a verdict of not guilty. It has nevertheless always been recognized in practice in this jurisdiction, that the jury has power to disregard the law as declared and acquit the defendant, however convincing the evidence may be, and that the court or judge has no power to punish them for such conduct. The Supreme Court of Pennsylvania, in the case of *Kane v. Commonwealth*, 89 Pa. 522, 33 Am. Rep. 787, in discussing the question as to whether the jury are the judges of both the law and facts, has well said: "The distinction between power and right, whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right. No court should give a binding instruction to a jury which they are powerless to enforce by granting a new trial if it should be disregarded. They may present to them the obvious considerations which should induce them to receive and follow their instruction, but beyond this they have no right to go. The argument in favor of their taking the law from the court is addressed very properly *ad verecundiam*."

After all, it is of little moment what the theory of courts or the Legislature may be as to the duty of the jury under their oaths. It is well known that in practice they have the power to determine for themselves whether the law as declared by the court is applicable to the facts, and if they acquit the defendant through a mistaken notion that it is not applicable, or out of a total disregard of it, the case is ended for all time; for, under another constitutional guaranty, that no person shall be twice put in jeopardy for the same offense, the court may not set aside the verdict and grant a new trial in such a case. Nor is it at all to the point that the statute (Penal Code, § 2096) authorizes the court to advise a verdict of acquittal when in its opinion the evidence does not warrant a conviction, or that the court should, when there is a failure of proof, direct such a verdict. *State v. Welch*, *supra*. The converse of this is not the law, as we have seen. Nor do we know of any respectable authority in which the position here assumed by the Attorney General has been upheld in a felony case. In Michigan it has been held that where the defendant is charged with a misdemeanor for the violation of a penal statute, and there is no question of intent, and the evidence permits no inferences about which reasonable men might differ, the trial judge may, with perfect propriety, state to the jury that the law, applied to the facts which are undisputed, shows the defendant to be guilty of the offense charged, and that it is their duty under the law to so find. *People v. Neumann*, 85 Mich. 98, 48 N. W. 290; *People v. Ackerman*, 80 Mich. 588, 45 N. W. 367.

In Pennsylvania it is the rule that the jury are the judges of both the law and the facts, and that it is error for the court to peremptorily instruct the jury in such a way as to take from them the right of deciding the degree of murder. *Shaffner v. Commonwealth*, 72 Pa. 60, 13 Am. Rep. 649. It was held in the same state, in *Kane v. Commonwealth*, supra, that the same rule applies to a prosecution for a misdemeanor for violation of a statute prohibiting the sale of intoxicating liquor on election day. In the case of *State v. Maine*, 27 Conn. 281, it was held that the defendant may not waive his right to trial by jury under the guaranty of the Constitution, and permit the court to try the question of his guilt or innocence without the intervention of a jury. So it was held in Alabama in the case of *Huffman v. State*, 29 Ala. 40, that a peremptory instruction to a jury to find the defendant guilty is erroneous, because, although the evidence against the prisoner was undisputed, yet its credibility was a question exclusively for the jury. The same rule was declared in the case of *Nonemaker v. State*, 34 Ala. 211. Likewise the Supreme Court of Georgia, in the case of *Tucker v. State*, 57 Ga. 503, held that, notwithstanding the overwhelming evidence of guilt, it was error for the court to charge that the jury should render a verdict of guilty. In *State v. Picker*, 64 Mo. App. 126, it was declared that a peremptory instruction to find the defendant guilty was a grievous error. In *Breen v. People*, 4 Parker Cr. R. (N. Y.) 380, the court charged the jury that if they found the statements of certain witnesses to be true, it established the larceny by the prisoner. This was held to be error. So in *Howell v. People*, 5 Hun (N. Y.) 620, the defendant was charged with a violation of the excise law. The court stated to the jury that the evidence against him was uncontradicted and undisputed, and directed a verdict of guilty. The Supreme Court said, in reversing the judgment: "The right to trial by a jury means that the persons indicted are entitled to have the question of their guilt passed upon by the jury. It does not mean that the court is to decide that question and the jury are only to utter the verdict of the court." The law is so declared by the Supreme Courts of Kansas and North Carolina, and by the federal courts. *State v. Wilson*, 62 Kan. 621, 64 Pac. 23, 52 L. R. A. 679; *State v. Winchester*, 113 N. C. 641, 18 S. E. 657; *State v. Riley*, 113 N. C. 648, 18 S. E. 168; *United States v. Taylor* (C. C.) 11 Fed. 470, 3 McCrary, 500; *United States v. Fenwick*, 25 Fed. Cas. 15,087. In *State v. Riley*, supra, the court said: "The plea of not guilty disputes the credibility of the evidence, even when uncontradicted, since there is the presumption of innocence, which can only be overcome by the verdict of the jury. The farthest the court can go in a criminal action, is to charge the jury that if they believe the evidence the

defendant is guilty." The text of Thompson on Trials lays down the rule thus: "Under constitutional provisions existing, it is assumed, in all states, which guarantee to persons accused of crime the right of trial by jury, an accused person has, in every case where he has pleaded not guilty, the absolute right to have the question of guilty or not guilty submitted to the jury, no matter what the state of the evidence may be. Such is the nature of the right thus granted, that it has been frequently held that it cannot be waived by the prisoner, and that the trial of a criminal case before the court without a jury, is erroneous, even where it takes place with the prisoner's consent." Section 2149.

As we have pointed out, a jury may be waived in this state in a misdemeanor case, under the express provision of the Constitution; but, with this exception, we think the great weight of reason and authority supports the view that the court may not in any case upon a plea of not guilty coerce the jury by a mandatory instruction to return a verdict of guilty. While the jury should take the law as laid down by the court and be governed by it, except in libel cases, wherein they are the judges of the law and fact (Const. art. 3, § 10; *Paxton v. Woodward*, 31 Mont. 195, 78 Pac. 215), the person accused may not be deprived of his absolute right to have the question of his guilt or innocence, not only of the particular crime charged, but of any included therein, determined by the jury without coercion by the court.

It follows that the judgment and order of the district court must be reversed, and the cause remanded for a new trial.

Reversed and remanded.

MILBURN and HALLOWAY, JJ., concur.

#### KIRBY v. HIGGINS et al.

(Supreme Court of Montana. Feb. 19, 1906.)

##### 1. MINES AND MINING—ADVERSE CLAIM—ACTION—EVIDENCE—SUFFICIENCY.

In an action on an adverse to a mining claim, evidence held insufficient to sustain a verdict for plaintiff.

##### 2. SAME—ADVERSE CLAIM—NATURE OF ACTION.

An action on an adverse to a mining claim is a suit in equity.

Appeal from District Court, Powell County; Welling Napton, Judge.

Action by George J. Kirby against W. I. Higgins and another. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Edward Scharnikow and J. B. Clayberg, for appellants. H. P. Napton and E. B. Howell, for respondent.

HOLLOWAY, J. In 1902 the owners of the Dewey quartz lode mining claim made application for patent. The owner of the

Nugget placer, a conflicting claim, filed his protest and adverse claim, which adverse was allowed, and within the time limited by law this action was commenced in the district court of Powell county to have determined which, if either, of the parties to the action is entitled to the ground in conflict. To the complaint is attached a plat showing the location of each of the conflicting claims and the ground in controversy. The answer raises issue as to all material allegations of the complaint. The cause was tried as an action at law to the court sitting with a jury. The jury returned a verdict "in favor of the plaintiff and against the defendant for the ground in controversy," and upon this verdict a judgment was entered in favor of the plaintiff adjudging him to be entitled to the ground in controversy as described in the complaint. From an order denying them a new trial, the defendants appealed. The errors assigned are insufficiency of the evidence to support the verdict and errors of law in the giving of certain instructions.

In his behalf, the plaintiff introduced the witness Hobart, a surveyor and mining engineer, who had surveyed the Nugget placer and had made a map of it. Much of the testimony was given with reference to this map, and is quite unintelligible to this court, for the reason that, when a witness was asked to designate a particular point on the map and did so, instead of having some identifying mark placed on the map, the record merely says, "Witness indicates," or uses some other equally indefinite expression. One instance will suffice to illustrate this: "Q. Will you please to point out on the map where the line 600 feet southwesterly from the discovery would be? (Witness indicates.) Q. Will you please mark on the map the end lines across with a pencil at that point? (Witness marks same.) Q. Now, how far is the end line, as you have it marked on the plat, to the northeasterly line—for [from] the discovery in a northeasterly direction? The witness: About 235 feet. Q. Will you mark on the map the point where 200 feet would be from the discovery in a northeasterly direction? (Witness marks.) Q. Will you draw a line at that point, with a pencil? (Witness draws line.)" All of this might have been understood by the court and jury, but is wholly unintelligible to this court.

However, the courses and distances given by the witness Hobart would seem to indicate that the ground surveyed by him as the Nugget placer is the same ground as that described in the complaint as the claim by that name, which is a quadrangle, one end being  $321\frac{5}{10}$  feet long, the other  $264\frac{5}{10}$  feet; one side being 1197 feet long and the other  $1150\frac{5}{10}$  feet. This witness, however, could positively identify but two corner posts, one marked "Nugget Placer" and the other "Southwest Corner. No. 3, Nugget Placer." He found two other posts which were point-

ed out to him as corner posts of the Nugget placer, but upon which he was unable to detect any markings whatever. The plaintiff then offered in evidence the declaratory statement of the Nugget placer, which describes a piece of ground 800 feet long, 200 feet wide at one end, and 70 feet wide at the other, and describes the corners as follows: "Beginning at corner No. 1, a post 4 inches square by  $4\frac{1}{2}$  feet long, set one foot deep with a mound of stone 4 feet in diameter by 2 feet in height around the same marked 'E. Cor. Nugget Placer,' and running thence Northwesterly about 200 feet to corner No. 2, a tree blazed on four sides and marked 'N. W. Cor. Nugget Placer,' and running thence Southwesterly about 800 feet to corner No. 3, a tree blazed on four sides and marked 'S. W. Cor. Nugget Placer,' and running thence easterly about 70 feet to corner No. 4 a tree blazed on four sides and marked 'S. E. Cor. Nugget Placer,' and running thence northeasterly about 800 feet to the place of beginning." Thereupon counsel for plaintiff said: "Mr. Howell: If the court please, we desire at this time to show that the plaintiff complains only of the amount of ground included within the location notice, and relinquishes any excess." As the notice of location was not before the court or jury, so far as this record shows, it is somewhat difficult to understand what counsel meant; however, again he says: "It is a question whether the posts would not cover all, but, all we want is the ground included in the discovery statement, and the same way with the lode claim, and, at the proper time, we will relinquish as to the lode claim." We assume that when counsel referred to "location notice" in the one instance, and "discovery statement" in the other, he meant "declaratory statement," and intended to relinquish all claim to the ground in controversy except that shown to be in conflict by the declaratory statement of the Nugget placer and the description of the Dewey lode as given in the answer. Plaintiff also called G. H. Schultz, the locator of the Nugget placer, who testified that he made the location in 1900; that he dug a sufficient discovery cut, found some placer gold, posted a notice of location and recorded the declaratory statement. He was then asked to point out the location of the corners, on the map before the court, and describe the markings, which he did. One corner was marked "Southeast Corner No. 1," with the name of the claim, and with respect to each of the other corners he says, "I marked it the same as the others," but does not give any courses or distances. Again he says, with respect to the Nugget placer claim, "I think I took out 800 feet in length and 300 feet in width on that placer claim." He testified that he is a citizen of the United States, qualified to make the location. Peter Commeau testified, on behalf of the plaintiff, that he did the necessary

representation work for the year 1901. Plaintiff then showed the transfer of this claim to him and rested his case. The defendants then introduced their evidence with respect to the Dewey lode claim and rested, and the plaintiff offered evidence in rebuttal; but neither the evidence offered by defendants nor by plaintiff in rebuttal aided in any respect the proof offered by the plaintiff in his case in chief.

We are now asked to say whether there is evidence sufficient to sustain the verdict returned. The verdict does not attempt to describe the ground awarded to plaintiff. The Nugget placer claim, as described in the complaint, and by the witness Hobart, is practically three times as large as the same claim described in the declaratory statement. The evident purpose of the plaintiff was to claim only the ground in controversy as shown by the conflict between the Dewey lode claim and the Nugget placer as described in the declaratory statement; and, while the map attached to plaintiff's complaint showed the conflict between the Dewey lode and the Nugget placer as described in the complaint, it does not show the conflict between the Dewey lode and the Nugget placer as described in the declaratory statement, and the plaintiff wholly failed to identify the Nugget placer, as described in the declaratory statement, with the same claim as described in the complaint and by the witness Hobart. From anything that appears in this record, it would have been equally as plain to the jury for the plaintiff to have said: "I have described 15 acres of ground in my complaint, but I now relinquish two-thirds of that and only ask to be awarded one-third of it." without informing the jury which particular one-third was desired. The record recites that it contains "all the evidence given in said cause," and this is not questioned. In the absence of any attempted identification of the particular ground claimed, it was simply impossible for the jury to make any finding in plaintiff's favor at all. Singularly enough, although counsel for plaintiff relinquished all claim to the ground in controversy, except such as might be shown to be in conflict between the Dewey lode claim and the Nugget placer, as described in the declaratory statement, the court entered judgment for plaintiff awarding him all the ground in controversy, as described in the complaint. Some of the instructions given are conflicting, but, doubtless, upon another trial, the action will be tried as a suit in equity, which it is. *Mares v. Dillon*, 30 Mont. 117, 75 Pac. 963. The evidence is wholly insufficient to support the verdict. The order denying defendants a new trial is reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and MILBURN, J., concur.

## IN re OWENS' ESTATE.

ARMSTRONG et al. v. JOHNSON.

(Supreme Court of Utah, April 19, 1906.)

### 1. ADMINISTRATORS — PERSONS ENTITLED TO LETTERS—CREDITORS.

An officer of a corporation, which is a creditor of a decedent, is not himself a creditor, within Rev. St. 1898, § 3813, declaring that, if none of the relatives of a deceased person apply for letters of administration, a creditor will be entitled to letters.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 76.]

### 2. SAME—NOMINEE OF ALIEN RELATIVE.

Rev. St. 1898, § 3812, declares that administration of the estate of an intestate must be granted to certain named relatives, when they are entitled to succeed to the decedent's personal estate, and provides that administration may be granted to one or more competent persons though not otherwise entitled to the same at the written request of the person entitled. Section 3814, provides that letters must be granted to an applicant, though it appears that there are others who have better rights, when such persons fail to appear within three months after the death, and section 3815, declares that no person is competent to serve as administrator, who is not a resident of the state, but that if the person entitled to serve is not a resident, he may request the court to appoint a resident, and such person may be appointed. *Held*, that where an alien relative of a decedent requests the appointment of a certain person and no nearer relative makes such application, it is the duty of the court to appoint the nominee of the alien relative instead of appointing a creditor or deceased.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 58, 59.]

Appeal from District Court, Third District; Geo. G. Armstrong, Judge.

Petition by Charles W. Johnson for letters of administration on the estate of William George Owens, deceased. Subsequently a petition was filed by Margaret Williams and another praying that S. B. Armstrong be appointed administrator. From an order granting letters to Johnson, Williams and Armstrong appeal. Reversed and remanded.

H. O. Shepard and S. P. Armstrong, for appellants. Thompson & Gibson, for respondent.

BARTCH, C. J. This was a proceeding for the appointment of an administrator to administer the estate of William George Owens, who died intestate March 30, 1903, at Los Angeles, Cal., then a resident of Salt Lake City, Utah. On June 27, 1905, the respondent filed a petition in the district court praying that letters of administration be issued to him. In the petition he alleged that the next of kin of the deceased were unknown; that the petitioner was the secretary and treasurer of a certain real estate company, a corporation; and that the corporation was a creditor of the deceased. On June 28, 1905, the appellant, Margaret Williams, a sister of the deceased, residing at Swansea, Wales, also filed a petition, in which the appellant Armstrong joined, pray-

ing that Armstrong be appointed as administrator. In this petition, it is alleged that the next of kin of the deceased are the petitioner, another sister, a brother, and a nephew. The two petitions were considered and heard together, and at the hearing, notwithstanding the petitioner Margaret Williams had previously filed objections based upon the record and files in the case, to the appointment of Johnson, the court appointed him, and ordered letters of administration to be issued to him. Thereupon this appeal was prosecuted, and specifications of error have been predicated upon the action of the court in the premises.

The appellant insists that Margaret Williams, sister of the deceased, though a non-resident, had the right, under our statutes, to have the person, whose appointment she had requested, appointed as administrator, his fitness for the position not being questioned. The statute, in section 3812, Rev. St. 1898, provides: "Administration of the estate of a person dying intestate, must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate or some portion thereof; and they are, respectively, entitled thereto in the following order: (1) The surviving husband or wife. (2) The children. (3) The father or mother. (4) The brothers or sisters. (5) The grandchildren. (6) The next of kin. Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court." Section 3813, Rev. St. 1898, so far as material here, reads: "If none of said relatives or their guardians will accept, then the creditors shall be entitled to letters, but when a creditor is applying, the court may, in its discretion, at the request of another creditor, grant letters to any other person legally competent. If a dispute arises as to relationship between applicants, or if there is any other good and sufficient reason, the court may appoint any competent person." Section 3814 reads: "Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear within three months after the death of the decedent and claim the issuance of letters to themselves." Under section 3815 no person is competent to serve as administrator or administratrix who is "not a bona fide resident of the state; but if the person entitled to serve is not a resident of the state he may request the court or judge to appoint a resident of the state to serve as administrator, and such person may be appointed."

Reading and construing these several provisions of the statute together, the intention of the Legislature is manifest that when a person dies intestate, his relatives or next

of kin, when not incompetent under the provisions of section 3815, shall be entitled to administer the decedent's estate in preference to a stranger even though he be a creditor, and especially is this true where a mere stranger seeks an appointment as administrator. Such intention seems the more clear from a consideration of the provision in section 3814, which requires letters of administration to be granted to any other applicant, when such persons as are entitled to them "fail to appear within three months after the death of the decedent and claim the issuance of letters to themselves." If a stranger or a creditor could be appointed administrator, notwithstanding that a person entitled appeared within three months from the decedent's death, and asked for letters, then this provision would be but useless verbiage having no effect. Familiar rules forbid a construction which will render meaningless and ineffective, words, phrases, or clauses in an enactment, when some other reasonable interpretation will render them effective and declare the legislative intent. It is only when none of those entitled will accept the appointment, or when no one of them appears within three months of the death of the decedent that the court is empowered to appoint a creditor either on his own petition, or at the request of another creditor. One of the principal reasons for thus preferring relatives and next of kin, doubtless, is that they, being entitled to succeed to what remains of the estate, after the discharge of the debts and obligations, are the most deeply interested in a proper administration of it, and in preserving it. The policy of thus preferring relatives and next of kin, over creditors, in the order in which their interests naturally appear, seems to be suggested alike by sound reason and justice. The creditor is interested only to the extent of having his claim paid, and, when that is done, his interest in the estate ceases, while the interest of one, who is entitled to all or a portion of the residue, continues until final distribution. For the latter, therefore, there is the greater inducement to conduct a wise and economical administration, and the former's interest can be just as well subserved as when a creditor is appointed. For the benefit of the creditor, as well as others interested in the estate, the law makes ample provision for prompt action, since it limits the time of preference, the clear intent and meaning of the statute being that those who are primarily entitled to administration must appear and assert their right, as provided by law, within three months after the death of the intestate. Until the expiration of that period, no creditor, in the absence of a renunciation of the right to administer by all of those preferred, is authorized to apply for appointment as administrator.

The Legislature having thus, for cogent and wise reasons, preferred relatives and

next of kin by provisions of statute, which are clearly mandatory and binding upon the courts, is not the fact of such preference indicative of the legislative intent, respecting the appointees of such preferred persons, that the provisions relating to such appointees, notwithstanding that the word "may," instead of "must" or "shall," was employed, are likewise mandatory? Do not the same considerations and reasons, which induced the preference relating to relatives and next of kin, apply with like force to their appointees selected, as is natural, out of special confidence and trust reposed in them? Such clearly would seem to be the case. The controlling object of the statute evidently is to secure to those, who have an interest in the residue of the estate, the right to administer. If, then, such persons, because of residence beyond the seas, or of minority, or other cause, cannot themselves administer, it is wholly within the spirit and policy of the law, and, therefore, the duty of the courts, to recognize those, whom such persons select and in whom they have special confidence, when their fitness for the position is unquestioned. The word "may," in subdivision 6 of section 3812, and in subdivision 2 of 3815, was not employed to vest mere discretion, but to confer a power upon the court to be exercised whenever the conditions or contingencies, indicated by the statute, should exist or arise, and when upon the occasion arising for the exercise of that power, the court fails to exercise it, but instead appoints some one not within the contemplation of the statute. It fails to comply with the law and its action is erroneous. When the relative or "next of kin reside in a foreign country, and cannot personally attend to take the administration themselves, they may appoint a person in whom they have confidence to take it for them; and the court ought to grant the administration to their appointee. The court have not executed the power the law gives them, when they have granted letters to a person not designated in that act, before the persons designated have refused; but only where they have granted letters to the proper persons." *Ritchie v. McAuslin*, 2 N. C. 251.

In *Strong v. Dignan*, 207 Ill. 385, 69 N. E. 909, 99 Am. St. Rep. 225, the same question here under consideration was presented. There, as here, a nonresident could not act as administrator, and the statute, *inter alia*, provided that "administration shall be granted upon the goods and chattels of decedent to the surviving husband or wife, or to next of kin to intestate, or some of them, if they will accept, or the court may grant letters of administration to some competent person, who may be nominated to the court by either of them." The appellate court, after construing this provision of the statute, said: "Taking this view, that is, that the nonresident sister had a right to nominate the administrator, the probate court of Cook

county revoked the letters, issued to the public administrator, and appointed the appellee. We think that this action of the probate court was correct and authorized by the language of the section." So, in *Clark v. Elizabeth*, 61 N. J. Law, 565, 40 Atl. 616, 737, it was said: "Words which, in their ordinary acceptance and when interpreted exclusive of the context and the subject-matter, imply a discretion of power, such as 'may,' 'it shall be lawful,' and the like, become in the construction of statutes mandatory where such is the legislative intent. The general rule is stated as follows: 'Where a statute confers authority to do a judicial, or, indeed, any other act, which the public interest or even individual right may demand, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having a right to make the application. In giving one person the authority to do an act the statute impliedly gives to others the right of requiring that the act be done, the power being given for the benefit not of him who is invested with it, but of those for whom it is to be exercised. The Legislature in such cases imposes a positive and absolute duty, and not merely gives a discretionary power; and it must be exercised upon proof of the particular facts out of which the power arises. When, therefore, the language in which the authority is conferred is only directory, permissive or enabling, for instance, when it is enacted that the person authorized 'may,' or 'shall if he deems it advisable,' or that 'it shall be lawful' for him to do the act, it has been so often decided as to have become an axiom that such expressions have a compulsory force, unless there is special grounds for a different construction.' *Maxw. Int. Stat.* 218, 219." In *Neidig's Estate* (Rupley's Appeal) 183 Pa. 492, 83 Atl. 1033, it was said: "If the parties entitled to letters do not desire to personally settle the estate they may name a suitable person to do so, and the register must regard their selection. The opinion of Judge Watson in *Jones's Appeal*, 10 Wkly. Notes Cas. 249, which was adopted by the Supreme Court, contains the following apposite language on this subject: 'I feel very confident that no case can be found where it has been held that the register is at liberty to disregard the clearly expressed wishes of the parties preferred by the law and entitled to the estate, whether they be residents of this commonwealth or beyond its borders, and grant letters to a total stranger, whose only interest is the expectation of earning commissions by his services in the execution of the trust \* \* \*. If the parties who are entitled to the estate are not in a position to administer it themselves, then the trust should be committed to their nominee who has their confidence, and whose services are to be paid for from their funds.'" 1 *Woerner, Admin.* § 233. *Macdougall v. Paterson*,

11 C. B. 755, 772. *Cobb v. Newcomb*, 19 Pick. (Mass.) 336; *Shomo's Appeal*, 57 Pa. 356; *Little v. Berry*, 94 N. C. 433; *Headman v. Rose*, 63 Ga. 458; *Hill v. Alsbaugh*, Adm'r, 72 N. C. 402; *Jones' Appeal*, 10 Wkly. Notes Cas. 249; *Newburgh Turnpike Co. v. Miller*, 5 John. Ch. (N. Y.) 101, 9 Am. Dec. 274; *Johnston v. Pate*, 95 N. C. 68; *Supervisors v. United States*, 4 Wall. (U. S.) 435, 18 L. Ed. 419; *Mason v. Fearson*, 9 How. (U. S.) 248, 13 L. Ed. 125.

The respondent applied for letters of administration not only before the expiration of the time limited, by the statute, for relatives and next of kin to apply, but he was not a creditor of the estate within his individual capacity, and, hence, not a creditor within the meaning of the statute. Nor was he of kin; nor had he any personal interest in the estate. He, therefore, had no right to be appointed as administrator of the estate. The mere fact that he was an officer of a real estate company and sustained a fiduciary relation to that concern, which he claimed was a creditor, did not characterize him as a creditor. The estate owed him nothing, and the indirect interest which he had in a part of its assets, because of his interest, if he had any, in the corporation, did not bring him within the contemplation of the statute as a creditor, and, under the circumstances, conferred upon him no right to administer the estate, or to be appointed, as administrator, in preference to a person whose appointment was requested by a relative who had an interest in the residue of the estate, after payment of the debts. *Myers v. Cann*, 95 Ga. 383, 22 S. E. 611; *Glenn, Trustee, v. Reid*, 74 Md. 238, 24 Atl. 155; *President, etc., v. Browne*, 34 Md. 450. Whether or not the intestate left a widow is immaterial, for, if he did, she never claimed the issuance of letters to herself, nor requested the appointment of any person in her behalf. The sister of the decedent is the only relative or next of kin who ever petitioned the court to have an administrator appointed, and she, having done so within the time limited by the statute, and being disqualified, because a nonresident, the person whose appointment she requested, there being no question as to his capability or fitness for the position, ought to have been appointed.

The judgment must be reversed, with costs, and the case remanded, with directions to the court below to proceed in accordance herewith. It is so ordered.

McCARTY and STRAUP, JJ., concur.

TWADDLE et al. v. WINTERS et al.  
(No. 1,675.)

(Supreme Court of Nevada. Feb. 1, 1906.)

#### 1. APPEAL—TIME OF TAKING—DISMISSAL.

Where a judgment was rendered on June 23, 1903, and no appeal was taken therefrom until

March, 1905, the appeal will be dismissed for failure to prosecute the same within a year.

#### 2. NEW TRIAL—MOTION—STATEMENT—PREPARATION—EXTENSION OF TIME.

Where the court reporter who took the evidence in an action left the state before preparing a transcript thereof, the parties against whom the judgment was rendered were entitled to such extensions of time to prepare a statement as a basis for a motion for a new trial as was necessary to enable them to secure a transcript of the testimony from the reporter and prepare such statement.

#### 3. JUDGES—JURISDICTION—POWERS IN CHAMBERS—EX PARTE ORDERS.

Comp. Laws, § 3292, authorizes the judge before whom a case was tried to extend the time for the preparation of a statement on a motion for a new trial, and district court rule 43 (24 Pac. xii) declares that only the judge having charge of the cause shall grant further time to do any act required to be done in the cause or proceeding, unless it is shown by affidavit that such judge is absent from the state or from some other cause is unable to act. Rule 41 provides that, when any judge shall have entered upon the hearing of a proceeding, no other judge shall do any act in the cause unless on the written consent of the judge first hearing the cause. Comp. Laws, § 2573, declares that the district judges of the state shall have coextensive powers throughout the state, and may each exercise the functions of judges in chambers at any point in the state, subject to the provisions that each judge may direct and control the business in his own district. *Held*, that where, on the determination of a cause, the judge entered an order that all further business not completed and all new business brought before the court during the absence of such judge should be referred to the judge of another district, the judge of such other district had jurisdiction in chambers within his own district to grant an ex parte order extending the time for the preparation of a statement on a motion for a new trial in the cause tried by the absent judge, without an affidavit that the latter was still absent at the time the order was granted.

#### 4. WATERS AND WATER COURSES—IRRIGATION—DIVERSION OF WATER—EVIDENCE.

In an action to determine water rights, alleged to have been appropriated by plaintiffs' grantors, evidence *held* to sustain a finding awarding to plaintiffs 184 inches under a 4-inch pressure.

#### 5. SAME—INJUNCTION—DECREE.

Where, in an action to determine water rights, defendant was enjoined from withdrawing from plaintiff's ditch water to which plaintiff was entitled, but there was evidence that there were times during the summer when it was not necessary to use as much water as plaintiff's ditch carried, on which occasions it should be turned to defendants, the injunction should specifically award such water to defendants, notwithstanding their right thereto might be implied by law.

#### 6. SAME—TIME—IRRIGATION SEASON.

Where plaintiff's intestate had testified, in a suit to determine water rights, that the irrigation season closed about October 1st of each year, and that sometimes he used water from the ditch in question a little later, a perpetual injunction restraining defendants from interfering with plaintiff's rights should limit plaintiff's right to use the water for irrigation to October 15th of each year.

#### 7. SAME—DEEDS—CONSTRUCTION.

Where a deed from plaintiff's predecessor in interest in certain land, to which defendants succeeded, conveyed one-third of a certain water ditch and flume, described, with the privilege of running water through the flume and ditch to the land conveyed, such provision did not

constitute a grant of water, but merely the right to convey water otherwise acquired through the flume and ditch.

**8. WATERS AND WATER COURSES—RIPARIAN PROPRIETORS—PRIOR APPROPRIATION.**

The fact that patents for defendant's lands lying along the banks of a creek were issued to defendants before adoption of Act Cong. July 26, 1866 (14 Stat. 251, c. 262), providing for the appropriation of water for irrigation purposes, did not confer on the owners of such land riparian common-law rights to the waters of the creek as against prior appropriators.

Appeal from District Court, Washoe County.

Action by Ebenezer Twaddle and others against Theodore Winters and others. From a decree in favor of plaintiffs, defendants appeal. Motion to dismiss appeal from judgment granted. Motion to dismiss appeal from order denying a new trial denied. Judgment modified.

Alfred Chartz, for appellants. Cheney & Massey, for respondents.

TALBOT, J. The respondents have moved to dismiss the appeal from the judgment because it was not taken within one year, and to dismiss the appeal from the order of the district court denying appellants' motion for new trial, and also to strike from the records the statement on motion for a new trial, upon the ground that the statement was not filed within the time prescribed by law. The appeal from the judgment is dismissed, because not taken until March, 1905, more than one year after its rendition on June 23, 1903. On that day Judge Curler, of the Second judicial district court, who had tried the case at Reno and rendered the decree, made in open court and had entered in the minutes an order "that all business and all cases and proceedings that have not been completed or in the process of completion, and all new business that may be brought before the court during the absence of the presiding judge, be referred to Judge M. A. Murphy, of the First judicial district court of the state of Nevada, and that he be requested to try, determine, and dispose of all cases and business now before the court in the absence of the judge of this district." Pursuant to this request Judge Murphy occupied the bench in Reno until July 31, 1903, when a recess was taken until the further order of the court. There was no other session until Judge Curler's return on August 17th. On July 17th Judge Murphy, in open court in Reno made an order allowing plaintiffs until August 15th in which to file objections to findings, and to prepare additional findings. On August 3d Judge Murphy at Carson City, and within his own First judicial district, by an ex parte order made without affidavit of Judge Curler's absence or inability, granted the defendants until September 15, 1905, within which to prepare, file, and serve their notice and statement on motion for new trial. Later extensions were made by Judge Curler, but whether they are effect-

ual depends upon this order, which respondents claim Judge Murphy was unauthorized to make under section 197 of the practice act (Comp. Laws, § 3202), which provides in regard to notices and statements on motions for new trial that "the several periods of time limited may be enlarged by the written agreement of the parties, or upon good cause shown by the court, or the judge before whom the case was tried," and under district court rule 43 (24 Pac. xii), which directs that "no judge, except the judge having charge of the cause or proceeding, shall grant further time to plead, move, or do any act or thing required to be done in any cause or proceeding, unless it be shown by affidavit that such judge is absent from the state, or from some other cause is unable to act."

Rule 41 (24 Pac. xii) provides: "When any district judge shall have entered upon the trial or hearing of any cause or proceeding, demurrer or motion, or made any ruling, order or decision therein, no other judge shall do any act or thing in or about said cause, proceeding, demurrer, or motion, unless upon the written request of the judge who shall have first entered upon the trial or hearing of said cause, proceeding, demurrer or motion." Section 2573 of the Compiled Laws, passed after section 197 of the practice act as quoted, enacts: "The district judges of the state of Nevada shall possess equal coextensive and concurrent jurisdiction and power. They shall each have power to hold court in any county of this state. They shall each exercise and perform the powers, duties and functions of the court, and of judges thereof, and of judges at chambers. Each judge shall have power to transact business which may be done in chambers at any point within the state. All of this section is subject to the provisions that each judge may direct and control the business in his own district, and shall see that it is properly performed."

We think under the minute order and circumstances related, the power inherent in Judge Curler to extend the time for filing the notice and statement became conferred upon Judge Murphy during the former's absence, and that Judge Murphy became the judge in charge, endowed with authority to grant the extension without the presentation of an affidavit showing the absence or inability of Judge Curler, as the rule requires before the order can be made by a judge not having the business in charge. Judge Curler's absence was presumed to continue until his return was shown, and consequently Judge Murphy's authority, based upon that absence, would likewise continue. It is said that under the first statute mentioned the language that "the court or judge before whom the case was tried" may extend the time invalidates the order, because Judge Murphy was not the judge before whom it was tried, and that he was not the court after he returned to Carson City, where he made

the order. In a narrow, technical sense this may be true, if we do not look beyond the strict letter of the statute. But not so if we consider the intent and purpose of the enactment, and construe it in the light of reason as applied to the ordinary rules of practice, and give due weight to the later section. Apparently the object of this legislation was to prevent the granting of extensions and the meddling of judges in cases which they had not tried or which were not properly under their control, and yet, in case of the absence or inability of the judge who tried the action, to grant relief or allow extensions to be made to deserving litigants. The argument advanced concedes that, if Judge Murphy had gone to Reno and entered the order in open court, it would have been good; but under this contention, if he had stepped through the door into the chambers and made it, it would have been void. Orders extending the time for filings are business usually or properly transacted in chambers, and under section 2573 can and ought to be made as effectually in any part of the state, by the judge having the case in charge, as if made by him in chambers or in open court. Judge Murphy was merely acting for Judge Curlier during his vacation, but by analogy the construction claimed, if adopted, would, in every case where a district judge dies, resigns, or is succeeded, invalidate the orders extending time under section 197 made out of court by his successor in office, although they are of that character ordinarily granted in chambers. This would mean a distinction and two rules for filing orders of the same kind, and that the judge who had tried the cause, as Judge Curlier had done in this instance, could make the order in chambers, while his successor could so make it only in the cases tried by him, and would have to be in court to make these simple orders extending time in actions which had been previously tried by another judge.

Appellants desired and were entitled to the time granted for the purpose of enabling them to secure from the court reporter, who had left the state, a transcript of the testimony given on the trial, which would enable them to properly prepare the statement. Under section 2573 Judge Curlier could have made an order granting them the extension at any place in the state, and, as during his absence Judge Murphy was requested by the court minute to attend to all business for him, we conclude that he was empowered to make the order at Carson City as he did, and as Judge Curlier could have done, and that it was not necessary for him to make the trip to Reno and undergo the formality of opening court to enter ex parte orders simply extending time, such as are usually made out of court.

The motion to dismiss the appeal from the order overruling the motion for a new trial and to strike out the statement is denied.

### On the Merits.

This action was brought by Alexander Twaddle, in his lifetime, and by Ebenezer Twaddle, as co-owners, for 450 miners' inches running under a 6-inch pressure of the waters of Ophir creek, alleged to have been appropriated by their grantors in the year 1856 "by means of dams, ditches, and a flume" for the irrigation of their ranch, containing 203.92 acres, in Washoe county. The answer denies the allegations of the complaint, sets up the ownership by the defendants Winters of a tract of land about one mile wide by two miles long, and alleges appropriations by them or their grantors, aggregating 600 inches flowing under a 4-inch pressure, by the year 1867, which are stated to be prior to any diversion of the water by the plaintiffs, and asserts a claim for defendant Longbaugh to 180 inches for fluming wood, lumber, and ice from large tracts of timber lands owned by him, and for domestic use and irrigating garden on 40 acres at Ophir. Witnesses appeared to sustain and others to dispute plaintiffs' right as initiated a half century ago, and the same is true regarding the claims of these defendants. The record affords a glimpse of pioneer history at a period previous to the admission of this state into the Union, and portrays the building and decay of saw and quartz mills and the rise and decline of towns by the banks of the stream, the waters of which are here in litigation. One witness testified that the Hawkins ditch, now known as the "upper Twaddle ditch," was completed in 1857, and that he turned the water into it that year. Others stated that water was running in the ditch and flume about that time, and that these were apparently in the same place and of about the same capacity as at present. On behalf of defendants other witnesses testified that they were over the ground and saw no ditch, and that none existed there during those earlier years. It is unnecessary for us to detail the conflicting portions of the evidence. These were carefully considered by the district court, and for the reasons stated in its decision, enforced by statements in deeds made many years before any controversy arose, the finding that this ditch was constructed and a prior appropriation of water made through it in 1857 finds ample support. At first on the Twaddle ranch land was plowed for only a garden and a small piece of grain, and but little hay was cut. A reasonable time was allowed in which to extend and complete the use of the water that would flow through the ditch, and the quantity of land irrigated was increased. The lower Twaddle ditch was constructed from Ophir creek at some time prior to 1869, and runs to and irrigates the eastern portion of plaintiffs' ranch. It is shown that since that year, at least, their lands have been in practically the same state of cultivation and irrigation that they were in at the time of

the commencement of this action, and that during that period plaintiffs used all the water they needed from Ophir creek without interruption, except in 1887, 1898, and at the time this suit was begun. It appears that the plaintiffs had not materially increased their appropriation in 33 years, while Theodore Winters admitted upon the stand that during the last 10 or 15 years he had been using twice as much water from Ophir creek, in addition to that from other streams, as he used during the first 10 years that he cultivated his lands. As he claims and uses more than the plaintiffs, we conclude that this large increase in his diversion of the waters of the stream since the completion of their appropriation which has remained stationary may account for the shortage and dispute.

By consent of the parties in open court the district judge, accompanied by a civil engineer who had testified as a witness for the defendants, viewed the premises and made measurements. At the point of least carrying capacity of the upper Twaddle ditch, which is the old square flume near the Bowers mansion and grave, he measured the flow at 184 inches and the water lacked more than 2 inches of reaching the top. A surveyor had testified for the plaintiffs that its capacity was 182 inches at this point, and that the capacity of 100 feet of the old flume remaining up nearer the head of the ditch which had been impaired by age and abandoned, and supplanted by a new V flume built above the old one by the plaintiffs in 1900, was 150 inches. At this point the judge found that the 184 inches of water which he had measured below about filled the new V flume, and he estimated that this old flume would carry from 200 to 300 inches. From his examination of the premises and the character of the soil, the court was of the opinion that the plaintiffs required, and were entitled to, at least the amount of water they had flowing in the flume at the time he made the examination, and he decreed them a prior right to 184 miners' inches running under a 4-inch pressure, or  $3 \frac{34}{50}$  cubic feet per second, from April 15th to November 15th of each year, and 20 inches, or two-fifths of 1 cubic foot per second, for domestic use and watering stock at other times. It is claimed that the amount allowed is not warranted by the evidence, because more than the capacity of the upper Twaddle ditch, as shown by the testimony mentioned, fixing it at 182 inches at the point above the mansion, and at 150 inches along the 100 feet of old flume, through which the water flowed prior to 1900. It is not necessary to determine whether the court, on its own examination and measurement, may allow a quantity beyond the range of the evidence, nor whether the surveyor could accurately estimate the capacity of the 100 feet of old flume without knowing the volume and velocity of the water that entered it, nor whether the vari-

tion of 1 part in 91, or the difference between 182 inches in his measurement and that of 184 by the judge should be disregarded as too trifling to be material and as a slight discrepancy to be expected; for the judgment for the 34 inches which defendants claim should be deducted, because in excess of the capacity of the upper ditch and flume before the construction of the V flume in 1900, is supported by the finding of the court that the plaintiffs and their grantors had for more than 31 years before the commencement of this suit used a portion of the water through the lower Twaddle ditch. It is urged that 184 inches is more than required for the irrigation of plaintiffs' ranch, and that this is especially so because a few of their 170.45 acres of cultivated land lie above the line of their upper ditch from Ophir creek, and a small portion is naturally swampy. The quantity of water allowed by the decree seems very liberal, both for irrigation and for domestic use and watering stock. Engineers and others testified that one-half and three-fifths of an inch of water per acre was sufficient, while for the plaintiffs, farmers from the vicinity varied in their estimates of the amount necessary from  $1 \frac{1}{2}$  to  $3 \frac{1}{2}$  inches per acre. The evidence indicated that the plaintiffs had used as much water as that awarded to them, or more, and had uniformly produced good crops. Much of their land is sandy, with a considerable slope. After examining the soil and viewing the quantity of water as it ran on the premises, the court agreed with the testimony of the plaintiffs that that amount was necessary, and adopted a mean between the highest and lowest estimates. The quantity of water requisite varies greatly with the soil, seasons, crops and conditions, and we cannot say that the allowance is excessive.

Alexander Twaddle testified that there were times during the summer, evidently short periods after the land had been irrigated, when it was not necessary to use as much as the upper ditch full of water. On such occasions, and whenever it is not needed by the plaintiffs, it should be turned to the defendants, if they have any beneficial use for it, and not permitted to waste. It may be implied by the law; but it is better to have decrees specify, and especially so in this case, in view of the testimony stated and of the perpetual injunction that the award of water is limited to a beneficial use at such times as it is needed. *Gotell v. Cardell* (Nev.) 69 Pac. 8. The point and purpose of diversion may be changed if such change does not interfere with prior rights. Under the testimony of Alexander Twaddle that the irrigating season closes about the 1st of October, and that sometimes he used water a little later, we think preferably the decree should limit plaintiffs' right for irrigating purposes to October 15th. This may allow defendant Longabaugh to fume wood a month earlier at this season when the water is low, and

allow Winters more for watering stock without material injury to the plaintiffs. Although his flume was erected many years ago, Longabaugh did not show any prior appropriation, and the decree properly enjoins him from interfering with that part of the water of Ophir creek awarded to the plaintiffs, because he ran their water in his flume past their ditch and into the one owned by Winters, and joined with the other defendants in answering and resisting the rights of the plaintiffs. The decree does not prevent him from taking any water in the creek in excess of the amount awarded to plaintiffs. Nor does it in any way interfere with the water belonging to him coming from other sources. This he may turn into Ophir creek and take out lower down, provided he does not diminish the flow to which the plaintiffs are entitled.

On May 30, 1877, John Twaddle, the father and predecessor in interest of the plaintiffs, conveyed to M. C. Lake "one-third of that certain water ditch and flume known as the 'Twaddle ditch,' leading from what is known as 'Ophir creek' to the land of said Twaddle, southerly from said creek through the lands of C. F. Wooten and M. C. Lake, with the privilege of running water through said flume and ditch to what is known as the 'Bowers mansion' or grounds; the expense of maintaining said ditch and flume to be paid by each in proportion to their interests in same." It will be noted that this language does not purport to grant any water, but rather the right to convey water, and that it amounts to a sale of a third interest in the ditch, with at least the privilege to that extent of running in it water which Lake had or might appropriate. Later the defendant Theodore Winters acquired the Bowers mansion and grounds through conveyances which did not mention any interest in this ditch. It does not appear that Lake or his grantors ever made any use of the ditch, or ever contributed towards its repair. Alexander Twaddle stated on the stand that he did not claim all this ditch, and that the plaintiffs owned two-thirds of it. Whether under this deed the one-third interest in the ditch became appurtenant to the Bowers land where it was never used for its irrigation, and later passed with the land without being mentioned, and whether, after the lapse of 25 years without any use or contribution towards its repair, the grantee of Lake has a third interest as a co-owner in the ditch and that part of the flume which has not been superseded by the new one built by plaintiffs, are questions which we need not determine; for they, and that part of the judgment of the court which gives the plaintiffs the "exclusive use of the upper Twaddle ditch and flume," are not within the allegations of the pleadings, which contain no reference to the exclusive use of, or a third or any interest in, the ditch. Under the assertion in the complaint of the appropriation of water "by

means of certain dams, ditches, and a flume" the court properly decreed to plaintiffs the right to use the water through either or both the ditches running to their lands. They would have that right in the upper ditch if their interest in it is only an undivided two-thirds, as the court has given them jointly with the defendants in the lower ditch; but whether the grantee of Lake owns and can assert a right to an undivided one-third interest is a question as foreign as the ownership of the mansion, and one which ought not to be determined by the judgment, in the absence of any issue or allegation concerning it. The defendants specifically excepted to finding No. 12 in this regard.

Patents for defendants' lands lying along the banks of Ophir creek were issued to their grantors before the passage of the act of Congress of July 26, 1866, and it is asserted that for this reason a vested common-law riparian right to the flow of the waters of Ophir creek accrued, of which they could not be deprived by that act. If this were true, defendants might well be considered, under the circumstances shown, to have lost that right by acquiescence in the continued diversion of the water by plaintiffs for a period many times larger than that provided by the statute of limitations; but in this contention counsel is in error. We do not wish to consider seriously or at length an argument by which it is sought to have us overrule well-reasoned decisions of long standing in this and other arid states, and in the Supreme Court of the United States, such as *Jones v. Adams* (Nev.) 6 Pac. 442, 3 Am. St. Rep. 788, *Reno Smelting Works v. Stevenson* (Nev.) 21 Pac. 317, 4 L. R. A. (N), 19 Am. St. Rep. 364, and *Broder v. Water Co.*, 101 U. S. 274, 25 L. Ed. 790, declaring that this statute was rather the voluntary recognition of a pre-existing right to water, constituting a valid claim to its continued use, than the establishment of a new one. As time passes it becomes more and more apparent that the law of ownership of water by prior appropriation for a beneficial purpose is essential under our climatic conditions to the general welfare, and that the common law regarding the flow of streams, which may be unobjectionable in such localities as the British Isles and the coast of Oregon, Washington, and northern California, where rains are frequent and fogs and winds laden with mist from the ocean prevail and moisten the soil, is unsuitable under our sunny skies, where the lands are so arid that irrigation is required for the production of the crops necessary for the support and prosperity of the people. Irrigation is the life of our important and increasing agricultural interests, which would be strangled by the enforcement of the riparian principle.

Congress, in appropriating millions for storage and distribution, and our Legislature, have recognized the advantages of conserving the water above for use in irrigation,

Instead of having it flow by the lands of riparian owners to finally waste by sinking and evaporation in the desert. The California decisions cited for appellants may no longer be considered good law even in the state in which they were rendered. In the recent case of *Kansas v. Colorado*, before the Supreme Court of the United States,<sup>1</sup> Congressman Needham testified that irrigation had doubled and trebled the value of property in Fresno and Kings counties, California; that they had to depart from the doctrine of riparian rights and under that doctrine it would be difficult to make any future development; that there has been a departure from the principles laid down in *Lux v. Haggin* (Cal.) 10 Pac. 874, because at that time the value of water was not realized; that the decision has been practically reversed by the same court on subsequent occasions; and that the doctrine of prior appropriation and the application of water to a beneficial use is in effect in force now in that state. We must decline to award the defendants the waters of the stream as riparian proprietors and patentees of the land along its banks prior to 1866.

The case will be remanded for a new trial, unless there is filed on the part of the plaintiffs, within 30 days from the filing hereof, a written consent that the judgment be modified by limiting the use of the 164 inches or  $3\frac{3}{4}$  cubic feet per second of water, awarded to the plaintiffs, to such times as may be necessary for the irrigation of their crops or lands or for other beneficial purposes, between April 15th and October 15th of each year, and by allowing plaintiffs for the remainder of the time the 20 inches awarded to them, when necessary for their household, domestic, and stock purposes, and by striking from the decree the words: "It is further ordered, adjudged, and decreed that said plaintiffs have the exclusive right to use and the exclusive use of said upper Twaddle ditch and flume at all seasons of the year." If such consent is so filed, the district court will modify the judgment accordingly, and, as so modified, the judgment and decree will stand affirmed.

FITZGERALD, C. J., and NORCROSS, J., concur.

(70 Kan. 880)

JORDAN et al. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Kansas. Nov. 5, 1904.)

On rehearing. Former judgment amended, so as to permit an award to a referee to stand.

For former opinion, see 76 Pac. 396.

Allen & Allen, E. D. McKeever, W. S. McClintock, J. S. Ensminger, and Stebbins & Evans, for plaintiffs in error. Rossington, Smith & West, and George H. Fearons, for defendant in error.

<sup>1</sup> 27 Sup. Ct. 655, 41 L. Ed.

PER CURIAM. Upon a rehearing (*Jordan v. Telegraph Co.*, 69 Kan. 140, 76 Pac. 396) on the application of the referee in this case as to the amount that should be allowed to him in costs for his services as such, the judgment of the court is so amended as to permit the award made by the district court in that respect to stand. On this rehearing several matters have been called to our attention which were not presented before, which go to enhance the value of the referee's services. In the light of the matter thus presented, we are not able to say that the award of the court below was erroneous. On the former hearing the referee was not represented, and it seemed then to be admitted, inferentially at least, by both plaintiffs and defendant, that the award was excessive.

(73 Kan. 287)

CRANE v. RENVILLE STATE BANK OF RENVILLE, MINN.

(Supreme Court of Kansas. March 10, 1906.)

TENDER—SUFFICIENCY.

An offer by a guarantor to pay an overdue note, if the holder wishes him to do so, accompanied by a display of a sufficient amount of money for the purpose, does not necessarily amount to such a tender of payment as will release him from liability, although the creditor says that he prefers the note to the cash; the transaction being prevented from having that effect by the fact that the offer is made contingent upon the creditor's desiring him to make the payment.

(Syllabus by the Court.)

Error from District Court, Franklin County; C. A. Smart, Judge.

Action by the Renville State Bank of Renville, Minn., against F. E. Crane. Judgment for plaintiff, and defendant brings error. Affirmed.

Deford & Deford, for plaintiff in error. Pleasant & Pleasant, for defendant in error.

MASON, J. F. E. Crane sold to the Renville State Bank of Renville, Minn., a number of notes, including two executed by John Ourada, for \$125 and \$75, respectively, giving a written guaranty of their payment. The notes against Ourada proved uncollectible and the bank sued Crane upon his guaranty, recovering a judgment from which he prosecutes error. The court found that upon the failure of Ourada to pay the notes at maturity the bank wrote Crane stating that fact and asking instructions, and that Crane answered directing that they be placed in judgment. Complaint is made that these findings are not supported by any evidence. There was testimony that the bank wrote and mailed to Crane a letter of the substance indicated. Crane testified that he had no recollection of receiving it. Nearly two months after its date he wrote to the bank saying: "Put that note into judgment. I have been away from home and that is the reason you have not heard from me." The whole question so far

as this assignment of error is concerned is whether the court was justified in regarding Crane's letter as an answer to that of the bank. The circumstance that it used the phrase "that note" instead of "those notes" is of but little force, and certainly is not conclusive against the theory that the subject-matter of the communication was the Ourada indebtedness. We think the view of the court has abundant support.

The substantial defense interposed by Crane is based upon the contention that in virtue of a conversation between himself and a representative of the bank he was relieved of all liability and the bank elected to look exclusively to Ourada for the collection of the notes. This conversation took place upon the occasion of the bank paying some \$800 to Crane in another matter, and was in full as follows: "Crane: Tim, how about the last bunch of paper I sold you? Have you looked it up? Banker: Yes, I have; and it is all first-class, except that fellow over here, Ourada. He has 640 acres of land, but he is trying to get behind his wife on that proposition, but he can't do that with me. Crane: On that contract of ours, Tim, I will take that paper up and pay you the money, if you want it, because I am here, and it will only cost me two or three days' time to go over there and get the matter fixed up while I am here, and I don't want to be annoyed with it after I am gone. Banker: No, I would rather have the note as have the money. Crane: Well, we have the money right here now on the table. Take out the amount of it if you would rather have the money than the notes, because I don't want to be annoyed with it after I get away from here. Banker: No; I will make him pay it. \* \* \* [Ourada] can't get behind that paper, because I will follow him to the end of the earth. I would rather have the note than have the money. I will make him pay it. He can't get behind his wife with 640 acres of land, and I would rather have the note than have the money."

It is claimed that this transaction amounted to a perfect tender of payment by the guarantor and its refusal by the creditor, and that therefore Crane stood from that moment discharged of all liability. An argument is made against this contention based upon the fact that at this time only one of the notes was due. It is argued that no tender could be made upon the note which had not matured, although it drew interest only after maturity, and that an effective tender as to the past due note could only be made by a separate offer to pay that one alone. Without attempting to pass upon the force of this suggestion we shall assume that irrespective of the maturity of the paper Crane was privileged to take it up at any time. The question to be determined then is whether the conversation already detailed amounted to a tender. We do not think it necessarily had that effect. It certainly came very near doing so, but fell just short of accomplishment. The gap was

not wide, but it was sufficient to defeat that result. "A tender is an offer by a debtor or other person who is under an obligation, to pay such debt or perform such obligation, the actual payment or performance being prevented by the refusal of the creditor or person entitled to performance to accept the same." 28 A. & E. Enc. of L. (2d Ed.) 4. Here there was no definite offer to pay on the one hand and refusal to accept on the other. The obligor indicated his readiness to pay if the obligee desired it, not otherwise. The obligee did not really refuse to accept payment. He merely indicated that he was indifferent. For some reason sufficient to himself he even appeared to prefer the note to the money, but he did not say that he preferred the note without Crane's guaranty back of it to the money, and he did not actually refuse to accept payment then and there. At this stage of the proceedings the only controversy between the parties appears to have been which could show the other the greater courtesy in the matter, each seeming to defer to the other's wishes. The offer made by Crane did not purport to be for his own protection, although that feature of the matter was incidentally alluded to. It professed to be for the accommodation of the bank, and its acceptance was in express terms left to the bank's option. There was no such explicit demand that the bank should either accept the money or definitely release Crane from further obligation as the banker had a right to expect if that was what was in the mind of the guarantor. The case is in some respects similar to *Clark v. Sickler*, 64 N. Y. 231, 21 Am. Rep. 606. The first paragraph of the syllabus reads: "An offer upon the part of a principal debtor to pay, and an omission so to do because of a request of the creditor that he retain the money, and the subsequent insolvency of the principle, do not discharge a surety." In the opinion it is said: "It is quite evident that the creditor had no idea of discharging the surety. He did not prevent the payment of the note. He did not refuse to receive the money. He only expressed a desire that it should not be paid."

Where a principal offers to pay a debt and payment is not made by reason of the conduct of the creditor there is good ground for holding that the surety should be deemed discharged upon the theory that the nonpayment results from a failure of the creditor to use due diligence to make collection from the principal and thereby protect the surety. But where, as in the present case, the offer to pay is made by the surety there is no room for the application of this doctrine. It is true that a surety may be released by the refusal to accept payment from him when he makes a good tender, but this is for an entirely different reason, namely, because such refusal interposes an insurmountable obstacle in the way of his pursuit of his remedy against his principal. *Hayes v. Josephi*, 26 Cal. 535; *O'Connor v. Morse*, 112 Cal. 31, 44

Pac. 305, 53 Am. St. Rep. 155. In the one case the release of the surety may be accomplished by the creditor's mere neglect to take advantage of a chance to take the money when he can get it, but in the other it can result only from his positive refusal to accept it when the surety makes tender and demands such acceptance as a right. Here the bank missed no opportunity for getting the money from Ourada, and it placed no insurmountable obstacle in the way of Crane's attempting to force the collection himself. The court was warranted in holding Crane liable for the expenses of the proceedings against Ourada, as well as for the amount of the debt, by the consideration that they were taken by his direction.

The judgment is affirmed. All the Justices concurring.

# DISNEY v. HEALY et al.

(Supreme Court of Kansas. March 10, 1906.)

## 1. LIMITATION OF ACTIONS—NEW PROMISE.

The petition in this case had letters attached which were alleged to have been written by one of the makers of the note, Thomas J. Healy, to the payee thereof, which prima facie were an acknowledgment of the debt and tolled the statute of limitations as to him.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 574-620.]

## 2. SAME—SUFFICIENCY OF ACKNOWLEDGMENT.

A grantee who accepts a deed of conveyance of land, and by a contract not set forth in the deed agrees to pay the grantors' debt secured by a mortgage on said land, is liable on such contract in an action by the mortgagee, even if a recovery on the note secured by the mortgage would be barred by the statute of limitations, but for such acknowledgment of the indebtedness by the mortgagor as tolled the statute as to him, provided such acknowledgment be made before the conveyance, not afterward. (Syllabus by the Court.)

Error from District Court, Logan County; J. H. Reeder, Judge.

Action by W. O. Disney against Thomas J. Healy and others. Judgment for defendants, and plaintiff brings error. Reversed.

This action was commenced on the 25th day of February, 1905, by the plaintiff in error as plaintiff in the district court of Logan county upon a promissory note secured by a real estate mortgage given by the defendants, Thomas J. Healy and wife, and which note by its terms matured December 1, 1895. To the petition were attached, as exhibits, alleged copies of letters written by Healy to the plaintiff, which letters, it is claimed, tolled the statute of limitations. The petition also alleged that, shortly before the commencement of the action, Healy and wife had conveyed the mortgaged premises by deed to the defendant, Jordan. The defendants filed a general demurrer to the petition, which demurrer was by the court sustained, and, the plaintiff electing to stand upon his petition, the court rendered judgment against him, and he brings the case here for review.

Lee Monroe, W. F. Schoch, and E. P. Hotchkiss, for plaintiff in error. Roark & Roark and W. H. Wagner, for defendants in error.

SMITH, J. (after stating the facts). Several of the letters attached as exhibits to the petition seemed to acknowledge an indebtedness or obligation from Healy to Disney. Probably the following under the date of April 9, 1900, less than five years before the commencement of this action, is the strongest, to wit: "W. O. Disney, Russell Springs, Kansas—Dear Sir and Friend: Yours enclosing deed to execute rec'd. You don't say any thing about cancelling my note. I am willing to make the deed, but must have the note and mortgage released and note returned to me. Yours truly, T. J. Healy." We think this is sufficient acknowledgment of an indebtedness to toll statute, being, in effect, a proposition to deed land in consideration of the release of the note and mortgage and the return of the note. *Pracht v. McNee*, 40 Kan. 1, 18 Pac. 925. Healy had the legal title to the land at the time he acknowledged the indebtedness.

The question remains whether the defendants Jordan were bound by their alleged contract with Healy to assume and pay his indebtedness to the plaintiff. It is said by Justice Brewer in *Schmucker v. Sibert*, 18 Kan. 104, 28 Am. Rep. 765: "Where a note and mortgage are once barred, a subsequent revivor of the note by part payment, promise, or acknowledgment of the payor, will revive the mortgage so far as it affects the interest of the payor in the mortgaged premises." The mortgage, as well as the note, therefore, was revived as to Healy at the time of the conveyance by himself and wife of the land to Jordan, and Jordan took it subject to the mortgage lien and agreed, in consideration, or in part consideration, of such conveyance, to pay the mortgage indebtedness. The mortgage was revived as to him, and the statute of limitations as to him commenced to run at the time of such conveyance. *Schmucker v. Sibert*, *supra*.

The judgment of the district court is reversed, and a new trial granted. All the Justices concurring.

# HURDLE v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas. March 10, 1906.)

## RAILROADS—INJURIES TO LICENSEE ON TRACK—QUESTION FOR JURY.

In an action for the death of one killed by being run into by a railroad train while riding a railroad velocipede, held, that the question of defendant's negligence and of plaintiff's contributory negligence were for the jury.

Error from District Court, Johnson County; W. H. Sheldon, Judge.

Action by Emma Hurdle against Missouri Pacific Railway Company. From a judgment in favor of defendant, plaintiff brings error. Reversed.

A. Smith Devenney and Cook & Gossett, for plaintiff in error. Waggener, Doster & Orr and Humbert Riddle, for defendant in error.

**PER CURIAM.** The trial court was not warranted in sustaining the demurrer to plaintiff's evidence. There is testimony that Hurdle, the deceased, in going to and from his work had used a railroad velocipede on the railroad track for years with the knowledge and consent of the company; that the engineer had some reason to believe that Hurdle would be upon the track about the time that he was run down and killed; that the engineer was looking along the track and must have seen Hurdle a distance of about 600 feet from the point of collision, and that the engineer did not give any signal or warning of approach until just before the collision. Leaving out of consideration the character of Hurdle's license to run the velocipede over the track, whether he had a right to rely upon the giving of certain crossing signals, and whether Hurdle had reason to, or did, believe that the belated train had already passed, we still think the right of recovery was not a question of law for the court. Even if Hurdle was careless in going upon the track, it would be no excuse for the engineer to recklessly run him down. If the engineer saw Hurdle and ran most of the intervening distance without giving warning, or using the ordinary means to save his life, it was a reckless, wanton act, and the company cannot rely upon Hurdle's negligence to protect it from liability. It was admitted by the engineer that he was on the lookout and that he saw Hurdle about 100 yards away when he sounded the whistle and applied the air brake. Other witnesses say, however, that Hurdle was in sight of the engineer about twice that distance, and also that the engineer did not sound the whistle until about the time that the engine struck and killed Hurdle. If it be granted that the engineer blew the whistle about 100 yards away, as he stated, there is still testimony to the effect that he must have run about 300 feet while in sight of Hurdle, without giving any warning or taking any precautions to avert the injury. If that be true, his action may justly be characterized as recklessness. Had the warning been given when he was 600 feet away Hurdle might possibly have thrown himself from the track and saved his life. Whether it was a reckless injury by the engineer, or whether recovery is barred because of Hurdle's own negligence, are questions for the determination of a jury.

Viewing the testimony in the light most favorable to the plaintiff, and allowing all reasonable inferences in his favor, we think the demurrer to the evidence should have been overruled, and therefore the judgment of the court will be reversed, and the cause remanded for further proceedings.

**WISNER v. BOARD OF COM'RS OF  
BARBER COUNTY et al.**

(Supreme Court of Kansas. March 10, 1906.)  
**HIGHWAYS — ALTERATION — DEFECTIVE PETITION.**

A defective statement of the change prayed for will not render void a petition for the alteration of a public road, where, notwithstanding such defect, the purpose of the petition can be gathered from the language used.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, § 240.]

(Syllabus by the Court.)

Error from District Court, Barber County; P. B. Gillett, Judge.

Proceedings by the board of county commissioners of Barber county, Kansas, and J. H. Light, for the alteration of a highway. From a judgment of the district court, holding the petition for the alteration sufficient, Sarah E. Wisner brings error. Affirmed.

Noble & Tincher, for plaintiff in error. C. C. Coleman, Atty. Gen., and Samuel Griffin, for defendants in error.

**MASON, J.** A petition was presented to the commissioners of Barber county for the alteration of a highway. Viewers were appointed, and upon their report the board ordered the desired change. Mrs. Sarah E. Wisner, a landowner whose interests were affected, filed a petition in error in the district court attacking the validity of the proceedings upon the ground that the road petition was void and conferred no jurisdiction on the county board for the reason that it did not intelligibly indicate what action the petitioners wished to have taken. The district court held that the petition was sufficient, and rendered judgment accordingly. Mrs. Wisner prosecutes error.

The road petition in question reads as follows: "The undersigned petitioners, householders of the county of Barber, state of Kansas, and residing in the vicinity of the road herein prayed for, respectfully petition your honorable body to cause to be reviewed, altered, and changed, the following described road, viz.: Road No. 141—Commencing at the southeast corner of the southwest quarter (¼) of the southwest quarter (¼) of section three (3) township thirty-two (32) south of range (10) west of the sixty P. M., thence north on quarter line according to the Tweedale survey of 1884 to intersect original road, No. 141, said road to be forty feet wide. And your petitioners will, as in duty bound, ever pray," etc.

The defendant in error maintains that the obvious meaning of this is that the petitioners ask that road 141 be changed so as to conform to the description given. The plaintiff in error insists that to have that effect the petition should have employed some such formula as the following: "To cause to be reviewed, altered, and changed the following numbered road, viz., road No. 141, so that said

road shall be located as follows: Commencing," etc. Clearness would doubtless have been promoted by such a statement, but we think the form that was used was capable of being construed to mean the same thing. It is plain that such is the meaning intended, or that there is an entire failure to express any intelligible idea. The effort should of course be to give force to the language employed if possible, rather than to reject it as meaningless. We think the court properly held that the petition was sufficient.

The district court dismissed the petition in error instead of affirming the action of the commissioners, but, as it is manifest from the record that the ruling was made upon the merits of the controversy, the form of the order is not regarded as material.

The judgment is affirmed. All the Justices concurring.

(73 Kan. 279)

**SAMP et al. v. BRADEN.**

(Supreme Court of Kansas. March 10, 1906.)

**ERROR, WRIT OF—DISTINCT JUDGMENTS—JURISDICTION.**

Where several and distinct judgments, each for less than \$100, are rendered against different defendants upon their individual liabilities as stockholders in a corporation, they cannot, by aggregating the judgments and uniting in a proceeding in error, give the Supreme Court jurisdiction, although the judgments were rendered in the same action and involved common questions of law.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 276-279.]

(Syllabus by the Court.)

Error from District Court, Allen County; Travis Morse, Judge pro tem.

Action by S. H. Braden, receiver of the Elsmore Creamery Company, against Fred Samp and Rudolph Kamping. Judgment for plaintiff, defendants bring error. Dismissed.

Chris Ritter and W. A. Choguill, for plaintiffs in error. McClain & Apt (Oscar Foust, of counsel), for defendant in error.

JOHNSON, C. J. S. H. Braden, as receiver of the Elsmore Creamery Company, brought an action against Fred Samp and Rudolph Kamping to recover upon their individual liabilities as stockholders of that company. They contested their liability upon various grounds, but the court found in favor of the plaintiff, and rendered judgment against Rudolph Kamping for \$100, and another judgment against Fred Samp for \$100. Although the judgments were embraced in a single entry they were distinct, and were founded upon single shares of stock, each of the face value of \$100. Both defendants joined in this proceeding, asking for a reversal of the judgments, but the right to a review is challenged on the ground that the amount or value in controversy is not sufficient to give the court jurisdiction. Under the Code the appellate jurisdiction of the

court cannot be exercised in cases of this character "unless the amount or value in controversy, exclusive of costs, exceeds \$100." Code Civ. Proc. § 542. Neither of the judgments exceeds \$100, and the question arises, can the defendants by uniting in one proceeding and aggregating their judgments confer jurisdiction upon this court? There was no joint liability of the defendants, nor is there any unity in the judgments. While both are in favor of the same plaintiff, and were rendered in the same action, each is based upon an independent and individual liability, and they stand as distinct and separate as if they had been awarded in different actions against each defendant. Neither defendant is concerned whether the judgment against the other is affirmed or reversed, nor would the compromise or settlement of a judgment by one defendant affect the liability of the other. Either one might settle the judgment against himself without the consent of the other, and if he did so, it would be clear that there would be no jurisdiction to review the remaining judgment. While these judgments grow out of the same corporate transactions, and involve some common questions of law, they are not tied together by any common interest, and they must be separately enforced. As to each defendant the judgment against him fixes the amount or value in controversy; and, since neither judgment is sufficient in amount to authorize a review, jurisdiction cannot be obtained by the defendants aggregating judgments which are several and distinct. *Richmond v. Brumme*, 52 Kan. 247, 34 Pac. 783; *Stinson v. Cook*, 53 Kan. 179, 35 Pac. 1118; *McClelland v. Cragun*, 54 Kan. 599, 38 Pac. 776; *Zable v. Harris*, 82 Ky. 473; *Oswald v. Morris*, 92 Ky. 48, 17 S. W. 167; *Henderson v. Wadsworth*, 115 U. S. 264, 6 Sup. Ct. 40, 29 L. Ed. 377; *Hassall v. Wilcox*, 115 U. S. 598, 6 Sup. Ct. 189, 29 L. Ed. 504; *Merritt v. Hozey*, 4 Rob. (La.) 319; *State National Bank v. Allen*, 39 La. Ann. 806, 2 South. 600; *Samson's Estate*, 201 Pa. 591, 51 Atl. 325; *Davis v. Upham*, 191 Ill. 372, 61 N. E. 76.

The proceeding in error will be dismissed. All the Justices concurring.

(73 Kan. 281)

**CULLISON v. CULLISON.**

(Supreme Court of Kansas. March 10, 1906.)

**DIVORCE—LIMITATIONS.**

The general statutes of limitations of this state have no application to actions for divorce.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 232.]

(Syllabus by the Court.)

Error from District Court, Stafford County; J. W. Brinckerhoff, Judge.

Action by Joseph Cullison against Amanda Cullison. Judgment for defendant, and plaintiff brings error. Reversed.

Israel Moore & Co., for plaintiff in error.  
Paul R. Nagle, for defendant in error.

GREENE, J. The plaintiff in error brought his action for divorce alleging extreme cruelty. When he had introduced his evidence, the court sustained a demurrer thereto on the ground that his cause of action was barred by the statute of limitations. It is agreed that the alleged cruelty and the separation occurred March 12, 1897, and the petition for divorce was filed August 6, 1904. The attorneys are to be complimented for the brevity of the record. The case-made, the certificate of the judge thereto, and the filing of the clerk of the district court, together with the entry of appearance herein, cover less than one page, and present clearly all the questions in the case.

The law of divorce has been treated in this state as a separate subject, and article 28 of chapter 80 of the General Statutes of 1901 enumerates the causes for which divorces may be granted and the procedure therein. With the exception of the manner of obtaining service of summons, no reference is made, directly or impliedly, to other provisions of the Code. The article contains no limitations upon the time within which the action may be commenced. The general statutes of limitations either specifically name the different causes of action to which the limitations apply or define the nature of such causes, so that the different limitations and the causes to which they apply are easily understood. In these statutes none of the causes for divorce are specifically named, nor can any of such causes be classified with those which are defined in the statute. Some states have fixed the time within which an action for divorce may be commenced after the offense. With few exceptions, these statutes are generally applied to adultery. Independently of the statute, long delay in commencing the action has frequently been taken into account in determining the sincerity of the party, but it has always been held a subject of explanation, and has never been held to be a bar. Bishop on Marriage, Divorce, and Separation, vol. 2, c. 12.

The judgment is reversed. All the Justices concurring.

#### ZIBOLD et al. v. RENEER.

(Supreme Court of Kansas. March 10, 1906.)

##### 1. INTOXICATING LIQUORS—CIVIL DAMAGE SUIT—REMOTE AND PROXIMATE INJURIES.

Under section 2465 of the General Statutes of 1901, if a wife be injured in her means of support as the result of an act committed by her intoxicated husband, the person who shall have sold or given to him the liquors, the use of which shall have produced the intoxication, will be liable to her in damages. This statute creates a cause of action unknown to the common law, and authorizes a recovery for both proximate and remote injuries.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 454.]

##### 2. SAME—PETITION—CONSTRUCTION.

Where, in an action by a wife for loss of means of support against one who is claimed to have sold her husband intoxicating liquors, by the use of which he became intoxicated, it is alleged in the petition that, while so intoxicated, he committed a homicide, was convicted of murder in the first degree, and sentenced to death and confinement in the penitentiary, until such time as an order should be issued by the Governor for his execution, the allegation that he was convicted of murder in the first degree is not, as a matter of law, equivalent to an allegation that he was not intoxicated when he committed the homicide.

(Syllabus by the Court.)

Error from District Court, Atchison County; B. F. Hudson, Judge.

Action by Ruth Reneer against Rosina Zibold and Emma Haegelin. Judgment for plaintiff, and defendants bring error. Affirmed.

Waggener, Doster & Orr, for plaintiffs in error. C. D. Walker and J. L. Berry, for defendant in error.

GREENE, J. Ruth Reneer obtained a judgment against Rosina Zibold and Emma Haegelin upon a petition stating, substantially, that she is the wife of William Douglas Reneer; that the defendants were partners engaged in the manufacture and sale of intoxicating liquors, especially of beer, near the southwest part of the limits of the city of Atchison; that on Sunday, June 3, 1900, the defendants and their authorized agents, Carl Sheele and Kelly Haegelin, at the brewery of the defendants, unlawfully sold, furnished, and gave to plaintiff's husband, and J. Burchart, and O. T. Oathout, quantities of beer, which they drank, thereby becoming intoxicated and being made boisterous, quarrelsome, and wholly indifferent and oblivious to conditions surrounding them; that while in this condition William D. Reneer shot and instantly killed Burchart and Oathout; that in consequence thereof he was informed against, tried, and convicted of murder in the first degree, and was on the 15th day of December, 1900, sentenced to death, and committed to the penitentiary, there to be confined and kept at hard labor until his execution upon a warrant of the Governor of the state; that he still remains so confined, and will ever continue to be, until he shall be executed. A statement follows concerning the earning capacity of William D. Reneer, and his age, and the plaintiff's dependence upon his labor and personal earnings for her means of support, of which she was deprived as a result of the intoxication of her husband produced by the use of the beer so furnished by the defendant to him. A demurrer was interposed to this petition, which was overruled. A trial was had, and a verdict and judgment rendered for the plaintiff in the sum of

\$5,000. This proceeding is prosecuted to reverse the judgment.

Several assignments of error are argued at length in the briefs. The two vital questions, however, are presented by the demurrer to the petition. It is contended: First, that the petition shows upon its face that the sale of the intoxicating liquors by the defendants to the plaintiff's husband was not the direct and proximate cause of her loss; second, that the petition states that Reneer was convicted of murder in the first degree for the killing of Burchart and Oathout, which is conclusive that he was not intoxicated when he committed the homicide; and therefore the act of the defendants in furnishing the intoxicating liquors was not the remote cause of plaintiff's loss of means of support.

There is no principle better settled at common law than that recoverable damages must be the proximate result of the wrongful act complained of, or that the wrongful act complained of must be the immediate and proximate cause of the injury for which a recovery is sought. Assuming that if the plaintiff be confined to this common-law rule she cannot succeed in her action, the demurrer to the petition should have been sustained, because the sale of the intoxicating liquors to Reneer and his intoxication from the use thereof were not the immediate and direct cause of the plaintiff's loss. The murder, arrest, trial, conviction, and sentence, resulting in the confinement of her husband in the penitentiary, constitutes an independent intervening cause, which was the proximate cause of her loss of support. Under the common-law rule the furnishing of the intoxicating liquor was only the cause of the cause. The statute under which plaintiff seeks to recover reads: "Every wife, \* \* \* who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of intoxication, habitual or otherwise, \* \* \* shall have a right of action, in his or her own name against any person, who shall by selling, bartering, or giving intoxicating liquors, have caused the intoxication of such person for all damages, actually sustained, as well as for exemplary damages; and a married woman shall have the right to bring suits, prosecute and control the same, and the amount recovered, the same as if unmarried. \* \* \*" Gen. St. 1901, § 2465.

Similar statutory provisions are found in several of the states, but the decisions of the courts construing them are not in harmony on the proposition contended for by plaintiff in error. By the act of February 27, 1873, regulating the sale of intoxicating liquors, the Indiana statute provided: "In addition to the remedy and right of action provided for in section

eight of this act, every husband, wife, \* \* \* or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, \* \* \* shall have a right of action \* \* \* against any person, or persons who shall, by selling, bartering, or giving away intoxicating liquors have caused the intoxication, in whole or in part, of such person." Laws 1873, p. 151, c. 59, § 12. In the case of *Krach et al. v. Heilman*, 53 Ind. 517, *Krach* sold and furnished intoxicating liquors to *Heilman*, of which he drank until he became so intoxicated that he was compelled to lie down in the bottom of his wagon while returning home. A barrel of salt in the wagon fell upon him causing his death. His widow brought an action to recover damages for her loss of means of support, and the court held that she could not recover because the selling of the intoxicating liquors to *Heilman* was not the immediate and proximate cause of the plaintiff's loss. It was said in the opinion (page 523): "The rule of law is that the immediate, and not the remote, cause of an event is regarded." The court's attention does not appear to have been turned to the statute under which the right of action was given, nor does there appear to have been any attempt to discover its meaning. No reference is made to the provision of the statute which gave the cause of action, nor any attempt made to construe it, or give its language any meaning, except to determine that it created a new cause of action. The doctrine of this case was followed in *Collier v. Early*, 54 Ind. 559, and in *Backes v. Dant*, 55 Ind. 181, without comment and without any reference to the statute or to its application to such actions. Subsequently, in the case of *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42, the court criticised *Krach v. Heilman*, supra, and the cases following it, in this language: "It is difficult, if not impossible, to reconcile the doctrine of the case under immediate mention with the earlier cases of *Fountain v. Draper*, supra [49 Ind. 441], *English v. Beard*, supra [51 Ind. 489], and *Barnaby v. Wood*, supra [50 Ind. 405], or the later one of *Schlosser v. State ex rel.*, 55 Ind. 82. Nor has the doctrine anywhere found favor; on the contrary, it has been disapproved." Page 533 of 55 Ind. (44 Am. Rep. 42). In the later case of *Homire v. Halfman*, 156 Ind. 470, 60 N. E. 154, the defendant sold intoxicating liquor to plaintiff's husband by the use of which he became intoxicated, and while intoxicated shot and killed *Seth Nense*, for which he was convicted of murder and confined in the penitentiary. The action was to recover damages for loss of support under a statute somewhat different in form, but in substance and effect identical with the one before the court in

*Krach v. Hellman*, *supra*. A recovery was had, and the court quoted and relied upon the rule of construction adopted in *Beers v. Walhizer*, 43 Hun, 254, *infra*. From an examination of these cases it will be seen that the common-law rule of recovery announced in *Krach et al. v. Hellman*, *supra*, is not now the law in Indiana. The Indiana statute is worded like our own, except that ours uses the words "in consequence of such intoxication," where the Indiana statute uses the words "on account of the use of such intoxicating liquors so sold."

Our attention is also called to the cases of *Shugart v. Egan*, 83 Ill. 56, 23 Am. Rep. 359, *Schmidt et al. v. Mitchell*, 84 Ill. 195, 25 Am. Rep. 446, and *Schulte v. Schleeper*, 210 Ill. 357, 71 N. E. 325, wherein that court, in construing a statute substantially like our own, held that the furnishing of the intoxicating liquor must be the proximate cause of the injury or loss for which a recovery is sought, or, in other words, that the common-law rule was not changed by the statute. It is probable that there are other states which have adopted the Illinois rule of construction, and, while such precedents are of great weight, the reasoning is neither convincing nor satisfactory. The Legislature created a right of action unknown to the common law. In creating this new right, it could, and did, extend the rule to include consequential and remote damages.

The excessive use of intoxicating liquors as a beverage is an unmixed evil. The only purpose accomplished by it is to breed and propagate vice. The legislative shafts have been leveled at this practice in nearly if not every state, and in almost every conceivable manner which looked toward its regulation, control, or entire suppression. It is quite in accord with this policy that Kansas passed the statute invoked by the defendant in error. It was known to the Legislature, as it is to all other persons, that the use of intoxicating liquors as a beverage makes drunkards; that an intoxicated person is incapable of caring for himself, is always in danger of being injured, and is likely to inflict injury upon others, at the cost of his liberty, possibly his life; that he habitually neglects his business and family; that the harm resulting from the excessive use of intoxicating liquors always falls most pitilessly upon the dependents of the user, not infrequently pauperizing himself and family. The idea naturally suggested itself to the Legislature that, if the sellers of intoxicants were made liable to those who should sustain injury to person or property or means of support, by an intoxicated person or in consequence of intoxication, the hazard would be so great that fewer persons would engage in the business, and those who would engage in it would exercise more caution. The Legislature therefore gave a cause of action and

created a liability for these injuries where none existed at common law. It is apparent that it was the intention of the Legislature to make this remedy effective and of practical utility, and that its enforcement should not be hampered by technical common-law rules. It was intended to provide a remedy against the persons furnishing the liquor which should produce the intoxication, where the injuries sustained in person, property, or means of support should result, in whole or in part, from such intoxication. Any other construction would, in a large measure, defeat the object of the statute. Persons who are openly engaged in a business prohibited by law, the results of which are to enrich themselves and make paupers and criminals of others, have no complaint against a liberal construction of a statute intended to make them responsible in civil damages to those who have been injured as a result of the illegal traffic in which they are engaged.

This court does not stand alone in this construction of the statute. There are many cases which hold that these statutes, creating a new cause of action, by their terms clearly eliminate the common-law rule of proximate cause, and hold that the plaintiff may recover where the loss sustained is the result of intoxication induced in whole or in part by liquors furnished by the defendant. Among these, the leading case is *Beers v. Walhizer*, *supra*. The statute under consideration was substantially like ours. The facts upon which the plaintiff relied were that the defendant sold her husband intoxicating liquors, the use of which caused him to become intoxicated, and while intoxicated and in consequence thereof he shot and killed one Barfield, for which he was arrested, convicted, and sentenced to a term of years in the penitentiary. The contention there, as here, was that the selling of the intoxicating liquor was not the proximate cause of the loss sustained by the plaintiff. It was said in the opinion: "Under the act it is necessary that two facts should concur, besides the sale or gift of the liquor by the defendant, to constitute a cause of action, to wit, intoxication resulting from its use, in whole or in part, and the loss of the means of support by the plaintiff in consequence of such intoxication. The statute requires nothing more. The act itself establishes a rule of evidence, applicable to and controlling in all cases arising under its provisions, which in some respects is new, and has produced a radical change of the common-law rule. The statute makes no distinction whether the loss of the means of support is the direct or remote result of the intoxication. It only requires that it should be established that the loss of the means of support is the result of such intoxication." This doctrine was approved and followed in *Homire v. Halfman*, *supra*. In *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323, the court said: "The Legislature \* \* \* may change the rule of the common law, which

looks only to the proximate cause of the mischief, in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it. This is what the Legislature has done in the act of 1873." In *Volans v. Owen et al.*, 74 N. Y. 526, 529, 30 Am. Rep. 337, it was remarked: "Both direct and consequential injuries are plainly included in the remedy given, and the Legislature, by giving a right of action for injury to 'means of support'—a cause of action unknown to the common law—evidently intended to create a new ground and right of action." In *Mead v. Stratton et al.*, 87 N. Y. 493, 41 Am. Rep. 386, it was held that the statute provided for a recovery by action for injuries to person or property, or means of support, without any restriction whatever, and that both direct and consequential injuries were included. It is evident that the Legislature intended to go, in such a case, far beyond anything known to the common law, and to provide a remedy for injuries occasioned by one who was instrumental in producing, or who caused, such intoxication. The same interpretation was placed upon the statute in *Neu v. McKechnie et al.*, 95 N. Y. 632, 47 Am. Rep. 89.

The contention that the allegation in the petition that Reneer was convicted of murder in the first degree is conclusive that he was not intoxicated when he committed the homicide cannot be sustained. The reasoning upon this proposition is that one cannot be convicted of murder in the first degree who is intoxicated at the time of the commission of the homicide. Intoxication is not of itself a defense to a charge of murder in the first degree. It does not follow that, because a man is intoxicated, his mind is necessarily so enfeebled thereby that he is incapable of deliberating or forming a purpose. One may be intoxicated and entertain and act from malice. He may be intoxicated and entertain a determination to commit murder. Indeed, the intoxication may suggest the murderous thought. For a person to be too drunk to entertain an intent to kill it would seem that he would have to be too drunk to entertain an intent to shoot. *State v. White*, 14 Kan. 538; *State v. Mowry*, 37 Kan. 369, 15 Pac. 282; *State v. O'Neil*, 51 Kan. 651, 33 Pac. 287. 24 L. R. A. 555.

The other assignments of error have been examined, and nothing prejudicial to the plaintiffs in error is found.

The judgment is affirmed. All the Justices concurring.

#### STATE v. LEARNED.

(Supreme Court of Kansas. March 10, 1906.)

##### 1. CRIMINAL LAW—FORMER CONVICTION—DISTINCT OFFENSE.

A plea in bar of prosecution for incest, by a man, which sets forth that he has been tried for and acquitted of the crime of statu-

tory rape upon the same woman for the same act is not a good plea.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 403.]

##### 2. INCEST—DEFENSES.

Neither, in such case, is it a good plea in bar nor a sufficient ground for quashing the information, that the action against the woman, *particeps criminis*, has, on request of the county attorney, been dismissed and barred as to her, for the purpose of making her a witness for the state.

##### 3. SAME—WHAT CONSTITUTES.

A man may be guilty of incest with a girl under 18 years of age.

##### 4. SAME—INFORMATION—SUFFICIENCY.

A count of an information which charges that at a certain time and place, within the jurisdiction of the court, a man (naming him) and a woman (naming her), he being a married man and the grandfather of the woman and she being an unmarried woman and being his granddaughter, "did then and there unlawfully, feloniously and incestuously have sexual intercourse with each other" is sufficient, and it is not requisite to allege that they did "commit adultery with each other" or did "commit fornication with each other."

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Incest, § 9.]

(Syllabus by the Court.)

Appeal from District Court, Stafford County; J. W. Brinckerhoff, Judge.

William Learned was indicted for crime. An order to quash information as to certain counts sustained, and the state appeals. Reversed.

On the 20th day of April, 1905, the county attorney of Stafford county, Kan., filed an information in the district court against W. M. Learned and Bertha M. Austin charging or attempting to charge both of said defendants jointly with incest with each other. There were six counts in the information. The first count charged the offense on the — day of July, 1903, the second count on the — day of November, 1903, the third count on the — day of November, 1903. The fourth and fifth counts charged the offenses having been committed on the — day of February, 1904, and subsequent to the 12th day of the month. The sixth count alleged the offense on the — day of June, 1904. Each count, after the first, charges that the offense therein alleged is separate and distinct from any offense charged in any other count in said information. At the October, 1905, term of court, said case being called, the county attorney requested the court to discharge Bertha M. Austin for the purpose of using her as a witness in said action which request was allowed. She was discharged, and the action was abated as to her. Thereupon the defendant, Learned, filed his plea in bar to the first five counts of said information and, for grounds thereof, alleged that prior to the 8th day of February, 1905, an information had been duly filed against him in said district court of Stafford county, charging him with the crime of statutory rape against the person of said Bertha M. Austin; that on the 8th day of February,

1905, said court having full jurisdiction of the premises, he had been tried by the jury on said charge therein and was acquitted; that the offense of which he had been acquitted was the same as the offenses set out in counts 1, 2, 3, 4, and 5, and that he should not again be put in jeopardy so far as said counts were concerned. The state filed its answer and admitted the trial and acquittal of Learned, as alleged, but alleged that only one offense was charged in the former action, and that it was not the same offense as charged in counts 1, 2, 3, 4, and 5, in this action. That said former offense of which Learned was acquitted, and the five offenses charged in the information in question were not the same in law nor in fact, and that the only matter involved in said former action was whether said Learned had sexual intercourse with Bertha M. Austin prior to the 12th day of February, 1904, and subsequently to the 1st day of January, 1904. It was also alleged in said answer and admitted by the defendant, Learned, that Bertha M. Austin became 18 years of age on the 12th day of February, 1904. To this answer the defendant, Learned, filed a general demurrer. On the hearing thereof the court sustained said demurrer so far as the same related to counts 1, 2, and 3 of the information, and abated the actions as to said counts and overruled the same as to counts 4 and 5. The state reserved the question as to the ruling on counts 1, 2, and 3. Thereupon the defendant, Learned, filed his motion to quash the information as to counts 4, 5, and 6, which motion was by the court sustained, and to which ruling the state excepted, and reserved the question, and, being tendered leave to amend the information, elected to stand thereon, and brings the case to this court for review.

C. C. Coleman, Atty. Gen., G. W. Alford, T. W. Moseley, R. H. Beals, and C. G. Webb, for the State. Fairchild & Lewis and H. C. Sluss, for appellee.

SMITH, J. (after stating the facts). The distinctive ingredient of the crime of incest is the relationship of the parties while the distinctive ingredient of the crime of statutory rape is the youthfulness of the female. The evidence necessary to convict of incest would not be sufficient to convict of statutory rape, as there need be no evidence as to the age of the female. On the other hand, evidence that would convict of statutory rape would not suffice to convict of incest as the relationship is wanting. Hence the crimes, although committed by the same act, are different crimes, and a prosecution for one is no bar to a prosecution for the other. *State v. Patterson*, 66 Kan. 447, 71 Pac. 860.

The plea in bar as to the first five counts of the information and also, subsequently, the motion to quash the last three counts are based, in part, upon the dismissal and barring of the action as to Bertha M. Austin, which was done for the purpose of using her as a

witness against her codefendant, Learned. This ground is untenable. The two, particeps criminis, are jointly charged, and one may be tried and convicted without the other. This is held to be the law in states, even where the concurrent consent of both parties is essential to constitute the crime. 16 Am. & Eng. Encyc. of L., 135. The case of the *State v. Hook*, 4 Kan. App. 451, 46 Pac. 44, which holds to the contrary is disapproved. Again it is urged that the plea in bar as to the first three counts of the information, at least, should have been sustained as the answer to the plea admitted that the girl was under 18 years of age at the times each of these offenses were alleged to have been committed, and that, by our statute, an essential ingredient of the offense is the joint criminality, and that it can be committed only by the concurrent consent of the man and the woman: that by the laws of this state a female under 18 years of age is incapable of consenting to sexual intercourse. The Supreme Courts of several states have held that the assent of both to the act is essential, while in several other states it is held that the consent of both is not essential. 16 Am. & Eng. Encyc. of L., 135. In all of the states which hold the assent of both is not essential, the statutes are very different from ours. No statute of any state has been found by the writer which seems more strongly to imply that the joint consent is requisite than our own. Our statute denounces the penalty against both equally. The statutes of some of the states do not. The inquiry then arises, can a girl under the age of 18 years consent to the act of sexual intercourse, with one within the degrees of relationship within which marriage is incestuous and void, and thus become guilty of incest? If not, why not? There is no statutory provision and no common-law rule to the contrary. Section 2016, General Statutes of 1901, commonly called the age of consent law, simply provides, "every person who shall be convicted of rape, either by carnally and unlawfully knowing any female under the age of 18 years or," etc. This does not disqualify the female under 18 years from consenting, but provides, in effect, that her consent is no defense; that notwithstanding her consent the act, on the part of the man, constitutes the crime of rape. *State v. Woods*, 49 Kan. 237, 30 Pac. 520; *State v. White*, 44 Kan. 520, 25 Pac. 33. We answer the above question in the affirmative. A female under the age of 18 years may be guilty of the crime of incest.

The only question remaining is whether the motion to quash counts 4, 5, and 6, should have been sustained on the ground that said counts do not state the offense "with such degree of certainty that the court may pronounce judgment upon conviction, according to the right of the case." We answer this question in the negative. The statute (section 2219, Gen. St. 1901) reads: "Persons within the degrees of consanguinity within

which marriages are by law declared to be incestuous and void \* \* \* who shall commit adultery or fornication with each other \* \* \* shall, upon conviction, be punished," etc. These counts of the information in addition to the time and venue of the alleged offense and the relationship of the parties, charged: "That \* \* \* one William Learned, being then and there a married man, and one Bertha M. Austin, being then and there an unmarried female, did, then and there unlawfully, feloniously and incestuously have sexual intercourse with each other." It is said, to be requisite, the charge must be that they committed adultery with each other, or that they committed fornication with each other. It has been so frequently decided by this court that it is not requisite that the exact language of the statute be used, but that other language of like import may be employed; that the citation of the cases is unnecessary. The language used is the exact equivalent of the statutory words, and each of these counts contain "a statement of the facts constituting the offense, in plain and concise language without repetition." Section 5545, Gen. St. 1901. "If a married man have criminal intercourse with his own daughter, she being a single woman, he is guilty of incestuous adultery, and she of incestuous fornication." *Cook v. State of Georgia*, 11 Ga. 53, 56 Am. Dec. 410.

The order of the district court sustaining the plea in bar as to counts 1, 2, and 3, the judgment thereon, the order sustaining the motion to quash as to counts 4, 5, and 6, with the order of dismissal of the action are vacated, and the case is remanded for further proceedings. All the Justices concurring.

ST. LOUIS & S. F. R. CO. v. MORRISON.  
(Supreme Court of Kansas, March 10, 1906.)

1. RAILROADS — FRIGHTENING HORSES—PRIVATE CROSSING.

Assuming that, where a private road crosses a railroad track by means of a subway, the situation is such as to authorize a court to submit to a jury the question whether the railroad company owes to one about to use or actually using such crossing a duty to give warning of the approach of a train, the omission to give such warning cannot be made the basis of a recovery for injuries received in a runaway by one whose horse is frightened by a passing train, after he has driven through the subway and is traveling upon a road parallel with the track, although he is but 50 feet from the crossing.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1241-1244.]

2. SAME—EVIDENCE.

In the case stated in the foregoing paragraph, the nonliability of the company is not affected by the further fact that the place where the plaintiff's horse was frightened was rendered one of peculiar danger, because the road was there confined in a narrow lane by a barbed wire fence paralleling the railroad.

(Syllabus by the Court.)

Error from District Court, Butler County,  
G. P. Aikman, Judge.

Action by M. H. Morrison against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

L. F. Parker and W. F. Evans, for plaintiff in error. T. A. Kramer, for defendant in error.

MASON, J. A horse which M. H. Morrison was driving became frightened at a passing train of the St. Louis & San Francisco Railroad Company and ran away. Mr. Morrison was thrown out of his buggy and seriously injured. He sued the railroad company and recovered a judgment for \$1,925, from which the defendant prosecutes error. The only question necessary to be considered is whether there was any evidence tending to show that the injury was the result of the breach of any duty which the company owed to the plaintiff.

In the vicinity of the place where the injury occurred the railroad track runs north and south and crosses a small stream known as the south branch of Hickory creek. Two wagon roads on the east side of the railroad, one coming from the north, the other from the southeast, unite at this point, and, paralleling the bed of the stream, pass under the railroad track and immediately turn south. These roads are not highways, but they have long been used by the owner of the land, his neighbors, and others to such an extent that ruts have been worn rendering them plainly visible. The railroad track south of the creek is straight for some 60 or 70 rods, and then turns and is hidden from sight by trees and bluffs. At the creek the wagon roads descend somewhat sharply to pass under the track, and from the low ground the view is cut off within 50 feet or so by the trees and the higher ground. On the west side of the railroad the wagon road runs south through a narrow lane, inclosed between the railroad on the one side and a barbed wire fence on the other. These conditions have existed for many years. On the day of the accident the plaintiff had business which rendered it desirable for him to make use of the crossing described. He drove toward it upon the road that comes up from the southeast. As he neared the railroad track, he listened for a train and looked down the track, as far south as it was visible. Not seeing or hearing anything to indicate the approach of a train, he drove under the track and turned south. He had just reached the high ground and entered the lane already described, and was pursuing his course south, being some 50 or 60 feet from the crossing, when a train going north passed him, frightening his horse and occasioning the injuries for which he asked damages. No whistle was blown or bell sounded as the train approached the crossing. The contention of the plaintiff is that the jury were warranted in concluding that the situation and surroundings of this crossing im-

posed a duty upon the company to have a signal given whenever a train approached it, and that the omission to give such a signal in this case was an act of negligence toward the plaintiff which caused his injury. The soundness of this contention constitutes the whole subject of inquiry. It is not claimed that any of the train crew knew of the situation of the plaintiff, but that they were chargeable with notice of the existence of the roads, and were bound to assume that there might be travelers at the crossing.

It is substantially conceded that the road was not of such a character as to be within the terms of the statute (section 1323, Gen. St. 1901), requiring a whistle to be sounded upon the approach of a locomotive to a public crossing. But it is insisted that, inasmuch as this crossing was so situated that one about to use it could not see far enough down the track to give him adequate warning of the coming of a train, the case falls within the rule stated in *Roach v. St. J. & I. R. Co.*, 55 Kan. 654, 41 Pac. 964, where it was held that whether it is negligence for an engineer to omit to give a signal near a private crossing is or may be a question for the determination of a jury. Whether this rule should ever be applied to any crossing, except where the wagon road and railroad track are upon the same grade, is a question upon which the authorities differ. In Massachusetts it is held that it should not, but in Pennsylvania and Kentucky the decisions are to the contrary. See *Favor v. Boston & Lowell Railroad Corporation*, 114 Mass. 350, 19 Am. Rep. 364; *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. 259, 98 Am. Dec. 346; *Rupard v. Chesapeake & O. R. Co.* (Ky.) 11 S. W. 70, 7 L. R. A. 316. In Wisconsin and in Georgia it is held that statutes requiring a whistle to be sounded whenever a locomotive approaches a public crossing have no application to any but grade crossings, for the reason that only in such cases is there any common use of the highway, or possibility of actual collision, although in both states it is recognized that the frightening of horses is one of the dangers intended to be guarded against by such statutes. See *Jensen v. C., St. P., M. & O. Ry. Co.*, 86 Wis. 589, 57 N. W. 359, 22 L. R. A. 680; *McElroy v. Ga., C. & N. Ry. Co.* (Ga.) 25 S. E. 439; *Ransom v. C., St. P., M. & O. Ry. Co.*, 62 Wis. 178, 22 N. W. 147, 51 Am. Rep. 718; *Bowen v. Gainesville, J. & S. R. Co.*, 95 Ga. 688, 22 S. E. 695. See, also, in this connection, *Skinner v. N. Y. O. & W. R. Co.* (Sup.) 64 N. Y. Supp. 325. Whether the railroad company may be held in any case to owe a duty to one who is using or is about to use a private subway under its track, to give timely notice of the approach of a train, need not now be determined, as we conclude that, however that question might be decided, no liability against the defendant is shown in this case, for the reason that at the time of the injury the plaintiff had crossed under

the railroad track and was traveling upon a road parallel to it.

It is true that, under statutes requiring signals to be given upon the approach of a train to a public crossing, it has been held, although there is some conflict in the decisions, that the railroad company owes the duty to give such warning not only to persons about to use or actually using the crossing, but also to those traveling upon the highway in the vicinity. But in these cases the liability of the railroad is based upon the very terms of the statute; the theory adopted being that the violation of a positive duty enjoined by the Legislature gives a cause of action to any one who suffers injury by reason of such violation and whose protection may reasonably be supposed to have been to any extent within the legislative contemplation. It is not to be inferred from these decisions that, in the absence of a statute, or in the case of a private crossing, to which the statute does not apply, the same doctrine would justify a court or jury in awarding damages to one whose horse was frightened by a train elsewhere than at a crossing. In the present case any duty that the railroad company may have owed the plaintiff did not arise from the fact that he was using a road which approached near to the track, but from his use of a road which actually crossed it, although at a different grade. It is obvious that, where a highway lies near to a railroad, there is some danger of accidents resulting from horses being frightened by passing trains, and that this danger would be less if timely notice should be given of their approach. But, so far as we are aware, it has never been contended on this account that there was an obligation on the part of those operating trains to give any signal upon approaching a place where the highway and railroad track come close together without crossing. Where the road and track lie parallel for a considerable distance, this would be impracticable, as involving a continuous sounding of the whistle or ringing of the bell. This consideration does not constitute the reason for not exacting such a requirement, however. It could indeed have little application where a highway comes up to the railroad, and then turns sharply away again. In such a situation there might be sufficient reason for giving a signal to justify legislation compelling it, but to demand it, in the absence of such an enactment, would be to require too close a balancing of probabilities on the part of the employé in charge of the engine. The very sounding of the whistle involves an appreciable addition to the risk of frightening horses even at a considerable distance. The law reports show that claims against railroad companies for causing runaways by the giving of signals, if not as common as those based upon an omission to give them, are far from infrequent. It may be that the risk of an injury resulting from the horse of

a traveler being frightened by a train while actually using the crossing under the track was so great that, as against that risk, a jury might well say that it was incumbent upon the agents of the railroad company to give a signal of the approach of a train. If so, the duty resulted from the special danger at that very place, and not from the general danger involved in the proximity of the wagon road to the railroad track. The plaintiff, not having been injured by the only peril against which it could have been the duty of the trainmen to protect him by the giving of a warning, had no ground of recovery against the company.

In the argument some stress has been laid upon the fact that the place where the plaintiff's horse took fright was rendered one of peculiar danger by reason of the road's being confined to such narrow limits by the barbed wire fence. This was not a condition for which the defendant was in any way responsible. If such a condition existed elsewhere than near the crossing, it would not impose a duty to signal upon the approach of a train. It had no necessary connection with the crossing. Its existence in proximity thereto was purely incidental. The special and peculiar danger resulting from the placing of a fence outside of the road so near the track was not one of which the railroad company was required to take notice, and against which it could be required to guard by the giving of signals with reference thereto.

For the reasons stated the judgment is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.

# ELECTRIC RY., LIGHT & ICE CO. v. BRICKELL.

(Supreme Court of Kansas. March 10, 1906.)

## 1. TRIAL—DEMURRER TO EVIDENCE.

Where, in an action for damages, on account of personal injuries, the defendant demurs to the evidence of the plaintiff on the ground that it appears therefrom that the party injured was guilty of contributory negligence, it will not be deemed erroneous for the court to overrule such demurrer, if the facts justify a contrary conclusion.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 332, 333, 355, 356.]

## 2. PLEADING—ISSUES AND PROOF—EVIDENCE—ADMISSIBILITY.

Any evidence is admissible under a general denial which controverts the facts denied.

## 3. STREET RAILROADS—INJURY TO PERSON ON TRACK—EVIDENCE.

Where a person, while sitting on a railroad track, is run over and killed, under circumstances which seem to justify the inference of negligence, and the plaintiff, to rebut such inference, offers evidence to establish that the deceased had been subject to attacks of pleurisy which rendered her temporarily helpless, for the purpose of enabling the jury to infer therefrom that she was helpless when run over, such evidence is not subject to the objection that it bases one presumption upon another.

## 4. TRIAL—SPECIAL FINDINGS.

It is not error for a court to refuse to require a jury to make its answers to certain special findings of fact more specific, when such answers, if made as requested, would not differ in legal effect from those already made.

## 5. SAME—INSTRUCTIONS.

It is not error to refuse to give an instruction to the jury, when the instructions given embrace in legal effect all that is in the one refused.

(Syllabus by the Court.)

Error from District Court, Geary County; R. L. King, Judge.

Action by William B. Brickell against the Electric Railway, Light & Ice Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Humphrey & Humphrey, for plaintiff in error. Roark & Roark, Lee Monroe, and E. P. Hotchkiss, for defendant in error.

GRAVES, J. On April 3, 1903, Susan Brickell was run over by one of the cars belonging to the plaintiff in error, and killed. The administrator of her estate brought an action in the district court of Geary county, to recover damages, and obtained a judgment for \$2,000. The defendant railway company seeks to reverse the judgment by proceedings in error in this court.

Several assignments of error are presented, the principal and most important of which is the refusal of the court to sustain a demurrer to the evidence. It is urged that this demurrer should have been sustained for the reason that the evidence shows contributory negligence on the part of the deceased. In substance, the evidence upon this subject was as follows: The defendant, plaintiff in error here, operated an electric railway in Junction City, Kan. The deceased resided on a street along which the railway ran, and was acquainted with the speed and power of the cars operated thereon. She was a poor, hard working woman; she and her husband were addicted to the use of intoxicating liquor, but she is not shown to have ever been drunk; at the request of her husband she sometimes obtained liquor for him. Upon the evening of the injury she had been out on the street for some time, but it is not shown for what purpose; at the time she was struck by the car she was sitting or crouching on or near one of the rails of the track, at a place where there was a slight downgrade; how long she had been there, why she did not move to avoid the car, are questions not very clearly answered by the evidence; she had a bottle of whisky with her which was broken when she was injured. There was a feeble headlight on the car, and she might have seen it for a long distance before she was struck. The motorman says she looked up at him about the time she was run over and had a wild look in her eyes which he could never forget; she suffered from occasional attacks of pleurisy which rendered

her temporarily helpless. It does not appear that she had any disposition to commit suicide; ordinarily she was in good health, and in possession of her faculties. The injury occurred about 9 o'clock at night, when her husband was at home asleep. Upon these facts the defendant claims that although the injury was caused by its negligence, the deceased was guilty of contributory negligence which bars a recovery; and the court erred in submitting that question to the jury. Did the deceased intend to commit suicide? Was she so drunk as to be unable to realize danger or to roll over and avoid it? Or was she helpless on account of an attack of pleurisy? Was the "wild look in her eyes," which will never be forgotten by the motorman, the look of insanity, or the result of anguish from pain, and terror at the terrible death about to take place? There is some evidence tending to answer each of these inquiries in the affirmative. It seems eminently proper therefore to submit them to a jury. We are unable to say that the district court erred in overruling the demurrer.

It is further urged by the plaintiff in error that all of the evidence offered to show that the deceased had been subject to attacks of pleurisy, which at times rendered her helpless, was erroneously admitted. It is claimed to be irrelevant and immaterial under the issues, and is an attempt to base one presumption upon another. The defendant pleads contributory negligence on the part of the deceased, and alleges in substance, that she intentionally and deliberately placed herself on the track for the purpose of being run over, locating herself in a way to avoid discovery by the motorman. The plaintiff replies with a general denial. This is the issue. Under a general denial any evidence may be given which controverts the facts denied. 1 Enc. of Pl. & Prac. 817; *Davis v. McCrocklin*, 84 Kan. 218, 8 Pac. 196. The evidence objected to was intended to show that the deceased was not on the track intentionally, but was there involuntarily, and in a helpless condition. This, if true, directly disproved the averments of the answer, and was admissible. We do not think the objection that this evidence had the effect of placing one presumption upon another, is well taken. It was shown that the deceased was on the track when injured, but this fact unaided by any further fact or inference, proves nothing. She may have been there voluntarily, and remained there through indifference or reckless negligence. She may have been there involuntarily, and against her will. Being there she may have been unable to move out of the danger, although fully realizing it. What the real fact was in this respect, could only be determined by inference from the facts proven. To remove the presumption of negligence produced by inferences drawn from the evidence of the defendant,

the plaintiff offered proof that the deceased was subject to attacks of pleurisy, which rendered her temporarily helpless. From this fact, when established, the jury was expected to infer that at the time of the injury, the deceased was in a helpless condition from one of these attacks. If this fact was proved, and the inference justifiable, then from this evidence the legal deduction would follow that she was not chargeable with contributory negligence. The only presumption, or inference in the proposition is based upon an established fact and not upon another presumption.

It is also claimed that the court erred in refusing to require the jury to make more definite answers to certain findings of fact returned by it. The defendant presented 35 special findings of fact to the jury; among which were the following: "(6) Q. Was there any reason why she could not have got off the track in a second of time? A. Yes. (7) Q. If you answer the last preceding question, 'Yes,' state what that reason was. A. She was mentally and physically unable to move. (10) Q. Was there anything to prevent the deceased from seeing the car approaching in time to have got off the track? If there was state fully what. A. Either physical or mental ailment." The defendant moved the court to require the answers to 7 and 10 to be made more definite and certain, which request was as follows: "Said defendant, in the presence of the jury and before they have been discharged from the consideration of this case, moves the court to require the jury to return to the jury room and to direct the jury to answer questions Nos. 7 and 10 of the questions submitted by defendant more definitely and so as to show whether it was a mental or physical ailment and disability which affected the deceased and to show which it was." If the deceased was helpless, at the time of the injury, it is immaterial whether, such helplessness was the result of a mental or a physical cause. To have required the jury to specify which, would have been useless. The result would not have been affected thereby and therefore, we cannot say that this refusal of the court was erroneous.

Finally it is said the court erred in refusing to give an instruction to the jury which reads: "You are instructed that the burden of the proof is on the defendant to prove the contributory negligence of the deceased, unless you find the evidence of the plaintiff shows such contributory negligence, in which case the burden of showing the same is not on defendant." The court did give an instruction which reads: "The court instructs the jury, that the burden of proving contributory negligence on the part of the plaintiff is upon the defendant." It is claimed that the court by refusing to give the instruction requested, left the jury to be misled by the supposition that the burden

of proof, as defined by the court meant that all the evidence to be considered upon the subject of contributory negligence must have been given by the defendant. If the court had not fully met this complaint in its other instructions there would have been considerable force in the contention, but we think the instructions as a whole are unobjectionable. The court presented the question of contributory negligence quite fully and clearly to the jury, and stated repeatedly, "If you find and believe from the evidence," that Susan Brickell, etc., this was equivalent to saying that the jury must "find and believe" from the whole evidence in the case, and not from the evidence of either party.

After a careful examination of all the questions presented we are unable to find any material error. The judgment is affirmed. All the Justices concurring.

(73 Kan. 252)

**WAGNER v. ATCHISON, T. & S. F. RY. CO.**

(Supreme Court of Kansas. March 10, 1906.)

**1. APPEAL — REVIEW — MOTION FOR NEW TRIAL.**

It is not necessary to file a motion for a new trial before bringing to this court for review a decision sustaining a motion for judgment upon the pleadings and the opening statement of counsel, and sustaining an objection to the introduction of any evidence in the case.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1707-1712.]

**2. SAME.**

The case of *Gruble v. Ryus*, 23 Kan. 195, and other cases holding that a motion for a new trial is a prerequisite to a review of a decision sustaining a demurrer to evidence disapproved.

(Syllabus by the Court.)

Error from District Court, Kingman County; P. B. Gillett, Judge.

Action by J. F. Wagner against the Atchison, Topeka and Santa Fe Railway Company. Judgment for defendants, and plaintiff brings error. Dismissed.

C. W. Fairchild, for plaintiff in error.  
W. R. Smith, O. J. Wood, and Alfred A. Scott, for defendant in error.

**BURCH, J.** The defendant in error moves to dismiss this proceeding for want of a lawful case-made. When the cause came on for trial in the district court a jury was impaneled and sworn, and the plaintiff made a statement of his case and of the evidence by which he expected to sustain it. The defendant moved for judgment in its favor upon the pleadings and the plaintiff's statement. The plaintiff then asked and obtained leave to amend his reply. The amendment having been made, the defendant renewed its motion for judgment, and objected to the introduction of any testimony in the case. The motion and objection were both sustained and judgment was rendered against the plaintiff for costs. On the same day a

motion for a new trial was filed, which was overruled some 30 days later. When the motion for a new trial was disposed of an order was made extending the time for making and serving a case-made. If no motion for a new trial were necessary, the filing of such a motion did not enlarge the time within which an extension could be granted, and jurisdiction to make the order referred to was lost. *Atkins v. Nordyke Marmon Co.*, 60 Kan. 354, 56 Pac. 533. Section 306 of the Code of Civil Procedure contains the following provisions: "A new trial is a re-examination in the same court, of an issue of fact, after a verdict by a jury, report of a referee, or a decision by the court. The former verdict, report or decision shall be vacated, and a new trial granted on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party."

From this language it is plain that a motion for a new trial has no function to perform, unless an issue of fact has been fully determined, and the determination has been embodied in one of three specified forms. Not only must there have been a trial—a judicial examination of the issues of fact, but those issues must have been definitely settled by the verdict of a jury, or its equivalent—final and conclusive upon the facts unless vacated. Until that stage of the proceedings in an action has been reached, the condition precedent to the filing of a motion for a new trial does not arise, the single circumstance capable of creating a field for its operation has not occurred, the only subject-matter vulnerable to its attack does not exist. There is no such thing as a new trial of issues of law. Questions relating to the determination of those issues may be investigated by this court without previous re-examination by the trial court. Whenever there has been a trial, and a verdict or report, or decision on the facts, only those errors of law occurring at the trial which inhere in and vitiate the conclusion of fact need be called to the attention of the trial court by a motion for a new trial. If the facts have been agreed to, or if issues upon the facts have been eliminated, or if for any reason the controversy so shape itself that its determination depends upon a question of law, and the normal end of a trial of an issue of fact—a verdict, if tried by a jury; a report, if tried by a referee; a decision, if tried by the court—is not reached, there is no occasion to use a motion for a new trial. If it be claimed that error of law has been committed so that the proceeding has fallen short of a verdict, report, or decision upon the facts the aggrieved party may ask this court to secure to him, not a new trial, but a trial in the complete sense of the term; not a re-examination of the issues of fact, but an initial examination of the issues of fact which shall be continued until it reach the point of actual

consummation for such proceedings. There must always be a "former" verdict, report, or decision, determinative of issues of fact to be vacated before there can be a new trial, or any necessity for a motion for a new trial. When judgment is rendered on the pleadings there can be no trial of the issues of fact, no verdict, and no motion for a new trial is required. *Land Co. v. Muret*, 57 Kan. 192, 45 Pac. 589. When an objection to the introduction of evidence under the pleadings is sustained there can be no investigation, much less determination of the issues of fact; and a motion for a new trial is not necessary. *Water Supply Co. v. Dodge City*, 55 Kan. 60, 39 Pac. 219. If, in stating his case to the jury, a party assert or admit some fact which leads his opponent to move at once for judgment, or to object to the introduction of evidence, the question for determination is one of law precisely the same as if the fact had been pleaded. The purpose of the motion is to obviate calling the witnesses and proceeding with the examination of the issues of fact, if any remain, and if the motion be sustained, there can be no verdict or decision on the issues of fact. Therefore no motion for a new trial is needed in such cases, and the party aggrieved may proceed at once to take the preliminary steps essential to a review of the decision by this court. *Ritchie v. K. N. & D. Ry. Co.*, 55 Kan. 36, 48, 49, 50, 39 Pac. 718.

It must be conceded that the cases of *Gruble v. Ryus*, 23 Kan. 195; *Norris v. Evans*, 39 Kan. 668, 18 Pac. 818; *Lott v. K. C. F. S. & G. R. Co.*, 42 Kan. 294, 21 Pac. 1070, and others, holding that if a demurrer to evidence be sustained, a motion for a new trial is necessary to sustain a proceeding in error here, are opposed in principle to this decision. The opinion in *Gruble v. Ryus* takes into consideration nothing except the fact that error of law occurring at the trial is ground for a new trial. It entirely overlooks the provision of the statute deferring a motion for a new trial in all cases until after a verdict, or its equivalent, has been returned. A demurrer to evidence raises nothing but a question of law, and it is impossible for its decision to be a decision of the issues of fact. If sustained, it not only leaves the issues of fact undetermined, but it deprives the party against whose evidence it is directed of any opportunity of having them determined by a verdict, report, or decision; and it is only "after" a verdict, report, or decision, which, unless vacated, settles all controversy with reference to the issues of fact that a motion for the re-examination and settlement anew of those issues is in order. The suggestion in *Gruble v. Ryus* that an improper exclusion of evidence may have induced the ruling sustaining the demurrer to the evidence does not change the procedure which the statute plainly establishes. Both errors may be presented to this court without a prelim-

inary motion for a new trial in the district court because the abortive trial did not progress to a verdict, report, or decision on the issues of fact.

The cases which follow *Gruble v. Ryus*, as an authority, do not discuss the question involved. Although they cannot be overruled in this proceeding, they appear to be contrary to the spirit of the statute, and are incompatible with the present views of the court.

The motion to dismiss is sustained. All the Justices concurring.

#### GOODYEAR v. WILLIAMS et ux.

(Supreme Court of Kansas. March 10, 1906.)

##### 1. PRINCIPAL AND AGENT—EVIDENCE OF AGENCY.

In a foreclosure action, under a plea of payment through an alleged agent, where it appears that the notes and coupons were payable at a certain bank, and that the defendant paid the same to a third person in no way connected with said bank, and before the principal note became due, and that the alleged agent, at the times of payment, had possession of neither the coupons nor the note, it is error to admit as evidence of the controverted agency any of the following: (1) Statements of the alleged agent, made at the time of the execution of the papers, without the knowledge of the mortgagee, that the interest coupons might be paid to him; (2) letters written by the plaintiff to the alleged agent, and which relate only to specific claims against other persons, and of which letters the defendant had no knowledge at or before the payment; (3) entries in a loan register, not a book of accounts, kept by the alleged agent, and of which neither the plaintiff nor defendant had any knowledge at or prior to the payment.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 37-40.]

##### 2. SAME—PRESUMPTIONS.

Where a debtor delivers money to a third person for the purpose of paying a promissory note which is not due, and such person has not the note in his possession, the presumption is that the person so receiving the money does so, not as the agent of the creditor, but as agent of the debtor. This presumption can only be overcome and the converse established by evidence to the contrary.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 36.]

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by Joe A. Goodyear against F. A. Williams and Alice Williams. Judgment for defendants, and plaintiff brings error. Reversed.

The plaintiff in error commenced this action in the district court of Sedgwick county to recover upon a promissory note and coupons and to foreclose a real estate mortgage given to secure the same; the note having become due by reason of a default of payment of an interest coupon. The defendants, Williams and wife, answered that there was a condition in the note and mortgage by the terms of which they were authorized, at their option, to pay off the same at any in-

terest-paying period by giving 30 days' notice in writing; that in June, 1902, they paid the same to one H. F. Goode, the agent of the plaintiff; and that they paid interest on the principal sum up to the 1st day of August, 1902, which was the next interest paying day. The principal note by its terms did not mature until the 1st day of February, 1903. The plaintiff, by verified reply, denied the agency of said H. F. Goode to receive such payment, and alleged that plaintiff had no knowledge that said Goode had ever pretended to collect said note until the filing of the answer in said action, and at the time of the alleged payment the notes sued on were in the possession of the plaintiff at his home in Manchester, Michigan. The claim that the defendants paid the principal note and the coupon for interest thereon to August 1st to Goode is uncontroverted, and it is uncontroverted that the alleged agent, Goode, never paid the same over to the plaintiff. Goode died insolvent before the commencement of this action, and either the plaintiff or defendants must lose the amount paid to Goode.

Adams & Adams, for plaintiff in error.  
E. Wilson and Edward Dill, for defendants in error.

SMITH, J. (after stating the facts). The sole issue in this case was whether Goode was the agent of the plaintiff to receive the alleged payment. It is not contended that Goode had the possession of the principal note or of the coupon claimed to have been paid at the time of the payment. Goode could only become the agent of the plaintiff by will of the plaintiff and the acceptance of such agency by Goode. The intent of the plaintiff to make Goode his agent might have been evidenced by express written or oral instructions directing Goode to take charge of his loans generally at Wichita and to collect at his discretion before or after maturity, or by such directions relating specifically to the loan of defendants, or such authority from the plaintiff to Goode might have been presumed by the defendants from transactions between the plaintiff and Goode which came to their knowledge before the alleged payment. If the defendants had known of such transactions between the plaintiff and Goode prior to the alleged payment as would justify them in believing that Goode had general authority over the loans of plaintiff in that locality, and had authority to receive payment of the same before due and without the possession of the notes and mortgages securing such loans, the plaintiff would be estopped from denying the authority of Goode to receive the alleged payment. We think, however, there is no evidence in this case of express authority to Goode, as a general or special agent of the plaintiff. Neither is there evidence of such dealings between the plaintiff and Goode, the knowledge of which came to the defend-

ants before the alleged payment, as would justify them in presuming such agency, or would estop the plaintiff from denying the same. Statements of the alleged agent, made in the absence of and without the knowledge of the plaintiff at the time of the execution of the note and mortgage, that the interest coupons might be paid to him, are not competent evidence upon the issue in this case. Neither are letters written by the plaintiff to the alleged agent, and which relate only to specific claims against other persons, and of which letters the defendants had no knowledge at or before the alleged payment, competent evidence. Neither are the entries in a loan register, not a book of accounts, kept by the alleged agent, and of which neither the plaintiff nor the defendants are shown to have had any knowledge prior to the alleged payment, competent evidence upon the issue in this case.

Where a debtor delivers money to a third person for the purpose of paying a note which is not due, and of which such person is not in the possession, the presumption is that the person so receiving the money does so, not as the agent of the creditor, but as the agent of the debtor. This presumption can only be overcome and the converse established by evidence to the contrary. This presumption of agency from the possession of the note by the person claiming payment is ordinarily sufficient in itself to justify the debtor in making the payment, and the want of such possession is of itself sufficient to put the debtor upon his inquiry as to the authority of the agent to receive payment. If this be so, it would seem that the circumstances must be strong, in the absence of direct authority from the creditor, which would justify a debtor in paying a note, especially one not due, to a pretended agent so as to bind the creditor thereby. Such circumstances, it would seem, must practically amount to an estoppel upon the creditor to deny the authority of the agent—an estoppel in pais. If the dealings of the plaintiff with the defendants or with others, of which dealings the defendants were cognizant, reasonably led the defendants to believe that Goode had full authority from the plaintiff, to receive payment of the debt without having possession of the notes, and if the defendants made the payment, relying upon said conduct of the plaintiff in making the payment to Goode, then it might be said that it would be a fraud for the plaintiff to deny such authority to Goode, and the plaintiff might be estopped by such conduct from denying it, but such is not the evidence in this case. The evidence of Williams as to what Goode said in regard to the payment of the interest coupons to him would only be competent after the agency of Goode was established, and is incompetent for the purpose of establishing such agency. It is not shown that Williams relied on the transactions set forth in the letters or in the

entries in the loan register, as he is not shown to have had any knowledge of either at the time of the payment.

There are other trial objections, but they are really based upon the incompetency of the evidence referred to above, and we do not consider it necessary to discuss them.

The judgment of the district court is reversed, and a new trial granted. All the Justices concurring.

(73 Kan. 771)

**JONES et al. v. STATE.**

(Supreme Court of Kansas. March 10, 1906.)

**BAIL—FORFEITURE—AMENDED INFORMATION—FAILURE TO APPEAR.**

On an information charging defendant with the unlawful sale of intoxicating liquors defendant was arrested and gave bond. His counsel entered a plea of not guilty. Leave was granted to file an amended information, the first ground of which contained the original count recopied, except that in the amended information the description of the place of sale was changed. The second count charged defendant with maintaining a nuisance. After the filing of the amended information, defendant's attorneys announced that they did not appear for defendant to plead or answer to the amended information. *Held*, that the court properly ordered the non-appearance of the defendant entered on the record and adjudged his recognizance forfeited.

Error from District Court, Trego County; J. H. Reeder, Judge.

Action by the state of Kansas against A. B. Jones and another. Judgment for plaintiff, and defendants bring error. Affirmed.

A. D. Gilkeson and S. M. Hutzler, for plaintiffs in error. I. T. Purcell, Lee Monroe, and E. P. Hotchkiss, for defendant in error.

**PER CURIAM.** The county attorney of Trego county filed an information which charged: "That on the 14th day of February, 1903, \* \* \* one J. Q. Thompson, in a certain frame building situated on the Main street of Collyer in said county, did then and there unlawfully sell and barter spirituous, malt, vinous, fermented, and other intoxicating liquors without a permit." Thereupon a warrant was issued, the defendant arrested, and he gave bond in the usual form for his appearance on the first day of the next term of the district court of Trego county to answer the charge. Court convened October 6, 1903. Counsel for the defendant appeared and entered a plea of not guilty, and demanded a trial. The defendant did not appear in person. The county attorney then asked permission to file an amendment information containing two counts, which was granted, to which defendant by his counsel objected and excepted. The amended information contained the original count recopied, with the exception that in the original information the offense was charged to have been committed in a building "situated on the Main street of Collyer in said county," while the amended information in this respect stated that the offense was committed in a building

"situated on the west side of a certain street sometimes called Main street in the town of Collyer, in said county of Trego."

The second count charged the defendant, under the prohibitory law, with maintaining a nuisance. After the filing of the amended information the defendant's attorneys announced to the court that they would not, and did not, appear for the defendant to plead or answer to the said amended information; that they would appear and answer for him to the original information and none other. The court thereupon ordered the non-appearance of the defendant entered on the record and adjudged his recognizance forfeited. The cause was then continued for the arrest of defendant. Thereafter this action was brought upon the forfeited recognizance. The defendants demurred to the petition, which was overruled; and the defendants not wishing to plead further, judgment was rendered against them for the amount of the face of the bond, to reverse which they prosecute this error. The defendant not having appeared, either by counsel or in person, to answer the charge in the amended information, it was the duty of the court to cause his nonappearance to be entered and to declare and enter a forfeiture of the recognizance. The petition contains all the facts and states a cause of action.

The judgment of the court is affirmed.

(73 Kan. 774)

**CRYSTAL CASE CO. v. ARNETT.**

(Supreme Court of Kansas. March 10, 1906.)

**SALES—OFFER—ACCEPTANCE.**

Where a manufacturer of show cases made defendant an offer on cases "to be shipped from the factory," and he replied ordering cases "f. o. b. cars" at the place where the factory was located, and thereafter some of them were shipped "f. o. b. cars" at that place, there was a completed contract between the parties; defendant's answer not having constituted an acceptance of the offer with an attempt to modify it and accept it as modified.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 44-48, 59.]

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by the Crystal Case Company against Eugene Arnett. From a judgment for defendant, plaintiff appeals. Reversed.

Stanley & Stanley, E. L. Foulke, and Hart & Koehler, for plaintiff in error. Stanley, Vermilion & Evans, for defendant in error.

**PER CURIAM.** This was an action brought by the plaintiff in error against the defendant in error to recover damages for the nonfulfillment in part of an alleged contract for the purchase of 100 show cases, a part of the order having been delivered. The plaintiff introduced its evidence, rested its case, and the defendant demurred. The court sustained the demurrer and the plaintiff standing thereon; the court rendered

judgment in favor of the defendant. The plaintiff as plaintiff in error brings the case here.

The evidence showed that the plaintiff had a factory where it manufactured show cases and also had its principal place of business at Alliance, Ohio. The principal question in the case for our decision is whether or not the following letters constituted a contract to sell and to purchase between the plaintiff and the defendant. Under date of March 22, 1901, the plaintiff by its president wrote the defendant as follows:

"We are in receipt of your esteemed favor of March 21st in which you state that you are in the market for a considerable number of show cases. \* \* \* In order that you may look into this matter somewhat, we are sending you under separate cover some cuts of our revolving show cases and we beg to state in this connection that the plan which you suggest—shipping out direct to the customer—is the one which we usually pursue, as we have found it to be very much more satisfactory in this, that it saves double handling and the expense thereto. In definite orders for 100 to be shipped from the factory within six months as you may direct we will make you the following quotations:

Style A, No. 1.....	\$15 00
Style B, No. 1.....	9 00
Style A, No. 1, without the hand rail, which is the exterior means of revolving the inside of the case.....	12 00
Style B, No. 1, without the hand top rail, which is the exterior means of revolving the inside of the case.....	8 00
Copper oxidized pedestal, when desired, we furnish for.....	3 50"

Under date of May 15, 1901, the defendant wrote the plaintiff as follows:

"Back in March and April we had some correspondence with you relative to show cases. I believe you quoted as follows:

Style No. 1, with hand rail (A) and bronze pedestal.....	\$18.50
Style B, No. 1, without hand rail.....	8.00
"Above prices f. o. b. cars Alliance, Ohio.	

"We now think of trying to sell a few of these cases and you may enter our order for a hundred. We will pay for them as ordered out. Don't know just the proportions of each, but presume about two of the B to one of the A. Will you please send us a small size (the smallest you have) cut of each style, and, if you have them so, prefer to have them show jewelry, but, if not, we will take them and have plates made ourselves."

It is claimed on the part of defendant that because a letter to the plaintiff proposed to sell 100 cases "to be shipped from factory" whereas the defendant's letter in answer thereto stated: "I believe you quoted as follows: \* \* \* Above prices f. o. b. cars Alliance, Ohio"—that the answer did not constitute an acceptance of the offer as made, but attempted to modify it and accept it as modified. By the rules of construction of

contracts it was the duty of the court below and is the duty of this court to determine if possible what was the meaning of the parties and if their minds met upon one meaning the letters constituted a contract. Otherwise there was no contract.

We are authorized in determining this question to consider the subsequent actions of the parties. In the first place, it may be noted that the language of plaintiff's letter if not ambiguous was, at least, unusual. It is usual to speak of freight delivered upon and to be carried by the railroad as "shipped." It is not usual to speak of goods delivered upon and carried by a dray as "shipped" but the usual expression is "carted" or "hauled." The defendant, it seems, recognized this ambiguity, if it may be so called, in the proposition and interpreted it without an intention of modifying it. He says, in substance, I believe you quoted above prices f. o. b. cars Alliance, Ohio. It is shown that the plaintiff either originally intended its quotation as interpreted by defendant or afterward accepted the defendant's interpretation as it shipped a part of the goods on the order of the defendant on that basis. The part performance evidences no misunderstanding, but is evidence of a complete understanding—a complete contract.

Some minor reasons for sustaining the judgment are discussed in defendant's brief which we have examined and do not find well sustained. The question of whether or not there was a contract seems to have been the question upon which the case turned and as we have concluded that there was a contract between the parties the ruling of the district court in sustaining the demurrer to plaintiff's evidence is reversed, and a new trial granted.

#### KRUSE v. FAIRCHILD.

(Supreme Court of Kansas. March 10, 1906.)

TAXATION — SALE — DEED — DESCRIPTION OF PROPERTY.

In the sale and conveyance of real property for taxes, a description is sufficient if it indicates such property with ordinary and reasonable certainty, and which would be sufficient between grantor and grantee in an ordinary conveyance; but if it is so inapt and uncertain as to mislead the owner, or will not afford fair notice of the tax levied against his property, or how much of it was sold for taxes, the conveyance will be invalid, and it is further held that the tax deed in question is void.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1519-1521.]

(Syllabus by the Court.)

Error from District Court, Kiowa County; E. H. Madison, Judge.

Action by William G. Fairchild against Henry Kruse. Judgment for plaintiff. Defendant brings error. Affirmed.

John D. Beck and C. F. Jesse, for plaintiff in error. Fairchild & Lewis, for defendant in error.

**JOINSTON, C. J.** This action was brought by William G. Fairchild to recover from Henry Kruse lots 1, 2, 4, and 5, and the S. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$ , and the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 5, township 30, range 17. It appears that Fairchild held the patent title to the land, and he also presented a tax deed issued in pursuance of a sale for the taxes of 1896; but it was conceded that the tax proceedings upon which that tax deed was based were illegal. Kruse rested his claim of title upon a tax deed executed to Clarence A. Farnum in 1894, and subsequent deeds purporting to convey the land to himself; but the trial court held the tax deed to be bad, and gave judgment for plaintiff. The validity of this tax deed is the main question in controversy.

It was attacked upon a number of grounds, including the uncertain and defective description of the land sold. In the tax deed the description of the property sold is: "The W.  $\frac{1}{2}$  N. E.  $\frac{1}{4}$  and the E.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$  of section 5, township 30, range 17 west of the 6th p. m., situated in the county of Kiowa and state of Kansas." The contention is that the description does not fit the land for which Fairchild asked a recovery. The land is a fractional section, a portion of which is subdivided and described as lots; and in the government survey of the land, as well as all the transfers, the northern part of the land is described as lots 1, 2, 4, and 5. In attempting to show that the land sought to be recovered by Fairchild had been sold for taxes and was the same land included in the Farnum tax deed, Kruse offered in evidence a plan of the government survey as shown by the official plats and field notes. The following diagram shows the government plan of subdivision and description:

LOT 2.		LOT 1.	
LOT 6.	LOT 5.	LOT 4.	LOT 3.

In other conveyances offered in evidence by Kruse the descriptions of the land do not conform to that of the tax deed under which he claims. The county clerks are required to obtain from the land offices abstracts of

government lands that have become taxable since March of the previous year, and of course these are certified as they have been surveyed and subdivided by the government. Tax Law, § 50; Gen. St. 1901, § 7575. The assessors are required to make out a pertinent and correct description of each piece, lot or parcel of real property, in numerical order as to blocks, lots, sections, or subdivisions in his township or city. Tax Law, § 44; Gen. St. 1901, § 7569. The taxing officers have the means of obtaining a correct description of the real property to be taxed, but it appears that the tax deed in question does not contain a correct or any recognized description of the land. Neither does it appear that the land had ever been described otherwise than as it had been subdivided and designated in the government survey. The patent, and every deed under which plaintiff claimed, described the land properly in accordance with the government plan. Even in the tax deed of plaintiff, which was conceded to be illegal, it was so described. All the intermediate instruments from that of Farnum, the tax-title grantee, down to the defendant, accorded with the government survey, and there was nothing to show that there had ever been any other subdivision made of it. A description is sufficient if it indicates the land with ordinary and reasonable certainty, but it should be so described that the owner may not be misled. It is important that he should be informed of the levy of a tax upon his land, and the amount of it, so that he may have the opportunity of paying the tax and saving the land from forfeiture and sale. It is equally important that he should have an opportunity to redeem the land after it has been sold for taxes. These opportunities are not afforded unless his land is identified by some pertinent description or designation. The one used in this instance is not pertinent or applicable to the land in question and did not furnish the owner any fair means of identification. The description may have included some of the land in suit, but how much, or, if a part, what part of the whole, was taxed and sold cannot be determined from the inapt and indefinite description employed. The court ruled correctly in holding the tax deed to be invalid. It may be noted, in passing, that there was omitted from the tax deed the county and state in which the assignee of the tax sale certificate resided. This is a prescribed recital in the statutory form.

Another objection made to the deed is that the seal of the county clerk, instead of the seal of the county, was affixed. There is a recital in the instrument that the county clerk has affixed the seal of the county. Under the authority of the recent case of *Clarke, Receiver, v. Tilden*, 84 Pac. 139, this must be deemed a sufficient authentication.

Judgment affirmed. All the Justices concurring.

149 Cal. 117

**STERLING v. GREGORY.** (L. A. 1,400.)  
(Supreme Court of California. April 2, 1906.)

**1. SALES—BREACH BY SELLER—ACTION—EVIDENCE—SUFFICIENCY.**

In an action for breach of a contract to buy from plaintiff all the oranges grown in a certain grove, evidence held to warrant a finding that the agreement was in consideration of defendant having the handling of the oranges grown in another grove.

**2. CONTRACTS—CONSTRUCTION—ENTIRE AND SEVERABLE CONTRACTS.**

The question whether a contract is entire or whether its various stipulations are to be regarded as severable is a question of construction, from the intent of the parties and all the circumstances.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 754.]

**3. SALES—CONTRACT—CONSTRUCTION.**

Where defendant agreed to buy all the oranges grown by plaintiff in a certain grove, in consideration of defendant's having the handling of the oranges grown in another grove, the contract was entire, and the agreements not severable.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 175.]

**4. CONTRACTS—RESCISSION—PARTIAL FAILURE OF CONSIDERATION.**

Under the express provisions of Civil Code, § 1689, a partial failure of consideration moving from one party authorizes the other to rescind.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1173.]

**5. TRUSTS—ACTION BY TRUSTEE—COSTS—LIABILITY.**

Under the express provisions of Code Civ. Proc. § 1031, where plaintiff, suing as trustee of an express trust, is unsuccessful and there is no showing of mismanagement or bad faith on his part, the costs are to be made chargeable only on the estate.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 324, 377.]

In Bank. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by A. E. Sterling, as trustee, against A. Gregory. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Otis, Gregg & Surr, for appellant. Frank C. Prescott and Prescott & Morris, for respondent.

**SLOSS, J.** Action for damages for breach of contract. The plaintiff was the owner of certain orange groves in San Bernardino county, known as the "Upper Orchard," and alleges an agreement with defendant, by the terms of which the latter agreed to buy all the oranges grown on this orchard at the price of 1¼ cents per pound. After the contract was partly executed, the defendant refused to accept or pay for any more fruit, and the plaintiff, after selling the remaining fruit for less than the contract price, brings this action to recover the difference. The answer denies that the contract was merely for the purchase and sale of the oranges grown on the groves described in the complaint, and alleges that the agreement between the parties was that defendant should

handle, pack, ship and sell for the account of plaintiff all the oranges grown on two other orchards belonging to plaintiff, and known as the "Triangle" and "Klondike" groves; that as part of the same contract and in consideration of having the handling of the crops from said groves the defendant agreed to buy all the oranges on the "Upper Orchard" at 1¼ cents per pound. The answer then goes on to allege that before the deliveries from the "Upper Orchard" were complete, the plaintiff broke his contract as to the "Triangle" and "Klondike" groves by selling the fruit grown on those groves to other parties; that thereby there was a partial failure of consideration as to the defendant, and he promptly rescinded the contract and restored to plaintiff everything of value which he had received from him. The findings on these issues were in favor of defendant, and he had judgment for his costs. Plaintiff appealed from the judgment within 60 days, and brings up the evidence by means of a bill of exceptions.

The appellant contends that the findings as to the contract between the parties are unsustained by the evidence. But this contention cannot prevail. While the plaintiff testified that he made no agreement regarding the fruit on the "Triangle" and "Klondike" groves other than he would give the handling of it to the defendant in case he should decide to ship it, two witnesses, in addition to the defendant himself, testified to an unconditional agreement that the defendant was to have the handling of the fruit from these groves at 50 cents per box, and was to buy the fruit from the "Upper Orchard" at 1¼ cents per pound. And the further finding that the purchase and sale of the oranges from the "Upper Orchard" was a part of the contract for the handling of the fruit from the other groves, and was made in consideration of defendant's having the handling of such fruit, also finds sufficient support in the record. There is testimony to the effect that the agreed price of 50 cents per box for handling would have allowed the defendant a profit of 25 cents per box. And the defendant, in stating the conversation between himself and the plaintiff regarding the transaction, gave this version: "I told him \* \* \* that a cent and a quarter was full market value at that time; but inasmuch as I would have the privilege of shipping the two other orchards below the railroad, the Klondike and the Triangle, that would realize me some profit that we would be sure of, as we were not taking the chances of the market on these two orchards, and that I thought I could handle the other orchards, paying him the cent and a quarter with this understanding. \* \* \* Mr. Sterling accepted my proposition." This testimony, if believed by the trial court, as it evidently was, fully justified the finding.

The appellant's main contention is that the contract, assuming it to have been made as

found by the court, was not an entire contract; that the stipulation for the sale of fruit from the "Upper Orchard" and the one regarding the handling of other fruit, were distinct and severable, and that, therefore, a breach of one furnished no ground for rescinding the other. It may readily be conceded that if the evidence went no further than to show that, at one and the same time, the parties agreed that the plaintiff should sell to the defendant, at a given price, the oranges from one grove, and that he should deliver to the defendant for handling, the oranges from other groves, for a compensation of 50 cents per box, the agreement for sale and the agreement for handling, would form separate and independent undertakings, and a breach of one would not authorize a rescission of the other. The several things required to be done by plaintiff were to be done at different times, and the money consideration to be paid for them was not entire, but was apportioned to each of the items to be performed. There is ample authority for the proposition that in such case the stipulations are ordinarily regarded as severable and independent. As examples of cases declaring contracts to be severable under such circumstances as those supposed may be cited. *Norris v. Harris*, 15 Cal. 250; *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621; *Herzog v. Purdy*, 119 Cal. 102, 51 Pac. 27; *Potsdamer v. Kruse*, 57 Minn. 193, 58 N. W. 983; *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248; *Holmes v. Gregg*, 66 N. H. 621, 28 Atl. 17. But it must be remembered that the question whether a contract is entire or whether its various stipulations are to be regarded as severable is a question of construction. The court seeks to determine the intent of the parties from a consideration of all the circumstances surrounding the making of the contract. The rule is well stated in *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734, 736, as follows: "A contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions and the consideration, are common each to the other and independent. \* \* \* On the other hand, a severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. \* \* \* It is sometimes difficult to determine whether the contract is entire or severable in such cases, and there is great diversity of decisions on the subject, but on the whole, the weight of opinion, and the more reasonable rule would seem to be that where there is a purchase of different articles at different prices at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered

essential either by the nature of the subject-matter or by the act of the parties. This rule makes the interpretation of the contract depend on the intention of the parties as manifested by their acts and the circumstances of each particular case." And the cases relied on by appellant, in which this court has declared certain contracts to be severable, all recognize that the intention of the parties governs and that stipulations apparently distinct and separate may, by the agreement of the parties, be made to be mutually dependent and to form parts of an entire contract. Thus, in *Norris v. Harris*, 15 Cal. 227, Field, C. J., said: "But a contract, made at the same time, of different articles, at different prices, is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties, etc." *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621, declares that where the price is, by the contract, apportioned to each item to be performed, "the contract will generally be held to be severable." And in *Herzog v. Purdy*, 119 Cal. 99, 51 Pac. 27, the court, in speaking of a similar contract, said: "Such a contract of sale the law regards in general as severable, and we discover no evidence here to take the case out of the rule, *nothing to show that the sale of one item was contingent upon the sale of the others, or that the contract was for other reasons an entirety.*" (In all the foregoing quotations the italics are ours.)

The case at bar differs in its facts from all those cited in that the answer alleged and the court found that the two undertakings of the plaintiff as to the different groves were, in fact, by the agreement of the parties, made parts of one contract, and the agreement to buy the oranges from one grove was in consideration of defendant's having the handling of the oranges from the other groves. This was in effect an allegation and finding that the contract was entire and not severable. Such finding being, as we have seen, sustained by the evidence, it follows that on the refusal by the plaintiff to fully perform his part of the contract, there was a partial failure of consideration, which under section 1689 of the Civil Code, gave the defendant the right to rescind. *Richter v. Union Land & Stock Co.*, 129 Cal. 367, 62 Pac. 39. By the judgment, the defendant recovered costs against the plaintiff. Since, under the admitted allegations of the complaint, the plaintiff sued as trustee of an express trust, and there was no charge of mismanagement or bad faith on his part, the costs should, under the provisions of section 1031, Code Civ. Proc., have been "made chargeable only upon the estate, fund, or party represented."

The judgment will therefore be modified by inserting therein a provision that the costs recovered by the defendant shall be

chargeable only against the trust property described in the complaint, and, as so modified, the judgment is affirmed.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

7 Cal. Unrep. 250

**SHEPARD v. F. A. ROBBINS PRESS WORKS.** (S. F. 4,489.)

(Supreme Court of California. April 11, 1906.)

**APPEAL — FILING OF TRANSCRIPT — TIME — GRANTING NEW TRIAL — CONDITIONAL ORDER.**

A motion for a new trial in an action to quiet title was denied upon condition that plaintiff consent to an amendment of the findings and judgment, and the order denying the motion stated that defendant's counsel should prepare an order specifying in detail the amendment to be made, and it was provided that, if plaintiff did not consent within 10 days, a new trial should be granted. Some four months later an order was made reciting the pendency of the motion for a new trial, specifying the amendment to be made and stating that if plaintiff failed to consent to the amendment within 10 days a new trial would be granted. Plaintiff at no time consented to the amendment. *Held*, that 10 days within which plaintiff might consent to the amendment and avoid the new trial did not begin to run until after the making of the second order, so that it was not until after the expiration of 10 days from that time that the 40 days allowed for the filing of a transcript on appeal began to run.

Department 1. Appeal from Superior Court, Marin County; Thomas J. Lennon, Judge.

Action by Elizabeth A. Shepard against F. A. Robbins Press Works, in which A. D. Shepard, as administrator, was substituted as plaintiff. From a judgment for plaintiff, defendant appeals. On motion to dismiss the appeal. Motion denied.

A. J. Treat, for appellant. Thomas, Gerstle & Frick, for respondent.

ANGELLOTTI, J. This is a motion by plaintiff to dismiss an appeal from the judgment, on the ground that appellant has not filed in this court a transcript on appeal within the time allowed by law. It is conceded that the 40 days, within which such transcript must be filed, did not begin to run until the motion for a new trial made by defendant was decided by the lower court (rule 2 of this court [78 Pac. vii]), and the question here is as to when that motion was decided, within the meaning of our rule. The notice of motion to dismiss was served on November 24, 1905, and filed November 25, 1905, at which times no transcript on appeal had been served or filed. The action was one to quiet title to certain land. On June 22, 1905, in the matter of defendant's motion for a new trial, which had previously been argued and submitted on a bill of exceptions, the trial court made the following order, viz.: "It is ordered that defendant's motion for new trial be denied, but upon the

condition, however, that plaintiff consent that the findings, judgment, and decree heretofore herein made, be amended and modified so as to make the southerly side of the disputed fence the northerly boundary of the Shepard property. If consent be not given by plaintiff within 10 days then it is ordered that a new trial be granted. Defendant's counsel will prepare and present to the court an order to this effect specifying in detail the amendment to be made." No order specifying in detail the amendment to be made was presented to the court until November 1, 1905, on which last-named day the trial court made the following order, viz.: "This cause having been tried and findings filed and judgment rendered in favor of the plaintiff, and the defendant having filed its bill of exceptions on motion for a new trial, and the same having been allowed and certified, and the motion for a new trial having been argued and submitted; and it appearing to the court that the case was tried upon the theory that the plaintiff claimed that the south line of the fence referred to in her complaint was the dividing line between the respective properties of the parties in said action; and it further appearing that the plaintiff by her findings and by her judgment has erroneously been given a boundary on the north line of her property three-fourths of an inch to the north of the north side of the fence between the north line of plaintiff's property and the south line of defendant's property; and it further appearing to the court that the true northerly line of plaintiff's property is a straight line along the southerly line of the said fence, as said line is prolonged from east to west, and that the court inadvertently signed findings and judgment in favor of plaintiff establishing the northern boundary line of her property in a straight line from east to west five and three-fourths (5¾) inches north of the southerly line of said fence; and it further appearing to the court that the said southerly side of said fence was at the time of the erection of the barn herein referred to situated six (6) inches north of the outside face of the corner post of the barn located in the northwest corner of plaintiff's property, to wit, four and one-quarter (4¼) inches from the outer face of the corner board of said barn: Now therefore, it is ordered, that if plaintiff within 10 days after the service of a copy of this notice upon her attorneys signs and files a relinquishment to defendant of all land north of a point beginning four and one-quarter (4¼) inches from the north or outer face of the corner board of the barn on the northwest corner of the property of the plaintiff, said last-named point being originally the southerly side of the fence between the property of the parties, and running thence in a straight line from west to east along the southerly line of said fence, as the same existed during the trial of said cause, the

motion for a new trial upon the part of the defendant shall be denied. Further ordered that if within said 10 days plaintiff shall fail to sign the relinquishment herein referred to and directed, then the motion of the defendant for a new trial will be granted upon all the grounds of said motion." This order was served on the attorney for plaintiff on November 13, 1905, and plaintiff having failed to file the required relinquishment, the trial court on December 8, 1905, made an unconditional order purporting to grant defendant's motion for a new trial.

Plaintiff's claim is that the order of June 22, 1905, became, by reason of the failure of the plaintiff to consent to the required modification, an order granting a new trial absolutely, at the expiration of 10 days from the making of such order. See *Holtum v. Greif*, 144 Cal. 521, 78 Pac. 11, and cases therein cited. If this claim be well founded, it is apparent that the time for filing the transcript expired long before the giving of the notice of motion to dismiss. We are of the opinion, however, that under the terms of the order in question, the time for plaintiff to comply with the expressed condition upon which a new trial would be denied, could not commence to run until the subsequent order, to be prepared by defendant, should be made by the court, specifying in detail the particular modification to which the plaintiff should consent. It is plain from the meager record before us that there was some doubt as to where the line designated in the order as "the southerly side of the disputed fence" was, such fence not being at all points still in existence, and the order made clearly shows the intent of the court that a subsequent order, specifically showing the modification desired, should be made, that plaintiff should have 10 days thereafter within which to consent thereto, and that if within such 10 days she consented to the modification specified in such subsequent order, the motion for new trial should be denied. Under the terms of the order of June 22, 1905, the 10 days within which plaintiff might comply with the specified condition could not commence to run until November 1, 1905, the date of the making of the second order. Her failure to comply with the condition could not be effectual to render the order one granting a new trial earlier than at the expiration of said 10 days. Until that time, therefore, there was certainly no decision of the motion for new trial, within the meaning of our rule. It is apparent, therefore, that the time for filing the transcript on the appeal from the judgment had not expired at the time of the service and filing of the notice of motion to dismiss the appeal. It is not necessary for the purposes of this motion to decide whether the failure of plaintiff to file her consent to the required modification rendered the order one granting a new trial at the expiration of 10 days from November 1, 1905, and we do not decide

that question. It is enough here that there was no decision of the motion prior to such last-mentioned time.

The motion to dismiss the appeal from the judgment is denied.

We concur: SHAW, J.; SLOSS, J.

149 Cal. 146

In re ALEXANDER'S ESTATE. (S. F. 4,434.)

(Supreme Court of California. April 10, 1906.)

1. WILLS—ESTATES CREATED—FEE SIMPLE.

Civ. Code, § 1336, provides that words in a will referring to death or survivorship relate to the time of testator's death, unless possession is actually postponed, when they must be referred to the time of possession. A will provided that one of testatrix's children, "if" she remained unmarried should have all that belonged to testatrix, and, if she married, the house that she bought should belong to her, and that "the rest" should be divided among the children. *Held*, that there was a gift to the child in fee in case of her nonmarriage at testatrix's death, and not an estate limited in its creation to the period during which she might remain unmarried, with a remainder to the other children to take effect on her death, or, if she should marry, on her marriage.

2. WILLS — CONDITIONS — VALIDITY — RESTRAINT OF MARRIAGE.

Under Civ. Code, § 710, providing that conditions imposing restraints on marriage, except on the marriage of a minor are void, a condition subsequent in a devise to a daughter, terminating the devisee's estate in fee on her marriage at any time is void.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1537.]

Department 1. Appeal from the Superior Court, Alameda County; F. B. Ogden, Judge.

Judicial proceedings on the estate of Emilie Alexander, deceased. From a decree of final distribution, George Alexander and others appeal. Affirmed.

Frederick E. Whitney, for appellants. E. M. Rosenthal, for respondent.

SLOSS, J. Appeal from decree of final distribution. Emilie Alexander died on June 5, 1904, leaving a will which was admitted to probate in the superior court of Alameda county on July 7, 1904. The testatrix was a widow, and was survived by three sons, George, Henry and Caesar Alexander, and two daughters, Mrs. Ray Rosenthal and Gussie Alexander, all over the age of 21 years. The estate having been duly administered, distribution was prayed for, and after proper proceedings for that purpose a decree was made, distributing the entire estate to Gussie Alexander, one of the daughters, absolutely. From this decree the other children of the testatrix appeal.

The controversy hinges on the construction of the decedent's will, which was olographic and written in the German language. A translation reads as follows:

"Oakland, the 28th March, 1903.

"This is my last wish while I still have good health and full understanding, that if

Gussie Alexander remains unmarried, that all that I have as well as real estate belongs to her, should she marry, then the house belongs to her for which she has the contract that she bought it, hers. The rest my other children shall divide among themselves; Henry Alexander, George Alexander, Caesar Alexander, and Ray Rosenthal. This is my last wish. [Signed] Mrs. Emilie Alexander.

"The testament which Mr. Rosenthal has can be torn up, it is against my wish."

The phrase "the house belongs to her for which she has the contract that she bought it, hers," refers to a dwelling house which had been conveyed by the testatrix to Gussie prior to the making of the will, and this property formed no portion of the estate. At the date of the will Gussie Alexander was the only unmarried daughter of the testatrix, and she never has married. The sons were all engaged in business. From these facts we must determine what interest or estate is given to Gussie Alexander under the will, and what to the other children of the testatrix. The essential words of the will are, "if Gussie Alexander remains unmarried, that all that I have \* \* \* belongs to her, should she marry \* \* \* my other children shall divide [it] among themselves." The contention of the appellants is that these words give to Gussie an estate limited in its creation to the period during which she may remain unmarried, with a remainder over to the other children, to take effect on her death, or, if she should marry, on her marriage. The respondent, on the other hand, claims that the gift to Gussie is a fee, which is to vest on condition that she is unmarried, and that the period at which the contingency of marriage or nonmarriage is to be determined is the death of the testatrix. We see nothing in the language of the will to indicate that, in any view, Gussie is given a life estate. There are no words in the instrument referring to her life or death. The only event affecting her title, whether by way of condition precedent or subsequent, or of limitation, is her marriage. She takes, therefore, either an estate limited in duration to the period during which she remains unmarried, or a fee conditional upon her being unmarried at some time. (Whether such fee, once vested, is to be cut off by a subsequent marriage, is considered in another part of this opinion.)

A devise or bequest for the time during which the grantee remains unmarried is a not unusual form of gift. In such case the vesting of the estate does not depend on a condition precedent, nor is it divested by a condition subsequent. The provision regarding marriage is a limitation, not a condition. 2 Woerner's Am. Law of Adm. (2d Ed.) 962. On marriage, the estate ceases by the expiration of the term for which, at the outset, it was created. But the words of this will are not the words ordinarily used for the creation of such limited estate. This is not a

gift to Gussie "while she remains unmarried," or "so long as she remains unmarried" or "until she marries." On the contrary, the estate is given to her "if she remains unmarried." The word "if," in legal as in ordinary phraseology, imports a condition, and there is no reason to give it another construction here. This then is a gift to Gussie on condition that she remains unmarried. Unmarried when? Certainly the gift cannot be on condition that she remains unmarried at all times, since in that view, she could never take anything as long as she lived. If she married, the condition would be broken; if not, it would not have been fully complied with. The only reasonable construction to give these words is to hold that they refer to the state of affairs that may exist at the death of the testatrix. And this accords with the general intent of the testatrix, deductible from the whole will, and the circumstances under which it was executed. Her sons were, by reason of their occupations, self-supporting, and the one daughter, being married, was provided for. Obviously the testatrix wished upon her death to make special provision for her other daughter, if that daughter should be left without the protection of a husband.

The words "if she remains unmarried" may be construed to refer to the date of the testatrix's death without violating any settled rules of construction. While, with reference to its effect a will speaks from the death of the testatrix, it will, where the testator speaks of a condition of things as actually existing, be held as referring to the date of the will. 2 Woerner's Am. Law of Adm. (2d Ed.) 887, 888; 1 Redf. on Wills (4th Ed.) 880. This will, by necessary implication, speaks of Gussie as an unmarried woman. Such reference to her is to be taken as speaking of her condition at the date of the execution of the will. And the condition of her remaining unmarried is given full operation by referring the time of its performance to the death of the testatrix. There are many cases of similar construction. A devise to A., with a limitation over in case of his death, vests an absolute estate in A., unless he dies during the testator's lifetime. *Wills v. Wills*, 85 Ky. 486, 3 S. W. 900; *Herbert v. Executor of Tuthill*, 1 N. J. Eq. 141; *Jones v. Webb*, 5 Del. Ch. 132; *Biddle's Estate*, 28 Pa. 59; *Phelps v. Phelps*, 55 Conn. 359, 11 Atl. 596; *Wright v. Charley*, 129 Ind. 257, 28 N. E. 706; *Kohtz v. Eldred*, 208 Ill. 60, 69 N. E. 900; 2 Jarm. Wills (6th Ed.) 661. Similarly, a gift to various persons "or the survivors of them" refers to those surviving at the death of the testator. 2 Jarm. Wills, supra; *Stevenson v. Lesley*, 70 N. Y. 512; *Matter of Mahan*, 98 N. Y. 372. The Civil Code of this state provides (section 1336) that "words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of

possession," but the above authorities, as well as many more that might be cited, show that the same rule exists universally, irrespective of any statute.

A case very similar to the one at bar was *Denfield*, Petitioner, 156 Mass. 285, 30 N. E. 1018. There the will, after devising certain property to the testator's daughter, went on to say: "The above provision for my daughter is made on condition she remain single." The court said that the condition "seems to be satisfied by holding that it is to continue until the time comes for distribution of the residue. It means on condition she remain single at that time. Otherwise it could never be determined in her lifetime whether she was to take the gift absolutely or not." In principle, the case seems directly in point, notwithstanding the fact that there were special circumstances (not existing here), which led the court to hold that the time when the condition was to be fulfilled was the date of distribution, rather than the death of the testator. If Gussie takes by reason of her having remained unmarried until the death of her mother, it is unnecessary to consider at length the effect of the gift to the other children, if she should marry. For the same reasons governing the construction of the gift to her, it may well be argued that the event of her marriage, which is to vest the estate in her brothers and sisters, must occur before the death of the testatrix. But if it be said that the intent was that this language should constitute a condition subsequent, terminating her estate in fee, and vesting it in others on her marriage at any time, the condition would be void as in restraint of marriage. Any distinction that may have existed at common law between such conditions as applied to real and to personal estate (30 Am. & Eng. Ency. of Law [2d Ed.] 802) has been abolished in this state by section 710 of the Civil Code, under which conditions imposing restraints upon marriage (with two exceptions not here involved), are void. Under any view, the distribution to the respondent was proper.

The decree is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

149 Cal. 214

In re WALKER. (S. F. 4,470)

(Supreme Court of California. April 11, 1906.)

1. WILLS—ESTATE IN TRUST—CREATION OF TESTAMENTARY TRUST TO SELL LAND.

Civ. Code, § 2289, provides that on the death of a trustee the superior court of the county where the property is situated must appoint another trustee and direct the execution of the trust. A will provided that a certain lot should be sold, and that the executor, who was appointed as trustee for such purpose, should invest the proceeds and pay the income to certain beneficiaries until their majority, when the investment should be delivered to them. The executor sold the lot, and after his death the purchaser petitioned for the appointment of a trustee to carry out the

trust. *Held*, that the petition was erroneously granted, as the trust was merely for the investment of proceeds and the payment of income to the beneficiaries, and not for a sale of land.

2. EXECUTORS—EXECUTOR'S SALE—CONFIRMATION.

Code Civ. Proc. § 1561, provides that where an executor has power, under a will, to sell property, he must make return of sale, and that no title passes until the sale be confirmed, and section 1575, provides for compelling the executor to make a return. *Held*, that where an executor had authority to sell land for the benefit of certain persons and, purporting to act under the power, he did so, but failed to make any return so that there was no confirmation, the beneficiaries having so ratified the sale as to estop them from disputing it, the court having jurisdiction of the probate proceedings might, because of the estoppel, confirm his sale and direct execution of the conveyance upon a compliance with the terms of the contract by the purchaser.

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Petition by Mrs. Annie L. Gallagher for the appointment of a trustee in place of a deceased trustee to carry out a trust created by the will of Jane Walker, deceased, and from an order granting the petition, Sadie Mayhew and another, beneficiaries of the trust appeal. Reversed.

R. H. Cross, for appellants. R. Clark and Sargent & Bardin, for respondent.

ANGELLOTTI, J. This is an appeal from an order of the superior court of Monterey county, made under the provisions of section 2289 of the Civil Code, appointing a trustee in place of a deceased trustee, "to fulfill and complete the purposes of the trust and to complete the contract set out in the petition of the petitioner." The trust in question was claimed to have been created by the last will of John Walker, the provisions of said will which are material being as follows, viz: Third. "I desire that my lot commonly known as Lot No. 3 in Block 41 of the Second Addition to Pacific Grove, Monterey Co. state of California be sold as soon as an advantageous price can be obtained for the same and that William F. Gibson, whom I hereby appoint as trustee for that purpose shall invest the proceeds in some income producing property or first mortgage security and pay the proceeds to my grandnieces Sadie and Nannie Mayhew, one-half thereof to each. I desire that such income shall be paid to Sadie and Nannie Mayhew directly, so that they can use the same themselves; and a receipt from them to my said trustee shall be sufficient to relieve him from any further responsibility therefor. When my said grandnieces shall attain their majority, then I direct my trustee to pay over said trust fund or deliver the investment to said grandnieces. If either shall die previous to attaining her majority, the survivor shall take her sister's portion." Seventh. "I give my executor hereinafter named full power to sell any and all of my estate real and personal

as he may deem expedient at either public or private sale and without first obtaining an order of court therefore. \* \* \*"  
Eighth. "I hereby appoint William F. Gibson of the city and county of San Francisco, state of California, as executor of this my last will and request that he be allowed to qualify and to act as such without giving bonds to any court."

This will was dated January 10, 1895, and deceased died in the year 1897, a resident of the city and county of San Francisco. Such will was admitted to probate in the superior court of such city and county, and the proceedings for the administration of the estate are still pending therein, no distribution as yet having been had. Wm. F. Gibson was appointed and qualified as executor of the will and continued to act as such until his death in 1901. On February 4, 1899, he, purporting to act as executor and trustee, agreed in writing to sell to respondent, Mrs. Annie L. Gallagher, the lot of land described above for \$800, \$80 to be paid as a deposit, and \$720 within three years, with interest, Mrs. Gallagher to pay all taxes on the land, and agreed that a deed should be executed on full payment of the purchase price. Something over \$600 had been paid by Mrs. Gallagher to Gibson under this agreement, prior to his death, and after his death \$80 was paid by her to the administrator with the will annexed of the estate of John Walker. At the time of the making of this agreement, Nannie Mayhew, one of the beneficiaries, had attained her majority, and the only other beneficiary, Sadie Mayhew, attained her majority June 7, 1899. The evidence showed that after the attainment of their majority, the beneficiaries received from Gibson small amounts aggregating \$185, proceeds of said agreement, and after his death, other portions of said proceeds from the administrator with the will annexed, all of which they still retain. No return of the sale made by Gibson was ever made to the superior court having jurisdiction of the estate. The order appealed from was made by the superior court of Monterey county on May 1, 1905, being based on an application therefor made by respondent May 31, 1904. The beneficiaries of the trust, Sadie Mayhew and Nannie Mayhew, appeal from such order.

It is apparent that the sole object of this proceeding is to enable Mrs. Gallagher to complete her contract for the purchase of this land and obtain title thereto. It is, of course, essential to the right of a court to appoint a trustee under the provisions of section 2289, Civil Code, to fill a vacancy, that there should be an existing trust to be executed. It is claimed by respondent that a valid trust for the sale of this lot and the investment of the proceeds of such sale was created by the will of Mrs. Walker and that this trust for the sale had not been fully executed. We are of the opin-

ion that under a proper construction of the provisions of the will, the sole purposes for which Gibson was appointed trustee were to invest, for the benefit of Sadie and Nannie Mayhew, the proceeds of the sale which the testatrix, in effect, directed to be made, and to pay the come of such investment to such beneficiaries during their minority, at the expiration of which they were to receive the principal in equal shares, and that the provision as to sale was simply a direction to her executor to sell as soon as an advantageous price could be obtained. It is true, as urged by respondent, that no particular form of expression is necessary to constitute a valid trust, but it is essential that the intention of the testator to so do should be apparent, and so far as the sale of the land by a trustee is concerned, we can see no evidence of such intent in the will before us. It will be observed that there is no direct devise of the land to Gibson, and that the provision as to the appointment of Gibson as trustee apparently has reference solely to the matter of investment of the proceeds, and payments of the same to Sadie and Nannie Mayhew. The duties imposed upon him as trustee in regard thereto were not such as to render it imperative that the legal title to the land should vest in him, and there is nothing from which the intent to create a trust for the sale of the land can be inferred. The fifth paragraph of the will contains a substantially similar provision as to the desire of the testatrix for the sale of certain shares of stock and the immediate payment of the proceeds of such sale to certain persons without any bequest in terms. In both of these cases, the direction for the sale is solely to the executor, who elsewhere is empowered to sell at either public or private sale and without any order of court, and the duties of the appointed trustee commence only upon the receipt of proceeds of the sale of the land, relate only to the disposition of such proceeds, and continue only to the time when both beneficiaries attain the age of majority. It would therefore seem apparent that no case was made authorizing action by the superior court of Monterey county under section 2289 of the Civil Code.

Respondent earnestly contends that the appellants are estopped from disputing the validity of the agreement of sale made by Gibson, by reason of the fact that, after attaining majority, they, apparently acquiescing therein, received and retained and still retain the proceeds of such agreement. This may be true, but, in our opinion, that question is not one to be determined in this proceeding. We are not here concerned with any question as to the validity against them of the agreement made by Gibson, or as to the acts of the parties thereunder, but solely with the question as to whether there is an existing trust, for the proper administration of which it is necessary that a trustee

should be appointed. If the acts and conduct of Sadie and Nannie Mayhew, the sole parties entitled under the will to receive the proceeds of the sale of said land, or the land itself in the event that no sale is made, have been such as to estop them from asserting the invalidity of the agreement for sale, appellants may doubtless have that fact adjudged in a proper proceeding, and obtain such relief against such beneficiaries as is appropriate. This proceeding was necessarily based entirely upon the theory that there was a trust for the sale of the land, created by the will, and the petition contained no allegation of any fact tending to create an estoppel as to the beneficiaries.

It may properly be suggested that under the circumstances mentioned by respondent we can see no reason why the respondent cannot have adequate remedy in the court having jurisdiction of the probate proceedings. The executor had the power under the will to sell this property for the sole benefit of Sadie and Nannie Mayhew, and, purporting to act thereunder, he made this sale to respondent. By reason of the statute (Code Civ. Proc. § 1561) the sale was ineffectual without confirmation by the superior court having jurisdiction of the estate, and it was the duty of the executor to make a return of such sale. This, so far, has not been done, but there is no reason why such a return should not still be made, and the court having jurisdiction of the estate has the power to require it to be made. Code Civ. Proc. § 1575. If the only persons interested in the proceeds of any sale of this property have so ratified the contract made by the executor as to estop them from disputing it, we can see no reason why the court could not, upon that ground alone, confirm the sale, and direct the execution of a conveyance upon a compliance by the purchaser with the terms of the contract. Certainly, under such circumstances, their objections would not be effectual to prevent a confirmation.

The order appealed from is reversed.

We concur: SHAW, J.: SLOSS, J.

149 Cal. 219

In re SHEPPARD'S ESTATE. (S. F. 4,419)

SHEPPARD v. KENDALL et al.

(Supreme Court of California. April 13, 1906.)

**1. WILLS—PROBATE—PETITION FOR REVOCATION—SUFFICIENCY.**

A petition for revocation of the probate of a will, merely alleging in general terms that a certain person exercised undue influence over testator, but stating no facts from which a legal conclusion of undue influence could be drawn, stated no cause of action.

**2. SAME—AMENDMENT—DELAY.**

Where a petition for the revocation of the probate of a will was filed 10 months after the will was admitted to probate, leave to amend the petition five months after it was filed was properly denied, in the discretion of the court.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Application by A. B. Kendall and others for probate of the will of Joseph Sheppard, deceased. The will was admitted to probate, and thereafter Lafayette Sheppard petitioned for revocation of the probate. From an order granting a motion to dismiss the petition, petitioner appeals. Affirmed.

William A. Coulter and McNab & Hirsch, for appellant. T. L. Carothers, L. G. Morse, John A. Percy, and John W. Preston, for respondents.

McFARLAND, J. On February 1, 1904, the probate court made an order admitting a certain written instrument to probate as the last will of Joseph Sheppard, deceased. Afterwards, on December 5, 1904—within the year allowed by section 1327, Code of Civil Procedure, for contesting a will which had been probated—Lafayette Sheppard, claiming to be son and heir at law of said deceased, filed a petition for the revocation of the said probate of said will. The executors and other interested parties answered the petition; and the matter coming on regularly to be heard by the court on May 23, 1905, the defendants moved the court for judgment on the pleadings that the proceeding for the revocation of the probate be dismissed; and after due hearing the court made an order granting the motion and dismissing the petition. From this order this present appeal is taken by said Lafayette.

The order appealed from was granted upon the ground that the said petition does not state facts sufficient to constitute a cause of action, or any ground for the revocation of the said probate of the will. The only averments in the petition of grounds for the revocation are as follows: "Your petitioner alleges that the making, signing and publishing of said paper purporting to be the last will and testament and codicil thereto of the said Joseph Sheppard, deceased, was procured through the undue influence, prejudice, and imposition from and by Isabel Sheppard, the stepmother of petitioner, and from and by Mrs. E. C. Reed, one of the many relatives of the said stepmother who were not related to decedent, but who are beneficiaries and legatees under said alleged last will. "That the said Mrs. E. C. Reed, on the death of petitioner's said stepmother, continued and repeated the said undue influences, prejudices and impositions, and made use of her confidential relations with the said Joseph Sheppard, as his constant companion and professional nurse, during a long period to and at the time of making said alleged will, when the mind of said Joseph Sheppard was weak and enfeebled from the infirmities of age and disease, to repeat and continue to prejudice and unduly influence the said Joseph Sheppard against your petitioner, and to unduly and unjustly influence the said decedent in

making and executing the said alleged will, and by such prejudice and undue influence did procure the making of said alleged will and codicil." In our opinion the trial court did not err in holding these averments insufficient. Of course, there is no hint in the petition of any legal ground for revocation other than that of "undue influence"; but undue influence is averred only in general terms as a conclusion of law, and that kind of averment is fatally defective. Undue influence is a legal conclusion to be drawn from certain facts, and the facts must be pleaded. In *Estate of Gharkey*, 57 Cal. 279, the court say: "When the grounds of contest embrace duress, menace, fraud, undue influence. \* \* \* such matters, not being ultimate facts, but conclusions of law to be drawn from facts, must be pleaded, not in the language of the statute, but the facts (not evidence of the facts) relied on must be stated, and issues relating thereto submitted to the jury, to the end that the court, either upon demurrer to the statement of the grounds of contest, or upon the verdict, may determine whether, as matter of law, such facts so pleaded or found constitute a valid reason why the proposed paper should not be admitted to probate." In the case at bar the averments in the petition, waiving the objection that they are nearly all merely recitals and not positive allegations, amount to nothing more than a general statement that undue influence was exercised over the testator; there are no averments of facts which compelled him to do that which was not his will to do, and procured an instrument which did not express his free intention.

At the time the order appealed from was made the appellant did not ask to amend, but previously to that time, on April 3, 1905, which was more than one year after the order admitting the will to probate, appellant made a motion to be allowed to file certain offered amendments, which was denied on May 9, 1904; and appellants contend that the refusal to allow these amendments was error, which can be considered on this appeal. The contention is not maintainable. The allowance of amendments to pleadings is mostly within the discretion of the trial court, and when the amendments to a petition for the revocation of a will are not offered until after the expiration of a year from the probate, their denial would not be reversed unless the circumstances showed very extreme abuse of discretion, which does not here appear. Moreover, the offered amendments, if allowed, would not have supplied the defects of the original petition.

It is contended that the court erred in denying appellants' motion for a continuance of the trial; but that matter is immaterial if, as we hold, the court was right in rendering judgment on the pleadings.

The order appealed from is affirmed.

We concur: LORIGAN, J.; HENSLAW, J.

ANDERSON v. GRAND VALLEY IRR. DIST. et al.

(Supreme Court of Colorado. Jan. 8, 1906.)

1. STATUTE—TITLE—SUFFICIENCY.

The first clause of the title of the irrigation district law (Laws 1901, p. 198, c. 87), which is, "An act to provide for the organization and government of irrigation districts," is sufficiently comprehensive to include every provision found in the act which provides for the organization of irrigation districts, the construction of ditches, condemnation of canals, the issuance of district bonds, and the approval of the proceedings of the district by the court, and the act is consequently not repugnant to Const. art. 5, § 21, requiring bills to contain but one subject, which shall be clearly expressed in the title.

2. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

The irrigation district law (Laws 1901, p. 198, c. 87), providing for the organization of irrigation districts, the construction of ditches, condemnation of canals, the issuance of district bonds, and the approval of the proceedings of the district by the court, does not violate the constitutional guaranties of due process of law.

3. WATERS AND WATER COURSES—PUBLIC WATER SUPPLY—IRRIGATION—CONSTITUTIONAL PROVISIONS.

Nor is it repugnant to Const. art. 16, which declares the water of natural streams to be the property of the public and dedicates the same to the use of the people subject to appropriation.

4. STATUTES—PASSAGE—COMPLIANCE WITH CONSTITUTIONAL PROVISIONS—EVIDENCE OF INVALIDITY.

One who questions the validity of a statute upon the ground of noncompliance by the general assembly with Const. art. 5, § 22, requiring the vote on the final passage of bills to be taken by ayes and noes, and the name of those voting to be entered on the journal which each house is required to keep by section 13 of the same article, must present proper evidence showing the facts upon which he relies to show such noncompliance, and the court will not consider admissions of parties or stipulations of counsel as to the contents of legislative journals in impeachment of the validity of a law.

En banc. Appeal from District Court, Mesa County; Theron Stevens, Judge.

Proceedings by the Grand Valley Irrigation District and others against Charles W. Anderson. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

This is a special proceeding instituted in the district court of Mesa county under the irrigation district law of 1901, found in Session Laws of that year at page 198 (chapter 87). Its object, in the language of the statute, is to obtain a judicial examination, approval, and confirmation of the proceedings of the irrigation district and its board of directors providing for and authorizing the issue and sale of its bonds. The trial court approved all such proceedings and confirmed the validity of the bonds and the order for their sale, and its judgment is brought here for review by appellant, who appeared as a defendant below. Considering the nature of the objections urged to the decree and the disposition that is made of them, it is well at the outset to summarize the substantive

provisions of this act, as well as the remedial provisions under which this special proceeding is conducted. The act is modeled upon, and is substantially similar to, the California "Wright Irrigation District Act" of 1887 (St. 1887, p. 37, c. 34), as the same has been subsequently amended by the Legislature of that state. It provides that whenever a requisite number of the resident freeholders "owning lands in any district susceptible to one mode of irrigation from a common source and by the same system of works, desire to provide for the irrigation of the same, they may propose the organization of an irrigation district under the provisions of this act," which "shall have the powers conferred or that may hereafter be conferred by law upon such irrigation district," provided that where already there exist proper and sufficient facilities for irrigating any lands within the proposed district, they shall be excluded from the operation of the statute, and the vested rights which the owners of such lands have theretofore acquired are not affected by it. The method of procedure is by petition, filed with the board of county commissioners of the proper county, which shall describe the boundaries of the proposed district and pray for its organization. The petition must be published for at least two weeks before the time at which the same is to be presented, together with a notice stating such time. A hearing upon the petition to all persons interested at the designated time is enjoined upon the board, and upon final hearing such changes in the boundaries of the district as seem proper may be made, and the board shall thereupon proceed to establish and define the boundaries of the district, but, in doing so, no land shall be exempted therefrom which is susceptible of irrigation by the same system of works applicable to other lands of the district, or included therein which, in the judgment of the board, will not be benefited by irrigation by the contemplated system, and in no case shall any lands be held by any district or taxed for irrigation purposes which cannot from any natural cause be irrigated thereby. There are provisions whereby, on application of the owner, other lands than those originally sought to be included in the district may be taken in. There are also specific provisions for the election by the qualified electors of three directors and a treasurer of the district which election is under the direction and control of the board of county commissioners, due notice of which must be given, and proper safeguards and ample regulations are made for conducting the election, making the canvass of the vote, and the induction into office of those elected. The powers and duties of these district officers are prescribed, and times and places for their regular meetings designated, and directions for all future elections made.

Among the powers conferred upon the district board is that to construct, purchase, and

condemn canals, reservoirs, water rights, and to acquire such other property as may be necessary for carrying out the provisions of the act. The manner in which such general power is to be exercised is not material here. It is sufficient to say that it is amply guarded with a view to the protection of the interests of those upon whom the burdens of the act are devolved. The use of all property, including water rights, acquired and necessary for the irrigation of the lands of any district so formed, is declared to be a public use and subject to the regulation and control by the state in the manner prescribed by law, and the title to such property is immediately vested by operation of law in the irrigation district in its corporate name, to be held by such district in trust for, and is dedicated and set apart to, the uses and purposes set forth in the act. Provision is made for issuing negotiable bonds of the district for the purpose of paying for property acquired by it in carrying out the scheme devised, the payment of which bonds and interest thereon, as well as the ordinary current expenses in conducting the corporate enterprise, is to be made out of revenues derived from an annual assessment upon the real property of the district. The county assessor must assess and enter upon his records the assessment of all real estate, exclusive of improvements, situate in any irrigation district, and, after the same has been duly equalized and extended as provided by law, make a return of the amount thereof to the board of county commissioners of the appropriate county. Upon the receipt from the assessor of the returns of the total assessment, and of the certificate of the board of directors certifying the amount of money required to be raised for the payment of bonds and expenses, it is made the duty of the board of county commissioners to fix the rate of levy necessary to provide the required sum. The county treasurer of the appropriate county is made the collector of this revenue, and, by section 20 (page 214) of the act, the revenue laws of the state for the assessment, levying, and collecting of taxes on real estate for county purposes are made applicable to the assessment, levy, and collection of taxes under this particular act, except as thereby modified.

Changes in the boundaries of the districts and the exclusion of lands therefrom and inclusion of lands therein, and provisions for the dismemberment or dissolution of the districts, are made which, however, are not now of material concern. The water which the district is authorized to acquire for purposes of irrigation of its included lands must be apportioned ratably to each landowner upon the basis of the ratio which the number of acres susceptible of irrigation last assessed to such owner for district purposes within the district bears to the whole number of acres susceptible of irrigation within the district, and the water right so apportioned shall attach to, and follow, the tract of land held in

freehold to which it is so apportioned, either under lease or sale; and in case the volume of water at the disposal of the district is not sufficient to supply the continual wants of the entire district, provision is made for a just and equitable apportionment thereof by the board of directors to the consumers, with due regard to the legal and equitable rights of all. The remedial portions of the act under which this proceeding was instituted begin with section 35 (page 228). In substance they are that the board of directors of any district organized under the act may commence special proceedings in the appropriate court, by which there may be examined the proceedings of the district and its board providing for and authorizing the issuing and sale of its bonds, whether the bonds, or any of them, have, or have not, been sold, in order to secure a decree of the court approving and confirming all such acts as in anywise affect the validity of the organization and the legality of the bonds, and, if found regular and in conformity with the law, a decree of approval and confirmation is to be rendered. When this petition is filed, the court fixes a time for hearing the petition, and orders the clerk to give and publish a notice which shall state the time and place fixed for the hearing, in which notice the petition must be referred to or described in such way as to give due notice of its contents and state the nature of the decree asked for. Any landowner or other person interested in the district may appear and demur to, or answer, the petition, which, unless controverted, shall be taken as true, and all persons affected by the proceeding who fail to appear or answer the petition shall be deemed to have admitted as true its material averments. A hearing is then had upon the issues, if any, thus joined, and upon the court is expressly conferred jurisdiction to make the examination and determination already outlined.

Chas. F. Caswell and Erastus W. Smith, for appellant. Carnahan & Van Hoorebeke and J. C. Helm, for appellees.

CAMPBELL, J., after the preceding statement, delivered the opinion of the court.

The foregoing summary of the law, though omitting many details, is sufficient for our present purpose. The chief objections which the appellant landowner, who appeared below to defeat the object of the proceeding, urges upon this appeal to the decree of confirmation are constitutional in character. Apparently the board of directors of the district has strictly complied with—at least there is no contention that it has disregarded—the procedure which the act of 1901 prescribes for the organization of the district, and has properly taken the various subsequent steps thereunder, up to and including the issuance and order of sale of the bonds. Bonds to the amount of \$585,000 were issued and ordered sold by the district board, but as no proposal

for the purchase was made, in order to facilitate their sale this proceeding for confirmation was brought. In view of the observation of the courts in the Nebraska case and Kinkade Case from Washington, in *Tulare I. Dist. v. Shepard*, *infra*, and in *Tregea v. Modesta I. Dist. infra*, and *Miller v. Perris I. Dist. (C. C.)* 85 Fed. R. 693, with respect to this special proceeding, it is pertinent to say that we are not defining the scope and effect of, or specifying the persons who are bound by, the confirmatory decree rendered herein. Necessarily we pass upon the objections to the decree which appellant interposes only so far as they bear upon the propositions whether the proceedings had for the organization of the district and the issuance of bonds thereby after the organization are or are not in harmony with the constitutional and statutory provisions which they are said to violate. That is, and obviously must be, the extent of our present holding, for anything beyond that would be mere dictum.

The errors assigned may thus be stated: (1) The act contains various provisions which are not embraced in the title; thereby is violated section 21 of article 5 of our Constitution, which is that no bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title; (2) that the necessary effect of the act is to deprive the owners of land included in the district of their property without due process of law; (3) that the trial court erred in holding that in issuing bonds the board of directors of the district properly proceeded in accordance with the methods prescribed in the act of 1901, instead of conforming to the essentially different amendatory act of 1903, found in the Session Laws of that year at page 265 (chapter 123).

1. Colorado is properly classed among the arid states of the west. Large tracts of land within its boundaries are not at present cultivable. They can be made fully productive only by irrigation. The conditions are much the same here as in the state of California, and the other arid regions. The object of this act, as even a casual reading shows, is compulsorily to provide means, at the expense of those landowners within the proposed district primarily benefited, for bringing into cultivation the arid lands of the state and making them highly productive by the process of irrigation. The general and sole subject of the act concerns the organization of irrigation districts. The title is cumbersome, involved, and unnecessarily prolix. The opening clause reads: "An act to provide for the organization and government of irrigation districts and to provide for the construction of canals and reservoirs and the acquiring of canals already constructed or partly constructed." The first part of the clause, *viz.*, "an act to provide for the organization and government of irrigation districts," is broad and comprehensive

enough to include every provision found therein. The remainder may be entirely disregarded as surplusage, and what is left covers every provision which the body of the act embraces. Every part of the act, including that for this proceeding, is strictly germane to the one general subject. The constitutional provision upon this subject must have, as this court has repeatedly announced, a reasonable construction. This act contains only one general subject, and that concerns irrigation districts, and this is clearly expressed in the title. While the General Assembly is again cautioned about attempting to make of the title a general index, still we are of opinion that this constitutional provision has not been violated in this instance.

2. The so-called "Wright Act" which, in all substantial particulars, is the same as the one now under consideration, has repeatedly been construed and upheld by the Supreme Court of California and the Supreme Court of the United States in the following, among other cases that might be cited: *Irrigation District v. Williams*, 76 Cal. 360, 18 Pac. 379; *Irrigation District v. DeLappe*, 79 Cal. 351, 21 Pac. 825; *Board of Directors v. Tregoe*, 88 Cal. 334, 26 Pac. 237; *In re Medera Irri. Dist.*, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; *In re Central Irri. Dist.*, 117 Cal. 382, 49 Pac. 354; *Merchants' Bank v. Irri. Dist.*, 144 Cal. 329, 77 Pac. 937; *Fallbrook Irri. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *Tregoe v. Modesta Dist.*, 164 U. S. 179, 17 Sup. Ct. 52, 41 L. Ed. 395; *Tulare Irri. Dist. v. Shepard*, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773. The Supreme Court of Washington in *Board of Directors v. Peterson*, 4 Wash. 147, 29 Pac. 995, and *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. 399, reaches the same conclusion, and in *Board of Directors v. Collins*, 46 Neb. 411, 64 N. W. 1086, the doctrine of the California cases is approved. It seems to us that all of the objections urged upon this hearing under the general head of "due process of law," so far, at least, as they affect the appellant, or are involved in, or bear upon, the issues raised in this special proceeding, have been met and sufficiently answered in the foregoing decisions, and to repeat the argument of the opinions would be a work of supererogation. Some of these decisions hold that the landowners whose property is affected by the act are thereby afforded a hearing, on due notice, upon the questions as to whether their lands shall be included in the district, and the correctness and validity of the tax or assessment which it authorizes to be laid upon the same, and as those are the only questions upon which they are entitled to be heard, their property is not taken without due process of law; others declare that the special proceeding, under which this cause is pending, being one to secure evidence, does not result in the violation of any right protected by the state or federal Constitution.

Counsel for appellant apparently concede that, were our Constitution substantially the same as that of California, these decisions would be squarely against their contention; but they say that due process of law is ignored in this act under our Constitution in that its material provisions are inconsistent with, and contravene, article 16 of our organic law, under which the right to the use of water for irrigation is the result of an appropriation and not of a grant, and that this article is further violated by our statute which expressly authorizes the acquisition or appropriation of a water right for a public use, because this court has repeatedly held that a water right can be acquired only for a private, and not for a public, use. Just what bearing these constitutional provisions, even if they mean everything appellant claims for them, have upon this statute is not made entirely clear to our minds by the argument of his counsel. Certainly, the act itself does not purport to be, or to contain, a grant to irrigation districts formed thereunder of water, or right to its use, or of any other property except the franchises of a public corporation. Provision is made therein whereby irrigation districts, when organized, may acquire a right to use water by making an appropriation under the laws of the state, and also by purchase or condemnation thereof. This, however, is not equivalent to saying that by the act the state purports to grant property to public corporations for a public, which can be devoted only to a private, use. The property rights which are spoken of are such as are to be acquired by the districts after their formation in accordance with constitutional and statutory methods by which water rights and other kinds of property may be obtained by a public corporation. The use of the water which the act contemplates is thereby declared to be a public use, but in one sense the water rights are private property to be utilized for the benefit of individual landowners, and all the property acquired by the districts, including water rights, in equity belongs to them. While we do not find in the Constitution of California provisions like those in article 16 of our Constitution concerning irrigation, we are not advised, and our investigation has not disclosed, that there are such essential differences between the Constitutions and laws of the two states with respect to water and water rights, or the methods of their acquisition, as would make such a law as that now under review contravene our Constitution while in harmony with that of California. By this decree, which confirms the regularity and shows conformity to the provisions of the act in the proceedings of the district in its organization, and in the subsequent proceedings of the district and its board in the issuance, and order of sale of bonds, we think there is no infringement of any right of appellant which is protected

by the state or federal Constitution, both of which enjoin due process of law in the taking of private property. This conclusion, of course, is on the assumption that the procedure prescribed by the act of 1901 has not been changed by a later act.

3. It is admitted that the district board in issuing the bonds followed the directions applicable to that subject contained in the act of 1901, and entirely disregarded the kindred directions of the amendatory act of 1903, which materially differ from the former. Justification, therefore, by the board is that the law of 1903 is void because, in the passage of the bill through the Senate, that branch of the General Assembly disregarded a mandatory provision of the Constitution, compliance with which is essential to the validity of an act. The particular defect pointed out is that in the Senate the bill was not read a third time or placed upon final passage, but, if so, the journal fails to show that the vote on final passage was taken by ayes and noes, and the names of those voting entered in the journal, which section 22 of article 5 expressly requires shall be done. In *Marean v. Stanley*, 21 Colo. 43, 39 Pac. 1086, this court decided that a party who seeks to question the validity of a statute upon the ground that either branch of the General Assembly has not complied with some mandatory constitutional requirement in its passage must in some proper way present to the trial court the facts upon which he relies to show such noncompliance, and, if he desires to have the decision of that court reviewed, he must, by bill of exceptions, make such evidence a part of the record. *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145; *Sargent v. La Plata County*, 21 Colo. 158, 40 Pac. 366; *Rice v. Carmichael*, 4 Colo. App. 84, 34 Pac. 1010, and *Hill v. Bourkhard*, 5 Colo. App. 58, 36 Pac. 1115, are to same effect. If the proceeding is an original one in the Supreme Court, the attacking party, of course, would be required to make proper proof of the impeaching facts. There was no decision in these cases how this fact is to be proved. But in *Peckham v. People*, 32 Colo. 140, 75 Pac. 422, it was expressly said that it is not within the power of counsel to enter into a stipulation, the effect of which will render a law void, and the court will not consider admissions of parties or their counsel that a law has not been passed in accordance with the mandatory requirements of the Constitution, or admissions of facts as to the contents of the legislative journals. At the trial here counsel stipulated that the Senate Journals showed certain things, and nothing more, bearing on the passage of the bill through that body which, if a proper way to prove facts, shows that, on final passage, the ayes and noes and the names of the Senators voting were not entered on the journal. On this review it is only fair to say that counsel of both parties are willing

to be bound by the stipulation, and do not question the propriety of thus bringing to the attention of the court the alleged facts which the Senate Journal is said to contain. But this is the sort of a question which the court will sua sponte raise, and will not tolerate a practice which allows counsel to disregard salutary rules of evidence in the manner of proving a fact on an issue concerning which, as in the case before us, the public, as well as private litigants, are so vitally interested.

Learned counsel for appellees vigorously attack the doctrine of the *Marean* and *Peckham* Cases as unwarranted and against the weight of authority. Notwithstanding the ingenious argument, we are persuaded that, rightly understood, both of them are correct, and should be strictly adhered to. By section 13 of article 5 of our Constitution, each house shall keep a journal of its proceedings, and may, in its discretion, from time to time publish the same. It is not obligatory, however, upon either house to publish its journal. In the *Marean* Case it was held that the court will not, on the mere assertion of counsel that a statute is invalid because of noncompliance with some constitutional requirement in its passage, proceed to make an examination of the journals of the respective houses to ascertain how that fact may be. If counsel wishes the court to pass upon the issue, he may, if the journals are not published, present as evidence of their contents bearing on the point in issue, a proper certificate of the Secretary of State, in whose legal custody they are; or, if published by proper authority, such portions of the published journals themselves may be brought directly, and in that form, to the attention of the court. The court, however, will not make such investigation for itself. The reason for the rule announced in the *Peckham* Case, and the necessity for its observance, seem almost too obvious for argument. Of course, learned counsel in this case would not be guilty of any impropriety; but to permit parties to a suit to stipulate impeaching facts of this kind would be dangerous, and afford opportunities for falsifying, or suppressing parts of, the journals. It may be suggested that the possibility of this danger is too remote on which to ground a rule of evidence, but we do not think so. The safer course, in a matter of such importance to the state and to the public interests, is to require that proof of the impeaching facts should be made in the orderly way which experience has demonstrated to be attended with the least possibility of danger.

As a practical question, where the legislative journals have not been published, it would be manifestly unfair and attended with great inconvenience to require trial judges holding court in counties remote from the capitol to examine the legislative journals upon the mere assertion of counsel

that some mandatory provision had been disregarded by one or both branches of the General Assembly, or to base their decisions on the agreement of parties as to the contents of the journals. In *State v. Boise*, 5 Idaho, 519, 51 Pac. 110, the court said that it knew of no authority for recognizing the stipulation of counsel whereby it was agreed that certain writings therein contained constituted a copy of the journals of the House of Representatives or Senate of the state. We believe this to be a wholesome rule, and that the *Marean* and *Perkham* Cases, *supra*, should both be approved. It may be true that the stipulation of counsel correctly reproduces all that the Senate Journal contains relating to the passage of the bill in controversy through that body. But that method of proof, in a case of this sort, was condemned in a decision of this court which was published before the final hearing below was had. It is not insistence on an unimportant technical requirement, but the enforcement of a settled and salutary rule of evidence, that compels us, because of its violation, to reverse the judgment which was predicated solely, as to this branch of the case, on the forbidden agreement of parties.

Because the trial court was in error in resting its judgment that the act of 1903 was unconstitutional on the stipulation of counsel whereby, in effect, it was agreed by them that the mandatory constitutional requirements in the passage of the bill were ignored by the Senate, the decree, for that reason and as to that point, must be reversed, and the cause remanded for further proceedings in harmony with the views expressed in this opinion. In all other respects the decree is affirmed for the reasons given, and the matters so adjudicated and hereby affirmed will not be submitted for a rehearing.

Reversed.

#### LOWE et al. v. DONNELLY.

(Supreme Court of Colorado. March 5, 1906.)

##### 1. EVIDENCE—DOCUMENTS—ADMISSIBILITY.

In an action of replevin for a mare, a writing signed by the plaintiff, showing an exchange whereby he received the mare from the defendant, did not constitute a bill of sale showing title in him, and was inadmissible as a self-serving declaration.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1068-1104.]

##### 2. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action of replevin for a mare, where the evidence showed that it had been removed from the state by the defendant, but there was no evidence tending to show that the purpose of the removal was to render it impossible to show the description and identity of the animal, an instruction that if it was removed for that purpose the inference is that the facts to be shown by an exhibition of the mare would be unfavorable to the defendants was erroneous.

Appeal from District Court, Phillips County; E. E. Armour, Judge.

Action by E. L. Donnelly against Mary F. Lowe and another. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Allen & Webster and W. D. Kelsey, for appellants. Wm. T. Rogers and J. S. Bennett, for appellee.

MAXWELL, J. This was an action in replevin for a black mare or the value thereof. A jury trial resulted in a verdict and judgment in favor of plaintiff, appellee here.

About the same number of witnesses testified on each side of the case to establish the identity and ownership of the animal—plaintiff claiming that the animal was about 6 or 7 years old, with certain marks and brands; the defendants, that the animal was 3 or 4 years old, with certain other marks and brands. Both parties attempted to give the history of the animal from its birth. The crucial point in the case was the identity of the animal. The evidence of the respective parties was utterly irreconcilable. Under the settled rule of this court, the evidence and judgment would not be disturbed, provided the rulings of the court were without prejudicial error. Plaintiff claimed title to the animal in question by purchase from one Mrs. L. M. Gathe.

Over objection of defendants, the plaintiff introduced in evidence the following paper: "I, Edd Donnelly traded this day, October 3rd, 1900, to Mrs. L. M. Gathe 2 Heifers coming 3 Branded U on one left shoulder, D on the other, For one Black Mare 6 years old passed, Branded —(Edd Donnelly)." The foregoing paper, termed by counsel for appellee a bill of sale, was introduced as substantive evidence of plaintiff's title, not as a memorandum made at the time of the transaction, used for the purpose of refreshing the memory of the witness. It is signed by plaintiff, not by Mrs. Gathe, the alleged vendor, is not a bill of sale, and can be considered as nothing more than a memorandum made by plaintiff, and as such, a self-serving statement or declaration and therefore it was inadmissible. *Stone v. O'Brien*, 7 Colo. 458, 460, 4 Pac. 792. In view of the fact, that the testimony was quite evenly balanced, the reception as evidence of this paper, was not without prejudice to the defendants.

The following instruction was given to the jury over the objection of the defendants: "If the jury believe from the evidence that the defendants, or either of them, removed or caused to be removed from the jurisdiction of this court, or from the state of Colorado, the mare in controversy in this action to render it impossible to show the description and identity of said mare by view and examination by the jury, then the inference is irresistible that the facts to be shown by an exhibition of said mare would be unfavorable to the defendants and you have a right to act on such presumption." Defendant's evidence

upon this point was, that Mrs. Gathe or the Gathes, had twice taken the animal from the possession of the defendants; that defendants had twice retaken it; that the defendants lived near the Nebraska line; that shortly after defendants secured possession of the animal the second time, having no stable accommodations for the animal, before the commencement of this suit, defendants sent it to Nebraska, where it had been before, for pasturage and sale, and to prevent Mrs. Gathe or the Gathes from getting it. There was not a syllable of testimony tending to prove, that the deportation of the animal, was to render it impossible to show the description and identity of the animal, hence the objectionable instruction, was predicated upon the existence of a fact which there was no evidence to establish, and it was therefore unwarranted. *Empson Packing Co. v. Vaughn*, 27 Colo. 66, 73, 59 Pac. 749, and cases cited. The animal itself could not have been substantive evidence in the case, nor could it have been introduced in evidence by the defendants, over the objection of plaintiff. No demand for its production at the trial was made by plaintiff, and no application for an order for inspection was made by plaintiff, conceding but not deciding, that *Mills' Ann. Code*, § 188, authorizes the court, in its discretion, to order a view by the jury of personal property, the subject of the litigation. Therefore, under the facts as stated, no presumption of law unfavorable to the defendants arose, certainly no irresistible presumption or inference. If the facts upon which the instruction was predicated had been established, the instruction would have invaded the province of the jury, as a presumption of fact is an inference or conclusion of the existence of a fact, from some other fact, which has been established. It is for the jury and not for the judge to draw presumptions of fact. *Thompson on Trials*, § 2290.

In principle the case of *Cartier v. Troy Lumber Co.*, 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470, is somewhat parallel to the case in hand: The trial court gave the following instruction: "If you believe from the evidence that the defendant Cartier, has in his possession or under his control, so that he might have produced them, books or papers which contain evidence material to this case, which he has not produced in evidence, you have a right to presume that such books and papers, if produced in evidence, would be injurious to his case, unless you find that such presumptions have been refuted by the other credible evidence in the case." In its opinion the court says: "It is said, however, that other books, maps, contracts, etc., were withheld. Some of these were pointed out in the argument; but it is not shown that they were called for by the plaintiff, nor that they would have been competent evidence on behalf of the defendant if they had been offered. We are unable to see how they could

have been introduced on his behalf as primary proof, without the consent of the plaintiff. No presumption against him could, therefore, arise from his failure to produce them. Whatever inferences may be drawn against the party by reason of his failure to produce evidence in his possession or under his control, are allowed on the theory that he willfully withholds such evidence. His conduct, says Greenleaf, is attributed to his supposed knowledge that the truth would have operated against him. \* \* \* He is treated in law as a 'spoliator of evidence.' \* \* \* It will not be seriously contended that a party is to be treated as a 'spoliator of evidence' merely because he does not produce books and papers which he could only offer in evidence by consent of his adversary, or because some fact might be developed on the trial which would render them competent. \* \* \* The case is certainly one falling within the rule, that where the evidence is conflicting and irreconcilable, the instructions to the jury must be accurate. Here, on the evidence actually before the jury, a verdict might well have been rendered either way. The jury is told, however, that from the mere absence of evidence they may presume against the defendant to the injury of his case. To what extent that injury might have been carried in the minds of the jury no one can tell. It furnished a broad ground upon which to condemn the entire defense. No one can say with confidence that it may not have seriously prejudiced the defendant's right. The giving of it was manifest and prejudicial error, for which the judgments of the circuit and appellate courts are reversed and the case remanded to the circuit court for another trial." Peculiarly applicable to the case under consideration is the latter portion of the above quotation.

In view of the conflicting and irreconcilable evidence in this case, the instruction necessarily had great influence with the jury, always alert to secure from the trial judge some intimation of his opinion as to how the case should be decided. For the errors committed in admitting as evidence the memorandum referred to, and in giving the instruction quoted, the judgment will be reversed.

Reversed.

The CHIEF JUSTICE and GUNTER, J., concur.

UNION COAL & COKE CO. v. SUNDBERG.  
(Supreme Court of Colorado. March 5, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—DEATH OF SERVANT—DANGEROUS APPLIANCES—CONTRIBUTORY NEGLIGENCE.

Defendant operated a dangerous tram road up the side of a mountain to the entry of its coal mine and posted a warning at the bottom of the incline prohibiting employes from using the tram cars as means of access to the mine,

though its superintendent had knowledge that they sometimes did so in spite of the warning. On the morning of the accident deceased, with other miners, boarded an empty train of tram cars, and deceased, instead of getting inside the car, which he could have done, took a position on the outside of the front end of the foremost car of the train, with his left foot on the bumper of the car and his right foot on the cable. As the train was passing over a "knuckle" in the tramway, deceased fell or was thrown from his position, and was run over and killed. *Held*, that deceased was guilty of contributory negligence as a matter of law.

**2. APPEAL—REVIEW OF EVIDENCE—CONTRIBUTORY NEGLIGENCE—QUESTION OF LAW.**

Where the undisputed evidence as shown in the appeal record, in an action for death of a servant, established that there could be no recovery, because of deceased's contributory negligence, the ruling on appeal reversing a judgment for plaintiff on that ground was a ruling on a question of law, and not an invasion of the province of the jury.

Appeal from District Court, Las Animas County; Jesse G. Northcutt, Judge.

Action by Edna Sundberg against the Union Coal & Coke Company. From a judgment for plaintiff, defendant appeals. Reversed.

Wolcott, Vaile & Waterman, H. H. Dunham, and W. W. Anderson (Wm. W. Field, of counsel), for appellant. John J. Hendrick, R. T. Yeaman, and John A. Gordon (Calvin E. Reed, of counsel), for appellee.

MAXWELL, J. In July, 1898, appellant was operating a coal mine in Las Animas county. The mine is situated near the top of a mountain. At the foot of the mountain is a railroad track. The output of the mine is delivered to the railroad cars by means of a tramway and cars operated by appellant. The tramway is built on the slope of the mountain, from the platform at the railroad track to the entry to the mine, a distance of about 1,500 feet. The lower 900 feet of track is laid at an angle of 16° 20' from the horizontal and the upper 600 feet at an angle of 32° 30' from the horizontal. From the brow of the mountain, or "knuckle," as it is termed by the witnesses, to the entry to the mine, there is a practically level space of about 65 feet. On this level space there are double tracks for the accommodation of empty and loaded cars. From the "knuckle" to the passing point, about half way down the incline, there is a single track. At the passing point there are double tracks for a space sufficient to allow the down-going cars to pass the up-coming cars and from thence to the platform at the foot of the incline the track is single, where there is another space of double tracking for the accommodation of empty and loaded cars. The cars upon this tramway are operated by gravity. At the entry to the mine are two drums upon a single shaft, upon each of which drums is wound a wire cable so arranged that as the cable unwinds from one drum it is wound upon the other. One end of the cable being attached to a train of loaded cars and the

train started over the "knuckle" down the incline, the other end of the cable having been attached to a train of empty cars at the foot of the incline, the weight of the train of loaded cars in their descent unwinding the cable from one drum, necessarily winds upon the other drum the cable attached to the train of empty cars, and thus the trains of cars are operated up and down the incline. To equalize the weight of the train of loaded cars and the train of empty cars, and so control the speed of both trains, a brake band encircling the drum is provided which is operated by means of a cable attached to one end thereof, the other end being stationary, which brake cable extends to a pilot wheel at the brow of the hill or "knuckle," is attached thereto, and is under the control of an employé, who is thus situated to enable him to have at all times an unobstructed view of the down-going and up-coming trains on the tramway. In the operation of the trains of cars upon the tramway, the object is to land the loaded cars on the platform at the foot of the incline, and the empty cars over the "knuckle" and upon the level space at the entry to the mine. Otherwise it is necessary to draw the empty cars over the "knuckle" by animal power. The length of the cable attached to the trains is so adjusted that the operator of the brake, by controlling the speed of the trains, could and did accomplish this object. When a train of cars is drawn over the "knuckle," the application of the brake to the drum causes it to stop, and the cable attached to the cars drops to the ground, the momentum of the cars frequently carrying them some distance towards the entry of the mine. The cars in use upon the tramway are about 9 feet long consisting of a rectangular box, resting upon two axles, running upon 4 wheels, constructed for the purpose of transporting coal from the mine and supplies to the mine, and for no other purpose. There are two wooden bumpers on each end of the cars 8 to 10 inches square. The cable, a one-inch wire rope, is attached to the bumpers by means of a rope socket, clevis, and pin. A train of cars consists of three cars. There is a path-way or trail from the foot of the mountain to the mine for the use of employes of the mine. Some of the employes used the trail. Many of them, however, rode in the empty cars up the incline to the mine. This practice was against a warning posted by the company at the foot of the incline, although the superintendent of the company at the mine, knew that it was indulged in and permitted it to be done.

On the morning of July 25, 1901, a number of the employes of the mine, among whom was Charles Sundberg, were at the foot of the incline. A train of empty cars was about to start up the incline. Six of the employes got into the cars; Charles Sundberg took a position on the outside of the front end of the foremost car of the train,

his left foot on the bumper of the car, his right foot on the cable. The train was drawn to the top of the incline. Just after the train had passed over the "knuckle," Charles Sundberg fell or was thrown from his position as above described, across the track in front of the train of cars, was run over by the first car and the front wheels of the second car, and as a result of the injuries thus received, died within an hour. His widow instituted this suit to recover damages for his death alleging in her complaint that his death was caused solely by the negligence of the company, and while the deceased was in the exercise of due care and diligence, and free from any carelessness or negligence on his part. The defense was a general denial of the negligence charged, and contributory negligence of the deceased. A trial of the cause to a jury resulted in a verdict and judgment in favor of plaintiff, for the sum of \$5,000, to reverse which is this appeal.

The only question which we shall discuss, and which to our minds is decisive of the case, is: Did the negligence of deceased contribute to the cause of his death? Deceased was a man 34 years of age, presumably of average intelligence, an experienced miner. He had been employed at the mine 16 months, and must have been familiar with this tramway, the manner of operating the trains thereon, and the appliances by means of which such trains were operated. The whole scheme was open, obvious, and easy of comprehension to a man of ordinary intelligence; no hidden, latent, invisible, or complex agency, power, or appliance was in use, requiring expert knowledge or experience to understand it. With knowledge which he must have had from the circumstances of the case, he voluntarily, without excuse, and recklessly placed himself in a position of known, extreme, and perilous danger. That a position in the cars was considered dangerous is evidenced by the fact that the company posted notices warning employees of the danger of riding in them. If it was dangerous to ride in the cars, the danger of riding outside, on the front end of the foremost car, with one foot on the bumper and the other on the cable, is scarcely conceivable. It is not claimed that any officer or agent of the company directed, requested, permitted or knew that deceased took the described position on the train, hence his act was voluntary. The evidence shows that 8 or 9 men could ride in the three cars, hence his act was without excuse, as 7 men only, including the deceased, boarded this train. The fact that none of the men who rode in the cars were injured, proved beyond a doubt, that the act of deceased was reckless, and in utter and absolute disregard of his personal safety. It is difficult for us to conceive of a more wanton disregard of every impulse and principle which should govern and control men of ordinary

intelligence, prudence, and care, in the preservation of their lives and safety, than was exhibited by the deceased in this case. He certainly was the author of his own misfortune, and upon him alone must rest the blame for the deplorable accident which resulted. If a recovery could be sustained under the undisputed facts in this case, a person may bring an injury upon himself and then hold another responsible in damages therefor.

For the law decisive of this case, it is unnecessary to look beyond the reported decisions of the courts of this jurisdiction. The case most nearly in point as to the facts involved, is that of *Jackson v. Crilly*, 16 Colo. 103, 26 Pac. 331, in which this court said, at page 106 of 16 Colo., at page 332 of 26 Pac.: "The testimony clearly shows that the deceased was in a place of known danger; that he put himself in this place of danger voluntarily, and it may be said recklessly. It is beyond all contradiction that the occupancy of the place of danger caused or contributed to his death. If he had been standing up or seated inside the box, or if he had, within the time after entering the car and ascertaining its crowded condition, and before the starting of the train, sought a position in the next or adjoining car, the lamentable accident would probably not have resulted. It is admitted by the testimony and by the strongest witnesses, and, it might be said, by the most willing witnesses, on the part of the plaintiff, that by a little inconvenience to himself he could have stood up in the car as others did, and thus avoided the accident. There was room for him if there were room for others, and he should have taken a place of safety. He was not an infant nor non compos. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter the former could not arise. He took upon himself the right and privilege of riding on the rear end of a box car, seating himself upon a board not exceeding in thickness two and one-half inches, with his feet elevated by being placed upon the seat directly in front of him, and with no possible opportunity of protecting himself in case of a sudden jolt or jar of the car; and we cannot escape the conclusion that his death was due to his own folly and recklessness. He himself was the author of his own misfortune. This is shown with as near an approach of demonstration as anything short of mathematics will permit. It is a well-known principle of law that where a man negligently and, without excuse, places himself in a place of known danger, and thereby suffers an injury at the hands of another, either wholly or partially by means of his own act, he cannot recover damages for the injury sustained. The contributory negligence which prevents recovery for an injury, however, must be such as co-operates in

causing the injury, and without which the injury would not have happened. The true test is: Did the plaintiff's negligence directly contribute to the production of the injury complained of? If it did, there can be no recovery; if it did not, it is not to be considered." And again, at page 108 of 16 Colo., and page 333 of 26 Pac.: "Voluntarily, as one of those who on that day was engaged in the pursuit of pleasure, the deceased entered this crowded car, and assumed a dangerous position, notwithstanding the fact that the adjoining car had ample room in which he could have found convenience, comfort, and safety, and seated himself on the rear end of the car, and in a position which any man of ordinary prudence ought to know was unsafe, ought to know that in case of the slightest accident or jolt he was liable to fall. No prudent man of ordinary intelligence, sober, in full possession of his faculties, with a due regard for his life, possessing some knowledge of journeying by railroad, and the liability to accident on occasions similar to the one in which deceased lost his life, could fail to conclude that a more perilous situation could not have been assumed by any one than that taken by Crilly." To the same effect see *Railroad Co. v. Martin*, 7 Colo. 592, 593, 4 Pac. 1118; *Lord v. Pueblo S. & R. Co.*, 12 Colo. 390, 393, 21 Pac. 148; *Victor Coal Co. v. Muir*, 20 Colo. 320, 330, 38 Pac. 378, 26 L. R. A. 435, 46 Am. St. Rep. 290; *Acme Coal Co. v. McIver*, 5 Colo. App. 267, 281, 38 Pac. 596.

Under the facts of this case, the evidence of plaintiff having established beyond dispute, the contributory negligence of the deceased, it was the duty of the court under the rule established in this jurisdiction, to have directed the jury to return a verdict for the defendant, upon the request made therefor by the defendant at the close of the testimony. This request was denied, which ruling of the court is assigned as error. In *Behrens v. Railway Co.*, 5 Colo. 400, 404, it is said: "In actions of this character, it is incumbent upon the plaintiff to make out a prima facie case in his favor showing that the damages claimed by him resulted from the negligence of the defendant. And where it affirmatively appears from his own evidence that the want of due prudence upon his part was the proximate cause of the injury complained of, it becomes the duty of the court, upon a motion made for nonsuit, to decide as a question of law, that the action cannot be maintained." And in *Lord v. Pueblo S. & R. Co.*, supra: "If the evidence, in the most favorable light in which it may reasonably be considered in behalf of the plaintiff, shows that the plaintiff was guilty of negligence which contributed to cause the injury as alleged and without which the injury would not have happened, then the court may properly nonsuit the plaintiff, or direct a verdict in favor of defendant."

Also in *Railroad Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79: "It sometimes happens that evidence tending to show contributory negligence on the part of plaintiff may be elicited from his own witnesses when giving their testimony in chief. In such case, unless such evidence be contradicted, or rebutted by counter evidence tending to show plaintiff's diligence, or freedom from negligence, he should, of course, suffer defeat, either by nonsuit or by the verdict of the jury." See also, *Jackson v. Crilly*, supra; *Railroad Co. v. Pickard*, 8 Colo. 163, 6 Pac. 149; *Kennedy v. Railway Co.*, 10 Colo. 493, 16 Pac. 210; *Railroad Co. v. Martin*, supra; *Mau v. Morse*, 3 Colo. App. 359, 33 Pac. 283; *Denver, etc., Co. v. Dwyer*, 3 Colo. App. 408, 411, 33 Pac. 815. Under the above authorities it was the duty of the court to grant defendant's request for a directed verdict. Its failure to do so was error which will necessitate the reversal of the judgment.

Upon the oral argument, it was very forcibly urged by learned counsel for appellee that a reversal of this case would involve a departure from the established rule of this court that the verdict of the jury will not be disturbed where there is evidence to support it, and that, the question of contributory negligence having been submitted to the jury and decided in favor of plaintiff, this court should not invade the province of the jury. We take the evidence as we find it in the record, and decided on the undisputed evidence there could be no recovery, for the reason that such undisputed evidence discloses that there was contributory negligence on the part of the deceased. The court must decide the legal effect of the evidence in the record. If, from the undisputed evidence, one inference or conclusion only can be drawn, and that is that there was contributory negligence, it must be so adjudged as matter of law and the court must declare the law. In ruling that there was contributory negligence, the court does not rule upon a question of fact, for the facts were undisputed. "Where a judge rules that there is no evidence of negligence, he does something more than is embraced in the ordinary ruling, that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability and in this way the law is gradually enriching itself from daily life." *Holmes, Common Law*, 120. This principle applies here, for we rule, not that there is or is not evidence of a fact, but that the disputed facts do not create a legal liability by reason of the contributory negligence of the deceased. It seems to us, that but one conclusion can be drawn from the undisputed facts in this case, and that such conclusion is indisputable, viewing the evidence in the most favorable light possible in behalf of plaintiff, and that is that there was such reckless disregard of his life and

safety, such negligence, upon the part of deceased, as was the direct and proximate cause of his death.

The judgment will be reversed.

Reversed.

The CHIEF JUSTICE and GUNTER, J., concur.

ORPHAN BELLE MIN. & MILL. CO. v. PINTO MIN. CO. et al.

(Supreme Court of Colorado. March 5, 1906.)

1. MINES AND MINERALS—LEASES—DUTIES OF LESSOR.

It is the duty of a lessee of a mining claim in general to determine the underground lines of the premises held under the lease.

2. SAME—TRESPASS—DEFENSES—INSTIGATION.

Where, during mining operations by the lessee of a mining claim, the general manager of the lessee asked the lessor's manager for a survey, a statement made by the latter that the lessee should not go too far over the end line, but that a few feet would not make any difference and that the lessor's manager would make an arrangement with the president of plaintiff, the owner of an adjoining claim, with reference to the lines, did not amount either to an instigation or request by the lessor corporation to the lessee to commit a trespass on the adjoining property.

3. SAME—OFFICERS—SCOPE OF AUTHORITY.

It is not within the scope of the general authority of the manager of a mining corporation to instigate or request a trespass to be committed by the lessee of his corporation so as to make the trespass the act of the corporation, and thereby make it liable as a willful trespasser.

In Banc. Appeal from District Court, El Paso County; Louis W. Cunningham, Judge.

Action by the Pinto Mining Company and another against the Orphan Belle Mining & Milling Company. From a judgment for plaintiffs, defendant appeals. Reversed.

William C. Robinson, Spurgeon & Cassidy, and Tyson S. Dines, for appellant. Edward C. Stimson (Charles Cavender, A. H. Martin, and Curtis Nye Smith, of counsel), for appellees.

MAXWELL, J. The Free Coinage Gold Mining Company, the owner of the Rising Sun and Pinto mining claims in the Cripple Creek district, leased a portion thereof to the Pinto Mining Company. The Orphan Belle Mining & Milling Company, owner of the Orphan No. 2 and the Ida Belle No. 1 and the Ida Belle No. 2 mining claims, by a lease in writing and under seal leased a portion of such claims to certain parties residents of Herrington, Kan., who organized and incorporated under the laws of Kansas the Herrington Mining & Milling Company and assigned their lease to said company. This lease described the leased premises as follows: "The south seventy-five (75) feet of the Orphan (No. 2) number two mining claim, and the south seventy-five (75) feet of the Ida Belle (No. 1) number one claim;

this ground being a portion of survey No. 8,149, Cripple Creek mining district, El Paso county, state of Colorado. Also a block of ground, situated on the Ida Belle (No. 2) number two, immediately adjoining on the west 75 feet by 100 feet, making in all a block of ground 382 feet by 75 feet." The premises covered by the two leases adjoined each other; the northerly end line of the Free Coinage Company's property being the southerly end line of the Orphan Belle Company's property. The Free Coinage Company, owner, and the Pinto Company, lessee, as plaintiffs, prosecuted this action against the Orphan Belle Company to recover the value of ore alleged to have been taken from the plaintiffs' premises by the Herrington Company, lessee of the Orphan Belle Company, at the instigation and request of the Orphan Belle Company, and for the mutual profit and advantage of lessor and lessee. The Herrington Company, lessee, was not made a party defendant to the suit. The portion of the amended complaint charging the trespass is as follows: "That the defendant's said lessees, at the instigation and request of the defendant, and acting in conjunction therewith, and for the mutual profit and advantage of said lessees and said defendant, and by means of a certain shaft upon the said adjacent land, and of levels, drifts, cross-cuts and stopes, and between the 1st day of December 1897, and the 30th day of March, 1898, penetrated into and upon the lands, premises, mines and mining claims aforementioned.

\* \* \* and by means of said underground workings then and there willfully, wrongfully, knowingly and unlawfully, and without license or consent of these plaintiffs or either of them, \* \* \* extracted therefrom, and converted to their own use and benefit large quantities of gold-bearing quartz or rock of great value, and plaintiffs further aver that the said lessees between the 1st day of December, 1897 and the 30th day of March, 1898, at the instigation and request of, and in conjunction with the said defendant, and for the mutual profit, gain and advantage of themselves and the said defendant as aforesaid, have extracted, taken out and carried away 244 tons of ore and gold-bearing rock or quartz from the veins, lodes and ledges aforesaid, which ores and gold-bearing rock or quartz was then and there of the reasonable value of \$17,090." Trial to a jury resulted in a verdict and judgment in favor of plaintiffs in the sum of \$8,450, to reverse which is this appeal.

The evidence established, that during the time included in this controversy the Orphan Belle Company was not conducting mining operations upon its property or any portion of it; that J. E. Hunter was manager of that company; that Fred Johnson until January 24, 1898, was the superintendent of the Herrington Company; that as such superintendent he had exclusive charge and control of the work done on the premises held under lease by

the Herrington Company, subject to the orders of the officers of said company; that the Orphan Belle Company had nothing to do or say with reference to where the work should be done within the lines of the premises leased to the Herrington Company, this matter being entirely under the control of Johnson, the superintendent of that company; that the actual trespass was initiated and at least a portion of it committed by the Herrington Company, between the middle or latter part of December 1897 and January 24, 1898; during the time Johnson was superintendent of the Herrington Company and under his direction; that Johnson did not know where the end line was; that no survey to determine the position of the end line had been made; that he did not intend to go over the line; that he did not know he was over the line at the time he left the employ of the Herrington Company January 24, 1898, but learned that fact by measurements made subsequent to that date. Testimony was introduced to establish the extent of the trespass, and the value of the ore extracted. The only evidence introduced to establish the allegations of the complaint, as quoted, was that of Johnson, who testified that the trespass was made between December, 1897, and January, 1898, by him as superintendent of the Herrington Company; that he shipped ore from the trespass slope. "Q. Did you have a conversation with Mr. Joe Hunter about the work you were doing at that time? A. I did. Q. State what that conversation was and when it was, as near as you can tell. (Defendant objects, being immaterial. Objection overruled. Defendant excepts.) Q. State the conversation. A. Mr. Hunter was the general manager of the Orphan Belle, and as such had general supervision over the lease, and also in regard to shipping ore. (Defendant objects to and moves to strike out that portion of the foregoing answer with reference to the general supervision over the lease, being a conclusion of the witness and not a statement of fact. Motion denied. Defendant excepts.) Q. Go on. A. And when I came toward the Pinto line I asked Mr. Hunter for a survey, and he told me that he would get one as soon as he could; to go on and not go over too far, but a few feet would not make any difference, as he would make an arrangement with Mr. Strong; that he would not object if Mr. Strong went over a few feet on his lines and he didn't think it would be any trouble." The Mr. Strong referred to in the above testimony was the president of the Free Coinage Gold Mining Company, one of the plaintiffs in this suit. Upon cross-examination this witness repeated in substance the foregoing testimony, but it also appears from the cross-examination of this witness that Hunter had nothing whatever to do with the work done, or where it was done, by the Herrington Company or its employés, except as it appears, without dispute, that Hunter was manager of the Or-

phan Belle Company. The foregoing is all the evidence introduced by plaintiff upon this point. Mr. Hunter testified with reference to this conversation: "I heard the testimony of Mr. Johnson as to a conversation I had with him some time in January, 1898, or December, 1897. I don't think I ever had any talk with him or ever made the statements to him concerning which he has testified." No evidence was offered to prove the scope of Hunter's authority as manager of the Orphan Belle Company.

Appellees concede that a lessee is not the agent of the lessor in any sense or to any extent whatever, and that the owner of leased premises is not liable for a trespass committed by its lessee upon adjacent premises. Their contention is thus stated in their printed brief: "The appellees do not seek to hold the appellant merely because it was the lessor of the Herrington Company; but, the relation of landlord and tenant entirely aside, the appellant ought to be held because it instigated and incited the Herrington Company to act as it did, and because it shared in the profits of the trespass, knowing that the trespass had been committed. This is a liability which it would have to bear even were it an entire stranger to the title to the premises occupied by the Herrington Company under its lease. It is no question of liability of a master for the wrongful acts of his servant. It is no question of the lessee's agency for the lessor. It is no question of the responsibility of a principal for unauthorized acts of an independent contractor. It is no question of the responsibility of a principal for the acts of an agent employed to do something other than the act complained of. It is purely a question of whether the appellant, in the lawful meaning of the word, participated in the trespass or incited or encouraged it, or knowing that it had been committed shared in the profits resulting from it." Again they say: "Under no possible theory of the case could the defendant be held guilty of an innocent trespass. The defendant was guilty of willful trespass or nothing." This contention is based entirely upon the conversation between Hunter, the manager of the Orphan Belle Company (lessor), and Johnson, superintendent of the Herrington Company (lessee). At the time this conversation took place the Orphan Belle Company had no control or authority whatever over the underground operations of the Herrington Company. It was conducting no mining operations, and had no manager or agent authorized to direct mining operations. It was a lessor company and did not have possession of its mining property except as it had such possession through its lessees. So far as appears from the record, it was under no obligation to furnish its lessees with an underground survey; the lease granted by it was in writing and under seal and definitely fixed and determined the

boundaries of the leased premises. For aught that appears in this record, it was the duty of the lessee to determine the underground lines of the premises it held under the lease. The law imposes upon the one mining the property the burden of having a survey to determine the location of the lines underground. Johnson did not know where the line was; did not know that he was committing a trespass; did not intend to commit a trespass. Hunter, who derived his information from Johnson, certainly did not know that a trespass was being committed or was contemplated. No officer of the Orphan Belle Company knew that a trespass had been committed until months after the same was committed, and necessarily did not know, at the time it received royalties on the ore extracted from the trespass stope, that it was receiving the fruits of a trespass. The only authority cited by appellees in support of its position is *Mining Company v. Mining Company*, 11 Colo. 223-237, 17 Pac. 760, 766 (7 Am. St. Rep. 226) from which the following extract is quoted: "The superintendent, Bearce, in mining the ore acted for appellant and within the scope of his employment. He did not act for himself, nor for a stranger, and it is impossible that one should act for no one. Nor does it appear that he committed the wrong from any spirit of actual malice or hostility towards appellee, but solely in the interest of appellant. \* \* \* Everything was done in its name. His salary, if he was paid for his services, was paid by the appellant, and the entire profits of his operations went into the coffers of his employer. The scope of an agent's employment is said in *Kingsley v. Fitts*, 51 Vt. 416, 'to be determined not alone from what the principal may have told the agent to do but from what he knows, or in the exercise of ordinary care and prudence ought to know, the agent is doing in the transaction.' \* \* \* He was the representative of the company, as much so as would have been the president and all the other directors of the company had they exercised the same powers as the superintendent. \* \* \* 'A person thus placed by a corporation in such a position and authority may be fairly considered as its representative pro hac vice.'" The facts as set forth in the quotation clearly distinguish the above case from the case under consideration.

Attributing to the language of Hunter its broadest possible meaning, we do not believe that it can be construed into an instigation or request of the lessor corporation to its lessee, to commit the trespass complained of herein, under the facts of this case. It cannot be held, that appellant participated in the trespass or shared in the profits thereof, knowing it had been committed, for the reason, that neither Johnson or Hunter or any officer of the Orphan Belle Company, at the time it received royalties on the ore

taken from the trespass stope, knew that a trespass had been committed. It is familiar law that a corporation can only act through its agents, and their acts within the scope of their authority are the acts of the corporation. The converse of this position is law. The acts of an agent of a corporation beyond the scope of his authority do not bind it. It is not within the scope of the general authority of a manager of a mining corporation, to instigate or request a trespass to be committed by the lessee of his corporation, so as to make such trespass the act of the corporation, and thereby make it liable as a willful trespasser. In the absence of all proof as to the authority of the manager of the Orphan Belle Company in this matter, it cannot be presumed that he had any authority whatever, except such as pertains to the office of manager. In any view which we can take of this case, as presented upon this record, the plaintiffs below should not have recovered.

At the close of the testimony, defendant requested an instructed verdict in its favor. This request was refused, and error is assigned thereon. The assignment of error is well taken. The judgment will be reversed.

Reversed.

CAMPBELL and GODDARD, JJ., not participating.

#### PATRICK v. BROWN.

(Supreme Court of Colorado. March 5, 1906.)

#### 1. TRESPASS—ACTION—POSSESSION BY PLAINTIFF.

One without title must have had actual possession in order to maintain an action for trespass on land.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Tresp. §§ 32-47.]

#### 2. APPEAL—REVIEW—VERDICTS—CONFLICTING EVIDENCE.

A verdict based on conflicting evidence will not be disturbed on appeal.

#### 3. JUSTICES OF THE PEACE—JURISDICTION—TITLE TO REAL ESTATE.

2 Mills' Ann. St. § 2630, provides that, if in any action before a justice of the peace relating to real estate it shall appear that the title is in dispute, the justice shall certify the cause to the district court. *Held*, that an action for trespass on land, where plaintiff relied on possession alone, was not within the statute.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 81.]

#### 4. SAME—APPEAL.

Where a justice has no jurisdiction of the cause of action, the county court has none on appeal.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, §§ 472-474.]

Appeal from Otero County Court; Marion F. Miller, Judge.

Action by G. F. Patrick against R. W. Brown. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

L. A. Crane and G. F. Patrick, for appellant.  
Fred A. Sabin and R. S. Beall, for appellee.

MAXWELL, J. This controversy is the result of an attempt by appellant, plaintiff below, to inclose for grazing purposes a large tract of land in Otero county. Judgment by default having been rendered in a justice court against appellee, upon appeal by him to the county court a trial to a jury resulted in a verdict and judgment in his favor, to reverse which judgment this appeal was taken to the Court of Appeals.

From the testimony it appears that the action was trespass, alleged to have been committed by appellee in allowing his cattle to graze upon land claimed to be in the possession of appellant. There being no pleadings in the case, the issues presented must be determined by the evidence adduced at the trial. Plaintiff maintained that he was in the actual and exclusive possession of a large tract of grazing land. To prove such possession, he and his witnesses testified that he constructed several miles of wire fence, joining thereby several detached portions of fence owned by other parties and making thereof a continuous line of fence inclosing the tract of land of which he claimed the actual and exclusive possession; that he kept fence riders along the line of this fence to inspect and repair the same when necessary. It also appeared from plaintiff's evidence that a portion of the land inclosed was government land; that a portion of the fence only is  $4\frac{1}{2}$  feet high; that several miles of fence is a two-wire fence; that quite a lot of cattle which did not belong to plaintiff were within the inclosure; that the fence inclosed a county road; that defendant's cattle were in the pasture before the fence was put there; that the land was open range when defendant went there with his cattle. The alleged damages were testified to. Defendant and his witnesses testified, as to the character of the fence: that several miles of it consisted of two wires only; that the cattle drifted on to the land inclosed within the fence, and out on the commons; that the land which plaintiff claimed to be in possession of was open range when defendant drove his cattle upon the land; that the fence testified to by plaintiff, did not inclose the land at the time defendant entered upon the land; that defendant's cattle went from the public highway to the land; that the fence built by defendant inclosed this public highway; that defendant was in possession of a house and a quarter section of land attempted to be inclosed by plaintiff under a license from the owner thereof, at the time plaintiff built a portion of the fence; that there was no fence between this quarter section of land, which defendant occupied, and the land claimed by plaintiff; that other cattle than plaintiff's

were grazing on the land. Plaintiff relied solely on possession of the land inclosed by him. To maintain his action it was necessary for him to prove actual possession. *Sullivan v. Clements*, 1 Colo. 261. The question of plaintiff's possession was submitted to the jury under proper instructions, decided adversely to plaintiff upon conflicting testimony, and we are concluded by the verdict, provided no error in the rulings of the court intervened at the trial.

The only assignments of error called to our attention by appellant are based upon alleged errors of the court in rulings upon the admission of testimony introduced by appellee, viz., as to the authority of appellant to inclose the quarter section of land of which appellee was in possession, the license of appellee to occupy such land, and the existence of a county road within the alleged inclosure. The testimony objected to all went to the question of appellant's actual possession of the land, and not to any question of title or boundaries of the land. Appellant's objection to such testimony urged here is that, the action having originated in a justice court, such court not having jurisdiction to hear or determine questions of title or boundaries, the county court had no jurisdiction on appeal. 2 Mills' Ann. St. § 2630, is relied upon: "If in any action before a justice of the peace relating to real estate, it shall appear that the title or boundaries are in dispute, the justice shall certify the cause and transmit the papers to the district court of the same county."

From a review of the testimony adduced at the trial it appears that there was no dispute as to either the title or boundaries, within the meaning of the statute above quoted. Neither party claimed title, except by possession, and no attempt was made by either party to establish boundaries. *Robinson v. Compher*, 13 Colo. App. 343, 57 Pac. 754. and *Rosengrave v. Clelland*, 16 Colo. App. 474, 66 Pac. 448, are cited in support of appellant's position. In *Robinson v. Compher*, supra, it was held that under our statutes a justice of the peace has no jurisdiction of an action to settle partnership accounts, it being an equitable matter, and that the county court can acquire no jurisdiction on appeal, where a justice of the peace has no jurisdiction. In the *Rosengrave* Case the same rule was applied, where an equitable defense was sought to be interposed in the county court upon an appeal from a justice of the peace. Thus it is seen that the above authorities are not in point. The objection to the testimony urged by appellant is not tenable.

Judgment affirmed.

Affirmed.

The CHIEF JUSTICE and GUNTER, J., concur.

**STONE v. VICTOR ELECTRIC CO.**

(Supreme Court of Colorado. April 2, 1906.)

**1. CORPORATIONS—FOREIGN CORPORATIONS—TRANSACTIONING BUSINESS IN STATE—APPLICATION OF STATUTE.**

Laws 1901, pp. 118, 121, c. 52, §§ 4, 10, requiring foreign corporations doing business in the state to make certain filings in the office of the Secretary of State, to pay certain taxes and fees, etc., has no application to business transacted by a foreign corporation before the statute was enacted.

**2. DEPOSITIONS—PRELIMINARY PROOF—ABSENCE OR INFIRMITY OF WITNESS—FOREIGN DEPOSITIONS.**

Civ. Code, § 343, providing that before depositions are admitted in evidence it must be shown that the deponents continued to be absent from the county or were infirm at the time of trial, has no application to depositions taken outside of the state.

**3. APPEAL—PRESERVING GROUNDS OF ERROR BELOW—FAILURE TO OBJECT OR EXCEPT.**

In an action for the contract price of a machine, a judgment for plaintiff cannot be reversed, on the ground that the contract contained a warranty with which the machine did not comply, where the record contains no assignments of error to instructions and no objections or exceptions were saved relative to the verdict.

**4. SALES—BREACH OF WARRANTY—DUTY TO RETURN GOODS.**

A contract for the sale of a machine provided that if, upon test, it did not prove satisfactory the buyer should return it, and the seller would repay whatever had been paid on it. The buyer notified the seller that the machine was unsatisfactory, and the seller directed the buyer to ascertain the cost of having it repaired so as to be satisfactory. Disregarding this direction, the buyer retained the machine and refused to pay the purchase price. *Held*, that it was the buyer's duty to advise the seller of any money which had been paid out upon the machine and to return the same, and that he could not defend an action for the purchase price of the machine upon the ground that it was unsatisfactory.

Appeal from Arapahoe County Court; Ben B. Lindsey, Judge.

Action by the Victor Electric Company against George L. Stone. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank S. Tesch, for appellant. Carlow, Skelton & Morrow, for appellee.

CAMPBELL, J. This action was begun in the court of a justice of the peace to recover the sum of \$77 for an electrical machine, called a "rotary transformer," sold by the plaintiff to the defendant. There was a judgment for plaintiff, both in the justice court and also upon defendant's appeal therefrom in the county court, and defendant is here with his appeal.

1. A number of specifications of error are directed to rulings of the trial court upon the evidence. Without indicating the character of these objections, it is sufficient merely to say that our examination leads us to believe that these assignments are not well taken.

2. The defendant properly questioned, below and here, the right of the plaintiff to

maintain the action. Sections 4, 10, c. 52, pp. 118, 121, of the Laws of 1901, require, among other things, that a foreign corporation doing business in this state shall make certain filings in the office of the Secretary of State, and pay certain taxes and fees, and receive from that officer a certificate or permit to do business in this state, and until such payments are made and certificate issued it is prohibited from transacting business, or prosecuting or defending any action in the courts of the state. Plaintiff is an Illinois corporation doing business in the city of Chicago. The machine, for the purchase price of which this action was brought, was ordered by defendant, who is a dentist in the city of Denver, by a letter written in Denver and transmitted to Chicago to plaintiff. The machine was manufactured in Chicago, and shipped there by the plaintiff to the defendant, and received by the latter in the city of Denver. Whether the sections of the statute invoked apply to this transaction we do not decide. The defendant's point is not well taken, because the contract of sale was made, and defendant's liability thereunder accrued, before the statute in question was enacted. We do not believe the statute was intended to be retroactive, and its provisions are not applicable to this case. *Texas Land & Mortgage Co. v. Worsham*, 76 Tex. 556, 13 S. W. 384; *Middlebrook v. David Bradley Mfg. Co.* (Tex. Civ. App.) 27 S. W. 169.

3. It is said that the trial court committed error in permitting depositions, taken in behalf of the plaintiff in the state of Illinois, to be read at the trial without affidavit or oral testimony that the witnesses who gave them continued absent from the county or were infirm at the time of the trial. This objection might be disregarded, because the abstract does not include the portion of the record showing such ruling. There is, however, no merit in the contention, for that provision of section 343 of the Civil Code requiring such proof is applicable only where the depositions are taken in, and not out of, the state.

4. The principal objection argued goes to the merits of the controversy. Defendant's main defense is that as a part of the contract of sale the plaintiff absolutely warranted the machine to be fit and suitable for the purpose for which it was ordered, and that, since there was a breach of this warranty, he might retain the machine, as he did, and by way of counterclaim recover for the expenses to which he was put in attempting to repair the same so as to make it fit and suitable for his purpose, and also for damages to his business which he suffered as the result of being deprived of a machine which was essential to the conduct of his business. If defendant's construction of the contract be correct, we cannot, in the present state of the record, say that this judgment should be reversed for the reasons which he urges.

There are no assignments of error to the instructions, and they are not reproduced in the abstract. If it be true, as defendant asserts, that the jury disregarded these instructions and returned a verdict manifestly against the weight of the evidence, it is his misfortune that he has not preserved his objections and saved his exceptions and presented the same for our determination, as our rules of practice require. In the present state of the record we are justified in assuming, even if the contract contained an absolute warranty, and defendant's evidence tended to prove that there was a breach thereof, that there was evidence upon both sides of this issue, as in fact there was, and that the matter was properly submitted to, and correctly found by, the jury.

For another reason, also, defendant's objection is not good. Whatever contract, with reference to the sale of the machine, was made is to be found in the correspondence between the parties. The letters and telegrams, which constitute the correspondence, are set forth in the record. If correctly abstracted, as we assume they are, they show that no absolute warranty of the machine was made by the plaintiff. In a general way plaintiff knew of the use that defendant intended to make of the transformer, but did not absolutely guaranty that it would do the work which defendant required of it. It did say to defendant that it had no doubt that the machine would work smoothly and prove satisfactory, but that if upon test it did not prove so defendant was to return the machine to plaintiff, and the latter would repay whatever the defendant had paid upon it. After the machine was manufactured, and before it was shipped, the plaintiff made a test of it and reported the result to the defendant with the further information that it did not have the power which the defendant in one of his former letters had alluded to as the capacity which he desired, and the plaintiff added that it would not ship the machine until the defendant so requested. With the information thus given, the defendant ordered the machine to be sent, with which the plaintiff complied. Soon after the receipt of the transformer by the defendant, and upon testing the same, it was found to be unsatisfactory, and plaintiff was notified thereof, and thereupon requested defendant to have his machinist report what would be the cost of making it satisfactory, upon receipt of which information the plaintiff would then either direct the machine to be returned or ask to have the changes made. To this request the defendant paid no attention, but made counter propositions as to what he would do, which the plaintiff declined to consider.

In view of these circumstances, we are clearly of opinion that it was defendant's duty to advise the plaintiff of any moneys, if any, that he had paid upon the machine up to the time of the receipt of such request,

and to return the machine. In accordance with the provisions of the contract. He could not retain the machine and, contrary to the express terms of his contract, recover the costs and expenses which he incurred and damages to his business by reason of the lack of necessary machinery in conducting it, even though he might maintain such a claim under a different sort of contract.

Perceiving no prejudicial error in the record which appellant is in a position to urge, the judgment is affirmed.

Affirmed.

GABBERT, C. J., and STEELE, J., concur.

MARSDEN v. HARLOCKER et al.

McPHERSON v. SAME.

(Supreme Court of Oregon. April 10, 1906.)

INTOXICATING LIQUORS—LOCAL OPTION—ELECTION—VALIDITY.

Laws Or. 1905, p. 41, c. 2, § 1, provides that, when a petition signed by not less than 10 per cent. of the registered voters of any county shall be filed with the county clerk, the county court shall order a local option election to be held at the time mentioned in the petition, and provides the method to be employed in determining whether the petition contains the requisite number of legal voters. By section 3, the petition is to be filed with the county clerk not less than 30 nor more than 90 days before the election. Section 6 requires the county clerk to file the petition and compare the signatures of the electors with their signatures on the registration books. Section 12 provides that if, at any time, an election shall result in prohibition, in any subdivisions of a county no election shall be held within the prohibited territory except an election for the entire county before the first Monday in June of the second calendar year following and not then unless petitioned for by the required number of voters. Section 14 provides that when prohibition has been carried at an election for the entire county no election shall be thereafter held in any subdivision until after prohibition has been defeated at a subsequent election for the same purpose held for the entire county. B. & C. Comp. § 933, provides that a judge may exercise out of court such powers only as are expressly conferred on him. *Held*, that it is the duty of the county court, and not the clerk, to inspect the petition for an election and examine its records to ascertain whether it complies with sections 1, 12, 14, and, if so, to order an election, which order is a condition precedent to a valid election and there was no valid election where the members of the court did not meet, nor assemble and make the proper investigations, but merely signed a memorandum purporting to authorize an election.

Appeal from Circuit Court, Coos County; J. W. Hamilton, Judge.

Suit by Robert Marsden against L. Harlocker, as county judge of Coos county, and others as county commissioners thereof, to restrain the canvassing of votes cast at a local option election, and a writ of review by H. H. McPherson to have the determination of the officers of Coos county reviewed and annulled. From a judgment and from a decree in favor of defendants, plaintiffs appeal. Judgment and decree reversed.

These two cases were argued and submitted together. That of *Marsden v. Harlocker* is a suit in equity instituted November 22, 1904, by Robert Marsden against L. Harlocker, as county judge of Coos County, and E. A. Anderson and Lloyd Spires, as county commissioners thereof, to restrain them from canvassing votes cast at, and from declaring the result of, an election held November 8, 1904, to determine whether the sale of intoxicating liquors as a beverage should be prohibited in that county, and to enjoin them from making an order prohibiting such sales. The complaint alleges, inter alia: That plaintiff is a citizen, taxpayer, and qualified elector of Coos county and engaged therein in operating a brewery, having about \$20,000 so invested. That on September 30, 1904, there was filed in the office of the county clerk of that county a pretended petition for an election to be held November 8th of that year, to determine whether the sale of intoxicating liquors should be prohibited in such county. That the county court thereof assembled in regular session at the courthouse therein, September 7, 1904, adjourning on the 12th of that month and that at no time thereafter, prior to November 19, 1904, did such court again convene or make any order calling an election for the purpose specified. That by reason of the failure to give proper notice of the time and purpose of the proposed election, the total vote cast thereat was 1,330 in favor of, and 1,220 against, prohibition, out of a total registration of 2,843, though for presidential electors at such election there were cast 2,840 votes. That the defendants, as such county court, are threatening to declare the result of the pretended election and to make an order prohibiting the sale of intoxicating liquors in Coos county, and unless restrained from doing so, they will put their menace into execution, thereby destroying plaintiff's business, to his irreparable injury. A demurrer to the complaint, on the ground that it did not state facts sufficient to authorize the granting of the relief sought, having been sustained, and the plaintiff declining further to plead, the suit was dismissed and he appeals. *McPherson v. Harlocker* is a writ of review to have the decision and determination of the officers of Coos county in the matter of the election referred to reviewed, vacated, and annulled.

John S. Coke and J. M. Upton, for appellant. E. C. Bronaugh, for respondents.

**MOORE, J.** It is contended by plaintiff's counsel that the failure of the county court of Coos county, as confessed by the demurrer, to order an election as prayed for in the petition therefor, rendered all the proceedings attempted to be had in pursuance thereof invalid, and, this being so, the court erred in not enjoining the defendants from invading the property rights of their client in at-

tempting to put into execution such void proceedings. The record shows that though the county court of Coos county did not convene in regular or special session within the time alleged in the complaint, the defendants, as members thereof, at different times and in various parts of the county, individually subscribed their names to a writing purporting to call an election to be held at the time and for the purpose specified in the petition, and this memorandum having been entered in the records of such court, it is maintained by defendants' counsel that the provisions of the local option act (*Laws Or. 1905, p. 41, c. 2*) vest the county clerk of each county with judicial authority to determine the preliminary steps necessary to confer jurisdiction of the subject-matter, and that when he has exercised this power, the calling of an election in pursuance thereof by the county court is a mere ministerial duty, requiring neither discretion nor judgment, and such order may properly be made, as in the case at bar, and therefore no error was committed as alleged.

The defendants' counsel, in support of the decree rendered herein, invoke the rule announced by a majority of the court in *People ex rel. v. Brenham*, 3 Cal. 477, where it was held that the time and place of an election having been prescribed by a city charter, the failure of the council to perform any duty required of them prior to an election should not defeat the choice of the electors when exercised in selecting officers for the municipality. We do not think the prevailing opinion in that case is founded in reason or supported by authority. The doctrine there promulgated has since been practically repudiated by the court making it. Thus, in *People v. Porter*, 6 Cal. 26, it was ruled that the proclamation of the Governor, required by statute, was necessary to the validity of a special election. In *People ex rel. v. Weller*, 11 Cal. 49, 70 Am. Dec. 754, it was decided that an election to fill a vacancy was invalid unless held under and in pursuance of the Governor's proclamation, which was mandatory and necessary to give notice to the electors that an election was to be held for such purpose. To the same effect are the cases of *People ex rel. v. Rosborough*, 14 Cal. 180, and *Kenfield v. Irwin*, 52 Cal. 164, in which latter case, Mr. Chief Justice Wallace, speaking for the court, says: "The time of holding an election, whether general or special, must be authoritatively designated in advance, either by law or by some means which the law has prescribed; otherwise the election is held without authority, and is ineffectual for any purpose." In all general elections, the time, place, and manner of holding which are prescribed by law, the rule is well settled that electors must take notice thereof, and as a corollary to this legal principle any requirement for the issuing of proclamations or the giving of other notice in respect to such elections must

be treated as directory only. *McCrary, Elections* (4th Ed.) § 185; *Stephens v. People ex rel.*, 89 Ill. 337. In the case of special elections, however, all the statutory requirements as to proclamations or other means of giving notice are considered as mandatory and must be observed in order to render the vote of the electors participating therein valid. *People ex rel. v. Kerwin* (Colo. App.) 51 Pac. 530; *Demaree v. Johnson* (Ind. Sup.) 50 N. E. 376; *Morgan v. Gloucester City*, 44 N. J. Law, 137; *McHan v. Connell* (Tex. App.) 15 S. W. 284. Thus, in *State ex rel. v. Tucker*, 32 Mo. App. 620, it was ruled that an election under a local option liquor law, which could be held on the happening of certain conditions, was special, and that all the preliminary steps prescribed should have been taken in order to give validity to the election. To the same effect, in construing local option liquor acts, see *In re Sullivan* (Sup.) 70 N. Y. Supp. 374; *In re Powers* (Sup.) 70 N. Y. Supp. 590; *In re O'Hara* (Sup.) 71 N. Y. Supp. 613.

The reason for this rule rests upon the doctrine that suffrage is a valuable civil right, to the exercise of which each qualified person is entitled, and he must be given or charged with notice as to when, where, and for what purpose he is to vote. If, by operation of law, the election invariably occurs at stated intervals, without any superinducing cause, except the efflux of time, the election is general, in which case all qualified persons are presumed to have knowledge thereof, and hence the failure of any officer or person upon whom the duty devolves to give a prescribed notice does not invalidate the votes cast thereat. Where, however, some local project may be initiated by petition or other means, an election to determine whether such proposition shall be adopted is special, and the electors cannot be presumed to have knowledge of an exercise of the power which calls for the necessity of exercising the electoral franchise. In which instance a compliance with all the statutory requirements in respect to the performance of the conditions precedent is mandatory in order to validate the election. The provisions of the local option act in this state (*Laws Or. 1905, p. 41, c. 2*), so far as deemed involved herein, are as follows:

"Section 1. Whenever a petition therefor signed by not less than ten per cent of the registered voters of any county in the state \* \* \* shall be filed with the county clerk of such county in the manner in this act prescribed, the county court of such county shall order an election to be held at the time mentioned in such petition, \* \* \* to determine whether the sale of intoxicating liquors shall be prohibited in such county. \* \* \* In determining whether any such petition contains the requisite percentage of legal voters, said percentage shall be based on the total vote in such county \* \* \* for Justice of the Supreme Court, at the last preceding general election; provided, that in no event shall more than

five hundred petitioners, who are legal voters, be necessary upon any petition to require an election as herein provided."

"Sec. 3. The petition therefor shall be filed with the county clerk not less than thirty nor more than ninety days before the day of election."

"Sec. 6. The county clerk shall, upon receipt of such petition, immediately file the same and shall thereupon compare the signatures of the electors signing the same with their signatures on the registration books of the election then pending, or if nonpending then with the signatures on the registration books and blanks on file in his office for the preceding general election. If the requisite number of qualified electors shall have signed the petition, and if not inconsistent with the provisions of sections 1, 12, and 14 of this act, he shall thereupon see that it is entered in full in the records of the county court as required by section 1 of this act."

"Sec. 12. If at any time an election hereunder shall result in prohibition for any subdivisions of county as a whole, or any precinct of said county, no election hereunder shall be held within said prohibition territory except an election for the entire county before the first Monday in June of the second calendar year following, and not then unless petitioned therefor by the required number of legal voters and subject to the provisions in section 14 of this act."

"Sec. 14. When prohibition has been carried at an election held for the entire county, no election on the question of prohibition shall be thereafter held in any subdivision or precinct thereof until after prohibition has been defeated at a subsequent election for the same purpose, held for the entire county, in accordance with the provisions of this act."

It will appear from an examination of the excerpts quoted that the only duty specifically imposed on the county clerk of any county, so far as it relates to a prohibition petition, is to compare the names of the electors appended thereto with their signatures on the registration books or blanks, and if the application calls for an election for a subdivision of a county, he is required to see that the petition is entered in the records of the county court. Who is to determine whether or not the petition contains the requisite number of legal voters, and is otherwise sufficient, is not directly stated in the act under consideration. It would seem, however, that since the county court is required to order an election when a proper petition therefor has been filed; that, in the absence of any positive declaration on the subject, it must be incumbent upon such court to determine the preliminary questions involved as a condition precedent to making the order. As a petition is required to be filed not less than 30 nor more than 90 days prior to the day of election, ample time is thus given for making the application so as

to secure an order at a regular session of the county court within the time prescribed.

We believe that a fair construction of the local option law, considered in its entirety, requires that after a county clerk has examined a petition for a prohibition election, compared the names subscribed thereto with the signatures of the qualified electors as they appear on the registration books or blanks, so as to indentify the petitioners, that it then becomes the duty of the county court to inspect such petition, and to examine its records to ascertain whether or not the application complies with sections 1, 12 and 14 of the act, and if the court concludes that these necessary requirements are fulfilled, it should order an election, which is tantamount to a proclamation authorizing the county clerk to issue notices thereof. As the right to vote upon the question of prohibiting the sale of intoxicating liquors is inaugurated by filing a petition, the election held in pursuance thereof is special, and hence the making of an order therefor by a county court, which in this particular respect at least requires an exercise of discretion and judgment, is mandatory and becomes a condition precedent to the holding of a valid election. "A court," say the editors of the *American and English Encyclopedia of Law* (volume 8 [2d Ed.] p. 22), "may be defined as a body in the government, organized for the public administration of justice at the time and place prescribed by law." A court consists of persons officially assembled under authority of law at the appropriate time and place for the administration of justice. *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54; *In re Allison*, 13 Colo. 525, 22 Pac. 820, 10 L. R. A. 790, 16 Am. St. Rep. 224; *Board of Commissioners v. Gwin*, 136 Ind. 502, 36 N. E. 237, 22 L. R. A. 402. Our statute observes the distinction usually recognized between a judge and a judicial tribunal, and provides that this officer may exercise out of court such powers only as are expressly conferred upon him. B. & C. Comp. § 933. The county court of Coos county did not meet in regular or special session, nor assemble at the time or place described by law, and the memorandum signed by the defendants, purporting to authorize an election to determine whether the sale of intoxicating liquors as a beverage should be prohibited in that county, was not an order within the accepted meaning of that term. No election ever having been ordered, the votes cast in Coos county, November 8, 1904, upon the question attempted to be submitted, were nullities, and such being the case, it remains to be seen whether a court of equity will grant the relief prayed for in the complaint.

The remaining question is one of remedy. The alleged threat of the defendants to canvass the vote cast, to announce the result thereof and to prohibit the sale of intoxicating liquors in Coos county is as though they

were about to order prohibition in force therein without observing any of the formalities prescribed by law as a means to that end. The rule is quite general that equity will not intervene when an adequate remedy is afforded at law, and hence in controversies involving the right to an office an injunction will not usually lie, because the parties have a complete remedy by statute to contest an election or by quo warranto to determine the right resulting therefrom. Where, however, an election relates to the adoption or rejection of some local question and does not include an office, it has been held in some jurisdictions, in the absence of any statute authorizing such proceedings, that equity would intervene to determine a contested election because of the irregularities or fraud in the conduct thereof. 10 Am. & Eng. Enc. Law (2d Ed.) § 916; *High, Injunc.* (4th Ed.) § 1250. Thus, in *State ex rel. v. Eggleston*, 34 Kan. 714, 10 Pac. 3, which was a suit to enjoin county commissioners from canvassing votes polled upon the proposition of the relocation of a county seat, it was held that the relief sought should have been granted. In deciding the case *Mr. Chief Justice Horton*, speaking for the court, says: "Counsel for the county board rely with a great deal of confidence upon the cases of *Moore v. Hoislington*, 31 Ill. 243, and *Dickey v. Reed*, 78 Ill. 201, to establish the doctrine that the canvass of election returns cannot be interfered with by an injunction. Both of these cases were proceedings for contesting elections. This is not a proceeding to contest an election, but to restrain the canvass of a vote upon the ground that the petition presented to the county board for the election was wholly insufficient because of the fact that certain names were by the signers requested to be withdrawn, and that some of the names signed were signatures of nonresidents, or other unauthorized persons. The petition alleges, in substance, that no election ought to have been ordered upon the petition, and that no election could have been legally held upon the petition, under the provisions of the statute."

It is contended by defendants' counsel that in *McWhirter v. Brainard*, 5 Or. 426, a different rule was adopted in this state. In that case it was held that an injunction would not lie to restrain the removal of county offices to a county seat that had been relocated pursuant to a majority of the votes cast at an election held for the purpose, *Shattuck, J.*, saying: "We think the matters of fact, which counsel claim should have been tried, do not constitute a cause of suit in equity—do not present a case wherein relief can be had by injunction. There is no special statutory provision for contesting an election for location of county seat; but we think when the question, in such a case, is the qualification of the voter, the conduct of the judges or the legality of the canvass, the proper remedy is by mandamus and not by injunction in equity." In *Robinson v. Win-*

gate (Tex. Civ. App.) 80 S. W. 1067, in a well-considered opinion, it was ruled by the Court of Civil Appeals of Texas that equity had no jurisdiction to prevent by injunction the publication of the result of a local option election, on the ground of its invalidity or unfairness in conducting it, even at the suit of liquor dealers on allegation of irreparable injury to their property in case publication was made. In the case last cited, Mr. Justice Gill, referring to the Texas statute, which permits any qualified elector to contest a local option election (Rev. St. Tex. 1895, § 3397; Norman v. Thompson [Tex. Sup.] 72 S. W. 62), says: "We think it follows, logically and inevitably, that a suit to contest the result of local option elections must be brought under the statute, and that a suit of this nature addressed to the general jurisdiction of the district court cannot be heard." It will thus be seen that the Texas court, observing the rule which prevails in all jurisdictions, denied injunctive relief, because the party alleging fear of injury from a proclamation of the result of a majority vote in favor of local option had an adequate remedy by statute for contesting the election. In McWhirter v. Brainard, supra, an injunction was denied because there was no special statutory provision for contesting an election for location of a county seat. We do not think the doctrine announced in that case can be predicated upon the reasons assigned, or that it is controlling in the case at bar, no election contest being permissible except in case of persons claiming an office. B. & C. Comp. § 2839 et seq. It would seem, therefore, that equity has jurisdiction to afford the relief prayed for in the Marsden Case; but, however that may be, the same questions are presented in the review proceeding instituted by McPherson, and in any event are properly before the court for determination.

In view of the fact that the county court did not, as required by law, order the election in question, such election was invalid, and the judgment and decree of the court below are respectively reversed.

Ex parte HUSSEY.

STATE v. HUSSEY.

(Supreme Court of Oregon. April 10, 1906.)

Appeal from Circuit Court, Coos County; J. W. Hamilton Judge.

Petition by E. D. Hussey for a writ of habeas corpus to secure his release from custody on a charge of violating the local option law. From a judgment denying the petition, petitioner appeals. Reversed.

W. C. Chase, for appellant. I. H. Van Winkle, Asst. Atty. Gen., for the State.

MOORE, J. The petitioner, E. D. Hussey, was convicted in the recorder's court of

North Bend, Coos county, for violating the provisions of the local option act as claimed to have been adopted in that county November 8, 1904, by a majority of votes cast in favor of prohibition, and having been adjudged to pay a fine of \$50 and to be incarcerated until such amercement was paid, he petitioned the court to be discharged from the restraint thus imposed, on the ground that he was illegally deprived of his liberty. The petition was denied and he appeals.

In the case of Marsden v. Harlocker, 85 Pac. 328, we decided that the vote on the local option act cast in Coos county, November 8, 1904, was void, and as the conclusion there reached is controlling herein it follows that the judgment in the case at bar must be reversed, and the cause remanded, with directions to discharge the prisoner; and it is so ordered.

STATE ex rel. RUTHERFORD et al. v. RHODES, County Judge, et al.

(Supreme Court of Oregon. May 22, 1906.)

COUNTIES—COUNTY COURTS—ORGANIZATION—TIME OF HOLDING.

Where a county judge and county commissioners assembled at a time other than that prescribed by B. & C. Comp. § 915, or fixed by a general order of the court made and entered on the journal, etc., they did not then compose the county court of the county, and an order then made calling an election to determine whether the sale of intoxicating liquors as a beverage should be prohibited in the county was void.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Counties, §§ 57, 63.]

Appeal from Circuit Court, Yamhill County; William Galloway, Judge.

Mandamus by the state, on relation of F. B. Rutherford and others, against B. F. Rhodes, county judge, and others to compel respondents, as the county court of Yamhill county, to make an order declaring the result of an election held therein to determine whether the sale of intoxicating liquors as a beverage be prohibited and to forbid such sales. From an order dismissing the writ, relators appeal. Affirmed.

Frank B. Rutherford, for appellants. McCain & Vinton and M. L. Pipes, for respondents.

MOORE, J. This is a special proceeding, instituted by the state of Oregon, on the relation of F. B. Rutherford and others, against B. F. Rhodes, as county judge of Yamhill county, and A. M. Waddell and R. L. Booth, as county commissioners thereof, to compel them, as the county court of that county, to make an order declaring the result of an election held therein, November 8, 1904, to determine whether or not the sale of intoxicating liquors as a beverage should be prohibited, and absolutely to forbid such sales. An alternative writ of mandamus, showing the relators' prima facie

right, under the provisions of the local option liquor law, to a performance of the ministerial duty sought to be enforced, was issued, whereupon the defendants, answering, denied the material allegations thereof and averred, inter alia, that when the petition for an election for the purpose specified was filed, the county judge and one county commissioner in vacation, after an adjournment of a regular term of the county court, and without a special term thereof having been called, attempted to make an order authorizing an election to be held to determine the proposed question, but that such order was void, in consequence of which the election was illegal, whereby the performance of the acts sought to be enforced did not devolve upon the defendants as a duty resulting from their respective offices. A demurrer to the averments of new matter in the answer, on the ground that the facts thus stated did not constitute a defense to the alternative writ, having been overruled, the proceedings were dismissed, and the relators appeal.

Our statute prescribing the terms of county courts contains the following provision: "The county court is held at such times as may be appointed by law, and at such other as the court in term, or the county judge in vacation, may appoint, in like manner and with like effect as the circuit court or judge thereof is authorized by section 901." B. & C. Comp. § 915. The county judge and county commissioners of any county in this state do not constitute the county court thereof for the transaction of county business unless they assemble at the time prescribed by law, or at a time designated by a general order of such court to that effect made and entered in the journal during the term time, or by a special order made and filed by the county judge in vacation, authorizing the transaction of certain business therein specified. The county judge of Yamhill county and a county commissioner thereof not having assembled at a time thus prescribed, they did not compose the county court of that county for the transaction of county business, and could not make a valid order authorizing the calling of an election to determine whether or not the sale of intoxicating liquors as a beverage should be prohibited therein, and their attempt to make a regulation to that effect was void. *Marsden v. Harlocker* (Or.) 85 Pac. 328.

It follows from these considerations that the judgment should be affirmed; and it is so ordered.



## ENTERPRISE HOTEL CO. v. BOOK et al.

(Supreme Court of Oregon. May 1, 1906.)

### 1. BONDS — BREACH — ACTION — PLEADING — ISSUES.

Where, in an action on a contractor's bond, conditioned on the contractor, under contract for the construction of a building, com-

plying with the terms of his contract, the answer set up affirmatively the making of the contract, its terms and conditions, and pleaded breaches thereof as a defense, there was no issue on the question of the existence of the contract binding the contractor to construct the building.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Bonds, § 207.]

### 2. PRINCIPAL AND SURETY—UNAUTHORIZED PAYMENTS TO PRINCIPAL — DISCHARGE OF SURETY.

Where a security reserved in a building contract for the benefit of the sureties on the builder's bond is impaired by a premature payment to the contractor, the surety is discharged to the extent at least of the amount so paid unless the payment was made with the knowledge and consent of the surety.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, § 284.]

### 3. SAME—WAIVER OF DEFENSES.

A contract for the construction of a building provided that certain payments should be made to the contractor as the work progressed, and that a specified sum should be paid to him on the certificate of the architect that the building was completed and was accepted by the owner. The contractor's bond provided that payments made at times or in a manner other than as stipulated in the contract should in no wise operate to release the sureties from liability. *Held*, that the sureties could not complain because all payments were not made at the time or in the manner stipulated in the contract, they having waived that defense in advance.

### 4. SAME — ALTERATION IN BUILDING CONTRACT.

A contract for the construction of a building provided that if the owner should, during the progress of the work, request in writing any alterations, the same should be made and should not make void the agreement, but the value thereof should be added to or deducted from the contract price. The contractor's bond provided that any departure from the specifications, or alterations of the same should not make void the bond. *Held*, that the sureties were not released from liability on the ground that the contractor consented to alterations in the work when requested, without first requiring that such request should be made in writing, the provision in the contract being for the benefit of the contractor.

### 5. SAME.

A contract for the construction of a building provided that the contract price should be paid to the contractor in installments as the work progressed. The contractor's bond provided that payments made at any other time than as stipulated should not affect the obligation of the sureties. *Held*, that the premature payment of the cost for extra work did not release the sureties from liability.

Appeal from Circuit Court, Wallowa County; Robert Eakin, Judge.

Action by the Enterprise Hotel Company against Peter Book and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an action on a builder's bond. The complaint alleges that on July 29, 1902, the defendant Book contracted in writing with the plaintiff corporation to erect and construct for it by January 1, 1903, a two-story and basement stone hotel in the city of Enterprise, in accordance with certain plans and specifications, for the sum of \$7,300, and to keep the building and premises free from

liens for labor or material; that as security for the performance of the contract, Book, as principal, and the defendants Hallgarth and Bader, as sureties, executed and delivered to plaintiff the following bond or undertaking:

"Know all men by these presents, that Peter Book, of Elgin, Oregon, as principal, and Chas. Hallgarth and H. Bader, sureties, are held and firmly bound unto the Enterprise Hotel Company in the penal sum of seven thousand, three hundred and sixty-six dollars, for the payment of which in United States gold coin, we hereby bind ourselves, our heirs, administrators and executors firmly by these presents. The condition of the foregoing obligation is such that whereas, said Peter Book and the said Enterprise Hotel Company have just entered into a contract whereby the said Peter Book has agreed and undertaken to furnish all of the labor and materials of every kind, and build and complete for the said Enterprise Hotel Company on or before the 1st day of January, 1903, a two-story and basement hotel building in the city of Enterprise, Wallowa county, state of Oregon, according to certain plans and drafts and explanations and the drawings and specifications prepared by Architect C. R. Thornton, which said plans, drafts, drawings and specifications are verified by the signatures of the parties to said contract and are by reference made a part of said contract; and whereas, the said Peter Book has agreed to give security for the building and completion of said building according to the said contract therefor; and whereas, the said Peter Book has agreed to save the said Enterprise Hotel Company free from all liens which may be filed or which may be enforced on account of materials furnished or workmanship employed or work done on or about said building and to pay for all materials furnished or work done, and to save the said Enterprise Hotel Company harmless from the payment of such liens or claims of lien: Now, therefore, if the said Peter Book shall furnish all of the materials and labor and build, construct and complete said building in all respects according to said contract and the plans and specifications referred to therein, and in all other respects comply with said contract, and will pay for all material and labor employed on said building or in its construction, and will not permit any person or persons to obtain any lien or liens upon said building for labor or materials furnished or to be furnished for said building and will save the said Enterprise Hotel Company harmless from any and all costs, charges, damages or attorney's fees from any such lien or liens or claims for liens, then this bond shall be null and void, but otherwise to be and remain in full force and effect and be liable to enforcement to the extent of all such costs, charges, damages and expense of every kind which may be sustained by the said Enterprise Hotel Com-

pany by reason of the failure of the said Peter Book to comply with the terms of the said contract and this obligation. It is expressly understood and agreed that any departure from the plans, drawings, and specifications, or if any additions to, or alterations of, or any omissions be made in said building, the same shall in no way affect or make void this undertaking, but the costs of the same shall be added to or deducted from the amount of said contract price of said building by a fair and reasonable valuation. And it is expressly further agreed and understood that any extension of time in which to complete said building, or should any changes or deviations be made from said contract in respect to the payments therein stipulated to be made, or should payments be made at any other time or manner than therein stipulated, the same shall in no wise affect the validity of this obligation or release the sureties hereto from liability. It is the intention of the parties to this undertaking to provide that any changes or alterations in the construction of said building or extension of time in which to construct the same, or change in the time or manner of making payment, shall not in any wise release the sureties hereto from their obligations on this bond. This obligation and the contract referred to, which is hereto annexed, and made a part of this obligation, are to be construed to be one transaction and one obligation.

"Witness our hands and seals in duplicate this 20th day of July, 1902.

"Peter Book. [Seal.]

"H. Bader. [Seal.]

"Chas. Hallgarth. [Seal.]

"Executed in the presence of

"N. C. McLeod.

"J. N. Hazelwood."

It is further alleged that Book did not complete his contract until July 1, 1903, by reason of which plaintiff was damaged in the sum of \$300, and that he suffered and permitted liens for labor and material amounting to \$2,969.94 to be filed against the building, which the plaintiff was compelled to, and did, pay. Judgment was demanded against the defendant Book and his bondsmen for the amount above set out, less \$723.97, retained by the plaintiff, from the contract price. The defendant sureties answered, denying all the material allegations of the complaint and for an affirmative defense setting up the contract between the plaintiff and the defendant, and pleading (1) that the delay in the completion of the building was due to the imperfect plans and specifications and the conduct of the plaintiff, and not the defendant Book; and (2) that the defendant sureties have been released and discharged from all liability under their contract because (a) payments were made by the plaintiff to Book at times and in amounts different from that stipulated in the contract, and (b) that changes and alterations were made in the work without the knowledge or consent of

the sureties which greatly increased their liability. A reply put in issue the new matter in the answer, and a trial resulted in a verdict and judgment in favor of plaintiff, from which the defendants appeal.

F. S. Ivanhoe and T. H. Crawford, for appellants. D. W. Sheahan, for respondent.

BEAN, C. J. (after stating the facts). There are numerous assignments of error, but they may all be grouped under three or four heads.

It is contended that the court erred in admitting in evidence the contract between the plaintiff and Book, and in refusing to direct a verdict for the defendants on account of a failure of proof. The contract in question and the bond heretofore set out are on one sheet of paper and were made up from printed forms. In the contract proper the contracting parties are referred to as the party of the first part and the party of the second part, and the names have been so transposed that, if the agreement is read literally and without reference to its context, it would appear as if Book owned the building and plaintiff was the contractor therefor. When the entire contract and bond are read together, it is apparent that the confusion grows out of a clerical error and the contract is in effect as alleged in the complaint. But, however that may be, the question is immaterial here because the answer of the defendants set up affirmatively the making of the contract, its terms and conditions, and pleads breaches thereof as a defense to this action, so that upon the pleadings there is no issue on that matter. The contract provides that certain payments should be made to Book as the work progressed, and that \$1,000 should be paid to him on the certificate of the architect that the building had been completed according to the contract and had been accepted by the plaintiff. The building was not completed until July 1, 1903, and about that time the plaintiff paid \$1,000 to Book. The defendant sureties contend that they were released by reason thereof, because such payment was made without adjusting the claim for damages growing out of the delay in the completion of the building, and because there was at the time a mechanic's lien on the same for a small amount. The argument is that the reserve payments stipulated in the contract were for the benefit of the sureties as well as that of the owner, and that the payment in question operated to impair this reserve to the injury and prejudice of the defendants.

It is a settled rule of law that where a security reserved in a building contract for the benefit of the sureties on the builder's bond is lessened, impaired, or destroyed by a premature payment to the contractors, the sureties will be released and discharged to the extent at least of the amount so paid. *Cochran v. Baker*, 34 Or. 555, 52 Pac. 520, 56 Pac. 641; *Hand Mfg. Co. v. Marks*, 36 Or. 523, 52 Pac.

512, 53 Pac. 1072, 59 Pac. 549; *Wehrung v. Denham*, 42 Or. 386, 71 Pac. 133. But this doctrine can have no application where such payment is made with the knowledge and by the consent of the sureties. 27 Am. & Eng. Enc. Law (2d Ed.) 495; *Brown Iron Co. v. Templeman*, 30 Tex. Civ. App. 50, 69 S. W. 249; *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 600. Now, in this case, the bond contains a provision that payments made at times or in a manner other than as stipulated in the contract shall in no wise affect the validity of the obligation or operate to release the sureties from liability thereon. It is plain that under this provision the sureties cannot complain because all payments were not made at the time or in the manner stipulated in the contract, as they had waived that defense in advance. The contract provides that if the plaintiff should at any time during the progress of the work request in writing any additions or alterations to the building, the same should be made and should in no way affect or make void the agreement, but the value thereof should be added to or deducted from the contract price, and the bond provides that "any departure from the plans, drawings, and specifications, or if any additions to or alterations of, or any omissions be made in said building, the same shall in no way affect or make void this undertaking," and that "it is the intention of the parties to this undertaking to provide that any changes or alterations in the construction of said building \* \* \* shall not in any wise release the sureties hereto from their obligations on this bond." It is claimed that because certain changes and alterations were made in the building as the work progressed, such as increasing the height of the basement walls, the thickness of the exterior walls, the putting in of dormer windows, and some work in connection therewith, a change in the painting specifications, and the doubling of the first and second-story floors, were made without having been first requested in writing by the plaintiff, the sureties are discharged and released from liability.

It is an elementary rule of law that a surety can insist by his contract that he will not be bound except upon his own terms, and therefore, any alterations or additions in a building contract that materially change, vary, or increase the risk assumed by the sureties will release them from liability unless made by their consent, and there are authorities holding that where the contract provides that before the alterations or additions are made the value thereof shall be agreed upon in writing by the owner and the contractor that alterations or changes made by verbal agreement release the sureties. *Killoren v. Meehan*, 55 Mo. App. 427; *United States v. Freel*, 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1177. But there is no provision in the contract under consideration that the value of the alterations or additions

should be agreed upon by the owner and contractor in advance. The stipulation is that the same shall be added to or deducted from the amount of the contract price by a fair and reasonable valuation, and that if any dispute should arise concerning the value of any work or changes, the same should be determined by arbitration, and hence the authorities referred to are not in point here, and the liabilities of sureties are not affected by alterations and changes if consented to by them. *McLennan v. Wellington*, 48 Kan. 756, 30 Pac. 183; *Hayden v. Cook*, 34 Neb. 670, 52 N. W. 165; *De Mattos v. Jordan*, 15 Wash. 378, 46 Pac. 402; *Kretschmar v. Bruss*, 108 Wis. 396, 84 N. W. 429; *Hedrick v. Robbins* (Ind. App.) 66 N. E. 704. The provision in the contract that if plaintiff should at any time during the progress of the work request in writing any alterations or additions the same should be made, was for the benefit of the contractor, and could be waived by him. If he saw proper to make any changes or alterations in the work when requested, without first requiring such request to be placed in writing, it would, it seems to us, constitute no defense for the sureties, nor release them from their obligations.

Again, it is contended that the value of any alterations or additions became a part of the contract price, and the amount thereof should have been retained by the plaintiff until the final payment. It is provided that the contract price shall be paid to Book in installments as the work progressed, and it is insisted that because the extra work was paid for from time to time as it was performed, that such payments were premature and operated to discharge the sureties, but, as we have already seen, the bond itself expressly provides that payments made at any other time or in any other manner than as stipulated, should in no wise affect the obligation of the sureties. It necessarily follows, therefore, that even if the defendants are correct in their interpretation of the contract, and that the payments for extra work should not have been made at the time the work was performed, nor until final payment on the building, the premature payment thereof did not release the sureties, or relieve them from liability.

This, we think, covers substantially all the questions raised on this appeal, and there being no error in the record, the judgment is affirmed.

#### STATE v. WATSON.

(Supreme Court of Oregon. May 1, 1906.)

##### 1. ARSON—EVIDENCE—REMOteness.

In a prosecution for arson, in which the state claimed that defendant attempted to burn the building by saturating a part of it with kerosene, testimony that three or four days after the fire, witness picked up some of the earth under the building, and that it smelled as if kerosene had been poured over it, was not objectionable as too remote.

##### 2. SAME—OWNERSHIP OF BUILDING—EVIDENCE.

Where, in a prosecution for arson, the ownership of the building was laid in a person alleged to have been a subtenant under defendant, a receipt for rent, signed by defendant while he was in jail, was competent on the question of ownership.

[Ed. Note.—For cases in point, see vol. 4. Cent. Dig. Arson, § 61.]

##### 3. CRIMINAL LAW—INSTRUCTIONS—ASSUMING FACTS.

It is not error to assume in an instruction facts as to which there is no conflict in the testimony.

[Ed. Note.—For cases in point, see vol. 14. Cent. Dig. Criminal Law, § 1754.]

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

William Henry Watson was convicted of arson, and appeals. Affirmed.

The indictment laid the ownership in George H. Wight, and the state claimed that Wight subleased from defendant and that defendant leased a room from Wight.

W. W. Cardwell, for appellant. A. M. Crawford, Atty. Gen., and Geo. M. Brown, Dist. Atty., for the State.

BEAN, C. J. The defendant was charged, in an information filed by the district attorney, with the crime of arson, by burning the dwelling house of George H. Wight. He was convicted, sentenced to the penitentiary, and appeals.

The theory of the state was that the defendant attempted to burn the building by saturating the outside of a part thereof, and the inside of a room rented by him of Wight with kerosene and setting it afire. Wight was a witness for the state, and was allowed to testify over defendant's objection and exception that three or four days after the fire he examined the ground under the room rented by him to defendant and found it wet; that he picked up some of the earth and it smelled as if kerosene had been poured over it. The objection urged to the testimony is that it was too remote; but it was competent as corroborating the other testimony tending to show that kerosene was freely used in starting the fire. Its value was for the jury.

To prove that Wight was the owner of the building, for the purposes of this case, the prosecution gave in evidence a receipt to him for rent signed by the defendant, whom it was claimed was Wight's landlord. After defendant had been arrested, and while he was incarcerated in the county jail, Wight sent money with which to pay the rent to the sheriff who delivered it to the defendant and took his receipt therefor, and we can see no objection to the competency of such receipt. It was the voluntary act of the defendant, and was evidence tending to contradict his contention that he, and not Wight, was the owner of the building.

Various articles were taken from the

room, rented by the defendant from Wight, during and after the fire, such as a coal oil can, some burlap sacks and excelsior saturated with oil, a telescope valise, etc. The evidence shows that these articles were safely preserved from the time they were taken from the room until offered in evidence on the trial, and were sufficiently identified to be admitted in evidence as tending to show the origin and cause of the fire. The court in its instructions said, among other things, that the testimony tended to show that the defendant leased or rented the room where it is claimed the fire occurred, and that there were found in such room a can of coal oil and other materials. It is claimed that in so doing it invaded the province of the jury. There was no dispute in the testimony as to the facts mentioned by the court. The witnesses for the state and the defendant agree upon that question, and there was, therefore, no error in the instruction. *State v. Morey*, 25 Or. 241, 35 Pac. 355, 36 Pac. 573.

The judgment is affirmed.

STATE ex rel. CRAWFORD, Atty. Gen., v. DUNBAR, Secretary of State.

(Supreme Court of Oregon. May 3, 1906.)

EQUITY — JURISDICTION — POLITICAL QUESTIONS.

Equity has no jurisdiction to compel the Secretary of State to strike from the ballot to be voted at a general election the words "giving anti-prohibitionists and prohibitionists equal privileges," following the words "for amendment to the local option law"; the question being a political one and not affecting property or civil rights.

Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit by the state, on the relation of A. M. Crawford, Attorney General, against F. I. Dunbar, as Secretary of State. From a decree dismissing the complaint on sustaining a demurrer thereto, plaintiff appeals. Affirmed.

This is a suit in the name of the state, on the relation of the Attorney General, against the Secretary of State, for the purpose, in effect, of striking from the ballot title of a proposed amendment to the local option law, to be voted on at the general election to be held on June 4, 1906, the following words: "Giving anti-prohibitionists and prohibitionists equal privileges"—and enjoining said officer from printing upon the ballots any more of the said proposed title than the words, "For amendment to the local option law." The complaint, after alleging certain matters of inducement, contains the following allegations as the gist of the suit: "That the parties presenting and filing with said defendant the petition for the initiative referring said proposed purported amendment to said local option law to the electors of said state designated the following title to said measure to be printed upon the official ballot to

be used at said general election, to wit: 'For amendment to the local option law and giving anti-prohibitionists and prohibitionists equal privileges.' Fourth. That that part of said title so designated which reads, 'giving anti-prohibitionists and prohibitionists equal privileges,' is not properly, fairly, or legally descriptive of said proposed purported amendment to the local option law, but, instead, is an argument in favor of said purported amendment, and is not at all descriptive of the subject or any of the subject-matter of said proposed bill, and does not describe or refer to anything in said proposed bill contained. That because said title, taken as a whole, is not properly, fairly, or legally descriptive of said proposed purported amendment, but an argument in favor thereof and a conclusion indorsing the same, it is unfair, unjust, and wholly without warrant of law, and the printing thereof upon the official ballot would unlawfully influence, mislead, and prejudice the electors at said general election and prevent an intelligent, fair, and true expression at the polls of the will of the people touching said purported amendment, to the great and irreparable injury of the state of Oregon. Fifth. That said defendant, Hon. F. I. Dunbar, in his official character as Secretary of State, and in discharge of his ministerial duty as such Secretary, is about to furnish to the county clerks of the several counties of the state of Oregon his certified copy of said argumentative, unfair, and unlawful title taken as a whole, to be printed on the official ballot to be used at the ensuing general election to be held on the fourth day of June, 1906, to the prejudice of the electors and to the great and irreparable injury to the state. Sixth. That plaintiff has no plain, speedy, adequate, and sufficient remedy at law"—and then prays that defendant be restrained from furnishing his certified copy of that portion of the said proposed title embraced in the words, "giving anti-prohibitionists and prohibitionists equal privileges," or any more of said proposed title than the words, "For amendment to the local option law." To this complaint a demurrer was filed on the ground that the court had no jurisdiction of the subject-matter of the suit, and that the complaint did not state facts sufficient to constitute a cause of suit, which demurrer was sustained and a decree entered dismissing the complaint, from which decree this appeal was taken.

C. M. Van Pelt, for appellant. Ralph E. Moody, for respondent.

PER CURIAM. The question involved in this appeal is purely a political one and affects no property or civil rights, and, as stated by Chief Justice Fuller in *Green v. Mills*, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90, "It is well settled that a court of

chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government, unless under special circumstances and when necessary to the protection of the rights of property, nor in matters merely criminal, or merely immoral, which do not affect any right of property." In *re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; *Luther v. Borden*, 7 How. (U. S.) 1, 12 L. Ed. 581; *Mississippi v. Johnson*, 4 Wall. (U. S.) 475, 18 L. Ed. 437; *Georgia v. Stanton*, 6 Wall. (U. S.) 50, 18 L. Ed. 721. "Neither the Legislature nor the executive department," said Mr. Chief Justice Chase, in *Mississippi v. Johnson*, "can be restrained in its action by the judicial department though the acts of both, when performed, are, in proper cases, subject to its cognizance." This is the well-recognized principle as announced by many of the highest tribunals of our states. *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220; *People v. Canal Board*, 55 N. Y. 393; *Smith v. Meyers*, 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375; *Hardesty v. Taft*, 23 Md. 513, 87 Am. Dec. 584; *Sheridan v. Colvin*, 78 Ill. 237, in which case the court said: "It is elementary law, that the subject of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal, or merely immoral, which do not affect any right of property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of the government, except under special circumstances and where necessary for the protection of rights of property." To the same effect is *High on Injunctions* (4th Ed.) §§ 20b, 132c. See, also, *People v. Mills*, 30 Colo. 263, 70 Pac. 322; *State v. Thorson*, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582. And this court in the case of *State ex rel. v. Lord*, 28 Or. 498, 43 Pac. 471, 31 L. R. A. 473, has followed the same rule.

The court, therefore, having no jurisdiction over the subject-matter involved, the decree of the lower court should be affirmed; and it is so ordered.

(42 Wash. 630)

**WESTERN TIMBER CO. v. KALAMA RIVER LUMBER CO.**

(Supreme Court of Washington. May 15, 1906.)

**1. FRAUDS, STATUTE OF—CONTRACTS FOR SALE OF LAND—MEMORANDUM.**

Where, pursuant to oral negotiations for the sale of land by one corporation to another, the directors of the proposed vendor adopted

a resolution to the effect that the lands should be sold, which resolution described the land, named the price, and was delivered to the proposed purchaser, it was a sufficient written memorandum to comply with the statute of frauds.

**2. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—MUTUALITY—EFFECT OF SUIT.**

In a suit to enforce specific performance of a contract to convey land, the fact that the contract was not signed by plaintiff does not render it unenforceable for want of mutuality, as the bringing of the action makes plaintiff liable and renders the contract mutual.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 93.]

**3. CORPORATIONS—CONTRACT BY AGENT—RATIFICATION.**

Where a person assuming to act as agent of a corporation negotiated a contract by which it was to purchase land on certain terms which required the execution of notes for deferred payments, the action of the officers and stockholders of the corporation in executing the notes and arranging for a cash payment required by the contract was a ratification of the acts of the alleged agent.

**4. VENDOR AND PURCHASER—CONTRACT—OFFER AND ACCEPTANCE—OBJECTION TO FORMAL DEFECTS.**

Where, pursuant to oral negotiations for the sale of land by one corporation to another, the board of directors of the proposed vendor passed a resolution which was sufficient in form to constitute a written memorandum within the statute of frauds and delivered it to the proposed purchaser, the action of the latter in requesting, on the advice of its attorney, the passage of a further resolution to obviate possible defects in the one first passed, was not a rejection of the contract as completed by the passage of the first resolution.

Appeal from Superior Court, Cowlitz County; W. W. McCredie, Judge.

Action by the Western Timber Company against Kalama River Lumber Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Coovert & Stapleton, for appellant. C. F. Boothe, for respondent.

**CROW, J.** This action was instituted by the appellant, Western Timber Company, a Washington corporation, plaintiff below, against the respondent, Kalama River Lumber Company, an Oregon corporation, defendant below, to enforce the specific performance of a contract to sell and convey a large tract of timber land in Cowlitz county, Wash. Some time in the fall of 1904, one Henry Turrish, the principal stockholder of appellant, who, acting as its manager, controlled its business policy although not an officer or director, had an interview at Duluth, Minn., with Mark Hessey, president of the respondent corporation, relative to the sale of said lands by respondent. Said Turrish then offered to purchase said lands for the appellant corporation for the sum of \$50,000, one half cash, the remainder to be payable in one and two years, with 5 per cent. interest, secured by notes indorsed by certain stockholders of the appellant company. In pursuance of this offer, an abstract of title was furnished by respondent and

approved by appellant. On October 21, 1904, the said Mark Hessey, as president of respondent company, called a meeting of its board of directors at Iron River, Wis. At this meeting only three directors were present. The board consisted of five directors, to wit, Mark Hessey, Winfield E. Tripp, their respective wives, and one M. T. O'Connell. These five directors owned all of the capital stock of the respondent company; the wives of Hessey and Tripp holding stock which belonged to their husbands, in order that they might qualify as directors. The directors present at the meeting of October 21, 1904, were Mark Hessey, Winfield E. Tripp, and M. T. O'Connell. At this meeting the following resolution was unanimously adopted and entered upon the minute book of the corporation: "Resolved, that the timber lands in Township 7 North of Range 4 East, and Township 7 North of Range 3 East, of the Willamette Meridian, now owned by the Kalama River Lumber Company, be sold and conveyed to the Western Timber Company for the sum of \$50,000; \$25,000 to be paid at the sealing and delivering of a warrantee deed to the Western Timber Company, and \$12,500 to be paid with notes due on or before one year from date, with interest at 5 per cent. per annum, and \$12,500 to be paid with notes due on or before two years from date, with interest at 5 per cent. per annum. It is further resolved, that the cash and notes received for said timber lands shall be divided between the stockholders of the said Kalama River Lumber Company, according to the stock held by the said stockholders, upon the surrendering to the said company their stock, duly assigned and transferred to said company." After the adoption of said resolution, Mr. Hessey, as president of respondent company, on October 22, 1904, delivered a signed copy thereof to Mr. Turrish, as the representative of the appellant corporation, and also handed to Mr. Turrish the minute book and certain papers of the respondent corporation, which were in turn referred by Mr. Turrish to the attorneys of the appellant corporation, who afterwards prepared a written opinion thereon, calling attention to certain alleged irregularities in the resolution and proceedings. It is not necessary to state these objections in detail: the principal one being based upon the fact that the board of directors had not met within the state of Oregon. Appellant's attorneys suggested that certain steps be taken by respondent to perfect said proceedings and to pass the title. Mr. Turrish handed their written opinion containing said suggestions to Mr. Hessey, who, accompanied by Mr. Tripp, immediately called upon said attorneys and procured from them forms and drafts of the resolutions and proceedings which they had recommended. Mr. Hessey and Mr. Tripp, taking these documents, left the attorneys' office with the expressed in-

tention of complying with their suggestions and completing the transfer. In the meantime Mr. Turrish provided funds for the cash payment, and had the notes for the unpaid purchase money properly executed and indorsed in accordance with the suggestion of Mr. Hessey. A subsequent meeting of the directors of the respondent corporation was called for October 27, 1904, at which time said directors, instead of taking the step recommended by the appellant's attorneys, adopted the following resolution: "Resolved, that the resolution adopted at a special meeting of the board of directors of the Kalama River Lumber Co., on the 21st day of October, 1904, agreeing to sell all the timber lands of said company in Cowlitz county, Washington, to the Western Timber Company, be and is hereby rescinded; also the resolution dividing the cash and notes between the stockholders of said Kalama River Lumber Company adopted on the 21st day of October, 1904, be and is hereby rescinded." Subsequent to the time Messrs. Hessey and Tripp had conferred with appellant's attorneys, and prior to the meeting of October 27th, the respondent corporation received by wire from Portland, Or., an offer of \$70,000 for the land. Notice was afterwards given to the appellant that the respondent's directors had adopted the rescinding resolution of October 27th, refusing to complete the sale, and thereupon this action was immediately commenced.

On the trial, findings of fact were made, from which it, in substance, appears that the respondent owns the lands in Cowlitz county; that Henry Turrish is the principal stockholder of the appellant, living at Duluth, Minn., and at the solicitation of Mark Hessey, president of respondent corporation, offered to buy said lands for the sum of \$50,000, one-half cash, the balance in one and two years, at 5 per cent. interest; that Mark Hessey, president of respondent, called said meeting of the board of directors at Iron River, Wis., on October 21, 1904, at which meeting three directors being present, the resolution first above set forth was unanimously adopted; that said resolution, the minutes of said meeting, and other papers of the respondent corporation were thereafter handed by said Mark Hessey, president of respondent, to said Henry Turrish, and by said Henry Turrish were handed to appellant's attorneys, Washburn, Bailey & Mitchell; that on October 22, 1904, the attorneys made a written report or opinion thereon, containing certain objections to the form of the proceedings; that said written opinion was by Mr. Turrish handed to Mr. Hessey, and thereafter Mr. Hessey and Mr. Tripp, another director of respondent, called upon said attorneys for such stockholders' resolutions, directors' resolutions, proxies, etc., as said attorneys desired to be executed; that said Hessey and Tripp left said at-

torneys' office with said resolutions and directions, with the intent and purpose of calling a meeting to adopt the same; and that said parties called a special meeting of the board of directors, which was held in Iron River, Wis., on October 27, 1904, all five directors being present, at which time the second resolution above set forth was adopted. The appellant took no exceptions to these findings. It, however, requested the court to make the following additional findings, which were refused: That upon receiving such resolution of October 21, 1904, Mr. Turrish, on behalf of the appellant, then and there assented to all of its conditions and proceeded to comply therewith by procuring the notes covering the deferred payments, and that at no time thereafter did appellant alter or modify the same or refuse to carry out the terms thereof; that at the trial appellant offered to pay into court at such time as the court should direct, said sum of \$25,000, for respondent, and to deliver the notes of appellant company for \$25,000, payable one-half on or before one year, and one-half on or before two years from October 22, 1904. To the court's refusal to make these findings appellant has excepted. Conclusions of law being made in favor of respondent, judgment was entered thereon, dismissing the action, and this appeal has been taken.

The appellant insists that the trial court erred (1) in its conclusions of law; (2) in its refusal to make the additional findings requested by appellant; (3) in its refusal to make the conclusions of law requested by appellant; and (4) in entering judgment for respondent and refusing to enter judgment for appellant. The respondent corporation was formed for the purpose, among other things, of buying and selling timber lands in the state of Washington. The directors were therefore acting within the scope of their authority when they agreed to sell said lands. It appears from the evidence that all of the capital stock of the respondent corporation was owned by its five directors, and as it was anticipated that, in compliance with the suggestions of appellant's attorneys, all of said directors would be present at the second meeting of October 27, 1904, said attorneys waived any objection to the fact that the meeting of said board of directors would be held in the state of Wisconsin and not in the state of Oregon; their view being that all stockholders present would be estopped from denying the validity of the sale or transfer. The appellant contends that the first resolution of October 21, 1904, authorizing the sale of said real estate, which contains all the essential elements of a valid written memorandum as to terms, and which was signed by the president and secretary of the respondent corporation, constituted a full compliance with the requirement of the statute of frauds as being a mem-

orandum in writing signed by the party to be charged, and that as such memorandum had been made and so signed, the respondent's contract to convey can be specifically enforced. We think the resolution was a sufficient written memorandum to constitute a compliance with the requirements of the statute. *Browne on Statute of Frauds* (5th Ed.) § 346. *Texas Ry. Co. v. Gentry* (Tex. Sup.) 8 S. W. 98; *Argus Co. v. Mayor*, 55 N. Y. 495, 14 Am. Rep. 206; *Tufts v. Plymouth Gold Mining Co.*, 14 Allen (Mass.) 407; *Central Land Co. v. Johnston* (Va.) 28 S. E. 175; *Grimes v. Hamilton County*, 37 Iowa, 290.

It is contended by the respondent that, even though it be conceded that a contract had been entered into between it and the appellant, and although it had signed a written memorandum thereof, still such contract cannot be specifically enforced in equity, for the reason that it is not mutual, but unilateral, and that the respondent should not be held to a specific performance, for the reason that the appellant, not having signed any written memorandum thereof, could not be held liable in an action for the purchase price. In answer to this suggestion, appellant contends that, by promptly filing a bill in equity and demanding specific performance, it placed itself in a position to have a decree rendered in favor of respondent, forcing it to pay the purchase price. As the adoption of the resolution of October 21, 1904, by respondent, was a sufficient compliance with the requirements of the statute of frauds, we think the contention of the appellant that the contract can be specifically enforced must be sustained. The weight of authority seems to be that the statute of frauds is satisfied if the memorandum be signed by the party defendant in an action for specific performance. The party not signing is not bound unless, as is held by some authorities, he has accepted the same as a valid, subsisting contract. Want of mutuality arising from the failure of one party to sign cannot be successfully pleaded as a defense by the other party who did sign, as the act of filing a bill for specific performance binds the former, and makes him liable, and renders the contract mutual. See *Woodruff v. Woodruff* (N. J. Sup.) 16 Atl. 4, 1 L. R. A. 380; *South, etc., R. Co. v. H. A. & B. R. R. Co.*, 98 Ala. 400, 13 South. 682, 39 Am. St. Rep. 74; *Fry on Specific Performance of Contracts* (3d Ed.) §§ 448-450; *Waterman on Specific Performance of Contracts*, § 201; *Pomeroy on Specific Performance of Contracts* (2d Ed.) § 170. " \* \* \* Equity will not direct a performance of the terms of the agreement of one party when, at the time of such order, the other party is at liberty to reject the obligations of such agreement; yet, as in a case where an agreement which the statute of frauds requires to be in writing has been signed by one of the parties only, or when the contract, by its

terms, gives to one party a right to the performance which he does not confer upon the other, upon the filing of a bill for enforcement in equity by the party who was before unbound, he thereby puts himself under the obligation of the contract. The contract then ceases to be unilateral; for by his own act the unbound party makes the contract mutual, and the other party is enabled to enforce it." 2 Warvelle on Vendors, p. 748. In *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703, the Supreme Court of Georgia says: "If a contract for the sale of land, required by the statute of frauds to be in writing, is evidenced by a writing signed by one party only, but sufficient to charge the party signing, such party would be bound to perform the contract. While in such a contract there is want of mutuality of obligation, still if the party in whose favor the writing is executed, though not bound because it is not signed by him, sees proper to waive his right to insist upon the invalidity of the contract, and as evidence of such waiver files a proceeding in a court of equity to enforce it, thus affirming in writing his willingness to be bound by the stipulations in the contract, he will by such proceeding, though previously not bound, put himself under the obligation of the contract. The contract then ceases to be unilateral; for by the act of the party who was in no way originally bound by the writing the contract becomes mutual, and the other party is thereby enabled to enforce it against him." In *Engler v. Garrett*, 59 Atl. 648, the Court of Appeals of Maryland say: "Was the contract mutual? This is not disputed in the pleading or in the evidence. It is said that it is not signed by the plaintiff, but this is not necessary, even under the statute of frauds, which only requires the signature of the party to be charged. 'There may be a mutual contract to which both parties have given their assent, though the evidence of such assent may exist in a different form as to the two parties. As to one, it may be verbal, while the other's is expressed by his signature in writing.' Waterman on Specific Perf. § 201. The testimony as to the plaintiff's acceptance of the contract is ample, and, besides this, if there had been doubt on this question, it disappeared when he filed his bill to enforce it." See, also, *Browne on Statute of Frauds* (5th Ed.) § 366; *Brown v. Munger*, 42 Minn. 482, 44 N. W. 519; *Central Land Co. v. Johnson* (Va.) 28 S. E. 175; *Cummins v. Beavers* (Va.) 48 S. E. 891; *Miller v. Cameron*, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554.

It is contended by the respondent that the resolution adopted by its directors on October 21, 1904, did not constitute a contract upon its part; that it did not result from a previous oral agreement, but that it was merely an offer to convey upon terms named, which offer was never accepted by the appellant, and that, by reason of such nonacceptance, no contract was, in fact, made. On the

other hand, it is contended by appellant that the resolution of October 21, 1904, was the result of a previous oral agreement entered into by Mr. Turrish on behalf of the appellant corporation, and Mr. Hessey on behalf of the respondent corporation, and which was to be submitted by Mr. Hessey to the respondent for its approval; and that the resolution constituted a valid written memorandum of a contract which appellant never refused to perform. The trial court, when requested by the appellant to find that it assented to all the terms of the contract, and proceeded to comply therewith, refused to do so. It failed to find that the contract was either accepted or rejected by appellant. Upon the evidence we think the court should have found that the contract was accepted by the appellant prior to the adoption of the rescinding resolution; that it was at all times ready, willing, and able to completely perform the same, and we now make such finding. It is true, there is a conflict of evidence upon this issue. Witnesses for the appellant testified that the contract was accepted, and that appellant was at all times ready, able, and willing to complete the purchase, while witnesses for the respondent testified to the contrary. We, however, regard the testimony of the witnesses for appellant as the most convincing on this question, it being strongly corroborated by all the surrounding circumstances. Mr. Hessey and Mr. Tripp certainly did not call upon appellant's attorneys for any other purpose than that of procuring copies of any resolutions said attorneys might desire the respondent to adopt in completing the transfer. They accepted said resolutions and left said attorneys with an apparent intent to have them adopted. In fact, the trial court found that such intent existed. From a careful examination of the entire record, we find no intention or desire upon the part of respondent to refuse a completion of the contract, until it received the offer of \$70,000 for the land, when, hoping to obtain a higher price than that to be paid by appellant, it first conceived the idea of rescinding its former resolutions of October 21st and refusing to adopt the additional resolutions suggested by appellant's attorneys. It is undisputed that the appellant had the money ready to make the cash payment, and had procured the execution of the notes in exact accordance with the request of respondent.

It is further contended by respondent that, as Mr. Turrish was not an officer or director of the appellant corporation, he was without authority to contract in its behalf. It appears that the acts of Mr. Turrish were ratified by the appellant corporation, in that it executed, and its officers and stockholders indorsed, the promissory notes for the deferred payments of purchase money. It has at all times been ready to make the cash payment, deliver said notes, and perform the contract on its part. The record fails to

show that respondent ever made any demand of performance, nor does it show any refusal by appellant. Respondent has again ratified the acts of Mr. Turrish by its prompt procedure in bringing and prosecuting this action. Mr. Turrish is shown to have been the principal stockholder of the appellant corporation, to have acted as its manager, and to have at all times controlled its business policy. The claim of want of authority upon his part seems to have been an afterthought, conceived by respondent for the purpose of escaping liability in this action. We think it is in no position to make any such contention. Respondent contends that the contract was not accepted by appellant, because it asked the adoption of further resolutions by respondent. The mere fact that appellant, out of an abundance of caution, desired further steps to be taken looking towards the completion of the transfer of the title, does not show any refusal upon its part to accept the offer of respondent. On the contrary, it indicates an opposite intention. Had respondent tendered the appellant an unacknowledged deed for the land, it would be just as reasonable to contend that a request for a corrected deed would constitute a refusal by appellant to accept the contract or complete its performance. Our view is that the appellant's acts clearly indicated a fixed intention to accept and perform the contract, rather than any inclination to refuse acceptance.

From a careful examination of the entire record and the authorities, we conclude (1) that the resolution of October 21, 1904, was a sufficient compliance with the requirements of the statute of frauds; (2) that the appellant at no time refused to accept or perform the contract; (3) that the offer of respondent was accepted by appellant prior to the adoption of the rescinding resolution; and (4) that the contract is one that can be specifically enforced against the respondent. This being true, the trial court erred in dismissing the action. It is ordered that the judgment of the honorable superior court be reversed, and the cause remanded, with instructions to enter a decree for specific performance, in accordance with the prayer of the complaint.

MOUNT, C. J., and DUNBAR, HADLEY, RUDKIN, and ROOT, JJ., concur.

#### CONNER v. CLAPP et al.

(Supreme Court of Washington. May 22, 1906.)

#### 1. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—OPTIONS.

An option for the purchase of land may be specifically enforced by the holder thereof.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 90, 178.]

#### 2. VENDOR AND PURCHASER—BOND FOR DEED—SURRENDER.

After the giving of a bond for a deed, the vendor wished to procure a loan on the property

to take up an outstanding mortgage, and the prospective mortgagee insisted that the mortgage should have priority over the bond and that the holder of the bond should join in the mortgage or surrender the bond. The bond was surrendered to the attorney for the mortgagee, with a statement that the parties had made other arrangements. Thereafter, however, the parties proceeded to make payments and improvements and otherwise act as if the bond was still in full force and effect. *Held*, that there was no surrender of the bond.

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by James F. Conner against James M. Clapp and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions for decree.

Agnew & Israel, S. M. Heath, and C. W. Hogdon, for appellant. J. B. Bridges and Ben Sheeks, for respondents.

RUDKIN, J. This case was before this court on a former appeal. Conner v. Clapp. 37 Wash. 299, 79 Pac. 929. In addition to the statement of the case contained in the opinion then filed, we deem it sufficient to say that the plaintiff, by his amended complaint, seeks the specific performance of the bond for a deed there referred to. It is admitted by the pleadings, established by the proofs, and was found by the court on the former trial, that the bond for a deed was executed and delivered; that the plaintiff is in possession of the property; that he paid \$2,000 of the purchase price on and prior to the delivery of the bond, and that he has made permanent and lasting improvements on the land of the value of \$3,500, in addition to the payment of considerable sums as taxes, assessments, and for insurance. After the case was remanded, the pleadings were amended, and the case was submitted to the court on the testimony taken at the former trial. The court stated that it could consistently reach no other conclusion than that announced on the former trial, and dismissed the action. From the judgment of dismissal this appeal is prosecuted.

We will now briefly consider the various objections urged by the respondents against the specific performance of the contract. It is first contended that the bond was a mere option, and that specific performance will not be decreed. Conceding, for the purpose of this case, that the bond was a mere option, the conclusion contended for by the respondents does not necessarily follow. "The giver of the option has often sought, and sometimes successfully, to resist performance by urging that, as the party holding the option was not compellable to exercise it affirmatively, it would be inequitable to require performance by the other. In a majority of the more recent cases, the courts have recognized the plea only to overrule and disallow it. It is now clearly recognized law that specific performance will not be refused on such grounds. 'An optional agreement to convey or renew

a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration, or forms part of the lease or other contract between the parties that may be the true consideration for it." 21 Am. & Eng. Enc. of Law (2d Ed.) p. 928. From what has been said it sufficiently appears that the bond in suit was supported by an adequate consideration, and this brings the case within the rule just stated. *Lawrence v. Pederson*, 34 Wash. 1, 74 Pac. 1011, cited by the respondents, is not in point. In that case it was held that a mining broker did not comply with his contract to procure a purchaser by simply procuring a person who took an option on the property. The right of the holder of the option to enforce specific performance was not there involved or considered. This objection rests substantially on the same basis as the next, viz., that specific performance will not be decreed because the appellant did not sign the bond and was not bound thereby, and because specific performance could not be decreed against him. This question was fully considered by this court in the recent case of *Western Timber Co. v. Kalama River Lumber Co.* (filed May 15, 1906), 85 Pac. 338, and was decided adversely to the respondents.

The next contention is that the bond was surrendered and canceled by the voluntary act of the parties. At the time of the conveyance of the property to respondents, it was subject to a mortgage in the sum of \$3,500, which was afterwards reduced to \$2,500. In the latter part of December, 1901, and the early part of January, 1902, the respondents were negotiating for a loan on the property in the sum of \$2,500 to take up this mortgage. The mortgagee insisted that the new mortgage should have priority over the bond for a deed, and that the appellant should join in the mortgage or surrender his bond. With the view of effecting this object, the appellant and the respondent J. M. Clapp went together to the office of the attorney for the mortgagee. The appellant turned the bond over to the respondent Clapp, and stated that the bond had been surrendered and that they had made other arrangements. It is not seriously contended that any other arrangements were, in fact, made at that time; at least the respondents do not indicate what they were. The appellant contends that this was done solely for the purpose of satisfying the attorney for the mortgagee, and we think this contention must prevail, as any other view of the case is utterly inconsistent with the subsequent conduct of the parties. Thus, after this alleged surrender, the appellant wrote the respondent in regard to other improvements he was about to make on the premises, to which no objection was apparently made. On July 1, 1902, six months after the alleged surrender, the respondent J. M. Clapp wrote the appellant that the interest was 45 days overdue, and that if

a settlement in full was not made by August 1st, other arrangements would have to be made. These facts are wholly inconsistent with the claim that the bond had been surrendered several months before. Indeed, the respondent J. M. Clapp testified that after he and the appellant left the office of the attorney for the mortgagee, he offered to return the bond to the appellant, but the appellant refused to accept the same, stating that he had no further use for it. Aside from the alleged surrender, it is not claimed that the respondents took any steps to forfeit the bond by suit, tender of a deed, or otherwise. *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184. As stated by the respondents in their brief, "the record in this case shows some loose and unbusinesslike transactions between the parties," and in view of such conduct and the payment of a considerable portion of the purchase price, and the making of large expenditures upon the property, we think that equity and good conscience demand that specific performance should be decreed. We were of this opinion on the former appeal, but inasmuch as the respondents might desire to offer further testimony on the issue of specific performance which they did not deem material on the issue then before the court, we refrained from directing a final judgment or expressing any opinion on the merits.

The respondents complain that the property has increased in value, and that the appellant is only seeking to take advantage of an increase. Undoubtedly this circumstance is a source of much litigation; but we might well ask: Are not the respondents prompted by the same motive in their defense? Had the value of this property decreased below the amount due on the bond for a deed, would the respondents be now resisting specific performance?

Finally, it is contended that the tender was insufficient. It is claimed that the bond called for \$6,500 and interest, whereas the appellant tendered only \$5,500 and interest. It is clearly shown by the proof that the amount to be paid was, in fact, \$5,500. The respondents contend that this proof was incompetent, and that it went in under their objection. However this may be, the objection could not reach the testimony of the respondents themselves, which clearly and unequivocally shows that the consideration was, in fact, \$5,500. In consideration of the entire record, we are satisfied that the appellant was entitled to the relief demanded. At the time of the former trial there was a mortgage on the property; but this mortgage has since matured and, if not already paid, the court below can make provision for its payment. As to the form of the deed, the appellant is only entitled to a deed of special warranty against the acts of the respondents and those claiming under them.

The judgment is reversed, and the case remanded, with directions to the court below to ascertain the amount due the respondents

under their bond, to which sum will be added any amounts the respondents may have paid by way of taxes, assessments, or for insurance on the property in controversy. Upon the payment of such sums, the court will enter a decree of specific performance. If the court finds that the appellant has made a good and sufficient tender of the amount due, and that such tender has been kept good, no interest will be allowed after the date of the tender. Otherwise interest will be allowed to the date of the judgment.

MOUNT, C. J., and FULLERTON, HADLEY, DUNBAR, ROOT, and CROW, JJ., concur.

**STATE ex rel. HARLAN v. CENTRALIA-CHEHALIS ELECTRIC RY. & POWER CO.**

(Supreme Court of Washington. May 19, 1906.)

**1. EMINENT DOMAIN—NECESSITY.**

A corporation organized to construct and operate electric street railways in two cities and a connecting electric railway will not be denied the right to proceed to condemn land to be flooded in connection with a water power to create electricity because it has not obtained franchises from the cities and a right of way between them, and so has not shown that the power will be needed for a public purpose; but it is enough that it has obtained the greater part of its right of way, that it is negotiating with the cities for the franchises, that the terms thereof have been practically agreed on, and that it is proceeding diligently with such matters; nothing being shown that will prevent ultimate accomplishment.

**2. SAME—PUBLIC PURPOSE.**

Though the articles of incorporation show that some of the objects for which a corporation was formed were purely private, it may exercise the power of eminent domain; its petition and testimony showing that it desires to condemn for the purpose of obtaining power to carry on its business as a public carrier.

**3. SAME—NECESSITY—EVIDENCE.**

The general statement in the testimony of the president of an electric railway company, purposing to erect a dam of a certain height to create power and seeking to condemn land which the dam will cause to be flooded, that all the power which could be developed by the dam would be required, and that if the company could get along with less it would be satisfied to take less, is sufficient, without any estimate of horse power required or proposed to be developed, in the absence of controverting evidence, to justify the finding that no more was proposed to be taken by condemnation than the necessities required.

**4. SAME—POWER FOR ELECTRIC RAILWAY—LOCATION.**

Under Laws 1903, p. 306, c. 175, § 2, providing that an electric railway company may appropriate property for right of way or for any corporate purpose, and imposing no limitation as to location, it may condemn land for power purposes, however distant from the railway.

The Centralia-Chehalis Electric Railway & Power Company brought an action to condemn land of Marian E. Harlan. An order in favor of the company was made therein, and a writ of review is brought, on relation of Harlan, to review such order. **Affirmed.**

H. S. Elliott and E. M. Green, for relator.  
W. W. Langhorne, for respondent.

FULLERTON, J. The respondent, the Centralia-Chehalis Electric Railway & Power Company, is a corporation organized under the laws of the state of Washington. The objects for which the corporation was formed, as recited in its articles, are many and somewhat varied, and those of a public and quasi public nature are commingled with those that are purely private. Its primary purpose, however, according to the testimony of its promoter, is to build, equip, and operate electric street railways in the cities of Chehalis and Centralia, and an electric railway between those two cities, to be connected to and operated with the street railways, for the purposes of carrying passengers and freight for hire. For the purpose of generating the necessary electric current to operate its railways the respondent sought to create a water power on the Chehalis river. It purposes to erect at the site selected a dam across the river some 60 or 65 feet high, which will at once create the necessary fall for power purposes and provide a storage basin, which can be drawn upon during the dry season, when the natural flow of the river may be insufficient to produce the required power. The dam, when constructed, will cause the water to back up and overflow a considerable area of land not now covered by water, a part of which belongs to the relator. The respondent was unable to agree with the relator as to the compensation to be paid for the land taken and damaged belonging to him, and brought an action to condemn under the statutes of eminent domain. After a hearing the court made the preliminary order adjudging the use to which the respondent intended to apply the property to be a public use, that a necessity existed for its taking, and ordered the question of the amount of compensation to be paid the relator to be submitted to the determination of a jury. This proceeding was brought to review that order.

The relator first contends that the use to which the respondent contemplates putting the property is not a public use. The relator does not deny, of course, that the operation of a system of electric railway between and within the cities of Centralia and Chehalis for the purposes of carrying passengers and freight for hire, would not be a public use within the meaning of the statutes and the Constitution; nor does he contend that it is beyond the powers of the court to condemn his land for the purposes of creating the necessary power to operate that system. But he says that the respondent has not proceeded far enough with its scheme to demonstrate that it will be permitted to construct and operate its proposed railways, since it was made to appear by the evidence that it had not procured franchises from the cities of Centralia and Che-

halls permitting it to construct its proposed railways within their boundaries, nor a complete right of way between the two cities. The relator argues that, inasmuch as the respondent cannot construct its proposed road until it procures these franchises and this right of way, it is not in a position to say that this power will be needed by it at all, and hence it ought not to be permitted to condemn his land until it is certain that the land will be needed. On the question of the progress the respondent had made in this direction, the record disclosed that it had procured a right of way for its road over all the distance between the two cities, except over a tract about 80 rods in width, and that for this it was negotiating with the owner who was a resident of another county. It appeared, also, that it was then negotiating with each of the cities for franchises; that in each of them the terms of the franchise to be granted had been practically agreed upon, and that ordinances had been drawn and introduced granting to the respondent a franchise in accordance with those terms which had passed to the second reading, and that in one of the cities it had deposited a considerable sum, to be forfeited in case it did not carry out the conditions imposed by the franchise which might be granted it. In fact, it was admitted by the relator on the hearing that the respondent was proceeding diligently in its effort to put itself in a position to commence at once the mechanical construction of its road. It seems to us that the respondent had proceeded far enough to show that its immediate purpose was to apply the power it sought to create by the appropriation of the relator's property to a public use. This was its declared purpose, and its acts in so far as it had actually proceeded pointed to that end. Moreover, it is manifest that an enterprise of this character cannot be completed all at once. Being made up of several parts, it must be completed in parts. Why, then, should one part be deemed of more importance than another? Why may not the city as well say that it will not grant the franchise until the respondent has produced the power as the court may say that it will not grant the right to procure the power until the franchise is granted? If the city did so say, and the court should hold with the relator, it is plain that the enterprise has reached a point beyond which it cannot proceed. But we think there is no reason for such a holding. We think that when it is made to appear that a promoter of an enterprise of this kind is proceeding diligently with it, and nothing is shown to have occurred that will prevent its ultimate accomplishment, the court ought not to deny the right to acquire by condemnation an essential part merely because there is a possibility that the enterprise cannot be carried to completion. There is no danger that the property condemned will be applied to uses foreign to

the purposes for which it is condemned. The property does not become the private property of the condemning corporation, in the sense that it can appropriate it to uses of a private nature. It must use it for the purposes for which it condemns it, or else submit to its reversion at the suit of the state. *People v. Pittsburgh R. R. Co.*, 53 Cal. 694; 2 Lewis on Eminent Domain, § 594 et seq.

The relator next contends that the respondent should not be permitted to exercise the right of eminent domain because its articles of incorporation show that some of the objects for which it was incorporated are purely of a private nature, and that to permit it to condemn property at all is to permit private property to be taken for a private use. There are cases which maintain the doctrine that a statute authorizing the condemnation of property for uses a part of which only are of a public nature is in violation of the rule that private property cannot be taken for private use, and hence cannot be enforced. *Gaylord v. Sanitary District of Chicago*, 204 Ill. 576, 68 N. E. 522, 63 L. R. A. 582, 98 Am. St. Rep. 235; *Ryerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 564. And there are cases which deny the right to condemn when the avowed purpose as set out in the petition is to condemn for uses some of which are private. *Harding v. Goodlett*, 3 Yerg. (Tenn.) 41, 24 Am. Dec. 546. But in this case the respondent asks in its petition to condemn for the public uses only recited in its articles of incorporation, making no mention of those which are purely private. If a private use is combined with a public one in such a way that the two cannot be separated, then unquestionably the right of eminent domain could not be invoked to aid the enterprise; but it has been said, and it seems to us that it is the better reason, that, where the two are not so combined as to be inseparable, the good may be separated from the bad, and the right exercised for the uses that are public. *Irrigation Co. v. Klein*, 63 Kan. 484, 65 Pac. 684; *Brown v. Gerald* (Me.) 61 Atl. 785, 70 L. R. A. 472. In the first of these cases the court said: "We see no greater reason for denying to a private corporation the power of eminent domain for the promotion of a public use, because by its charter it is also authorized to engage in a private enterprise, than to deny to a private person the same power because he is inherently endowed with the same authority." Furthermore it was held in the case of *In re Niagara Falls & Whirlpool R. Co.*, 108 N. Y. 375, 15 N. E. 429, that in determining the question of public use "the courts are not confined to, and it is not to be tested exclusively by, the description of those objects and purposes as set forth in the articles of association, but evidence allunde, showing the actual business proposed to be conducted, may be considered." And, this being true, we think it must be true, also, that when a

corporation, whose articles disclose purposes some of which are public and some of which are not, seeks to exercise the right of eminent domain, we may look to its application and the evidence introduced at the hearing to determine what its real purposes are. Measured by this test there can be no question as to the purposes of the respondent corporation; for both its application and the testimony show that it desires this power that it may further its business as a common carrier. But, while the exercise of this right of eminent domain must be guarded jealously, so that the private property of one person may not be taken for the private use of another, after all is said and done, the power to prevent property taken for a public use from being subsequently diverted to a private use must rest rather in the supervisory control of the state than in caution in permitting the exercise of the power. Property taken for a public use by a corporation organized solely to promote a public business may be as easily diverted by it to a private use as it may by one having both public and private objects. It is not the object for which a corporation is formed that prevents it from wrongdoing. The preventive rests in the power of the state to compel the lawful exercise of its granted privileges.

It is next said that there is no proof that the necessities of the respondent require the use of all of the property it proposes to take. It is true that the evidence does not give the estimated horse power required to operate the respondent's proposed public facilities, nor does it give an estimate of the horse power it is proposed to develop; but the president of the company, while testifying, stated generally that all that could be developed by the dam proposed would be required, and that, if the company could get along with less, it would be satisfied to take less. Inasmuch as there was no evidence offered to controvert this statement, we think is sufficient to justify the finding that no more is proposed to be taken than the necessities require.

Finally, it is said that nothing but land adjacent to the right of way may be taken for the use of a railway company, and that the lands in question here are not adjacent to the railway the respondent proposes to construct. Under the earlier statutes relating to eminent domain there would be much in this contention; but the several subsequent statutes conferring the power of eminent domain on electric railway companies provide that they shall have the right to appropriate lands for a right of way and "other corporate purposes," without limitation as to the locality. See Laws 1903, p. 366, c. 175, § 2. It seems to us that this is broad enough to permit the condemnation of land for power purposes, however distant it may be from the proposed railway. Contrary to the statement of the relator that the public have no interest in the cost of the pow-

er the respondent uses to operate its railway, we think the public have a vital interest in that cost. The public is interested in cheap transportation, and, since the use of the facilities nature has afforded will help acquire cheap transportation, the law should be construed rather to enable their use than to permit them to waste in idleness. The principle is distinguishable from the principle of the cases holding that a station for a power house or coal beds cannot be condemned. In this case there is no other source from which power can be derived without an expense which is prohibitive of the enterprise, while in the other cases the situation was wanted because of its convenience, not because of necessity.

The order of the court will stand affirmed.

MOUNT, C. J., and CROW, ROOT, HADLEY, RUDKIN, and DUNBAR, JJ., concur.

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STONE et al. v. MOODY et ux.  
(Supreme Court of Washington. May 25, 1906.)

On rehearing. Reversed and remanded.  
For former opinion, see 84 Pac. 617.

PER CURIAM. After additional written argument and further consideration, we have reached the conclusion that this case should be, and it is hereby, remanded for a new trial. Either party may have the privilege of using the evidence before the court on the former trial in so far as the same is available and desired, and may introduce such further evidence as seems advisable.

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CADMAN v. SMITH.  
(Supreme Court of Oklahoma. Sept. 6, 1905.  
Rehearing Denied Jan. 6, 1906.)

1. TAXATION—COLLECTION—AUTHORITY TO COLLECT—COUNTY TREASURER—POWER TO COLLECT TAXES.

In this territory the county treasurer's authority to proceed to the collection of the taxes enumerated upon the tax list is derived from the warrant of the county clerk directing such collection, and not from the provisions of the statute.

2. SAME—CLERK'S WARRANT—SUFFICIENCY.

The warrant of a county clerk to the treasurer, directing the collection of taxes in the following form: "You are hereby notified to collect in a manner prescribed and the time provided by the statutes of Oklahoma territory the taxes contained within these rolls, levied according to law, and extended into their several respective funds. Witness my hand and seal at Perry, the county seat of Noble county, this 28th day of October, 1898. Allen Daniels, County Clerk of Noble County. [Seal]"—*held*, a sufficient warrant of authority.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1058-1064.]

3. SAME—SALE OF LAND—NOTICE—DELINQUENT TAX LIST—PUBLICATION.

A statute requiring the publication of a delinquent tax sale notice once a week for three consecutive weeks means 21 days, and a sale

of real estate by a county treasurer for delinquent taxes, where notice of such sale has been given for a period less than 21 days prior to such sale, is void, and a tax deed to land so sold is void.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1340.]

#### 4. SAME—LIMITATIONS—TAX TITLES—REMOVAL OF CLOUD.

The patent owner of real estate, who remains in possession thereof until the right of the holder of a tax deed to the same is barred of a right of action to recover possession thereof, may maintain an action to remove a cloud from his title because of such tax deed, where the grounds of such action are that such tax deed is void.

(Syllabus by the Court.)

Error from District Court, Noble County; before Justice Bayard T. Halner.

Action by W. T. Smith against Netta B. Cadman. Judgment for plaintiff. Defendant brings error. Affirmed.

H. A. Johnson, for plaintiff in error. W. M. Bowles, for defendant in error.

GILLETTE, J. This action was brought by the defendant in error, W. T. Smith, to remove a cloud upon his title to lot 10, block 27, in the city of Perry, Noble county, O. T. The petition charges that the plaintiff in error, Netta B. Cadman, is the holder of a tax deed to said lot, issued and recorded on November 21, 1901, based upon tax sale certificate issued November 20, 1899, for taxes due on said lot for the years 1897 and 1898; the action being brought June 3, 1903. A trial was had and concluded in the district court of Noble county in December, 1903, at the conclusion of which the trial court made the following findings of fact and conclusions of law:

"(1) The court finds from the evidence that the county clerk of Noble county, Oklahoma territory, failed to attach his warrant to the tax list, ordering and directing the county treasurer of this county and territory to collect the taxes therein named, for the years 1897 and 1898. (2) The court further finds from the evidence that no warrant was attached to or upon the tax list directing the county treasurer to collect the taxes for the years 1897 and 1898. (3) The court further finds that the publication notice which has been introduced in evidence on the — day of — is insufficient; that the required statutory notice to sell the delinquent taxes for the years 1897 and 1898 was not given. (4) The court further finds from the evidence that the property in question was sold to H. A. Johnson on the — day of —, 1899, and that a tax certificate was issued to H. A. Johnson on the 20th of November, 1899; that said tax certificate was duly assigned and acknowledged by H. A. Johnson to the defendant herein, on the 18th of November, 1901. (5) The court further finds from the evidence that a tax deed was issued in due and regular form, by the treasurer of this county, to the defendant herein, on the 21st

day of November, 1901, and that the seal was duly and regularly attached thereto, and that said tax deed was duly and regularly recorded by the register of deeds of this county on the 21st day of November, 1901, at 3:30 o'clock p. m., in book 1, p. 79. (6) The court further finds from the evidence that on June 3, 1903, the date of the filing of this petition, the plaintiff was in possession of the lot in question, and had been in possession thereof for a number of years prior thereto by virtue of his recorded deed."

"Conclusions of law: The court finds and holds, as a conclusion of law, that the tax deed is, and was, absolutely void. The court further finds and holds that the action is not, and was not, barred by the statute of limitations at the commencement thereof. The court holds, as a matter of law, the tax warrant being wholly insufficient, and the tax deed being absolutely void, that the plaintiff is not required to pay any taxes, penalties, assessments, or costs incurred in the advertisement and sale of the property."

The court further adjudged the tax deed to be void, and ordered the same canceled and held for naught, and entered its order quieting the title to the property in controversy in the plaintiff as prayed for in the petition, and the costs taxed to the defendant, and rendered judgment declaring the tax title of plaintiff in error wholly void, and directing a cancellation of the same; to reverse which judgment this proceeding in error is prosecuted.

The findings of fact being amply supported by the evidence and having the force and effect of a special verdict by a jury, it only remains for this court to determine whether the court below erred in applying the law to the facts thus found. The findings of fact by the court, upon which its judgment was based, were: "First, that the county clerk failed to attach his warrant to the tax list ordering and directing the county treasurer of Noble county, O. T., to collect the taxes therein named for the years 1897 and 1898, and finds that no tax warrant was attached to or upon the tax lists for those years, directing the treasurer to collect the taxes; second, that the publication of the delinquent tax sale notice by the treasurer of said county for the years 1897 and 1898 was insufficient." The courts are unanimous in their determination that, where the property of the citizen is sold to satisfy a public charge against it, the requirements of the law authorizing such sale must be substantially complied with. The officer making the sale may not assume anything with reference thereto, and must do all things that the law directs, or his attempted sale is invalid. Did the county clerk in this instance attach to the tax list delivered to the treasurer a warrant of authority authorizing the treasurer to collect the taxes levied against this property?

In this territory the county treasurer gets his authority to proceed to the collection of

the tax list from the warrant of the county clerk, and not from the provisions of the statute, and one of the questions here submitted is with reference to the sufficiency of the tax warrant of the county clerk of Noble county attached to the tax list delivered to the treasurer. The language of that warrant is as follows, viz.: "Warrant of Authority. Territory of Oklahoma, County of Noble—ss.: To G. T. Bryan, County Treasurer: You are hereby notified to collect in a manner prescribed and time provided by the statutes of Oklahoma territory the taxes contained within these rolls, levied according to law and extended into their several respective funds. Witness my hand and seal at Perry, the county seat of Noble county, this 28th day of October, 1898. Allen Daniels, County Clerk of Noble County. [With the seal of the county clerk of said county here duly attached.]" The provisions of our statute touching the warrant of the county clerk to the treasurer is as follows: "And the county clerk shall attach to the lists his warrant under his hand and official seal, in general terms requiring the treasurer to collect the taxes levied according to law, and no informality in the foregoing requirements shall render any proceedings for the collection of taxes illegal." We are unable to concur with the court below in its holdings as a conclusion of law that the tax deed was void because of the insufficiency of this warrant. The word "notified," as used in the warrant of the clerk, might have been substituted by a better word conveying the meaning intended. But to say that by reason of its use the treasurer was not thereby warranted in proceeding to the collection of the taxes, enumerated in the lists to which it was attached, would, we think, be doing violence to sound reason in the premises, and especially where the statute provides that "no informality in the foregoing requirements shall render any proceedings for the collection of taxes illegal." The view here expressed is not in conflict with the determination of this court in *Frazier v. Prince*, 8 Okl. 253, 58 Pac. 751, for in that case there was no pretense of authority by the county clerk to the treasurer. In that case the county clerk simply certified to the correctness of the tax roll, and there was not even a pretended warrant to the treasurer authorizing him to collect the taxes shown by the roll.

The second proposition upon which the trial court based its judgment, to wit, "that the publication of the delinquent tax sale notice by the treasurer of said county for the years 1897 and 1898, was insufficient," is based upon the following requirement of the statute: "The treasurer shall give notice of the sale of real property by the publication thereof once a week for three consecutive weeks." *Wilson's Rev. & Ann. St. 1903*, § 6021. In the judgment of this court the language of the statute here used means 21 days. In this we are supported by authority. The

Supreme Court of Oregon, in *O'Hara v. Parker*, 39 Pac. 1004, had this precise question under consideration, and determined it in the following language: "The validity of the tax deed remains to be considered. A number of infirmities therein are alleged. We shall notice but two. The first notice of sale was published in the weekly *Ostorian*, June the 6th, and the last on June 27, 1885. The sale was had on Friday, July 3d. A computation of time during which this notice was published, by excluding the first day of publication and including the day of sale, shows the notice to have been published but 27 days. The statute requires the publication to be four weeks successively. This means 28 days." In that case the court cites: *Black on Tax Titles*, 210; *Meredith v. Chancey*, 59 Ind. 466; *Early v. Homans*, 16 How. (U. S.) 610, 14 L. Ed. 1079; *Boyd v. McFarlin*, 58 Ga. 208; *Bacon v. Kennedy*, 56 Mich. 329, 22 N. W. 824. In addition to the authorities cited in support of the opinion of the court of Oregon, the following authorities support the same conclusion: *Townsend v. Martin*, 55 Ark. 192, 17 S. W. 875; *Martin v. McDiarmid*, 55 Ark. 213, 17 S. W. 877; *Morris v. St. Louis*, etc. (Colo. Sup.) 29 Pac. 802; *Martin v. Barbour* (C. C.) 34 Fed. 701; *Carpenter v. Shinnors*, 108 Cal. 359, 41 Pac. 473; *Wambole v. Foote*, 2 Dak. 1, 2 N. W. 239.

It was necessary for the treasurer to give the required notice before the law conferred upon him jurisdiction to sell and convey the property of a citizen for the nonpayment of taxes. This was not done. It appears from the evidence that the first publication of notice by the treasurer for the sale of this property was made on the 2d day of November, 1899, and the last publication November 16, 1899, and that the property in question was sold by the treasurer on November 20, 1899, 18 days from the date of the first publication. The statute requires three weeks' notice, and this means 21 days. The statute fixed the length of time notice should be given, and, without giving notice as required by the statute and for the length of time prescribed, he was powerless to sell, and, by treasurer's deed, to convey the land in question. It follows that the sale made by the treasurer of the premises in question was void. The same, however, was a cloud upon the title of the defendant in error when this action was brought.

The conclusion here reached brings us to a consideration of the question as to whether or not this action may be maintained in view of the statute of limitations concerning tax titles, which provides: "No action shall be commenced by the holder of the tax deed or the former owner or owners of land by any person claiming under him or them to recover possession of the land which has been sold and conveyed by deed for nonpayment of taxes, or to avoid such deed, unless such action shall be commenced within one year after the recording of such deed; and in

case of action to avoid the deed not until all taxes, interest and penalties, costs and expenses shall be paid or tendered by the parties commencing such action." Section 5468, Gen. St. Okl. 1893. Upon the request of defendant at the conclusion of the evidence, the court made findings of fact; the sixth finding being to the effect that plaintiff was in possession of the premises at the time the action was brought. This finding was not challenged, except upon the motion for a new trial, the fourth ground of which is as follows: "The findings of fact made upon request of defendant is not supported by sufficient evidence in this, to wit, there was no evidence to support the finding that the plaintiff was in possession of the lot at the time suit was brought, but all the evidence was contrary thereto." We have examined the evidence touching this question, as well as the evidence on behalf of the defendant tending to show that she was in possession, and not the plaintiff. The only conclusion tending to show the defendant's possession was that during the year 1902 her attorney, in November, caused some plowing to be done on the lots, and had oats sown thereon. The plaintiff claimed to have been in possession of the lot all the time from the date of purchase from the government, and had the same fenced; the fence, however, was manifestly down a part of the time, and the showing on his part in this respect is anything but satisfactory. Out of all the testimony offered, however, the trial court found the possession of the premises to be in the plaintiff, and we are not inclined, upon the proof submitted, to disturb this finding, for it is clear the premises were not in the adverse possession of the defendant. The plaintiff being in possession of the premises at the time the action was commenced, we think it clear he might maintain this action, notwithstanding the one year statute of limitation above referred to, for it is clear that the right of the holder of the tax deed to bring an action to oust the plaintiff is barred by that statute, and the tax deed under such circumstances is simply a cloud upon the title of the plaintiff in possession; and, where the right of the holder of the tax title had been barred, there seems to be no good reason why such cloud should not be removed in an action grounded upon the fact that such tax title is void. In such case the holder of the original title, without any fault of his, finds his property incumbered by a cloud upon the title, and it would be contrary to every principle of equity, as well as justice, if no action in equity can be maintained for the removal of the same, and this seems to be the views of Mr. Cooley, in his treatise on Taxation (page 562), where he says: "Where the landowner of a patent title has retained possession until the tax purchaser is barred, he may bring suit in equity to remove the cloud from his title,

and the tax purchaser, if in possession, has a corresponding right."

It is urged that the plaintiff cannot maintain this action because of a failure on his part at the bringing of the same to tender or pay all taxes, interest and penalties, costs, and expenses, incident to the execution of the tax deed. There was no finding of fact by the trial court touching a tender by plaintiff to defendant of taxes, interest, penalty, etc., at the commencement of this action, and we do not here now decide that such tender was or was not necessary under the facts and circumstances of this case. It is sufficient to rest this opinion upon the fact that, if such tender was necessary, it was sufficiently made. The petition shows a tender of \$16.79, accompanied by the declaration that the amount so tendered was the full amount of all taxes, fees, costs, interest, and charges of every kind against the property, which allegation is replied to only by a general denial contained in the answer. Upon the trial of the cause this tender was renewed, accompanied by the declaration that the plaintiff was ready to pay whatever amount might be found to be due. The trial court inquired of the defendant if such tender was accepted, but no response was made to such inquiry, and no proof was offered showing such sum to be insufficient for the purpose offered. There is therefore no substantial controversy about the tender, and no ground presented upon which it might be held insufficient. *Wilson v. Wood*, 10 Okl. 279, 61 Pac. 1045.

It follows that the judgment of the court below must be affirmed. All the Justices concurring, except HAINER, J., who presided in the trial court.

#### BASTIN v. SCHAFER et al.

(Supreme Court of Oklahoma. Sept. 6, 1905.  
Rehearing Denied Jan. 10, 1906.)

#### 1. REFORMATION OF INSTRUMENTS—MORTGAGE—DECREE OF FORECLOSURE.

Where a note signed by the husband alone is secured by mortgage on the homestead jointly executed by a husband and wife, and the mortgage contains a recital to the effect that the debt secured thereby is a note signed by the wife in connection with her husband, but the evidence on the trial is sufficient to identify the note signed by the husband alone as the indebtedness actually secured by the mortgage, and as the note in contemplation of the wife when she signed the mortgage, *held* not error for the court to reform this mortgage and decree a foreclosure of the mortgage on the homestead.

#### 2. SAME—IDENTITY OF INDEBTEDNESS.

In interpreting a clause in a mortgage describing the indebtedness secured thereby, the note actually secured should be construed with it, and, if true, control the description of the indebtedness in the mortgage.

[Ed. Note.—For cases in point see vol. 35. Cent. Dig. Mortgages, §§ 215, 219.]

#### 3. HUSBAND AND WIFE—CONSIDERATION RUNNING TO HUSBAND.

A mortgage given by both husband and wife to secure a note upon sufficient consideration,

running to the husband alone is valid against the wife, without any consideration moving to her separately.

#### 4. HOMESTEAD—CONVEYANCE.

While all transactions in which the joinder or assent of the wife is obtained in or to any disposition of the homestead will doubtless be scrutinized by the courts with jealous vigilance, yet this will not be carried to the extent of relieving her from the consequences of her own acts which she clearly understands or should have understood.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 203-209.]

Gillette J., dissenting.

(Syllabus by the Court.)

Error from District Court, Canadian County; before Justice C. F. Irwin.

Action by Henry Schafer against Annie C. Bastin and L. A. Bastin. Judgment for plaintiff, and defendant Annie C. Bastin brings error. Affirmed.

M. D. Libby, for plaintiff in error. Jos. G. Lowe, for defendant in error Schafer.

PANCOAST, J. L. A. Bastin executed a certain promissory note, with Henry Schafer as surety. To secure Schafer, a mortgage was executed by Bastin and wife upon their homestead, the mortgage containing a recital to the effect that the note, which the mortgage was given to secure, had been signed by both husband and wife. At maturity, a renewal note was given, signed as before, and, not being paid when due, it was taken up by the surety, and this action brought to enforce the lien created by the mortgage. The petition declared upon a note signed by Bastin and wife, and the answer of Annie C. Bastin admitted the execution of the mortgage, but denied that she had signed the notes or either of them, and alleged the fact to be that she had signed the mortgage for the purpose of securing a note according with the recital thereof in the mortgage. Upon these pleadings, plaintiff moved for judgment, which motion was sustained as to judgment against Bastin, but overruled as to foreclosure of the mortgage. The plaintiff, on amendment, alleged, in effect, that the note was signed by Bastin alone, and that the mortgage sought to be foreclosed was given to secure the note sued on, notwithstanding the recital in the mortgage of a note signed by both husband and wife, and prayed a reformation of the description of the note, and foreclosure of the mortgage. Annie C. Bastin, in her amended answer, assumed the position that inasmuch as she has not signed the note sued on, that the mortgage was therefore without consideration and void; that she signed the mortgage for the purpose of securing a note conforming to the recitation therein, and not otherwise, and alleged facts constituting the real estate mentioned in the petition a homestead. Upon these pleadings and the evidence adduced by plaintiff, plaintiff in error rested her case.

The court then directed a correction of the mortgage to conform to the allegations of plaintiff's amended petition, gave judgment against L. A. Bastin for the amount of the note and interest, and decreed a foreclosure of the mortgage. From this judgment, plaintiff in error appeals.

The proposition contended for by plaintiff in error is, since the mortgage recited a note signed by Bastin and wife as principals as the consideration for which it was given, and the note in fact being signed by Bastin only, that therefore the mortgage is without consideration as to her and void. Incidentally in his brief counsel for plaintiff in error urges as error the action of the trial court in permitting correction or reformation of the mortgage so as to show a note executed by the husband alone, which would, he assumes, constitute a different contract than that for which the mortgage was actually given. A description in a mortgage, however, of the debt intended to be secured thereby need only be of such general character and such a reference to the subject-matter as to direct the attention of interested persons to sources of correct and full information, and such as, interpreted in the light of attendant circumstances, embraces the liability intended to be secured. 20 A. & E. Enc. Law (2d Ed.) 926; *Fernandez v. Tormey*, 121 Cal. 515, 53 Pac. 1119. Such a description in a mortgage of the obligation secured is a mere recital of the debt, and has not that primary binding force accorded the covenants and stipulations therein. The bond or note actually secured by a mortgage should be construed with it, in interpreting a clause describing the indebtedness, and should and does control the description of the indebtedness in the mortgage. *Cleavenger v. Beath*, 53 Ind. 172; *Crafts v. Crafts*, 13 Gray (Mass.) 360; 20 A. & E. Enc. of Law (2d Ed.) 928. It was not contended on the trial that a note different from that sued on was ever executed by Bastin and wife, other than the original note, or that the mortgage had reference to any existing obligation signed in fact by those parties together. The note was signed by Bastin alone, and he took the mortgage to his wife for her to sign, and that she understood the character of the instrument she was signing and the nature of the act fully appears from her testimony while on the stand at the trial. She admitted her knowledge that the surety wished to be secured for such note by such an instrument as she in fact signed, and she knew, also, the indebtedness the mortgage was given to secure. The record sufficiently shows but one note to have been signed, but one note to have been in contemplation of the parties when the mortgage was executed, and whatever misapprehension plaintiff in error may now insist she was under as to the specific note secured, the evidence on the trial is

certainly ample, even as against a stranger to the mortgage, to identify the debt or obligation intended to be secured and sued on in this case as the one under contemplation by the wife when she executed the mortgage.

What consideration counsel for plaintiff in error had in mind when he asserted a lack thereof as to Annie C. Bastin, is not apparent from his argument. Although the consideration for the note the mortgage was given to secure ran to Bastin alone, nevertheless the mortgage is valid against the wife, without any consideration moving to her separately. 20 A. & E. Enc. Law (2d Ed.) 923; *Bailey v. Litten*, 52 Ala. 282. Nor is the plaintiff in error aided here by the character of the real estate involved. While all transactions in which the joinder or assent of the wife is obtained in or to any disposition of the homestead will doubtless be scrutinized by the courts with jealous vigilance, yet this will not be carried to the extent of relieving her from the consequences of her own acts, which she clearly understands, or should have understood. 15 A. & E. Enc. of Law (2d Ed.) 682; *Peake v. Thomas*, 39 Mich. 584. And that plaintiff in error did so understand her act in signing the mortgage in question in this case we think clearly appears from her testimony given on the stand at the trial.

For the reasons given, the judgment of the court below is affirmed.

IRWIN, J., who tried the case below, not sitting. All the other Justices concurring, except GILLETTE, J., who dissents.

BURWELL, J. I am satisfied that the conclusion reached in this case is correct for the sole reason that the mortgage was intended to secure the payment of the note in question. The description of the note in the mortgage was a mutual mistake of the parties. The plaintiff pleaded and proved such facts as authorized a reformation of the mortgage so as to correctly describe the note executed and sued on herein, and the mortgage having been reformed by the trial court, and there being no defense offered, justifying, under all the circumstances, a judgment for the defendants or either of them, the lower court properly found for the plaintiff.

I am authorized to state that Justice BEAUCHAMP also concurs in the result for the reasons I have expressed.

FOX v. BERNARD et al. (No. 1,686.)  
(Supreme Court of Nevada. April 3, 1906.)

#### 1. MORTGAGES—FORECLOSURE—LIMITATIONS.

In 1893, plaintiff loaned \$400 to a borrower taking a deed as security, and executing a bond to reconvey on or before 1898 on payment being made. In 1896, plaintiff loaned \$600 additional, and accepted as security for \$1,000 the deed already made, and by release the borrower relieved plaintiff from the obligations of his

bond, who executed a new bond binding him to reconvey on or before January 1, 1900, on the payment of \$1,000 and interest. *Held*, that an action for the purpose of declaring the deed a mortgage and foreclosing it, brought in April, 1904, was not barred by limitations, the extension of the time for a reconveyance given by the surrender of the first bond and the execution of the second one being as effective as if plaintiff had conveyed the property to the borrower and taken a new deed from him.

#### 2. EXECUTORS AND ADMINISTRATORS—ACTIONS—LIMITATIONS.

Where, in a suit to declare a deed a mortgage and to foreclose it, no judgment for any deficiency was demanded or granted by the judgment directed only against the premises, the fact that the suit was not begun within the time required by the probate act, after the rejection of the demand by the executrix of the deceased grantor, was immaterial, though the executrix was made a party defendant.

Appeal from District Court, Lyon County.

Action by C. F. Fox against Mrs. Harriet Bernard, as executrix of William Bernard, deceased, and individually, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

John Lothrop and Alfred Choatz, for appellants. C. E. Mack and Geo. D. Pyne, for respondent.

TALBOT, J. On February 18, 1893, the plaintiff loaned \$400 to William Bernard, now deceased, and to secure the payment thereof he deeded to plaintiff on that day the lands described in the complaint, and at the same time plaintiff executed to him a bond for a deed whereby he agreed to reconvey the property on or before February 18, 1898, provided that he was paid on or before that date \$400, and also \$36 annually. On February 8, 1896, plaintiff loaned Bernard the additional sum of \$600, and accepted as security for \$1,000 and interest, the deed made to plaintiff at the time the \$400 was borrowed, and by release made in writing, acknowledged and recorded, Bernard then relieved him from all obligations resulting from the bond made February 18, 1893, and thereupon plaintiff executed to Bernard a new bond, dated February 8, 1896, conditioned that plaintiff would make and deliver a good and sufficient conveyance of the property to Bernard, provided plaintiff were paid \$1,000 on or before January 1, 1900, and also \$90 annually, and further provisioned that if Bernard paid these amounts and the taxes he would be entitled to the use and possession of the premises. A receipt and the statement or admission of Bernard a short time before his death indicate that the only payments were on interest to the 8th day of February, 1897. He died the following year and letters testamentary were issued to his widow, Mrs. Harriet Bernard, who has since married C. J. Orth. Plaintiff's demand arising out of the above transactions was presented against the estate, and by her as executrix was rejected on August 29, 1898. There is testimony indicating that she had previously recognized the demand by endeavoring to borrow money for its payment. On July 24,

1901, the property was set over to her by decree of distribution. From a judgment decreeing the deed to plaintiff to be a mortgage, and ordering a foreclosure and sale of the premises to satisfy the amount, \$1,731.25, and \$76.40 costs, found due to plaintiff, she appeals.

The well-settled doctrine, that a deed executed merely for the purpose of securing a debt will be construed as a mortgage, is not assailed, but for appellant it is contended that as suit was not brought until April, 1904, more than six years after the last loan and the giving of the last bond on February 8, 1896, and more than four years after the time, January 1, 1900, fixed for a conveyance thereunder conditioned on payment, the action is barred by the statute of limitations. It is said that by executing a written release of the first bond and accepting a new one in its stead, at the time he borrowed the last amount, \$600, Bernard did not sign any writing agreeing to pay or acknowledging a debt, and that therefore the obligation to pay on his part was merely verbal and would be barred in four years. We do not so view that transaction. Most instruments in daily use, such as deeds, mortgages, notes, orders, drafts, and checks are signed by only one of the parties, but are not, for that reason, verbal, nor half verbal. Although Bernard executed no note or writing agreeing to pay any money, he signed a deed absolute in terms conveying the property to plaintiff, and by this suit and the decree no more is sought than he, under his signature, obligated himself to yield. In equity the extension of the time for a reconveyance by plaintiff, given by the surrender of the first bond, and the execution of a new one ought to be considered as effective as if plaintiff had conveyed the property to Bernard, and taken a new deed from him, which would have left the title in plaintiff as it now stands. It was not necessary to have these extra deeds, and if they had been executed they would not have varied the time for bringing suit, and the initiation of the running of the statute which was controlled by the last bond, and the date therein fixed and extended for payment and reconveyance. Plaintiff is fortified with a writing for all that is awarded him by the judgment and for more if the property is worth more. The loan and giving of the security, which vary the unconditional terms of the deed, and which are shown verbally, are facts favorable to appellant which it would have been incumbent upon her to prove if plaintiff had sued in ejectment for the property and introduced the deed. The bringing of the action four years and four months after January 1, 1900, the time fixed in the last bond for a reconveyance conditioned on payment, was not too late.

It is also urged that suit was not begun within the time required by the provisions of the probate act after the rejection of the claim by the executrix. Whether this is so is

immaterial for although she as executrix is named as a party defendant, the allegations of the complaint and the decree may be considered as running against the property only. No judgment for any deficiency after sale or otherwise against the estate is demanded or given by the decree, which is directed only against the premises, and plaintiff's rights to this extent would not be curtailed nor affected by failure to present a claim to the executrix, nor by her rejection of the claim filed, nor by his omission to sue within the time prescribed for commencing actions on rejected claims against estates of deceased persons, as is necessary when it is desired to reach the assets of the estate. In *Cookes v. Culbertson*, 9 Nev. 207, as here, a deed was given as security for a loan which was not evidenced in writing. It was said in the opinion: "The remedy upon the debt is barred by the statute, but the debt was not thereby extinguished; and as the statute of limitations of this state applies to suits in equity as well as actions at law, the creditors could have enforced payment by foreclosure of the mortgage within four years after the cause of action accrued. He had two remedies, one upon the debt, the other upon the mortgage; by losing one he does not necessarily lose the other." Since the rendition of that decision the time for commencing actions on written instruments has been extended from four to six years, and under well-recognized principles plaintiff was allowed that length of time after the date fixed for payment of the \$1,000 and for the termination of the bond or a reconveyance, which was January 1, 1900. As said in *Borden v. Clow*, 21 Nev. 278, 30 Pac. 822, 37 Am. St. Rep. 511, "It is a rule in regard to the statute of limitations that the statute begins to run when the debt is due and an action can be instituted upon it." Under the argument for appellant the four years from the final loan on February 8, 1896, to the time for payment of the \$1,000 under the bond on January 1, 1900, would be deducted from the six years allowed for bringing suit, and on that theory if the maturity of the loan had been more than six years, instead of four, plaintiff's cause of action would have been barred before it accrued.

The judgment of the district court is affirmed.

FITZGERALD, C. J., and NORCROSS, J., concur.

In re CHARTZ. (No. 1,687.)  
(Supreme Court of Nevada. March 1, 1906.)  
1. CONTEMPT — ATTORNEYS — MISCONDUCT IN ARGUMENT.

Defendant, an attorney of the Supreme Court, in a petition rehearing of a cause in which the Supreme Court had held a statute limiting the hours of labor constitutional, stated that in his opinion the decisions favoring the power of the state to limit the hours of labor on the ground of the police power of the state were

all wrong, were written by men who have never performed manual labor, and by politicians and for politics, and that they did not know what they wrote about. *Held*, that such statement constituted a contempt of the Supreme Court, which was not purged by defendant's disavowal of any intent to commit a contempt and by his apology.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, §§ 8, 174.]

## 2. SAME—PUNISHMENT.

Defendant for such offense was subject to reprimand and to an order striking the petition from the files, and taxing him with the costs of the contempt proceeding.

Original proceeding for contempt against Alfred Chartz. Defendant found guilty. Reprimanded and warned.

TALBOT, J. Respondent was commanded to show cause why he should not be adjudged guilty of contempt for having, as an attorney of record in the Matter of the Application of Peter Kair for a Writ of Habeas Corpus, filed in this court a petition for rehearing in which he made use of the following statement: "In my opinion the decisions favoring the power of the state to limit the hours of labor, on the ground of the police power of the state, are all wrong, and written by men who have never performed manual labor, or by politicians and for politics. They do not know what they wrote about." Respondent appeared in response to the citation, filed a brief, and made an extended address to the court in which he took the position that the words in question were not contemptuous, disavowed any intention to commit a contempt of court, and, further, that, if the language was by the court deemed to be objectionable, he apologized for its use and asked that the same be stricken from the petition.

In considering the foregoing statement, it is proper to note that in the briefs filed by respondent upon the hearing of the case in the first instance he used language of similar import, which this court did not taken cognizance of, attributing its use to over zealousness upon the part of counsel, but which was of such a nature that the Attorney General in his reply brief referred to it as insinuating that the Legislature in enacting, and this court in sustaining, the law, were being "impelled or controlled by some mythical political influence or fear which exists only in the pyrotechnic imagination of counsel." Also, the case and its condition at the time the objectionable language was used should be taken into consideration. The proceeding in which this petition was filed had been brought to test the constitutionality of a section of an act of the Legislature limiting labor to eight hours per day in smelters and other ore reduction works, except in cases of emergency, where life or property is in imminent danger. St. 1903, p. 33, c. 10. This act had passed the Legislature almost unanimously and had received the Governor's approval. At the time of filing the petition

respondent was aware that this court had previously sustained the validity of this enactment as limiting the hours of labor in underground mines (Re Boyce, 27 Nev. 327, 75 Pac. 1, 65 L. R. A. 47), and in mills for the reduction of ores, smelters, etc. (Re Kair, 28 Nev. —, 80 Pac. 464), and that similar statutes had been upheld by the Supreme Court of Utah and the Supreme Court of the United States in the cases of State v. Holden, 14 Utah, 71, 86, 46 Pac. 757, 1105, 37 L. R. A. 103, 108; Holden v. Hardy, 160 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; Short v. Mining Co., 20 Utah, 20, 57 Pac. 720, 45 L. R. A. 603, and by the Supreme Court of the state of Missouri, in Re Cantwell, 179 Mo. 245, 78 S. W. 569. It may not be out of place here, also, to note that the latter case has since been affirmed by the Supreme Court of the United States, and more recently the latter tribunal, adhering to its opinion therein and in the Utah cases, has refused to interfere with the decisions of this court in Re Kair.

It would seem, therefore, a natural and proper, if not a necessary, deduction from the language in question, when taken in connection with the law of the cases as enunciated by this and other courts, that counsel, finding that the opinion of the highest court in the land was adverse, instead of favorable, to his contentions, in that it specifically affirmed the Utah decision in Holden v. Hardy, which sustained the statute from which ours is copied, and that all of the courts named were adverse to the views he advocated, had resorted to abuse of the justices of this and other courts, and to imputations of their motives. The language quoted is tantamount to the charge that this tribunal and the Supreme Courts of Utah, Missouri, and of the United States, and the justices thereof who participated in the opinions upholding statutes limiting the hours of labor in mines, smelters, and other ore reduction works, were misguided by ignorance or base political considerations.

Taking the most charitable view, if counsel became so imbued and misguided by his own ideas and conclusions that he honestly and erroneously conceived that we were controlled by ignorance or sinister motives, instead of by law and justice, in determining constitutional or other questions, and that these other courts and judges and the members of the Legislature and Governor were guilty of the accusation he made because they and we failed to follow the theories he advocated, and that his opinions ought to outweigh and turn the scale against the decisions of the four courts named, including the highest in the land with 19 justices concurring, nevertheless it was entirely inappropriate to make the statement in the brief. If he really believed or knew of facts to sustain the charge he made, he ought to have been aware that the purpose of such a document is to enlighten the court in regard to

the controlling facts and the law, and convince by argument, and not to abuse or vilify, and that this court is not endowed with power to hear or determine charges impeaching its justices. On the other hand, if he did not believe the accusation, and made it with a desire to mislead, intimidate, or swerve from duty the court in its decision, the statement would be the more censurable. So that taking either view, whether respondent believed or disbelieved the heinous charge he made, such language is unwarranted and contemptuous. The duty of an attorney in his brief or argument is to assist the court in ascertaining the truth pertaining to the pertinent facts, the real effect of decisions and the law applicable to the case, and he far oversteps the bounds of professional conduct when he resorts to misrepresentation, false charges, or vilification. He may fully present, discuss, and argue the evidence and the law, and freely indicate wherein he believes that decisions and rulings are wrong or erroneous, but this he may do effectually without making bald accusations against the motives and intelligence of the court, or being discourteous or resorting to abuse which is not argument nor convincing to reasoning minds. If respondent has no respect for the justices, he ought to have enough regard for his position at the bar to refrain from attacking the tribunal of which he is a member, and which the people through the Constitution and by general consent have made the final interpreter of the laws which he, as an officer of the court, has sworn to uphold and protect. These duties are so plain that any departure from them by a member of the bar would seem to be willful and intentional misconduct.

The power of courts to punish for contempt and to maintain decency and dignity in their proceedings is inherent, and is as old as courts are old. It is also provided by statute. By analogy we note the adjudications and penalties imposed in a few of the many cases. Lord Cottingham imprisoned Edmund Lechmere Charlton, a barrister and member of the House of Commons, for sending a scandalous letter to one of the masters of the court, and a committee from that body, after an investigation, reported that in their opinion his "claim to be discharged from imprisonment by reason of privilege of parliament ought not to be admitted." 2 Milne & Craig, 317. When the case of *People v. Tweed*, in New York City, came up a second time before the same judge, before the trial commenced, the prisoner's counsel privately handed to the judge a letter, couched in respectful language, in which they stated, substantially, that their client feared, from the circumstances of the former trial, that the judge had conceived a prejudice against him, and that his mind was not in the unbiased condition necessary to afford an impartial trial, and respectfully requested him to consider whether he should not

relinquish the duty of presiding at the trial to some other judge, at the same time declaring that no personal disrespect was intended toward the judge or the court. The judge retained the letter, and went on with the trial. At the close of the trial he sentenced three of the writers to a fine of \$250 each, and publicly reprimanded the others; the junior counsel at the same time expressing the opinion that, if such a thing had been done by them in England, they would have been "expelled from the bar within one hour." The counsel at the time protested that they intended no contempt of court, that they felt and intended to express no disrespect for the judge, but that their action had been taken in furtherance of what they deemed the vital interests of their client and the faithful and conscientious discharge of their duty. The judge accepted the disclaimer of personal disrespect, but refused to believe the disclaimer of intention to commit a contempt, and enforced the fines. 11 Alb. Law J. 408; *In re Pryor*, 26 Am. Rep. 752.

For sending to a district judge out of court a letter stating that "the ruling you have made is directly contrary to every principle of law, and everybody knows it, I believe, and it is our desire that no such decision shall stand unreversed in any court we practice in," an attorney was fined \$50 and suspended from practice until the amount should be paid. In delivering the opinion of the Supreme Court of Kansas (*In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747), Brewer, J., said: "Upon this we remark. In the first place, that the language of this letter is very insulting. To say to a judge that a certain ruling which he has made is contrary to every principle of law, and that everybody knows it, is certainly a most severe imputation. We remark, secondly, that an attorney is under special obligations to be considerate and respectful in his conduct and communications to a judge. He is an officer of the court, and it is therefore his duty to uphold its honor and dignity. The independence of the profession carries with it the right freely to challenge, criticize, and condemn all matters and things under review and in evidence. But with this privilege goes the corresponding obligation of constant courtesy and respect toward the tribunal in which the proceedings are pending. And the fact that the tribunal is an inferior one, and its rulings not final and without appeal, does not diminish in the slightest degree this obligation of courtesy and respect. A justice of the peace before whom the most trifling matter is being litigated is entitled to receive from every attorney in the case courteous and respectful treatment. A failure to extend this courtesy and respectful treatment is a failure of duty; and it may be so gross a dereliction as to warrant the exercise of the power to punish for contempt. It is so that in every case

where a judge decides for one party he decides against another; and oftentimes both parties are beforehand equally confident and sanguine. The disappointment, therefore, is great, and it is not in human nature that there should be other than bitter feeling which often reaches to the judge as the cause of the supposed wrong. A judge, therefore, ought to be patient, and tolerate everything which appears but the momentary outbreak of disappointment. A second thought will generally make a party ashamed of such outbreak. So an attorney sometimes, thinking it a mark of independence, may become wont to use contemptuous, angry, or insulting expressions at every adverse ruling, until it becomes the court's clear duty to check the habit by the severe lesson of a punishment for contempt. The single insulting expression for which the court punishes may therefore seem to those knowing nothing of the prior conduct of the attorney, and looking only at the single remark, a matter which might well be unnoticed; and yet, if all the conduct of the attorney was known, the duty of interference and punishment might be clear. We remark, finally, that while, from the very nature of things, the power of a court to punish for contempt is a vast power, and one which in the hands of a corrupt or unworthy judge may be used tyrannically and unjustly, yet protection to individuals lies in the publicity of all judicial proceedings, and the appeal which may be made to the Legislature for proceedings against any judge who proves himself unworthy of the power intrusted to him."

Where a contention arose between counsel as to whether a witness had not already answered a certain question, and the court, after hearing the reporter's notes read, decided that she had answered it, whereupon one of the attorneys sprang to his feet, and, turning to the court, said, in loud tones and insulting manner: "She has not answered the question"—held that "the attorney was guilty of contempt, regardless of the question whether the decision of the court was right or wrong." *Russell v. Circuit Judge*, 67 Iowa, 102, 24 N. W. 741. In *Sears v. Starbird*, 75 Cal. 91, 16 Pac. 531, 7 Am. St. Rep. 123, a brief reflecting upon the trial judge was stricken from the record in the Supreme Court because it contained the following: "The court, out of a fullness of his love for a cause, the parties to it, or their counsel, or from an overzealous desire to adjudicate 'all matters, points, arguments, and things,' could not, with any degree of propriety under the law, patch and doctor up the case of the plaintiffs, which, perhaps, the carelessness of their counsel had left in such a condition as to entitle them to no relief whatever." In reference to this language, it was said in the opinion: "Here is a distinct intimation that the judge of the court below did not act from proper motives, but from a love of the parties or their counsel. We see

nothing in the record which suggests that such was the case. On the contrary the action complained of seems to us to have been entirely proper. See *Sill v. Reese*, 47 Cal. 340. The brief, therefore, contains a groundless charge against the purity of motive of the judge of the court below. This we regard as a grave breach of professional propriety. Every person on his admission to the bar takes an oath to 'faithfully discharge the duties of an attorney and counselor.' Surely such a course as was taken in this case is not a compliance with that duty. In *Friedlander v. Sumner G. & S. M. Co.*, 61 Cal. 117, the court said: 'If unfortunately counsel in any case shall ever so far forget himself as willfully to employ language manifestly disrespectful to the judge of the superior court a thing not to be anticipated, we shall deem it our duty to treat such conduct as a contempt of this court, and to proceed accordingly.' And the briefs in the case were ordered to be stricken from the files." In *U. S. v. Late Corporation of Church of Jesus Christ of Latter Day Saints* language used in a petition filed, in effect accusing the court of an attempt to shield its receiver and his attorneys from an investigation of charges of gross misconduct in office, and containing the statement that "we must decline to assume the functions of a grand jury, or attempt to perform the duty of the court in investigating the conduct of its own officers," was held to be contemptuous. (Utah) 21 Pac. 519.

In *Re Terry* (C. C.) 36 Fed. 419, an extreme case, for charging the court with having been bribed, resisting removal from the courtroom by the marshal acting under an order from the bench, and using abusive language, one of the defendants was sent to jail for 30 days and the other for 6 months. Judge Terry, who had not made any accusation against the court, sought release and to be purged of the contempt by a sworn petition in which he alleged that in the transaction he did not have the slightest idea of showing any disrespect to the court. It was held that this could not avail or relieve him, and it was said: "The law imputes an intent to accomplish the natural result of one's acts, and, when those acts are of a criminal nature, it will not accept, against such implication, the denial of the transgressor. No one would be safe if a denial of a wrongful or criminal intent would suffice to release the violator of law from the punishment due to his offenses." In an application for a writ of habeas corpus, growing out of that case, Justice Harlan, speaking for the Supreme Court of the United States, said: "We have seen that it is a settled doctrine in the jurisprudence, both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in

its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred, and that according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them." 128 U. S. 313, 9 Sup. Ct. 83, 32 L. Ed. 405.

In *Re Woolley*, 74 Ky. 95, it was held that to incorporate into a petition for rehearing the statement that "your honors have rendered an unjust decree," and other insulting matter, is to commit in open court an act constituting a contempt on the part of the attorney; and that, where the language spoken or written is of itself necessarily offensive, the disavowal of an intention to commit a contempt may tend to excuse, but cannot justify the act. From a paragraph in that opinion we quote: "An attorney may unfit himself for the practice of his profession by the manner in which he conducts himself in his intercourse with the courts. He may be honest and capable, and yet he may so conduct himself as to continually interrupt the business of the courts in which he practices, or he may, by a systematic and continuous course of conduct, render it impossible for the courts to preserve their self-respect and the respect of the public and at the same time permit him to act as an officer and attorney. An attorney who thus studiously and systematically attempts to bring the tribunals of justice into public contempt is an unfit person to hold the position and exercise the privileges of an officer of those tribunals. An open, notorious, and public insult to the highest judicial tribunal of the state for which an attorney contumaciously refuses in any way to atone may justify the refusal of that tribunal to recognize him in the future as one of its officers."

In *Re Cooper*, 32 Vt. 262, the respondent was fined for ironically stating to a justice of the peace: "I think this magistrate wiser than the Supreme Court." *Redfield, C. J.*, said: "The counsel must submit in a justice court, as well as in this court, and with the same formal respect, however difficult it may be either here or there. We do not see that the relator has any alternative left him but the submission to what he no doubt regards as a misapprehension of the law, both on the part of the justice and of this court. And in that respect he is in a condition very similar to many who have failed to convince others of the soundness of their own views, or to become convinced themselves of their fallacy." In *Mahoney v. State* (Ind. App.) 72 N. E. 151, an attorney was

fined \$50 for saying: "I want to see whether the court is right or not. I want to know whether I am going to be heard in this case in the interest of my client, or not"—and making other insolent statements. In *Redman v. State*, 28 Ind. 205, the judge informed counsel that a question was improper, and the attorney replied: "If we cannot examine our witnesses, he can stand aside." This language was deemed offensive, and the court prohibited that particular attorney from examining the next witness. In *Brown v. Brown*, 4 Ind. 627, 58 Am. Dec. 641, the lawyer was taxed with the cost of the action for filing and reading a petition for divorce which was unnecessarily gross and indelicate. In *McCormick v. Sheridan* (Cal.) 20 Pac. 24: "A petition for rehearing stated that 'how or why the honorable commissioner should have so effectually and substantially ignored and disregarded the uncontradicted testimony, we do not know. It seems that neither the transcript nor our briefs could have fallen under' the commissioner's observation. A more disingenuous and misleading statement of the evidence could not well be made. It is substantially untrue and unwarranted. The decision seems to us to be a travesty of the evidence. Held that counsel drafting the petition was guilty of contempt committed in the face of the court, notwithstanding a disavowal of disrespectful intention. A fine of \$200 was imposed, with an alternative of serving in jail."

The Chief Justice, speaking for the court in *State v. Morrill*, 16 Ark. 384, said: "If it were the general habit of the community to denounce, degrade, and disregard the decisions and judgments of the courts, no man of self-respect and just pride of reputation would remain upon the bench, and such only would become the ministers of the law as were insensible to defamation and contempt. But happily, for the good order of society, men, and especially the people of this country, are generally disposed to respect and abide the decisions of the tribunals ordained by government as the common arbiters of their rights. But where isolated individuals, in violation of the better instincts of human nature, and disregarding of law and order, wantonly attempt to obstruct the course of public justice by disregarding and exciting disrespect for the decisions of its tribunals, every good citizen will point them out as proper subjects of legal animadversion. A court must naturally look first to an enlightened and conservative bar, governed by a high sense of professional ethics, and deeply sensible, as they always are, of its necessity to aid in the maintenance of public respect for its opinions." In *Sommers v. Torrey*, 5 Paige (N. Y.) 64, 28 Am. Dec. 411, it was held that the attorney who put his hand to scandalous and impertinent matter stated against the complainant and one not a party to the suit is liable to the censure of the court and chargeable with the cost of pro-

ceedings to have it expunged from the record. In *State v. Grailhe*, 1 La. Ann. 183, the court held that it could not consistently with its duty receive a brief expressed in disrespectful language, and ordered the clerk to take it from the files.

Referring to the rights of courts to punish for contempt, Blackford, J., in *State v. Tipton*, 1 Blackf. (Ind.) 166, said: "This great power is intrusted to those tribunals of justice for the support and preservation of their respectability and independence. It has existed from the earliest period to which the annals of jurisprudence extend; and except in a few cases of party violence, it has been sanctioned and established by the experience of ages." Lord Mayor of London's Case, 3 Wilson, 188; opinion of Kent, C. J., in the Case of Yates, 4 Johns. (N. Y.) 317; *Johnston v. Commonwealth*, 1 Bibb (Ky.) 598. At page 206 of *Weeks on Attorneys* (2d Ed.) it is said: "Language may be contemptuous, whether written or spoken, and, if in the presence of the court, notice is not essential before punishment, and scandalous and insulting matter in a petition for rehearing is equivalent to the commission in open court of an act constituting a contempt. When the language is capable of explanation, and is explained, the proceedings must be discontinued; but, where it is offensive and insulting per se, the disavowal of an intention to commit a contempt may tend to excuse, but cannot justify, the act. From an open, notorious, and public insult to a court, for which an attorney contumaciously refused in any way to atone, he was fined for contempt, and his authority to practice revoked." Other authorities in line with these we have mentioned are cited in the note to *Re Cary* (D. C.) 10 Fed. 632, and in 9 Cyc. p. 20, where it is said that contempt may be committed by inserting in pleadings, briefs, motions, arguments, petitions for rehearing, or other papers filed in court insulting or contemptuous language, reflecting on the integrity of the court.

By using the objectionable language stated respondent became guilty of a contempt which no construction of the words can excuse or purge. His disclaimer of any intentional disrespect to the court may palliate, but cannot justify, a charge which under any explanation cannot be construed otherwise than as reflecting on the intelligence and motives of the court, and which could scarcely have been made for any other purpose unless to intimidate or improperly influence our decision. As we have seen, attorneys have been severely punished for using language in many instances not so reprehensible, but in view of the disavowal in open court we have concluded not to impose a penalty so harsh as disbarment or suspension from practice, or fine or imprisonment. Nor do we forget that in prescribing against the mis-

conduct of attorneys litigants ought not to be punished or prevented from maintaining in the case all petitions, pleadings, and papers essential to the preservation and enforcement of their rights.

It is ordered that the offensive petition be stricken from the files, that respondent stand reprimanded and warned, and that he pay the costs of this proceeding.

NORCROSS, J., concurs.

FITZGERALD, C. J. In this matter my concurrence is special and to this extent: The language used by the respondent in his petition for a rehearing, and on which this contempt proceeding was based, was, in my opinion, contemptuous of this court, and, of course, should not have been used. The respondent, however, in response to the order of the court to show cause why he should not be punished therefor, appeared and disclaimed any intention to be disrespectful or contemptuous, and moved that, if the court deemed the language contemptuous, the said language be stricken out of his petition. Respondent not only contended and said that he had no intention to be disrespectful or contemptuous, but he also earnestly contended that the language charged against him and which he admitted having used was not disrespectful or contemptuous. In this last contention, I think, he was plainly in error. The duty of courts in matters of this kind is indeed an unpleasant one, such, at least, has it always appeared to me. Yet it must sometimes be done. Therefore I concur in the conclusion reached, and in the order stated in the opinion of Justice TALBOT, to wit: "It is ordered that the offensive petition be stricken from the files, that respondent stand reprimanded and warned, and that he pay the costs of this proceeding."

#### GRANDIN v. SOUTHERN PAC. CO.

(Supreme Court of Utah. April 19, 1906.)

##### 1. MASTER AND SERVANT—RISKS ASSUMED—KNOWLEDGE OF SERVANT OF DANGER.

In the absence of evidence to the contrary, it will be assumed that a person employed by a carrier to load and unload cars was a man of average understanding, capable of appreciating the obvious dangers connected with the duties he undertook to discharge.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 892.]

##### 2. SAME.

A person employed by a carrier to load and unload cars was injured while assisting in unloading battery houses from a flat car. At the time of the accident, he had been in the service of the carrier for three months, knew the nature of the work, and knew that there was more or less risk of injury incident to the service. *Held*, that the fact that he had not assisted in unloading battery houses prior to the accident was immaterial on the question of his assumption of risk, because the nature of the service suggested that the employé must at

times handle materials and appliances different from those usually received and handled.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 575.]

### 3. SAME.

Where employes engaged in unloading cars, assisted in constructing the means necessary to perform the service, and continued without objection to perform the work according to the method adopted by them, or the employer, the employes assumed the risks of danger incident thereto, including the negligence of co-employes; the employer exercising proper diligence in the selection and retention of co-employes.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 567.]

### 4. SAME.

A labor gang employed by a carrier to load and unload cars was engaged in unloading battery houses from a flat car, when a member of the gang was injured. To perform the work a temporary platform was constructed at the car, and from it two wooden skids were placed to form an incline to the ground. The members of the gang constructed this appliance, and the employe who was injured knew about the construction and did not object to its insufficiency. The danger was obvious. *Held*, that the injured employe assumed, as a matter of law, the risks incident to the performance of the service.\*

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 610, 613, 622.]

Appeal from District Court, Second District; J. A. Howell, Judge.

Action by Carl J. Grandin against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action to recover damages for personal injuries which the plaintiff alleges he received through the negligence of the defendant. In the complaint it is alleged, in substance, that on February 19, 1904, the plaintiff, under the employ of the defendant, was engaged, with other employes, in its yard at Ogden City, in unloading certain battery houses from a car; that, to accomplish this work, the employes, by order of the defendant, constructed a temporary platform at the car with large sills or skids, about 10 inches square, extending from the platform on an incline to the ground, thence on the ground a certain distance; that the houses were placed, one at a time, upon a low four-wheeled truck, run down the incline and out onto the sills on the ground, the employes guiding and holding the truck and house each time; that the battery houses when so unloaded were placed so close together upon the sills that the tongue of the truck was removed each time after the first one had been unloaded, and the truck guided by employes holding the wheels; that the implements so used were insufficient, unsafe, and dangerous because of the size and weight of the battery houses, and the angle of the

incline; and that, while so unloading one of the houses, the truck ran off the sill, upset, and caused the injury of which complaint is made. In the answer all the material allegations of the complaint are denied, and contributory negligence of the plaintiff is alleged.

From the evidence it appears that, when the accident occurred, the plaintiff had been in the employ of the defendant for the period of three months, as a common laborer. His duties were of a general character in the shops and about the yard—moving all kinds of material, and loading and unloading such material into and from cars. At the time of the accident, he and five other employes, constituting a labor gang, including a gang foreman who worked with the others, were engaged in unloading battery houses from a flat car. The dimensions of these houses were  $4\frac{1}{2}$  by 5 feet and  $8\frac{1}{4}$  feet high. To unload them the gang constructed a temporary platform at the car, by means of carpenter sawhorses, blocking, and cross-ties. From this platform two wooden skids, 8 by 8 or 9 inches and 14 feet long, were placed parallel, so as to form an incline from the platform to the ground, and from the end of the skids, on the ground, were laid sills on which the houses were to be placed. In unloading the houses each one was placed upon a low four-wheeled truck, and then wheeled down the incline and out upon the sills. There were six of these houses, and each time, after the first one was unloaded, in unloading a house the tongue was removed from the truck, so as to get it closer to the house previously unloaded. The plaintiff assisted in constructing the platform and incline, in arranging the appliances, and using the truck, without any objection either from himself or any other workman. The work had thus been going on from between 7 and 8 o'clock in the morning to between 2 and 3 o'clock in the afternoon, when the accident happened, and five of the houses had then been unloaded. Respecting this work, the plaintiff, in the course of his testimony, said: "The truck was first brought there after we got the timbers put in place. I do not remember who brought it, but a couple of the gang. I saw the truck run up these skids when the first house was unloaded. I don't know who had hold of the tongue the first time. I remember the crowd of us used the truck. I had no occasion at that time to give any particular attention to the particular thing that each individual was doing. The whole thing was being done by the gang, and we were all co-operating in the work." The witness McClure said: "While this work was being performed, by this gang, in the way described, no one of the gang objected to the tongue being removed, or made any objection, as to the arrangement there, in connection with the removal of these houses. There was not a word said." The unloading of the house, which resulted in the injury, was

\*Dunn v. Railroad, 80 Pac. 311, 28 Utah, 478; Roth v. Eccles, 79 Pac. 918, 28 Utah, 456; Christenson v. R. G. W. Ry. Co., 74 Pac. 876, 27 Utah, 132, 101 Am. St. Rep. 945; Higgins v. Southern Pacific Co., 72 Pac. 690, 26 Utah, 164.

being done in the same manner as that of the previous ones. It had been wheeled down to the bottom of the incline where it had been stopped, with the front wheels of the truck on the sills and the hind wheels still on the incline. Then, upon the tongue of the truck being removed by a colaborer, as on the previous occasion, in an attempt to place that house next to the previous one, the front wheels of the truck were pushed off the sills, when the house fell over and caused the injuries of which complaint is made. Respecting what caused the wheels to leave the sills, the witness McClure, on cross-examination, said: "I think the reason we had the trouble that time was that the men pushed too hard behind. That is the only reason I know of why it went off. When it got down as far as the tongue would go, then we stopped and put blocks in front of the forward wheels to hold it. Then we took the tongue out, and then it was shoved, and shoved too hard." After the removal of the tongue, two of the gang, as previously, attempted to guide the wheels of the truck on the sills, but were unable to do so, and when the house began to fall the plaintiff stumbled over a colaborer, fell, and was thus unable to avoid injury. At the trial the jury returned a verdict in favor of the plaintiff, and, upon judgment being entered accordingly, the defendant appealed.

P. L. Williams and Geo. H. Smith, for appellant. T. D. Johnson and Thos. Maloney, for respondent.

BARTCH, C. J. (after stating the facts). The decisive question presented is whether the plaintiff has shown any right of recovery. The appellant contends that, having aided in the construction of the temporary contrivance to unload the battery houses, the injured had actual knowledge of the means employed in the service, and, as the dangers connected therewith were open and obvious, and as he voluntarily, without objection to the means employed, undertook to perform the service, he assumed the consequent risk of injury; that the defendant's motion for nonsuit, based upon a failure of plaintiff's proof to establish a prima facie case, ought to have been granted; and that the court, having denied the motion, ought, at the close of the entire testimony, have granted defendant's request to instruct the jury to return a verdict for the defendant.

Upon careful examination of the evidence disclosed by the record, we are of the opinion that the appellant's contention is well founded. The unloading of the battery houses was in the regular line of service which the plaintiff was employed to perform. His duties related generally to all kinds of material that might be in, or shipped into, the yard. His employer was a common carrier engaged in the business of receiving and transporting all kinds of goods, implements, and material, and, in the absence of evidence showing the

contrary, we must assume that the respondent was a man of average understanding and knowledge of things about him, and capable of appreciating the obvious dangers connected with the duties he undertook to discharge. At the time of the accident, he had been in that service for three months, knew what its nature was, and must have known that there was more or less risk of injury incident to the service. Such hazards, as are merely incidental to the business, the servant and the master are supposed to have taken into consideration in the negotiations respecting the employment. The fact that this was the first occasion on which battery houses had been received into the company's yard is immaterial, because the very nature of the service suggests that the employes must at times handle materials and appliances which are different from those usually received and handled. Doubtless, there are occasions, like the one in this instance, when, in order to load or unload such material, the construction of improvised means becomes necessary to perform the service. In such cases, the employes, who voluntarily assist in providing such means, for performing the service more conveniently, and continue, without objection, to perform it according to the method adopted by them, or their employer, assume the risks of danger incident thereto, including the negligence of co-employes, when the employer, in the latter case, has exercised proper diligence in the selection and retention of the co-employes. It is not claimed that the company neglected its duty in this regard. The objection relates merely to the means used in and the manner of performing the service. But, whether or not the best method was employed, the plaintiff assisted in constructing the platform and incline, observed the kind of timbers that were used for skids and sills, knew all about the construction, its temporary character and use to which it was to be put, and assisted in making use of it, including the truck, in unloading the houses, and while making use, without objection or even a suggestion of insufficiency, of the very means he helped to provide, he was accidentally injured. The whole thing was open to his observation and knowledge. Whatever dangers were connected with the manner of performing the service were, at least, as open and obvious to him as to his employer, and he had an equal opportunity to observe them; he having assisted in unloading, from the same car, a number of houses, in the same way and with the same means, just previous to the injury. And there is evidence indicating that the immediate cause of the accident was the negligence of colaborers—fellow servants, who, it seems, heedlessly pushed the house that fell over too hard after the tongue was removed from the truck. Such facts and circumstances as are here disclosed show no liability on the part of the employer, and consequently no right of recovery on the

part of the employé. In a case like the one presented by this record, where the servant, of his own volition, consents to perform the service according to the method adopted, the same being open and obvious, the law is that the servant assumes the risk of the dangers incident to and connected with the performance of the service in such manner.

In *Dunn v. Railroad*, 28 Utah, 478, 80 Pac. 311, a gang of section laborers constructed a temporary platform with ties and plank for the purpose of loading a car with ties. The platform was constructed in the absence of the plaintiff, but afterwards he, in common with other laborers, without objection, used it in loading the car with ties, and, after having so used it for about two hours, he slipped on the platform, fell, and received injuries for which he brought suit. The record there presented a case much like the one at bar, and this court, in passing upon it, said: "If, under such facts and circumstances as are disclosed by this record, an employer would be liable to an employé in damages, it would seem difficult to conceive of a case of accidental injury where the employer would not be liable. That this is one of those unfortunate accidents, in which there is no responsibility on the part of the employer, we entertain no doubt. It is clearly a case of an assumed risk incident to the employment. We are aware of the general rule that, where a master employs a servant, he must exercise ordinary care to furnish the servant a reasonably safe place in which to perform the service, and a failure to do so will render the master liable for any injury to the servant resulting from such failure; but in this case we can perceive no violation of the rule that can avail the respondent, who, we have a right to assume, in the absence of evidence to the contrary, was a man of average understanding and knowledge of things about him. We cannot say from the proof that the place was not reasonably safe, but, if it was not—if it was dangerous—the danger was open and obvious, and the employé could easily observe it. Whatever hazard was connected with the loading of the ties was equally open and obvious to the employé as to the employer, if not more so; and, if there was anything unsafe about the platform, the exercise of ordinary care would have revealed it to the employé. He having voluntarily engaged in such service, concurring in the use of the contrivance, observing its construction and temporary character, and, as a man of ordinary understanding and knowledge, aware of the dangers incident to the employment, and having, of his own volition, undertaken to perform the service in that way, must be held to have assumed the ordinary risks of injury incident to that service, including the risk of the injury in question, and cannot now be heard to complain." And, in that case, upon the ques-

tion of reasonably safe place to perform the service, Mr. Justice McCarty observed: "While it is a duty the master owes to his servant to furnish him with a reasonably safe place in which to perform his work, the master is not bound to anticipate and guard against every conceivable kind of accident or misfortune that might occur. The appellant in this case was only required to use that degree of care and diligence in the construction of the runway and platform that a reasonably cautious and prudent man, understanding the dangers and hazards of the employment, would use under the same or like circumstances. The master cannot be expected, nor is he required, to anticipate and guard against every conceivable kind of accident and misfortune that might happen to the servant in the performance of the work; yet, if the respondent can be permitted to recover in this case, it would be difficult to conceive of a set of circumstances under which a master would not be liable to his servant for injuries sustained because of an accident to the servant while in the performance of the work required of him. The platform and runway were simple devices, temporary in character, and plainly observable, and to me it is incomprehensible how it was possible for respondent to go up this runway and onto the platform every few minutes for a space of two hours, and not become aware of the nature and character of their construction." *Cooley on Torts*, 634-636; *Roth v. Eccles*, 28 Utah, 456, 79 Pac. 918; *Christienson v. R. G. W. Ry. Co.*, 27 Utah, 132, 74 Pac. 876, 101 Am. St. Rep. 945; *Higgins v. Southern Pac. Co.*, 26 Utah, 164, 72 Pac. 690; *Sullivan v. India M. Co.*, 113 Mass. 396.

Entertaining the conviction that the plaintiff has shown no right of recovery, we do not deem it important to discuss or pass upon any other question presented.

The judgment must be reversed, with costs, and the case remanded for further proceedings in accordance with law. It is so ordered.

MCCARTY, J., concurs.

STRAUP, J. I am of the opinion that the respondent assumed the risk, and therefore concur in the judgment of reversal.

#### OREGON SHORT LINE R. CO. v. DISTRICT COURT OF THIRD JUDICIAL DIST.

(Supreme Court of Utah. April 23, 1906.)

1. CERTIORARI—GROUNDS FOR REVIEW—EXCESS OF JURISDICTION—EXISTENCE OF OTHER REMEDY.

Const. art. 8, § 4. confers on the Supreme Court original jurisdiction to issue writs of certiorari, and Rev. St. 1898, § 3630, provides that a writ of review may be granted by the Supreme Court when an inferior tribunal exercising ju-

dicial functions is exceeding its jurisdiction and there is no appeal, nor any plain, speedy, and adequate remedy. *Held*, that where a judgment has been rendered in a district court in favor of plaintiff in an action instituted before a justice of the peace and taken to the district court by appeal, and it is shown that the district court has exceeded its jurisdiction, the Supreme Court has power by certiorari to review such jurisdictional question; the judgment not being reviewable by further appeal.\*

## 2. JUSTICES OF THE PEACE — JURISDICTION — FREEHOLD.

Sess. Laws 1903, p. 69, c. 83, provides that every steam railroad shall erect and maintain a fence on each side of its railroad where the same "passes through lands owned and improved by private owners," and connect the same at all public road crossings with cattle guards, and that for failure so to do the corporation shall be liable for all damages sustained by the owner of any domestic animal killed or injured by such railroad in consequence thereof. *Held* that, where a complaint before a justice of the peace against a railroad for killing plaintiff's horse at a point where the road was not fenced alleged that the railroad "passed through lands owned and improved by private owners," the denial of such allegation did not raise a material issue of freehold, ousting the justice of jurisdiction, as provided by Rev. St. 1898, § 3674.

Application by the Oregon Short Line Railroad Company for writ of certiorari to review a judgment rendered by the district court of the Third judicial district, in an action brought by one O. O. Carty against petitioner. Application denied.

P. L. Williams, G. H. Smith, and Jno. G. Willis, for plaintiff. Goodwin & Van Pelt, for defendant.

STRAUP, J. 1. An application is made to this court for a writ of certiorari to review a judgment and proceedings of the district court. The petitioner, the Oregon Short Line Railroad Company, in behalf of said application, alleges that O. O. Carty, as plaintiff, filed an unverified complaint against the petitioner in the justice's court, wherein it was alleged, so far as material here, that petitioner's steam railroad operated by it at Hot Springs, in Salt Lake county, "passed through lands owned and improved by private owners, and for a distance of more than twenty rods south of said Hot Springs; that about four rods south of said Hot Springs there was a public crossing and line of travel running east and west across the right of way and tracks" of petitioner; that its track at said place was not fenced, nor were there any cattle guards connecting the lands on each side of the track; that, by reason of petitioner's neglect to maintain fences and cattle guards, Carty's horse, of the value of \$100, casually strayed and entered upon petitioner's right of way and was run over and killed by a locomotive operated by petitioner, in consequence of which judgment was demanded against pe-

tititioner for the sum of \$100, the value of the horse. To this complaint the petitioner filed an unverified answer, admitting its ownership and operation of the railroad, but otherwise denied "each and every allegation" of the complaint, and pleaded contributory negligence. The case was tried before the justice, and judgment was rendered against petitioner for the value of the horse. From this judgment it appealed to the district court, where the case was tried de novo and a judgment there rendered against petitioner. Petitioner further alleged that upon the issues presented by the pleadings the justice and the district court exceeded their jurisdiction in rendering and entering judgment. In no other particular is it alleged that either of said courts exceeded jurisdiction. To this petition the defendant above named, the district court, demurred and made a motion to quash the writ.

2. The determination of the matters presented involves the following questions: First, where a case had been commenced in the justice's court and appealed to the district court, and there a final judgment rendered, may the proceedings in the district court be reviewed by the Supreme Court on a writ of certiorari, if sufficient facts are made to appear on the application that the district court exceeded its jurisdiction? and, second, if so, does the petition here show sufficient facts whereby it is made to appear that the district court exceeded its jurisdiction?

It is urged by the defendant that in view of what was said in the cases of *Crooks v. District Court*, 21 Utah, 98, 59 Pac. 529, and *Smith v. District Court*, 24 Utah, 164, 66 Pac. 1065, we are without power or authority to review such a judgment or proceedings of the district court, even though it may have exceeded its jurisdiction. When these opinions are read and considered, it will be found that the controlling feature in the mind of the court was that a writ of certiorari could not be made to merely perform the function of an ordinary appeal. That is to say, the Constitution of Utah not giving any right of appeal to the Supreme Court from a judgment of the district court in a case commenced in the justice's court, and the Constitution making such a judgment of the district court final as to the right of an appeal, unless the validity or constitutionality of a statute is involved, a party may not use the writ of certiorari to have reviewed mere errors or mistakes made by the district court in proceedings and determinations within its jurisdiction. But nowhere in the opinion of the court in either of the above cases was it indicated that where it is made to appear that the district court has exceeded its jurisdiction in a judicial proceeding from which no appeal lies, and when there is no plain, speedy, and adequate remedy, this court is powerless to inquire into and review determinations made without jurisdiction or in

\*Salt Lake City, etc., Co. v. Salt Lake City, 67 Pac. 791, 24 Utah, 232; Gilbert v. Board, 40 Pac. 284, 11 Utah, 373.

excess of the jurisdiction conferred. In order to review such excess of jurisdiction, it matters not whether such action is made to appear in a proceeding originally commenced in the district court or appealed to it from a justice's court, but whether, in a proceeding before it, the district court, in the exercise of judicial functions, exceeded its jurisdiction, and that there is no appeal, nor any plain, speedy, and adequate remedy. We therefore adhere to the doctrine announced in the Crooks and Smith Cases, that this court will not permit a writ of certiorari to be used to exercise the functions of an ordinary appeal and to review errors and mistakes where the court acted within its jurisdiction. Under the statute the office of a writ of certiorari is to inquire into and to review determinations made without jurisdiction or in excess of the jurisdiction conferred. We have the undoubted right by writ of certiorari to inquire into and to review such determinations.

Section 4, art. 8, Const. Utah, among other things, provides: "The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus." Section 3630, Rev. St. 1898, provides: "A writ of review may be granted by the Supreme Court, or by a district court, or a judge thereof, when an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer and there is no appeal nor, in the judgment of the court or judge, any plain, speedy and adequate remedy." When, therefore, it is made to appear, as is required by subsequent provisions of the statute, that the district court has exceeded its jurisdiction, and that there is no appeal nor plain, speedy, and adequate remedy, we have the right and power to issue a writ of certiorari to inquire into and review determinations made by it without or in excess of its jurisdiction. *Salt Lake City, etc., Co. v. Salt Lake City*, 24 Utah, 282, 67 Pac. 791; *Gilbert v. Board*, 11 Utah, 378, 40 Pac. 264; *Spelling, Ext. Relief*, § 1921; 6 Cyc. 750, 759; *Harris, Certiorari*, § 78; 4 Enc. Pl. & Pr. 90, 95, 98.

3. This brings us to the next question: Are sufficient facts made to appear showing that the district court acted in excess of its jurisdiction? Section 3674, Rev. St. 1898, so far as material here, provides: "The parties to an action in a justice's court, cannot give evidence upon any questions which involve the title or possession of real property, etc., nor can any issue presenting such question be tried by such court; and if it appear from the answer of the defendant, verified by his oath, or that of his agent or attorney, that the determination of the action will necessarily involve the question of title or possession to real property, etc., the justice must suspend all further proceedings in the action and certify the pleadings, and if any of the pleadings are oral, a transcript of

the same, from his docket to the clerk of the district court of the county in which said justice's precinct is situated; and from the time of filing such pleadings or transcript with the clerk, the district court has over the action the same jurisdiction as if it had been commenced therein." Chapter 83, p. 69, Sess. Laws 1903, so far as material here, provides: "Every railroad company operating a railroad by steam power within this state is hereby required to erect, within six months after the approval of this act, and thereafter maintain a fence on each side of its railroad where the same passes through lands owned and improved by private owners and connect the same at all public road crossings with cattle guards." Provision is then made as to the kind of fence that shall be maintained, and then it is provided: "And any such corporation shall be liable for all damages sustained by the owner of any domestic animal killed or injured by such railroad in consequence of the failure to build or maintain such fence."

It is now claimed by the petitioner, because it was alleged in the complaint in the justice's court that petitioner's railroad "passed through lands owned and improved by private owners," and because of its general denial, the face of the pleadings showed that title to real estate was necessarily involved, and that the justice had no jurisdiction to try the case, and therefore no jurisdiction was conferred upon the district court by the appeal. We are of the opinion, and so hold, that sufficient facts are not made to appear that title or possession of real estate was necessarily involved within the meaning of the statute. The allegation in the complaint, which was in the language of the statute, "passed through lands owned and improved by private owners," was merely descriptive of the general character of the lands through which the railroad passed and along which the petitioner was required to fence. By such an allegation the title or right of possession of the lands was not necessarily involved. It was wholly immaterial whether the adjoining land was owned by Carty, or the petitioner, or any other particular person. Plaintiff might have averred that the railroad passed through lands owned and improved by one or several persons, and, if the proof showed it was owned by another or different persons, it would not have been a fatal variance. The subject-matter of the litigation was an injury to personal property, of which the justice clearly had jurisdiction. If it could be said that title or possession of real estate was at all involved, it was drawn in question only incidentally or collaterally. The judgment did not in any sense adjudicate, directly or indirectly, title or right of possession to the land. The only judgment that could be rendered for plaintiff, and that was rendered in the case, was for the value of the horse destroyed, and the rendition thereof did not necessitate defining

or determining or passing on the extent of title or right of possession to real estate within the meaning of the statute prohibiting the justice from entertaining jurisdiction. "The suit here is only for the recovery of the statutory fine or penalty, and, at most, involves only incidentally a freehold. The justice of the peace could render no judgment that either party was possessed of a freehold estate, for the reason that his jurisdiction does not extend that far; it being limited to the recovery of the fine or penalty imposed by the statute." *Herman v. Com'r's Highways*, 197 Ill. 94, 64 N. E. 337. "It is obvious that the title of land may incidentally come in question in various forms of action, as, for instance, in assault and battery, where the defendant justifies the assault in defense of his freehold. I apprehend that in such case the jurisdiction of the justice would not be arrested, but that he should proceed to hear and determine the title, so far as it affected the rights of the parties in the suit, in the same manner that the matter would be heard and determined in the superior court." *Haven v. Needham*, 20 Vt. 183. When the plaintiff is put "to the necessity of proving his declaration, he is bound to either prove, or disprove a title to the land, then the justice has no jurisdiction to try the case. But when the declaration is such as not to require the proof of title to land to sustain it, and such question only comes into the case by reason of some special line of defense, then the justice was not ousted of his jurisdiction to try the action. There is hardly any form of action in which the title or ownership of land may not incidentally arise, and it would be productive of infinite confusion and mischief to hold that in all actions whenever that is the case the jurisdiction ceases, and the parties are remitted to a new litigation in another forum." *Jake-way v. Barrett*, 38 Vt. 316. "The averment in the declaration in question that the trees were standing 'on the land of the said plaintiff' was not an averment of claim of title. *Reynolds v. Maynard* (Mich.) 100 N. W. 174.

Our attention has been called to *Boyd v. Southern Cal. Ry. Co.*, 126 Cal. 573, 58 Pac. 1046, and *Baker v. Southern Cal. Ry. Co.*, 110 Cal. 455, 42 Pac. 975, holding that title to realty was involved. The California statute and the Utah statute are susceptible of different constructions. The former statute provides that if railroad corporations fail to fence and their engines or cars shall kill or maim cattle, etc., "upon their line of road which passes through or along the property of the owner thereof they must pay to the owner of such cattle," etc. It was held by the California courts that the statute was designed to protect the adjoining landowners. In the *Boyd Case* it was further said: "In this count of the complaint plaintiff avers title in himself to a described tract of land. \* \* \* When plaintiff based his right on that statute averring ownership of

land, as he did and was required to do, title to the land was necessarily involved," etc. In the *Baker Case*: "It will be noticed that by this section it is contemplated that the plaintiff must be the owner of the land through which the line of road passes, and an allegation of ownership was made in the complaint in the present case." It will therefore be observed that under the California statute, as construed by the courts of that state, it is essential that the plaintiff be the owner of land to entitle him to recover, and an allegation of such ownership is required in his complaint to state a cause of action. The Utah statute is not susceptible of such a construction. It gives a right of action to the owner of any domestic animal killed, whether he be the owner of the adjoining land or not, and hence to state a cause of action a plaintiff under the Utah statute is not required to allege that he is the owner of land. Furthermore, the consideration in the California cases involved the right of an appeal from the superior court to the Supreme Court under the constitutional provision, "in all cases at law which involve the title or possession of real estate," and it was held that the Supreme Court had appellate jurisdiction in such cases if "title or possession is only incidentally involved." *Hart v. Carnall-Hopkins Co.*, 103 Cal. 132, 37 Pac. 196. The Utah statute in question forbids the justice from entertaining jurisdiction when title or possession to real estate is necessarily involved.

Our conclusion is that no sufficient facts are made to appear that title or possession of real estate was necessarily involved, and the demurrer is therefore sustained.

Having reached this conclusion, it is not necessary to decide whether the petitioner is in position to raise the question because of its answer in the justice's court not being verified, or as to a waiver on its part because of its failure to object to the justice proceeding to try the case on the merits, and because of no request being made that the case be certified to the district court, or because of its failure to object to the district court's trying the case de novo.

The petitioner having indicated that if the demurrer be sustained it cared not to further plead, therefore the order of this court is that the application be denied, the proceeding dismissed, and the orders and stay heretofore granted by us dissolved.

BARTCH, C. J., concurs in the result. McCARTY, J., concurs.

(30 Utah, 379)

SANFORD v. KUNKEL et al. (WALSH et al., Interveners).\*

(Supreme Court of Utah, April 23, 1906.)

1. MECHANICS' LIENS—TIME OF TAKING EFFECT—BEGINNING OF WORK.

Under Rev. St. 1898, § 1394, providing that mechanics' liens are preferred to any lien.

\*For opinion on rehearing see 35 Pac. 1012.

mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished, also to any lien, mortgage, or incumbrance of which the lienholder had no notice and which was unrecorded at the time the building improvement or structure was commenced, work done, or materials commenced to be furnished, a mechanic's lien filed within the time specified by section 1386 takes effect as of the date of the commencement of the work and the furnishing of the materials and is prior to intervening equities.\*

**2. SAME—PROPERTY AFFECTED BY LIEN—REMOVAL OF BUILDING—EFFECT.**

Rev. St. 2898, § 1372, gives a mechanic's lien on the property on which labor is performed or for which material is furnished to the extent of the interest of the owner or lessee in the real estate. Section 1379 declares that the lien shall extend to cover so much of the land whereon the building, structure, or improvement may be made as may be necessary for the convenient use and occupation of the building or improvement, and if the building shall occupy two or more lots or other subdivision of land, such lots shall be deemed one lot for the purposes of the lien law. *Held*, that the removal of a building by third persons to land other than that on which it was originally erected without the knowledge and consent of the owner thereof, or mechanic's lienholders, did not relieve the building in its new location from liability for a deficiency existing on the sale of the land on which the building was erected to satisfy such liens.

**3. SAME — SALE OF BUILDING — INJURY TO FREEHOLD.**

Where third persons wrongfully removed a building which was subject to mechanic's lien, to a lot other than on which it was originally constructed, and the building was necessary to satisfy such liens, the lienholders were entitled to sell and remove the building from its new location, or, if that could not be done without great injury to the building or freehold on which it stands, such freehold, including the building, was subject to sale with a right of redemption as in the case of the foreclosure of a mortgage.

Bartch, C. J., dissenting.

Appeal from District Court, Third District; C. W. Morse, Judge.

Action by Benjamin Sanford against Mark Kunkel and others, to foreclose a mechanic's lien, in which A. H. Walsh and another intervene. From a judgment in favor of plaintiff and interveners for less than the relief demanded, they appeal. Reversed.

Patterson & Moyer, for appellants. James Ingebretzen, for respondents.

**STRAUP, J. 1.** This is an action brought by Sanford against Kunkel, the Utah Lumber Company, and Charles E. Murphy, defendants, to foreclose a mechanic's lien. Appellants Cain and Walsh were made parties and intervened. Judgment was had in favor of defendants and against plaintiff and interveners. The appeal is on the judgment roll, without a bill of exceptions containing any evidence. The assignments relate only to the conclusions of law. The findings, so far as material, show: On August 1, 1903, Kunkel was the owner of lots 8, 9, and 10. He then

entered into a contract with appellant Cain to furnish plans and specifications and to superintend the construction of two dwellings to be erected on said lots; on August 5th, with appellant Sanford to construct the cellar walls and to do the carpenter work; on August 3d, with appellant Walsh to do the plumbing; on August 5th, with Morrison Merrill & Co. to furnish lumber, hardware, and other material for the house on lot 10 and the south half of lot 9. Cain commenced his work on the 1st day of August, 1903, Walsh on the 3d, and Sanford on the 8th. The last work performed by them was on the 27th day of October, 1903. Morrison Merrill & Co., furnished the first material August 18, and the last October 26, 1903. The two buildings were erected on the said lots, one house substantially on lot 8 and the north half of lot 9, and the other on lot 10 and the south half of lot 9, without any fence or barrier between them, and all of said land was necessary for the use and occupation of said buildings. Appellants Sanford, Walsh, and Cain performed labor and furnished material on both houses in pursuance of their contracts. When the building on lot 8 and the north half of lot 9 was almost finished and the contracts of appellants nearly completed, on or about the 12th day of September, 1903, the respondents, the Utah Lumber Company and Charles E. Murphy, its manager, without the knowledge or consent of Kunkel, the owner of the ground, or of the appellants, removed said building from said lot 8 and the north half of lot 9 to lots 4 and 3 adjoining and owned by the Utah Lumber Company, and there caused it to be attached to a brick foundation. On November 9, 1903, Sanford filed a notice of lien on lots 8, 9, and 10; Walsh on November 7, 1903; Cain on November 4, 1903; and Morrison Merrill & Co. on November 26, 1903. Sanford on the 18th day of September, 1903, Walsh on the 24th day of September, and Cain on the 26th day of October, also filed notice of liens on lots 4 and 3, wherein, among other things, it was stated that the building thereon was erected on lot 8 and north half of lot 9 for Kunkel, and that after it was substantially completed the Utah Lumber Company and Charles E. Murphy forcibly, wrongfully, and without the knowledge or consent of Kunkel or the lien claimants, removed it therefrom to lots 4 and 3. Morrison Merrill & Co. assigned its claim to Cain. Kunkel defaulted. Appellants prayed that their liens be foreclosed against lots 8, 9, and 10, and, if the proceeds of sale be insufficient to satisfy them, that then the house wrongfully removed from lot 8 and the north half of lot 9 be sold and the proceeds applied on such deficiency, and that they be granted such other relief as in equity they may be entitled. The trial court decreed a foreclosure as to lots 8, 9, and 10. Because of the removal of the building from lot 8 and the north half of lot 9, and its being attached to a brick foundation on lots 4 and 3, the

\*Culmer v. Caine, 61 Pac. 1008, 22 Utah, 216; Fields v. Daisy Min. Co., 69 Pac. 523, 25 Utah, 76.

court ruled the lien on the building was lost and did not follow it to its new location, hence denied appellants all relief with respect thereto, and merely gave them a deficiency judgment against Kunkel. This ruling of the court presents the matter for review.

2. Section 1372 of the mechanics' liens statute (Rev. St. 1898) provides: "Mechanics, materialmen, contractors, subcontractors, builders and all persons of every class performing labor upon or furnishing materials to be used in the construction, etc., of any building, etc., and also architects, etc., who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, or superintendence, etc., shall have a lien upon the property upon which they have rendered service, or performed labor, or furnished materials, for the value of such service rendered, labor done, or materials furnished, by each respectively, whether at the instance of the owner or of any other person acting by his authority or under him as agent, contractor, or otherwise; provided, that a lien or liens shall attach only to such interest as the owner or lessee may have in the real estate." Section 1379: "The liens granted by this chapter shall extend to and cover so much of the land whereon such building, structure or improvement shall be made, as may be necessary for the convenient use and occupation of such building, structure or improvement, and the same shall be subject to such liens; and in case any such building shall occupy two or more lots or other subdivisions of land, such lots or other subdivisions shall be deemed one lot for the purposes of this chapter," etc. Section 1384: "The liens provided for herein are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other incumbrance of which the lienholder had no notice and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or materials commenced to be furnished." Section 1385: "The liens herein provided shall relate back to and take effect as of the time of the commencement to do work upon and furnish materials on the ground for the structure or improvement, and shall have priority over any lien or incumbrance subsequently intervening, except a lien herein provided for of the same class, or which may have been created prior thereto, which was not then recorded and of which the lienor under this chapter did have actual notice." Section 1386 provides that the original contractor, within 60 days after the completion of his contract, and a subcontractor within 40 days after furnishing the last material or performing the last labor for any building, shall file for record a notice of intention to hold and claim a lien. Section 1392 provides: "The court shall cause the property to be sold

in satisfaction of the liens and costs, as in the case of foreclosure of mortgages, subject to the right of redemption of the owner and creditors as provided by law," etc.

A finding was made that, at the time of the removal of the building, appellants had no notice of lien filed of record, but it will be observed that, under the statute, and as construed by this court, the lien has its inception from the time of the commencement of the work and the furnishing of materials, and, by relation, takes effect as of that date, and is given priority over any lien or incumbrance subsequently intervening, or which may have been created prior thereto which was not recorded and of which the lien claimants had not actual notice. *Culmer v. Caine*, 22 Utah, 216, 61 Pac. 1008; *Fields v. Daisy Min. Co.*, 25 Utah, 76, 69 Pac. 528. Appellants were not required to file their notice of liens until 60 days after the completion of their contracts, if original contractors, or within 40 days after furnishing the last material or performing the last labor on the building. The notice of liens was filed within such time, and no question is made that they were not filed within time. The claim made by respondents is that, under the statute, the lien does not attach to the building alone independent of the land upon which it is erected, but attaches only to the realty and to the building as a part of it; that when the building, although seized by the lien as part of the realty, is severed and removed therefrom, it ceases to be a part of the realty, and hence ceases to be charged with the lien. If such assertion is correct in principle, it leads to the inevitable conclusion that a contractor may enter into a contract with the owner of land worth \$500, to erect thereon a building of the value of \$10,000, and when it is completed all but painting, the owner, without the knowledge or consent of the contractor, may remove it to an adjoining lot and thereby substantially destroy the contractor's lien. The cases cited by respondents do not support such a doctrine. They are to the effect that where a building is constructed on ground not owned by the person with whom the contract of construction was entered into and for whom the building was erected, no lien attached to either the land or the building, on the theory that the lien law contemplated that a party for whom a building is erected, and against whom and whose interest the lien is to be enforced, shall have some estate or interest in the land upon which the building is erected. Cases are also cited to the effect that where a building is erected for one on land owned by him the lien does not separately attach to the building, in the sense that the lien may be enforced against the building alone and independent of the land, unless the statute by express terms gives such right, upon the ground that it is the owner's right to have the whole

property sold for the satisfaction of the debt, and that by the sale of the building alone and its removal from the premises his right of redemption would be defeated. These cases do not avail respondents, because the facts upon which they are founded do not here exist. Appellants made their contracts with and performed labor and furnished materials for Kunkel, the owner of the land upon which the building in question was constructed. The case at bar is, therefore, unlike one where a building is constructed for one on ground not owned by him and where no lien at all existed and attached. *Morrison Merrill & Co. v. Clark*, 20 Utah, 432, 59 Pac. 235, 77 Am. St. Rep. 924.

By express provisions of the statute the liens taking effect from the commencement of the work or the furnishing of material, the building, as a part of the realty on which it was erected for the owner of the realty, was seized and charged with the liens at the time when respondents removed the building, just as effectually as if it had been removed after the notice of liens had been filed and recorded. As the liens had attached, and could not thereafter be destroyed or impaired by the owner selling or incumbering the realty, we cannot see on what just principle they may be destroyed or impaired by the owner severing, removing, and selling that which is a part of the realty, much less when such is done by the wrongful act of a mere stranger and trespasser. When the lien has once attached, it cannot be defeated by the removal of the building to another lot. *Bolsot, Mechanics' Liens*, § 182. *Bishop v. Honey*, 34 Tex. 245. The case here is analogous to those where a building was removed from mortgaged premises without the consent of the mortgagee, in reference to which it was said: "So far as the house was concerned, it was a part of the property covered by the mortgage and it contributed largely to the value of the security. As it was removed from lot 6 without the knowledge or consent of the mortgagee and with the knowledge of all the parties claiming any rights adverse to those of the mortgagee, we see no reason why such mortgagee should not be permitted to follow the house after having exhausted lot 6 and apply it if necessary to the payment of the mortgage debt. This course would give the mortgagee the benefit of the security for which he contracted." It does not necessarily follow "that the house in this case became a part of lot 7 by the removal thereupon and so escape from the lien of the mortgage. \* \* \* We see no reason why complete relief should not be afforded the mortgagee in this action. As lot 6 is to be first sold if its proceeds satisfy the judgment the house will not be sold at all. If, upon the sale, lot 6 proves insufficient, then the house will be called upon for the unsatisfied balance or as much of it as it will pay. There is no unfairness in this."

*Hamlin v. Parsons*, 12 Minn. 108 (Gil. 59), 90 Am. Dec. 284; *Partridge v. Hemenway*, 89 Mich. 454, 50 N. W. 1084, 28 Am. St. Rep. 322; *Turner v. Mebane*, 110 N. C. 413, 14 S. E. 974, 28 Am. St. Rep. 697; *Dakota Loan & Trust Co. v. Parmalee*, 5 S. D. 341, 58 N. W. 811; *Dorr v. Dudderar*, 88 Ill. 107; *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789; *Rogers v. Gillinger*, 30 Pa. 185, 72 Am. Dec. 694; *Hoskin v. Woodward*, 45 Pa. 42.

The case of *Verner v. Betz*, 46 N. J. Eq. 256, 19 Atl. 206, 7 L. R. A. 630, 19 Am. St. Rep. 387, cited as holding a contrary doctrine, is distinguishable. There the house, after its removal from mortgaged premises and after it was attached to other land, was sold to a bona fide purchaser without notice. In that case the trial court ruled that the purchaser had notice and purchased with knowledge of all the circumstances, and, therefore, the mortgage lien on the building was not discharged. 13 Atl. 622. The appellate court, on the theory that the purchaser was an innocent purchaser for value, reversed the judgment. The appellate court said that the decisive question was: "Assuming that the appellant Verner bought the house and paid for it a valuable consideration without knowledge of its removal," can a court of equity return it to the wasted property after being affixed to other lands and sold to a bona fide purchaser? After discussing the question in view of the assumed premises, the court concludes: "Having found that the appellant Verner is a bona fide purchaser of the building in controversy affixed to his land," the decree is reversed and modified. Here, the respondents, having themselves removed the building without the knowledge or consent of appellants or of Kunkel, the owner, can in no sense be considered innocent purchasers, but are justly characterized trespassers and wrongdoers. The case of *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 80, supports the contention of respondents. There a flood carried a building from mortgaged premises into a street a short distance from the mortgaged lot. While standing in the street the mortgagor sold it to a third person, who was about to move it on land of his own. The mortgagee brought an action to restrain him from so doing. The court, in holding that the mortgagor had the right to sell it and the purchaser to convert it to his own use, did so on the theory that by its severance and removal from the freehold the building ceased to be realty and was withdrawn from the operation of the mortgage lien. It was there said: "So far as legal effect is concerned, it matters not whether the severance was by the act of God or the act of man. The severance, *proprio vigore*, changed the character of the property from real to personal, irrespective of the means by which it was accomplished." This case is cited with approval in *Verner v. Betz*, *supra*. We think it is unsound in principle. It has been criticised in notes to 23 Am. St.

Rep. 325, and was repudiated in *Loan & Trust Co. v. Parmalee*, supra, and in *Patton v. Moore*, supra.

3. It is also urged by respondents that the court should not decree the removal of the building, because to remove it will injure their freehold. The court has not found that the removal of the building will injure their freehold. But if it did to some extent injure it, respondents are not in a position to complain thereof. They must be held to have anticipated the consequences of their own wrongful act. When they invaded the freehold from which they removed the house, thus wasting and damaging the former, and attempting to free the latter from the operation of the lien with which it was charged, they must be held to have known such act was unlawful, and, when they attached the building to their freehold, that they had no right or authority to do so. When they are called upon to surrender the fruits of their illegal transaction their claim of injury in consequence thereof does not appeal very persuasively to equity. A court of equity is more solicitous in compelling restoration to the wronged than it is in protecting the wrongdoer in something which is the direct result of his wrongful act. In so doing the court should not inflict unnecessary or avoidable injury. But at all events it will not encourage the spoliation of realty by a wrongdoer, permit him to destroy a lien attached to the most valuable part of it, and thus allow the justice of the lien statute to be defeated. In case the building here is attached to the freehold of respondents in such a way that it cannot be removed without great injury to the building or great injury to their freehold, we think it will not be violative of any principles of equity, as between the respondents and appellants, to require a sale of both the freehold and the building, to the extent of the deficiency, after exhausting the freehold from which the building was wrongfully removed. Respondents cannot well complain of this if there wrongful act renders it necessary to be done.

The judgment of the lower court is reversed, with directions to modify the judgment and to decree, first, the sale of lots 8, 9, and 10 in satisfaction of appellants' liens, and, if any deficiency remain, that then the building removed by respondents to lots 4 and 3 be sold and the purchaser be given a right to remove it, if such can be done without great injury to the building or the freehold upon which it stands, and, if such cannot be done, that then the court decree the sale of lots 4 and 3, together with the building thereon, to the extent of such deficiency; the surplus, if any, to be yielded to the respondents, and that they be given the right of redemption as in the case of foreclosure of mortgage. Costs to be taxed against respondents.

McCARTY, J., concurs.

BARTON, C. J. (dissenting). Viewing and considering the facts as they appear from the evidence in the record, in the light of the decisions of the courts made under statutes similar to or like ours, and of the law as laid down by the text-writers with reference to such statutes as ours, under which the lien extends to and covers the land and not alone the building, I am unable to concur with my associates in this judgment, and therefore dissent.

STATE ex rel. RIDDELL v. DISTRICT COURT OF SECOND JUDICIAL DIST. et al.

(Supreme Court of Montana. Feb. 26, 1906.)

1. CONSTITUTIONAL LAW—DUE PROCESS—NOTICE OF TAXING COSTS.

A statute authorizing the taxation of costs on a memorandum filed without any notice to the person liable therefor would be obnoxious to Const. art. 3, § 27, guarantying that no person shall be deprived of life, liberty, or property without due process of law.

2. COSTS—TAXATION IN LOWER COURT OF COSTS ON APPEAL—NOTICE.

Code Civ. Proc. § 1867, points out the mode to be pursued for the enforcement of costs in original proceedings and provides that a memorandum of the items of costs shall be served on the adverse party. Section 1869 provides that whenever costs are awarded to a party by an appellate court, if he claims such costs he must within a certain time deliver to the clerk below a memorandum of his costs verified as prescribed by section 1867, and thereafter he may have an execution therefor. No provision in the latter section is made for notice to the adverse party. *Held*, that the provisions for notice in former section are applicable to proceedings under the latter.

3. SAME—TAXATION—WAIVER OF NOTICE OF PROCEEDINGS.

Costs, being allowed only by statute, can be collected only by the method pointed out by the statute, and where the provisions of the statute were not followed, in that the adverse party had no notice of the filing of the memorandum, such party, by submitting his motion to tax along with his motion to strike out the memorandum as a whole, did not give the court jurisdiction of the subject-matter.

Certiorari by the state of Montana, on the relation of J. A. Riddell, against the district court of the Second Judicial District of the state of Montana and Hon. John B. McClernan, judge thereof, to review an order taxing costs. Order annulled.

John J. McHatton, for relator. Carpenter, Day & Carpenter, for respondents.

BRANTLY, C. J., Certiorari. On appeal to this court by the defendants in a cause entitled *Riddell v. Ramsey et al.*, 31 Mont. 386, 78 Pac. 597, a judgment in favor of plaintiff and an order denying defendants' motion for a new trial were reversed. When the remittitur went down to the district court, the defendants filed with the clerk their verified memorandum of costs and disbursements on the appeal and caused execution to be issued therefor as upon a judgment under the

statute. Code Civ. Proc. § 1869. Thereupon the plaintiff filed his motion, supported by affidavit, to the effect that a copy of the memorandum had not been served upon him before or after filing, and asked that the execution be stayed pending a decision by the court upon the question whether the defendants were entitled to their costs. Execution was stayed. The plaintiff then moved the court, making special appearance for that purpose, to strike out the memorandum, and at the same time submitted a motion to tax the bill on its merits, making specific objections to various items included therein. The court denied the motion to strike out the memorandum, and thereupon proceeded to consider and determine the motion to tax. Certain of the items were disallowed, with the result that the amount claimed, \$944.05, was reduced to \$652.05. Thereupon this proceeding was begun to have the order taxing costs annulled as in excess of jurisdiction. The writ was issued, and the record certified up.

The contention is made by counsel for relator that, under the rule laid down in *State ex rel. Hurley v. District Court*, 27 Mont. 40, 69 Pac. 244, since no notice of the filing of the memorandum was given under the provisions of section 1867 of the Code of Civil Procedure, the memorandum ought to have been stricken out as a whole. Counsel calls attention to the fact that he made a special appearance for the purpose of asking that the memorandum be stricken out, and that, although he at the same time submitted the merits of plaintiff's claim, thus asking for substantive relief, he did not thereby waive his right to have the relief demanded by his special appearance. The district court should have stricken out the memorandum or bill as a whole. It was without jurisdiction to tax or allow any item. The respondents rely, of course, on the provisions of section 1869 of the Code of Civil Procedure, and insist that, since the defendants in the case of *Riddell v. Ramsey et al.*, supra, complied literally with its requirements and filed their verified memorandum with the clerk within the prescribed time, they were entitled to have execution issue thereon as a matter of course, subject to be recalled on motion of the plaintiff pending a motion to tax. They contend, further, that the provisions of section 1867, touching the service of the memorandum, do not apply; for, if notice need not be given, then the court has nothing to do in the premises. The difficulty with this position is that, if the provisions of this latter section do not apply as to the requirement of notice, neither do they in any other particular. The result is that the party against whom such costs are claimed is without remedy. The memorandum may include all sorts of illegal items, and the party filing it has a judgment for them, without notice or opportunity to his adversary to be heard, before his property

may be taken under the execution to satisfy the judgment thus obtained without notice. If this meaning is to be given that section, it would, it seems, be clearly obnoxious to the constitutional guaranty that no person shall be deprived of life, liberty, or property without due process of law (Const. art. 3, § 27), the phrase "due process of law" including notice and a hearing before judgment. *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215.

We do not think it necessary to hold section 1869 unconstitutional. The chapter of which this section is a part has to do with costs and the mode by which they may be collected. Section 1867 points out the mode to be pursued for the collection of costs in the district courts, and also in original proceedings in this court; at least it does not in terms apply to district courts exclusively. Section 1869 points out the mode by which they may be collected when awarded on appeal; but we think that all the analogies, as was stated in *State ex rel. Hurley v. District Court*, supra, require notice of the claim to be given under the provisions of section 1867, or that they should be denied. While the exact point now before the court was not raised in *State ex rel. Hurley v. District Court*, supra, yet what was there said as to the necessity of notice was not entirely impertinent and is wholly applicable in this case. This rule must govern or the conclusion is inevitable that section 1869 is invalid, and that parties have no means provided by which they may collect costs awarded to them by this court on appeal. Section 1867 clearly does apply to proceedings in this court in some respects. We think it must be held to apply also to the method of claiming in the district court costs awarded by this court on appeal, and that the method pointed out must be pursued, else the court has no power to settle controversies in any manner concerning them. Nor do we think the relator, by submitting the motion to tax along with his motion to strike out the memorandum as a whole, gave the court jurisdiction of the subject-matter. Costs, as costs, are allowed only by statute and can be collected only by the method pointed out by the statute. *Orr v. Haskell*, 2 Mont. 350; *Riddell v. Harrell*, 71 Cal. 254, 12 Pac. 67; *O'Neil v. Donahue*, 57 Cal. 226; *Sellick v. De Carlow*, 95 Cal. 644, 30 Pac. 795; *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409. When, therefore, the party claiming costs has failed to claim them as directed by the statute, his right to them has not attached, and the court has no other power in the premises than to strike out and disallow them on motion of the adverse party. For these reasons we think that the district court, in proceeding to tax and allow any portion of the bill in controversy, was wholly without jurisdiction, and the order must be annulled.

At the hearing no question was made as to

the remedy. We have therefore considered the case upon the merits, without reference to the question whether the proper remedy has been invoked in this case.

Order annulled.

MILBURN and HOLLOWAY, JJ., concur.

### PALMER v. SPAULDING.

(Supreme Court of Montana. March 6, 1906.)

#### APPEAL—APPEALABLE ORDERS.

An order of the district court dismissing an appeal from a justice's court is not appealable either as a final judgment or as an appealable order within Code Civ. Proc. § 1722, as amended by Sess. Laws 1899, p. 146, authorizing an appeal from a final judgment and from an order granting or refusing a new trial, etc.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

Action by Claude A. Palmer against A. A. Spaulding. From an order dismissing an appeal from a judgment of a justice's court, plaintiff appeals. Dismissed.

J. L. Staats, for appellant. H. A. Bolinger, for respondent.

BRANTLY, C. J. This action, brought for the purpose of recovering the possession of certain personal property, originated in a justice's court of Gallatin county. From a judgment in plaintiff's favor, defendant appealed to the district court. Plaintiff moved that court to dismiss the appeal on grounds the merits of which need not be noticed. The court sustained the motion, causing to be entered in the minutes the following order: "Motion to dismiss heretofore taken under advisement, is at this time sustained by the court." From this order the defendant thereupon attempted to appeal to this court as from a final judgment.

In this court the plaintiff has interposed an objection to the consideration of the appeal on the merits, on the ground that this court has no jurisdiction. It is clear that the order is neither in form nor substance a final judgment; and, not being in itself an appealable order (Code Civ. Proc. § 1722, amended by Act of 1899 [Sess. Laws 1899, p. 146]), this court has no jurisdiction to consider the case upon the merits, and plaintiff's objection must be sustained.

The appeal is therefore dismissed.

Dismissed.

MILBURN and HOLLOWAY, JJ., concur.

### STATE v. FULLER.

(Supreme Court of Montana. March 19, 1906.)

#### 1. CRIMINAL LAW — HARMLESS ERROR — EXCLUSION OF EVIDENCE.

Where, in a criminal prosecution, a witness for the state had testified on cross-examination that he had not told the county attorney that

he wanted to testify, but had gone to him and told him what he knew, the exclusion of a further question as to whether the witness had sent any one else to the county attorney to tell him that witness wanted to testify, while technically erroneous, was harmless.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3138, 3139.]

#### 2. SAME—OBJECTIONS TO EVIDENCE—WAIVER.

Where, in a prosecution for murder, defendant consented to the use of his shoes for comparison with tracks found at the scene of the killing, he waived the right to object to evidence so obtained on the ground that its use was forbidden by Const. art. 3, §§ 7, 18, prohibiting unreasonable searches and seizures, and declaring that no person shall be compelled to testify against himself.

#### 3. SAME — EVIDENCE — COMPARISON OF SHOES WITH TRACKS—ADMISSIBILITY—COMPELLING ACCUSED TO GIVE EVIDENCE AGAINST SELF.

In a prosecution for murder, the admission of evidence that shoes taken from defendant without his consent corresponded with tracks found near the scene of the killing did not deprive defendant of the rights guaranteed to him by Const. art. 3, § 18, declaring that no person shall be compelled to testify against himself in a criminal prosecution, and section 7, prohibiting unreasonable searches and seizures, or Const. U. S. Amends. 4, 5, containing substantially the same provisions.

#### 4. SAME.

In a prosecution for crime, evidence of footprints or other marks or tokens found upon or near the place of the killing may be admitted to connect the accused with it or identify him as the guilty person, if the evidence tends to show that he left such evidence behind him.

#### 5. SAME—TRIAL—COMMENTING ON EVIDENCE.

In a prosecution for murder, a remark of the court, in admitting in defendant's behalf a transcript of the evidence taken at the coroner's inquest, that he would admit it for what it was worth, was not prejudicial as a comment on the weight of the evidence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1528, 1533.]

#### 6. SAME—INSTRUCTIONS—DEFINING MALICE.

In a prosecution for murder, a definition of malice not precisely conforming to Pen. Code, § 7, but nevertheless sufficiently comprehensive to give the jury a definite idea of the meaning of the word, was not a cause for reversal, in the absence of a request for a more specific instruction.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2005.]

#### 7. SAME—HARMLESS ERROR.

Alleged error in defining the expression "heat of passion" was harmless, where the jury found defendant guilty of murder in the first degree, especially in view of the fact that the evidence did not tend to prove manslaughter.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3161; vol. 26, Cent. Dig. Homicide, § 720.]

#### 8. SAME—CREDIBILITY OF WITNESSES.

In a prosecution for crime, an instruction that, if any witness had willfully testified falsely as to any material fact, the jury were at liberty to disregard his entire testimony, though erroneous, because failing to limit the right to disregard the testimony to such portions thereof as were not corroborated, was not cause for reversal, where the evidence conclusively showed defendant to be guilty.

#### 9. SAME—FAILURE OF DEFENDANT TO TESTIFY.

In a criminal prosecution in which defendant had not testified, it was proper for the court of its own motion to instruct the jury that defendant in a criminal case cannot be compelled to be a witness against himself, and that if

he does not claim the right to be sworn and does not testify, this fact must not be used to his prejudice.

Appeal from District Court, Silver Bow County; Michael Donlon, Judge.

Miles Fuller was convicted of murder, and appeals. Affirmed.

Jas. H. Baldwin, John Lindsay, and Edwin S. Booth, for appellant. Albert J. Galen, Atty. Gen., and W. H. Poorman, Asst. Atty. Gen., for the State.

BRANTLY, C. J. On November 7, 1904, defendant was by information charged with the crime of murder, and thereafter, having been tried upon his plea of not guilty thereto, was convicted of murder of the first degree and sentenced to death. He has appealed from the judgment and from an order denying him a new trial.

The brief of counsel assigns many rulings and decisions of the court, which, it is alleged, prejudiced the defendant in his substantial rights. Of these only a few are sufficiently meritorious to require special notice. The following brief statement of the facts will be sufficient to make clear the contentions made: It appears that the homicide grew out of a grudge of long standing between the defendant and Henry Gallahan, the deceased. The defendant had repeatedly stated that he intended to kill Gallahan at the first opportunity. He made this statement to the deceased himself in the presence of one of the witnesses, a few days prior to the killing. Both men occupied cabins a short distance west of the city of Butte. About 6 o'clock on the evening of October 24, 1904, two of the witnesses going east into the city, along one of its principal streets near its western outskirts, met the deceased going west, near where he was killed. One of these, two or three minutes after passing the deceased, saw the defendant standing behind the corner of a school building "peeking" in the direction the deceased was going. A short time later the two, the defendant and the deceased, were observed further west standing a few yards apart on the hillside. No one was near enough to them to hear what, if anything, was said by either of them. The defendant first fired at the deceased. They then exchanged shots rapidly, both using revolvers, until the deceased fell mortally wounded by a shot in the head. The defendant then started west, but stopped, returned to where the deceased was lying, slashed his throat twice with a knife or other sharp instrument, severing the jugular vein, and then fled, escaping in the dusk of the evening. Those who witnessed the shooting were from 250 to 600 feet away; two of them, Semmons and Almqvist, pursued the defendant for some distance. Though there was not sufficient light to enable him to distinguish the features of a man clearly, Almqvist recognized him. Later on the same evening he was arrested. On the following

day the undersheriff took the shoes worn by the defendant at the time of the arrest and compared them with footprints found leading from the place of the shooting to within a short distance of defendant's cabin. The impression made by the shoes corresponded exactly with these footprints. The evidence is that the undersheriff told the jailer to get defendant's shoes and that he went and took them off defendant in the corridor of the jail where he then was.

Gladstone Bray had witnessed the affray, but, though his name had been given to the coroner, he had not been called to testify at the inquest, nor had the county attorney been informed of the fact that he was an eyewitness until, on the evening before the trial began, he gave the information himself. When the trial opened, this fact having been made to appear, his name was by permission of the court indorsed upon the information. He was thereupon called and sworn as a witness. In one place in his testimony he positively identified the defendant as the man who was seen running from the scene of the shooting. On cross-examination, being questioned how he came to be called as a witness, he stated: "I did not go to the county attorney and tell him I wanted to testify in the case. I just went up there and told him." He was then asked: "Did you send any one else to him to tell him that you wanted to testify?" The county attorney having interposed a general objection, the witness was not permitted to answer. This ruling is assigned as error, because, it is said, the answer would "perhaps" have shown the interest of the witness in the outcome of the case, and hence should have gone to the jury as reflecting upon his credibility.

The interest and feeling of a witness are always material elements to be weighed and considered by the jury in determining the credibility of his story. It does not appear, however, from any offer made by counsel what the answer of the witness would have been, nor that they expected to contradict him if his answer had been in the negative. The witness had already stated that he had volunteered his evidence, thus evincing a willingness to see the defendant convicted; and if it be conceded that the ruling of the court was technically wrong as an undue restriction of the cross-examination, as we think it was, yet an affirmative answer would not have added further evidence of his interest. Evidently, since counsel did not prosecute the inquiry further or make an effort to prove, they were satisfied that they had obtained from the witness all the evidence they could showing interest. We think the ruling, though technically erroneous, was without prejudice.

The same witness in another place of his cross-examination testified: "Q. You don't know who fired them [the shots] of your own knowledge? A. I knew it was Fuller and Gallahan. Q. How do you know? A. Be-

cause I heard the people talking about it." Contention is made that this portion of his evidence is hearsay, and that the court erred in refusing to strike it out. The court did at first refuse to strike it out, but a few moments later, upon attention being called to it by counsel, the whole of it was stricken out and the jury admonished not to consider it. Further, the court submitted an instruction calling the attention of the jury specifically to the fact that certain testimony had been stricken out and that they must bear this constantly in mind during their deliberations, and not make use of it in making up their verdict. The prior erroneous ruling was thus fully corrected and the contention of counsel is not sustained by the record.

The testimony of the undersheriff, touching his comparison of defendant's shoes with the footprints leading from the place of the shooting, together with the shoes, was admitted, over objection by counsel that the use of this character of evidence was a direct violation of the constitutional prohibition that "no person shall be compelled to testify against himself in a criminal proceeding" (Const. Mont. art. 3, § 18), and also of the guaranty that "the people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures" (Const. Mont. art. 3, § 7). Counsel also rely upon articles 5 and 4 of the amendments to the Constitution of the United States, which, respectively, embody substantially the same provisions. We do not think the evidence shows that what was done by the undersheriff was without the defendant's consent. From this point of view the defendant may not complain; for the privilege guarantied by the first provision of the Constitution cited may be waived by consent, either expressly or by implication. Otherwise a defendant who has offered himself as a witness in his own behalf would not be subject to cross-examination bringing out criminatory facts, should he conclude not to submit to it. The rule is, as pointed out by Mr. Wigmore in his work on Evidence (volume 3, p. 2276), that when the defendant offers himself as a witness in his own behalf, he waives his privilege as to all matters pertinent to the issues involved. So, if the defendant consented to the use of his shoes, voluntarily surrendering them to the officer for the purpose for which they were used, he cannot now complain that the evidence so discovered was used against him. And these remarks apply as well to the guaranty of security in the other provision; for, if the shoes were taken by the defendant's consent, he cannot be heard to complain that the officer was guilty of an unlawful seizure.

But, accepting the theory of the defendant that the evidence does establish a taking without his consent, we still think the evidence in question was properly admitted.

The prohibition first invoked is nothing more than a statement of the common-law rule of evidence, and guaranties no greater privilege than that all persons, whether parties or extraneous witnesses, shall be free from compulsion by legal process to give self-incriminating testimony. After tracing the history of the rule, Mr. Wigmore states the object thus: "Looking back at the history of the privilege of the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to extract from the person's own lips an admission of his guilt, which will thus take the place of other evidence. Such was the process of the ecclesiastical court, as opposed through two centuries—the inquisitorial method of putting the accused upon his oath, in order to supply the lack of the required two witnesses. Such was the complaint of Lilburn and his fellow objectors, that he ought to be convicted by other evidence, and not by his own forced confession upon oath. Such too, is the inference from the policy of the privilege as a defensible institution; that is to say, it exists mainly in order to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's confessions. Such, finally, is the practical requirement that follows from the necessity of recognizing other unquestioned methods of procuring evidence; for, if the privilege extended beyond these limits, and protected an accused otherwise than in his strictly testimonial status if, in other words, it created inviolability not only for his physical control of his own vocal utterances, but also for his physical control in whatever form exercised, then it would be possible for a guilty person to shut himself up in his house, with all the tools and indicia of his crime, and defy the authority of the law to employ in evidence anything that might be obtained by forcibly overthrowing his possession and compelling the surrender of the evidential articles—a clear *reductio ad absurdum*. In other words, it is not merely compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion. The one idea is as essential as the other. The general principle, therefore, in regard to the form of the protected disclosure, may be said to be this: The privilege protects a person from any disclosure sought by legal process against him as a witness." Section 2263, p. 3123.

As further pointed out by this author, the privilege also extends to the production by a person of documents or chattels in response to a subpoena, or to a motion to order production, or to other forms of process treating him as a witness, because at any time he might be liable to be called upon to establish

the identity, authenticity, or origin of the article produced. And this view is sustained generally by the courts. In New York it is held that it is no invasion of this privilege to compel the defendant to stand up in the presence of the jury so that he may be identified by a witness. "The main purpose of the provision [of the Constitution] was to prohibit the compulsory oral examination of prisoners before trial, or upon trial, for the purpose of extorting unwilling confessions or declarations implicating them in crime. It could reach further only in exceptional and peculiar cases coming within the spirit and purpose of the inhibition. A murderer may be forcibly taken before his dying victim for identification, and the dying declarations of his victim may then be proved upon his trial for his identification. A thief may be forcibly examined and the stolen property may be taken from his person and brought into court for his condemnation. A prisoner's person may be examined for marks and bruises, and then they may be proved upon his trial to establish his guilt; and it would be stretching the constitutional inhibition too far to make it cover such cases and cases like this, and the inhibition thus applied would greatly embarrass the administration of justice." *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741. In Tennessee and Texas it is held in cases of larceny that, though a confession has been extorted from the defendant by fear of punishment or the hope of immunity and is therefore inadmissible, yet, if by means of information thus gained by the officers the stolen property is found, this fact is admissible, together with the further fact that the defendant informed them of its place of concealment; the knowledge thus evinced by him putting it upon him to give such explanation as he may exculpating himself. *White v. State*, 3 Heisk. (Tenn.) 338; *Selvidge v. State*, 30 Tex. 60. This is the rule in New York also. *Duffy v. People*, 26 N. Y. 588.

In *State v. Graham*, 74 N. C. 646, 21 Am. Rep. 493, the defendant was charged with larceny. Footprints were discovered at the scene of the crime and leading to and from it to a fence in the direction of defendant's house. The officer who made the arrest compelled the prisoner to put his foot in the tracks, thus demonstrating an exact correspondence. This was proved upon the trial, over defendant's objection. On review the court held the evidence admissible on the theory that, though the act of the officer was an invasion of defendant's rights, yet it did not affect the resemblance, the only fact which had weight as evidence. Applying the same rule, the Supreme Court of Alabama, on a trial for arson, held that it was competent for the state to show that shoes taken from defendant's house and belonging to him were compared with tracks found near the

scene of the crime, and were the same in length and breadth. *Morris v. State*, 124 Ala. 44, 27 South. 336. The case of *Myers v. State*, 97 Ga. 76, 25 S. E. 252, is directly in point. There, as here, the officer in charge of the prison ordered the prisoner's shoes to be taken from him for the purpose of comparing them with tracks found near the place where the body of the murdered man was discovered. The trial court excluded the evidence of the officer as to the result of the comparison, but failed to admonish the jury not to consider it. On review it was held that the omission to admonish was not prejudicial, because the evidence was competent and should have been admitted, and the court remarked that "it was the duty of the officer to have taken from the possession of the defendant any article which he might have had that would throw any light upon the circumstances of his guilt or innocence, and preserve it for use at the trial." Similar instances of the application of the rule may be multiplied almost indefinitely. *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207; *England v. State*, 89 Ala. 76, 8 South. 146; *People v. Rowell*, 133 Cal. 39, 65 Pac. 127; *State v. Morris*, 84 N. C. 756; *People v. Keep*, 123 Mich. 231, 81 N. W. 1097; *Commonwealth v. Pope*, 103 Mass. 440; *Squires v. State*, 39 Tex. Cr. R. 96, 45 S. W. 147, 73 Am. St. Rep. 904. The cases of *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, and *Brown v. Walker*, 161 U. S. 501, 16 Sup. Ct. 644, 40 L. Ed. 819, cited by counsel, are not opposed to the rule laid down by Mr. Wigmore and in the cases cited. Indeed, they are both cases in which criminatory evidence was sought to be extorted by compulsory process, in direct violation of the privilege.

There can be no controversy as to the general rule that footprints or other marks or tokens found upon or near the place of the crime may be admitted to connect the accused with it and identify him as the guilty person, if the evidence tends to show that he left such evidences behind him. *People v. Mead*, 50 Mich. 228, 15 N. W. 95; *Harris v. State*, 84 Ga. 269, 10 S. E. 742; *Gray v. State*, 42 Fla. 174, 28 South. 53; *State v. Reed*, 89 Mo. 168, 1 S. W. 225; *Underhill*, *Crim. Evidence*, § 313; 1 *Wigmore on Evidence*, § 413. Nor do we understand that it is in this case drawn in question by the defendant. The guaranty of the state and federal Constitutions against unreasonable searches and seizures does not, as we understand it, establish a rule of evidence, but insures inviolability of the homes, persons, and effects of the citizens from unreasonable searches and seizures, or, in other words, searches and seizures not authorized by law. Its purpose was and is to declare unlawful and prohibit the use of general warrants to search the homes of citizens and seize their books and papers and other effects, to be used against them as evidence in pending controversies. It grew out

of the bitter contest between Wilkes and the English government in 1762 (Wilkes' Case, 19 How. State Tr. 982), and was finally established as a part of the English Constitution by Lord Camden's decision in *Entick v. Carrington*, in 1765 (Id. 1029). Both of these cases were actions for trespass against officers of the crown who had made or authorized indiscriminate searches and seizures of the plaintiffs' papers and other effects under general warrants. In neither of them, however, was the competency of the evidence thus found brought in question. The provision in the state and federal Constitutions is therefore a limitation upon the powers of the respective governments declaring all searches and seizures unlawful and forbidding the Legislature and the Congress to authorize them, when they do not fall within the limitation; and the redress for the wrong therein denounced is an appropriate action directly against those who have been guilty of trespass. Except where there is a violation of the rule prohibiting the enforced production of self-incriminating testimony heretofore considered, the competency of the particular evidence is not affected by the means by which it has been obtained, and this rule has generally been recognized by the courts in the United States.

In *State v. Flynn*, 36 N. H. 64, the court said: "It seems to us an unfounded idea that the discoveries made by the officers and their assistants, in the execution of process, whether legal or illegal, or where they intrude upon a man's privacy without any legal warrant, are in the nature of admissions made under duress, or that it is evidence furnished by the party himself upon compulsion. The information thus acquired is not the admission of the party, nor evidence given by him, in any sense. The party has in his power certain mute witnesses, as they may be called, which he endeavors to keep out of sight, so that they may not disclose the facts which he is desirous to conceal. By force or fraud access is gained to them, and they are examined, to see what evidence they bear. That evidence is theirs, not their owner's. If a party should have the power to keep out of sight, or out of reach, persons who can give evidence of facts he desires to suppress, and he attempts to do that, but is defeated by force or cunning, the testimony given by such witnesses is not his testimony, nor evidence which he has been compelled to furnish against himself. It is their own. It does not seem to us possible to establish a sound distinction between that case and the case of the counterfeit bills, the forger's implements, the false keys, or the like which have been obtained by similar means. The evidence is in no sense his." The defendant had been indicted for keeping for sale a quantity of intoxicating liquor, in violation of the statute. An officer had searched his premises under a warrant issued by the police magistrate of Manchester.

On the trial, testimony as to what the officer thus ascertained was admitted, over objection. On review, the appellate court stated its views as quoted above. In *Gindrat et al. v. People*, 138 Ill. 103, 27 N. E. 1085, plaintiffs in error were upon trial for larceny of a diamond ring. Objection was interposed to the testimony of one De Sell, who, the evening after the robbery and acting as a detective, but without a warrant or authority from any one, went to the rooms occupied by the defendants and there discovered certain criminal facts and seized certain articles of jewelry, which were admitted in evidence. The objection was that the evidence was incompetent for that the means by which it was obtained was violative of section 6 of the Constitution of Illinois, the same in substance as the provision of our own and the federal Constitution cited. After discussing the purpose and meaning of the provision the court said: "Courts, in the administration of the criminal law, are not accustomed to be oversensitive in regard to the sources from which evidence comes, and will avail themselves of all evidence that is competent and pertinent and not subversive of some constitutional or legal right." The court quotes with approval from 1 Greenleaf on Evidence, as follows: "Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." The case of *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429, was similar. The defendant was charged with grand larceny, by depriving the prosecutor of his money by means of a trick by substituting therefor worthless state bank bills. Upon his arrest he was searched and other bank bills of the same character were found upon his person. On the trial these were admitted in evidence in connection with the testimony of the officer making the arrest, over the objection of counsel that they were incompetent because possession of them had been gained by an invasion of the personal rights of the defendant and an illegal seizure. The court, in reply to this objection, said: "One complete answer to this is that if it was an illegal seizure, that is no objection to the use of the papers as evidence: they being proper evidence in the case in other respects; for the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would it form a collateral issue to determine that question [citing authorities]. But the seizure was not illegal, for the reason that these papers were instruments or tokens used by the defendant in the perpetration of the crime with which he is charged and with which he stood charged at the time they were taken from his

person. There is such a thing as unreasonable search, which the law will not permit, but where a person stands charged with crime, and an instrument or device is found upon his person or in his possession which was a part of the means by which he accomplished the crime, those instruments, devices, or tokens are legitimate evidence for the state and may be taken from him and used for that purpose." We can see no valid distinction between these cases and the one at bar. The following cases are also in point: *People v. Adams*, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675; *Commonwealth v. Tibbetts*, 157 Mass. 519, 32 N. E. 910; *State v. Mallett*, 125 N. C. 718, 34 S. E. 651; *Russell v. State* (Neb.) 92 N. W. 751. See, also, 3 Wigmore on Evidence, § 2264.

Counsel for defendant cite *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, as conclusive of their contention. But we do not think it has any application. In that case the question before the court was the constitutionality of a statute which authorized a federal court in revenue cases on motion of the government to require the claimant to produce in court his books, invoices, or papers to be used as evidence against himself in order to declare a forfeiture. The legislation was declared repugnant to amendments 4 and 5 of the Constitution of the United States. In so far as the order required the production of self-incriminatory matter, it was within the prohibition of the fifth amendment; but, as we have seen, its evidentiary value could not be affected by the fact that it was obtained by a trespass upon the rights guaranteed by the fourth amendment, notwithstanding the dictum in the majority opinion of the court to the contrary.

It is said that the court committed error in commenting upon the weight of the evidence in the presence of the jury during the progress of the trial. This contention is based upon a statement by the judge during the trial, with reference to a transcript of the evidence taken at the coroner's inquest which had been admitted in favor of the defendant for impeachment purposes, to the effect that the evidence had been admitted for "what it was worth." The judge should, during the course of the trial, refrain from remarks that are calculated in any way to influence the minds of the jury. This includes remarks to counsel touching the management of the case and reflecting upon their conduct, as well as those touching the character of the witnesses and the value of their testimony; and, if the remarks so made are material and improper, they may be prejudicial. Accordingly, if properly excepted to and brought into the record, they may work a reversal of the case on that ground. *Elliott*, Appellate Procedure, § 671. Jurors have great confidence in and respect for the presiding judge, and are vigilant in

their attention to whatever is said by him. He cannot be too careful in guarding his conduct in this regard. *Cronkhite v. Dickerson*, 51 Mich. 177, 16 N. W. 371. This is the common observation of all who have frequented the courts or have taken part in their proceedings. But, while this is true, it is not every remark so made that may be alleged as ground of error. The court is frequently called upon to rule on questions presented during the progress of the trial. In overruling objections to evidence, even if it is done in the briefest way, the decision necessarily is that such evidence is competent and has some weight; and if, in making the ruling, the remark is incidentally made that the evidence is admitted for what it is worth, this is no more than what is always impliedly said with reference to all the evidence in the case; for it is all admitted for what it is worth, and this, it would seem, is what each juror is presumed to understand. The same may be said of other rulings. We cannot think that the casual remark of the judge here made the subject of animadversion could have been understood as an expression of opinion as to the weight of the evidence, or that it prejudiced the defendant in any degree whatever.

Paragraph 13 of the charge deals with the subject of malice as a constituent element of the crime of murder. Complaint is made that it is erroneous. While it does not define the term "malice" in the exact words of the Penal Code, § 7, it is sufficiently comprehensive to give the jury a definite idea of its meaning, especially so in the absence of a request for a more specific instruction.

We do not think the defendant has any ground to complain of the court's definition of the expression "heat of passion." The jury found him guilty of murder of the first degree. Whether, therefore, the definition be correct or not, the jury could not have been misled by it. The finding that the killing was prompted by deliberately premeditated malice aforethought excluded the idea of heat of passion as an element requiring consideration (*State v. Sloan*, 22 Mont. 293, 56 Pac. 364), thus evincing the fact that the jury properly did not consider this instruction at all. Besides, the facts proven at the trial did not tend to show a case of manslaughter. The defendant has no reason to complain of a charge which authorized the jury to find him guilty of manslaughter, when the evidence tended to show a case of murder. It is also said that the instruction assumes the fact that the defendant did the killing. This contention is not maintainable. The instruction, standing alone, is free from fault in this regard; but it is especially so when it is taken together with the rest of the charge. *State v. Rolla*, 21 Mont. 587, 55 Pac. 523; *Territory v. Hart*, 7 Mont. 502, 17 Pac. 718.

Paragraph 20 of the charge, after quoting

section 3123 of the Code of Civil Procedure, as to the credibility of witnesses and the method by which they may be impeached, proceeds: "If you find that any witness has testified willfully and deliberately false as to any material fact in this case, you are at liberty to disregard his entire testimony. And in this case, if the jury believe from the evidence that any witness has sworn willfully false to any fact material to the issue, they are at liberty to disregard the entire testimony of such witness, in so far as the same has not been corroborated by other credible evidence." The first sentence of the language quoted, standing alone, is erroneous, under the ruling laid down in *State v. De Wolfe*, 29 Mont. 415, 74 Pac. 1084, 101 Am. St. Rep. 579, and in *Cameron v. Wentworth*, 28 Mont. 70, 57 Pac. 648. As is said in the latter case, the power of the jury should be confined to the formulation of a judgment upon the evidence within the exercise of legal discretion, and in subordination to the rules of evidence. So, while they may disregard the testimony of a witness who has been guilty of deliberate perjury in a material matter, they may do so only in subordination to the limitation that there is no other corroborative evidence in the case entitled to credit. If there is such evidence, they may not disregard the entire story of the witness, but only the false statement. The language quoted, taken together, seems to have been an attempt on the part of the court to state, first, an abstract proposition of law, followed by a concrete application of it to the facts of the case. But be this as it may, the verdict of the jury was obviously correct. The defendant introduced practically no testimony at all of a substantive character to establish a defense, such as alibi or self-defense, or to contradict the statements of the state's witnesses. His evidence was confined to an impeachment of the evidence introduced by the state. Under the circumstances, we think the jury were not misled by the erroneous statement in the first part of the paragraph quoted. It is a familiar principle that an instruction, even if it be erroneous, will not be sufficient to set aside a verdict, if it is apparent that the jury were not misled thereby. As stated by Mr. Thompson: "Thus it is said that instructions faulty or technically erroneous will not work a reversal of the judgment if the jury were not misled, or if, as a whole, the case was fairly presented to them, and especially if their verdict is obviously correct." Thompson on Trials, § 2431. Under the circumstances of this case, though the instruction is technically erroneous, it is not apparent that the jury could have been misled by it, though the general rule is, as has always been recognized by this court, that contradictory instructions are sufficient to reverse the judg-

ment. *State v. Sloan*, 22 Mont. 293, 56 Pac. 364; *State v. Keerl*, 29 Mont. 508, 75 Pac. 362, 101 Am. St. Rep. 579. In instruction No. 24 the court charged the jury as follows: "The court instructs the jury that a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself, and if the defendant does not claim the right to be sworn and does not testify, this fact must not be used to his prejudice." Criticism is made of this part of the charge for that it comments upon and calls the attention of the jury to the fact that the appellant did not testify, and also informed the jury that the appellant might have testified had he so desired, but that the state could not compel him to do so. The defendant was not sworn as a witness. This fact was apparent to the jury. The court was perhaps not bound to instruct the jury with reference to this fact. It was entirely proper, however, if the court chose to do so, to inform the jury as it did, that the fact that the defendant failed to testify could not be used to his prejudice. In any event, the instruction was favorable to the defendant, and for that reason he has no right to complain of it.

With reference to the instructions requested and refused, it is sufficient to say that they are all fairly covered by the instructions submitted, which are full, fair, and, generally speaking, applicable to the facts proven. We find no error which we think was prejudicial to the defendant.

The judgment and order are affirmed

HOLLOWAY, J., concurs.

MILBURN, J. I concur in the conclusion and in all of the opinion, except that portion in regard to the shoes of the defendant. What is said in the opinion in that regard is ably stated, comprehensive and, I think, correct in a proper case; but I consider it all unnecessary in the case before us, for the reason that it does not appear whether the shoes were taken from the defendant by his consent or not. As said in the statement of facts in the opinion: "The evidence is that the undersheriff told the jailer to get defendant's shoes, and that he went and took them off defendant in the corridor of the jail where he then was." If the prisoner gave them up willingly—and there is nothing in the evidence to show that he did not, and there is nothing in the record that implies that he did not—then the argument in the opinion in regard to the shoes is entirely unnecessary. It is sufficient, in my opinion, to say that the point raised by counsel for the defendant in respect of the shoes does not appear to be well taken, for the reason that there is not any evidence in the case supporting his contention or tending to support it.

## STATE v. BEESKOVE.

(Supreme Court of Montana. March 19, 1906.)

## 1. CRIMINAL LAW—APPEAL—RIGHT OF APPEAL—ORDER DENYING MOTION IN ARREST.

Under Pen. Code, § 2272, authorizing defendant to appeal from a judgment of conviction and from an order denying a motion for a new trial, and from an order made after judgment affecting the substantial rights of the party, no appeal lies from an order overruling a motion in arrest of judgment.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2591.]

## 2. SAME—REVIEW ON APPEAL—FINAL JUDGMENT.

An order overruling a motion in arrest of judgment of conviction is an intermediate order and reviewable on appeal from the judgment, under Pen. Code, § 2321, providing that, on appeal by defendant from a judgment, the court may review any intermediate order involving the merits.

## 3. SAME—MOTION IN ARREST—DEFECTS IN INFORMATION.

The sufficiency of an information with reference to the allegation of the venue of the crime may be attacked for the first time by motion in arrest of judgment.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2457.]

## 4. INDICTMENT AND INFORMATION—ALLEGATION AS TO PLACE OF OFFENSE.

Allegation of the place of the commission of the offense charged in an information is of the substance of the charge, for the local jurisdiction of the court over crime is limited to crimes committed within the county.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 230-243.]

## 5. SAME.

Under Pen. Code, § 1832, providing that an information must contain a statement of the facts constituting the offense in such manner as to make a person of common understanding know what is intended, and section 1841, requiring an information to allege that the offense charged was committed at a place within the jurisdiction of the court, an information must allege that the offense charged was committed within the jurisdiction of the court, though section 1842 declares that no information is insufficient by reason of any defect in matter of form not prejudicial to the rights of defendant, and section 2600 provides that neither departure from the form prescribed by the Code in respect to any pleading nor mistake therein renders it invalid, unless prejudicial to defendant; the common law being in force, except as modified by the Code.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 230-243.]

## 6. SAME—ALLEGATION OF PLACE OF COMMISSION OF OFFENSE—SUFFICIENCY.

An information which mentions the county in the caption in the description of the court in which, and of the officer by whom, the charge is preferred, and which in the charging part does not mention the word county, but only uses the words "then and there," in such a sense that the word "then" refers to a preceding date alleged as the date of the crime, and the word "there" refers to some place where defendant then was, does not allege the county in which the offense was committed, and is bad as against a motion in arrest.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 240.]

## 7. CRIMINAL LAW—NEW TRIAL—MISCONDUCT OF JURY—IMPEACHING VERDICT—AFFIDAVIT OF JURE.

In the absence of statutory provisions, as well as under Pen. Code, § 2192, authorizing the granting of a new trial where the verdict has been decided by lot, impliedly excluding the evidence of jurors to impeach their verdict in other cases, a juror in a criminal case should not be permitted, on motion for new trial, to impeach a verdict by proving that he misunderstood the charge of the court.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2392-2395.]

## 8. WITNESSES—CROSS-EXAMINATION.

Where a witness on a trial for homicide testified that he and accused had had trouble, but denied that he had ever tried to frighten him, it was error to exclude a question on cross-examination as to whether he had not told any of the witnesses that he had done so, though the question did not call the witness' attention to the time and place of the alleged statements so as to lay a foundation for impeaching evidence under Code Civ. Proc. § 3380.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 940, 969.]

## 9. CRIMINAL LAW—TRIAL—INSTRUCTION—WEIGHT OF TESTIMONY.

Though the court in a criminal case charged, in the language of Code Civ. Proc. § 3123, that a witness is presumed to speak the truth, unless repelled by the manner in which he testified, by the character of his testimony, or by evidence affecting his character for truth, or his motives, or by contradictory evidence, and added that the testimony of any witness who had willfully testified falsely to any material matter might be disregarded unless corroborated, it was reversible error to refuse to charge that, in determining the weight of the testimony of a witness, the jury could consider his appearance, manner, candor, fairness, and means of knowledge, with the facts in evidence.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

K. F. W. Beeskove was convicted of murder, and he appeals. Reversed.

S. G. Murray and Harry H. Parsons, for appellant. Albert J. Galen, Atty. Gen., and W. H. Poorman, Asst. Atty. Gen., for the State.

BRANTLY, C. J. The defendant was, upon his plea of not guilty to an information charging him with murder, found guilty of murder in the first degree, and by the judgment of the court was condemned to death. He has appealed from the judgment and from an order denying him a new trial. He has also attempted to appeal from the order of the court overruling his motion in arrest of judgment. The integrity of the judgment is questioned upon the grounds: That the court erred in overruling defendant's motion in arrest of judgment, in the admission and exclusion of evidence, in giving and refusing instructions to the jury; that the jury were guilty of misconduct; and that the verdict is contrary to the law and the evidence.

1. Touching the attempted appeal from the order overruling the motion in arrest of judgment, it is sufficient to say that no appeal lies from such an order on behalf of

defendant. Pen. Code, § 2272. It is an intermediate order which may be reviewed on appeal from the judgment, and not otherwise. Pen. Code, § 2321.

2. The principal question submitted for decision arises out of the contention of counsel for defendant that the information does not contain sufficient substantial allegations to give the court jurisdiction of the offense of which the defendant was convicted. It is said that no venue is laid in the information, and for that reason it was insufficient to put the defendant upon his defense.

The information, omitting formal parts, is as follows: "In the district court of the Fourth judicial district, in and for Missoula county, Montana, on this 6th day of September, A. D. 1905, in the name and on behalf and by the authority of the state of Montana, K. F. W. Beeskove is accused by the county attorney of Missoula county, Montana, by this information of the crime of murder in the first degree, committed as follows: That said K. F. W. Beeskove did, on or about the 22d day of June, A. D. 1905, willfully, deliberately, feloniously, premeditatedly and of his malice aforethought, make an assault in and upon one William Burrig, and a certain gun then and there loaded with gunpowder and leaden ball, and by him the said K. F. W. Beeskove then and there had and held, he, the said K. F. W. Beeskove, did then and there feloniously, willfully, deliberately, premeditatedly and of his malice aforethought, shoot off and discharge at, upon and against the said William Burrig, with intent then and there to kill and murder the said William Burrig, and with the leaden balls out of the said gun so shot off and discharged, he, the said K. F. W. Beeskove, did then and there feloniously, willfully, deliberately, premeditatedly and of his malice aforethought strike, penetrate and wound the said William Burrig, thereby inflicting in and upon the body of said William Burrig a mortal wound, of which the said mortal wound, the said William Burrig did then and there die. All of which is contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the state of Montana." The sufficiency of the information was not challenged by demurrer, nor during the trial by other appropriate method; the question now submitted being first presented in the case by motion in arrest of judgment. This course saved the adverse ruling for review by this court, however, if under the law the allegation of venue is jurisdictional, and if, further, it cannot be understood from the allegations in the information before us that the crime sought to be charged was committed in Missoula county.

It is well settled upon reason and authority that the circumstances of time and place are of the substance of the charge, though, as to the time, it is sufficient if it is charged that the offense was committed at a time prior to

the finding of the indictment or the filing of the information. If the time is an essential ingredient of the offense, the allegation must be precise. This was the rule at common law (4 Blackstone, Com. 307), and has prevailed in the several states of the Union, except where by statute the specific allegation of venue has been declared not essential (State v. Shull, 40 Tenn. 42; Shannon's Code Tenn. 1896, § 7088), or where the venue stated in the margin or caption is declared sufficient after verdict (Nichols v. People, 40 Ill. 397; State v. De Lay, 30 Mo. App. 357; State v. Simon, 50 Mo. 370). Mr. Bishop, in his text, declares this to be the rule and cites the cases generally in support of it. 3 Bishop, Criminal Procedure, 360, and cases collected in note. The reason of the rule is that the local jurisdiction of the crime is in the county where it is committed, and the charge must show that fact; furthermore, the defendant is entitled to know the cause of the accusation, so that he may prepare his defense. Const. art. 3, § 16. While in this state much of the particularity required at the common law has been dispensed with, and no defect or imperfection in form, which does not prejudice the substantial rights of the defendant, can affect a judgment of conviction (Pen. Code, §§ 1842, 2000), still time and place are essential elements and must be so alleged as to enable a person of common understanding to know what is intended by the charge (Pen. Code, § 1832). This is apparent from the provisions of section 1841 of the Penal Code; for among them is the requirement that the indictment or information shall, with the exception stated, allege that the offense was committed within the jurisdiction of the court and at a time prior to the finding of the indictment or the filing of the information. If it be borne in mind that the common law is in force in this state, except so far as it has been supplanted by our Codes, the conclusion cannot be escaped that the provisions of the Penal Code cited (sections 1832, 1841, 1842), and others germane to the subject, while dispensing with mere matters of form, still require all the substantial allegations necessary under the common-law rule.

Does the information before us meet the requirements of this rule? The only mention of the county is found in the caption in the description of the court in which, and of the officer by whom, the charge is preferred. In the charging part the word "county" is not used at all. The only reference words found there are in the expression "then and there." The first of these evidently refers to the preceding date alleged as the date of the crime, while the other as clearly refers to some place where the defendant then was, the description or designation of which has been omitted. If such an expression as "in the county aforesaid," or "said county," or the like, had been used, the reference to the caption would have been clear and unequivocal, and any person of common under-

standing would at once conclude that the pleader meant to say that the offense was committed in Missoula county. As it is, it is only by the merest inference that one who has had experience in such things would reach this conclusion. Under the statute, the charge must be in ordinary and concise language, and so direct as to enable—not those of learning and experience, to understand it, but the man of ordinary understanding (section 1832, *supra*); for the purpose of the information is not only to state jurisdictional facts, but to inform a man of ordinary understanding what the charge is. We do not think that the information in this case meets these requirements, and therefore conclude that the district court was in error in not granting the motion in arrest of judgment. The result is that the judgment must be reversed, and the cause remanded for a new trial.

3. In aid of the motion for new trial, the defendant filed the affidavits of two jurors, in which both stated in effect that they did not understand the instructions of the court; that, after reading them, they were of the impression that they required the jury to find the defendant guilty either of murder of the first degree or to acquit him; and that, being of the opinion that he should not be acquitted, they voted for the verdict of murder of the first degree, rather than declare him innocent. It is insisted by counsel for defendant that these affidavits show such misconduct on the part of the jury as to entitle the defendant to a new trial on the ground of such misconduct. While there is some contrariety in the decisions of courts upon the question whether jurors should be heard to impeach their own verdict, we think reason and great weight of authority condemn the practice which permits it. See 29 Am. & Eng. Ency. Law, 1008, 1009, with notes. In any event it should not be tolerated further than the statute permits. Pen. Code, § 2192. This section provides for the one exception, namely, cases where the verdict has been decided by lot, or by any other means than a fair expression on the part of all the jurors. In such case the impeaching affidavit may be made by members of the jury. Code Civ. Proc. § 1171. This express exception, under the rule "*expressio unius est exclusio alterius*," it would seem excludes all other exceptions. Early in the history of the state, the Supreme Court of California declared it to be the rule, founded on necessary policy, that such affidavits cannot be admitted to impeach a verdict. *People v. Baker*, 1 Cal. 404. This rule was adhered to until 1862, when the Legislature provided for the single exception of the case where the verdict was found by a resort to chance. With this modification, the rule now prevails. *People v. Azoff*, 105 Cal. 632, 39 Pac. 59; *People v. Soap*, 127 Cal. 408, 59 Pac. 771. The sections of our statute cited were adopted from that state, and, since the interpretation given to them embodies the better rule, we

approve and adopt it. Beyond this the court ought not to receive such evidence, for the obvious reason that, after the verdict has been rendered, members of the jury would be subject to all sorts of influences intended to induce them to repent of their decision and lend their aid in having it revoked. They might even be tampered with and corrupted so that the integrity of the verdict would rest, not upon the integrity and honesty of the jury during their deliberations, but upon their susceptibility to such influences after their duties have been faithfully performed under their oaths. The case at bar illustrates the danger such practice invites. The court explicitly and clearly instructed the jury, in one paragraph of the charge, that they could find the defendant guilty of any grade of unlawful homicide or acquit him, according to their view of the evidence under their oaths. After reaching a verdict they were brought into court, and through their foreman returned it; all of them answering to their names and concurring therein. Several weeks later two of them solemnly swore that they understood that the instruction meant that they should convict the defendant of murder in the first degree or acquit him, leaving them no alternative. Very naturally, the question at once arises: What influenced these men to do this? Why did they keep silent so long? Had they so read the instructions as they swear they did, and forgotten them? Their statements could not be contradicted. The result is that, if their affidavits were to be heard, the court could not do otherwise than grant a new trial on the statements made in them. We think the court properly rejected them as not competent.

4. The court's rulings upon the admission and exclusion of evidence were correct except in one instance. The homicide was the culmination of a dispute as to the ownership of certain wood; the defendant insisting that it was on ground within the boundaries of his homestead claim on the public land. He had controversies with all of his neighbors as to his rights—among others, with one Franklin—and seems to have entertained the idea that the deceased with Franklin and others were engaged in a conspiracy to drive him from the settlement. Franklin was called as a witness to prove that the wood was entirely outside of defendant's boundaries. Among other things, he testified in chief that he and the defendant had had trouble, but denied that he had ever tried to frighten him. On cross-examination he was asked if he had not told one of the other witnesses that he had done so. He was not permitted to answer. The question as put did not call the attention of the witness to the circumstances of time and place of his alleged statement, so as to lay the ground for the introduction of contradictory evidence, under the statute (Code Civ. Proc. § 3380); it was nevertheless legitimate cross-

examination, and an answer should have been permitted (*Klipp v. Silverman*, 25 Mont. 296, 64 Pac. 884).

5. The defendant requested an instruction to the effect that, in determining the weight to be given to the testimony of every witness, the jury had a right to consider his appearance on the stand, his manner of testifying, his apparent candor or lack of it, his apparent fairness, and means of knowledge, together with all the other facts and circumstances appearing in the evidence. The court failed to submit this and gave instead section 3123 of the Code of Civil Procedure, supplemented by an addition to the effect that, if the jury believed that any witness had willfully and deliberately testified falsely to any material matter, they were at liberty to disregard his testimony entirely, except so far as it was corroborated by other credible evidence in the case. The instruction requested should have been given. It called the attention of the jury particularly to matters which they should consider in weighing the testimony, and the defendant had a right to have this done. In other respects, we think the charge was full and fair, covering all the phases of the case.

6. Though counsel contended earnestly that the verdict is contrary to the evidence, we think it sufficient to go to the jury, and, though it is conflicting in important particulars, we cannot say that their finding thereon was wrong.

The judgment and order are reversed, and the district court is directed to grant the defendant a new trial.

Reversed and remanded.

MILBURN and HOLLOWAY, JJ., concur.

# BURNS v. CHICAGO, B. & Q. RY. CO.

(Supreme Court of Wyoming. April 11, 1906.)

## APPEAL AND ERROR—RECORD—NECESSITY OF BILL OF EXCEPTIONS.

Supreme Court rule 13 (26 Pac. xii) provides that nothing which could have been properly assigned as ground for a new trial will be considered on appeal unless it was properly presented by motion for a new trial, and such motion was overruled, and exception reserved, all of which should be embraced in the bill of exception. Rev. St. 1899, § 3746, makes it a ground for a new trial that the verdict is contrary to law. Section 3742 provides that when the decision objected to is entered on the record and the grounds of objection appear in the entry, the exception may be taken by the party causing it to be noted at the end of the entry that he excepts. Section 3743 provides that, when the exception is to the opinion on a motion to strike, for a nonsuit, or for a new trial for misdirection by the court to the jury, or because the verdict or finding is against the law or the evidence, the party excepting must reduce his exception to writing and present it for allowance. After a witness had been called by plaintiff, the court sustained defendant's objection to the introduction of evidence on the ground of the insufficiency of the petition, to which plaintiff excepted, whereupon

a verdict was directed for defendant, and such facts were shown by the journal entry. *Held*, that assignments of error that the court was in error in overruling a motion for a new trial, dismissing the petition, and that the verdict was contrary to law, could not be considered on appeal, in the absence of any bill of exceptions showing proper presentation of the question by a motion for a new trial, as section 3742 is not intended as a substitute for a bill of exceptions, where the exception relates to matters occurring during the trial.

Error to District Court, Sheridan County; C. H. Parmelee, Judge.

Action by James Burns against the Chicago, Burlington & Quincy Railway Company. Judgment in favor of defendant, and plaintiff brings error. Dismissed.

Robert P. Parker, for plaintiff in error.  
E. E. Lonabaugh, T. F. Burke, and N. K. Griggs, for defendant in error.

POTTER, C. J. This cause was heard on the motion of defendant in error to dismiss, on the ground that no reviewable error is presented. The cause was brought in the district court by the plaintiff in error to recover damages for the alleged killing of certain cattle of plaintiff by an engine or engines of the defendant. A jury trial was had resulting in a verdict for the defendant, whereupon judgment was rendered dismissing the cause and awarding defendant its costs. The petition in error complains of that judgment and assigns as error: (1) That the court erred in overruling plaintiff's motion for new trial. (2) That the court erred in dismissing plaintiff's petition. (3) That the verdict is contrary to law.

There is no bill of exceptions in the record, nor is it claimed that a bill was prepared or allowed, although it appears by a journal entry that time was granted within which to reduce exceptions to writing, which time has expired. It is clear, therefore, that none of the errors assigned are presented in a manner to authorize their review in this court. Rule 13 (26 Pac. xii), so often referred to in former decisions, provides that "nothing which could have been properly assigned as a ground for a new trial in the court below will be considered in this court, unless it shall appear that the same was properly presented to the court below by a motion for a new trial, and that such motion was overruled, and exception was at the time reserved to such ruling; all of which shall be embraced in the bill of exceptions." That the verdict is contrary to law is made by statute a ground for its vacation and a new trial. Rev. St. 1899, § 3746. Hence, in the absence of a bill of exceptions showing that such question was properly presented to the court below by a motion to vacate or for a new trial, it cannot be considered in this court on error. It has been settled in this jurisdiction by a long line of decisions that a motion for new trial must be embraced in a bill of exceptions to become part of the

record, and as there is no bill in this record, and therefore, no motion for new trial which this court can consider, it follows that we cannot review the action of the court below in overruling the motion for new trial. Unless the verdict is contrary to law as alleged it is not perceived that the judgment is erroneous or prejudicial, though perhaps it should have been entered in a slightly different form.

We cannot agree with the contention of counsel for plaintiff in error that the error alleged appears upon the record proper. It appears that in the journal entry of the trial, verdict, and judgment, it is recited that after the jury were impaneled and sworn, and a witness had been called by the plaintiff, the court sustained defendant's objection to the introduction of any evidence by the plaintiff on the ground of the insufficiency of the allegations of the petition to constitute a cause of action, to which ruling the plaintiff excepted; and that thereupon the court directed the jury to return a verdict for the defendant; but no exception to that direction seems to have been entered. Counsel takes the position that the final result followed the ruling of the court sustaining the objection to the introduction of evidence, to which an exception was entered on the journal, and it is argued that as the case therefore presents the single question of law whether the petition states a cause of action, no new trial or motion for new trial was necessary, since the statute defines a new trial as a re-examination in the same court of an issue of fact, after a verdict by a jury, report of a referee or master, or a decision by the court. It is to be observed, however, in the first place, that though the court ruled on the trial that no evidence could be received for the plaintiff, on the ground above mentioned, the issue between the parties was nevertheless one of fact; the answer denied some of the material allegations of the petition, which, assuming that they would authorize recovery, would require proof on the part of the plaintiff. And should the judgment be reversed it is not perceived that this court could do otherwise than order the verdict vacated and remand the cause for a new trial upon the issues of fact. This court, certainly, could not presume the denied allegations of the petition to be true and direct a judgment for the plaintiff, without proof on his part.

Again, although the statute provides that, "when the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing it to be noted at the end of the entry that he excepts" (Rev. St. 1899, § 3742), that provision applies only where the decision would properly be entered of record, if no exception was taken to it. *Lockhart v. Brown*, 31 Ohio St. 431. Our Code provisions, including the statute above

quoted, were taken from the statutes of Ohio; and in the Ohio case above cited, it was said that such statute "is not intended as a substitute for a bill of exceptions, where the exception relates to matters occurring during the trial." In that case the exception related to the charge of the court to the jury, and it was held that the charge excepted to was improperly made a part of the entry, and was not reviewable in the absence of a bill. We do not think that the rulings of the court during the progress of an ordinary trial on the admission and rejection of evidence are properly or usually entered upon the journal record of the court, and clearly they are not required to be so entered. It might therefore be seriously questioned whether the recital found in the entry in the case at bar as to the objection to the introduction of evidence and the decision thereon was properly there, or, being there, constituted a proper record of the occurrence. And the same might be said respecting the alleged direction to the jury.

However, as to the assignments of error in this case, the matter is set at rest by section 3743, Rev. St. 1899, which provides that when "the exception is to the opinion of the court on a motion to direct a nonsuit, to arrest the testimony from the jury, or, for a new trial for misdirection by the court to the jury, or because the verdict, or if a jury was waived, the finding of the court, is against the law or the evidence, the party excepting must reduce his exception to writing, and present it to the court \* \* \* for allowance."

The motion to dismiss will be granted, and the cause accordingly dismissed.

BEARD and SCOTT, JJ., concur.

### METZ v. WILLITTS.

(Supreme Court of Wyoming. April 23, 1906.)

#### 1. TRIAL—EVIDENCE—MOTION TO STRIKE FOR IRRELEVANCY.

A motion to strike for irrelevancy, which goes to all the testimony of a witness or all of the testimony in a case, is improperly sustained if any of the testimony is relevant to the issue.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 248.]

#### 2. SAME—DUTY OF MOVING PARTY.

It is the duty of the party moving to strike for irrelevancy to assign with particularity the irrelevant evidence to which his motion is directed, and not to include relevant testimony.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 248.]

#### 3. SAME.

A motion to strike for irrelevancy goes to the admissibility of the evidence, and not to its weight or sufficiency; and the rule is the same in trials to the court as in jury trials.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 250.]

#### 4. SAME—GROUNDS FOR MOTION.

In an action to recover a certain sum alleged to be due plaintiff from defendant on the

sale to the latter of hay and certain pasture feed, for which defendant promised to pay, a ground of a motion to strike out testimony, to wit, that the cause of action, if any, plaintiff has against defendant would be one of nonacceptance, and not of sale and delivery, and the evidence is wholly insufficient to sustain the allegations of plaintiff, was not a ground for striking out the evidence, unless all of the evidence was irrelevant to the issue.

**5. APPEAL AND ERROR—MOTIONS TO STRIKE OUT—QUESTIONS FOR REVIEW.**

Where, in a trial to the court, all the evidence in the case was struck out on defendant's motion, and a finding for defendant was based on the absence of evidence in support of plaintiff's cause of action, the sufficiency of the testimony as shown by the record, not having been properly passed on by the trial court, was not before the appellate court for consideration, and the sole question was as to the action of the trial court in excluding the testimony.

**6. TRIAL—MOTION TO STRIKE OUT EVIDENCE—GROUNDS.**

Where plaintiff submitted relevant evidence upon the issues in the case, he had a right to have it remain in the case, and its sufficiency tested by a proper motion, or by a finding of the court on the final submission of the case, so that on the record he could, if such ruling or finding was adverse to him, be in a position to have the question reviewed by the appellate court; and the action of the court in striking out plaintiff's evidence, on the ground that the same was insufficient to make out his case, was error.

Error to District Court, Sheridan County;  
C. H. Parmelee, Judge.

Action by W. S. Metz against J. O. Willitts. Judgment for defendant, and plaintiff brings error. Reversed.

Metz & Sackett, for plaintiff in error. E. E. Enterline, for defendant in error.

**SCOTT, J.** Plaintiff and defendant in error were respectively plaintiff and defendant below, and for convenience will be designated as such in this opinion. The plaintiff brought this action to recover the sum of \$488, alleged to be due upon a sale of 72 tons of hay and the pasture feed upon from 600 to 700 acres of land, and for which he claims defendant promised to pay for the hay at the rate of \$4 per ton, and \$200 for the pasture, with interest from October 10, 1904, the date of such alleged sale. The case was tried to the court without a jury, and judgment of dismissal was rendered in favor of defendant and for costs. The plaintiff brings the case here on error.

1. The plaintiff was sworn and testified as a witness in his own behalf, and rested his case upon his own testimony and certain letters which he identified as having been written by defendant and which were admitted in evidence. Thereupon the defendant moved "to strike out all the testimony of the plaintiff, for the reason that the same is irrelevant; that the cause of action, if any, plaintiff has against defendant, would be one of nonacceptance, and not of sale and delivery, and the evidence is wholly insufficient to sustain the allegations of the plain-

tiff." The motion was sustained, to which ruling plaintiff excepted, and such ruling is here assigned as error. The judgment recites that "the defendant by his counsel moved to strike out the testimony of the plaintiff and dismiss the action, and the court, being now fully advised in the premises, doth sustain the motion, and doth find generally for the defendant," and judgment was rendered dismissing the case and for costs in favor of the defendant. A motion to strike for irrelevancy, which goes to all the testimony of a witness or all of the testimony in a case, is improperly sustained if any of the testimony is relevant to the issue; and, conversely, it should only be sustained when all of the evidence is irrelevant to the issue. *Wandling v. Straw*, 25 W. Va. 692. The authorities are numerous, and all agree that when the motion is directed to relevant, as well as incompetent and irrelevant, testimony, the motion should be denied. It is the duty of the moving party to point out with particularity the irrelevant evidence to which his motion is directed and not to include relevant testimony. 22 Ency. Pl. & Pr. 1318, and cases there cited. A case recently decided by the Supreme Court of Montana is to the same effect. *Dorais v. Doll et al.*, 83 Pac. 884. Such a motion goes to the admissibility of the evidence and not to its weight or sufficiency. The rule is clearly stated in *Wilcox v. Stephenson*, 30 Fla. 377, 11 South. 639, where the following language is used: "Motions to strike out evidence that has been introduced in a cause \* \* \* must be predicated upon some feature of irrelevancy, incompetency, legal inadmissibility, or impertinency in the evidence itself that is struck at." The court further said: "When the plaintiff rested his case upon testimony relevant, pertinent, and proper so far as it went, but which in the conception of the defendant was insufficient to warrant the recovery claimed because of the absence of proof of other facts upon other issues necessary to be proved before recovery could legally be had, the proper way to have availed himself of such defect was to have requested an instruction from the court to the jury to the effect that, unless the unproved fact contended for was proven, then under the law the plaintiff could not recover, or he might also have availed himself of the defect by demurring to the evidence." That was a jury trial, but we do not think the rule is different when the trial is to the court. A party, having introduced evidence material to the issue has a right to have that evidence remain in the case, and its sufficiency can only be challenged in the proper way.

Defendant's motion was not for judgment for failure of the plaintiff to prove his case, but was solely for the purpose of striking out the evidence of the plaintiff. The last ground of the motion, viz.: "That the cause of ac-

tion, if any, plaintiff has against defendant would be one of nonacceptance, and not of sale and delivery, and the evidence is wholly insufficient to sustain the allegations of the plaintiff," was not a ground for striking out the evidence, unless all of the evidence was irrelevant to the issue. We have examined the excluded evidence, and we find that there was relevant and competent evidence upon the issues of the case. It is true that in a trial without a jury the court is the judge of the evidence as well as of the law; but the evidence was not permitted to remain in the case, and its sufficiency determined as in a motion for judgment for failure in proof, or by demurrer to the evidence, nor was there any motion for nonsuit or directed verdict, as is resorted to in a trial by jury, or for judgment for defendant upon plaintiff's evidence. In all such cases the motion is directed to the sufficiency of the evidence, and not to its admissibility. If, as stated in the motion, the evidence was insufficient to sustain the allegations of the plaintiff, that matter would be determined by the court, and its finding should be upon the sufficiency or insufficiency of such evidence. The court having excluded all the evidence in the case the finding for the defendant was based of necessity upon the absence of any or all evidence in support of plaintiff's cause of action. Then, there being no evidence before the court upon which to base a finding as contended by and for the plaintiff, the sufficiency of the excluded testimony as shown by the record not having been properly passed on by the court is not before us for consideration. The sole and only question here is as to the action of the court in excluding the testimony. We are of the opinion that the plaintiff having submitted relevant evidence upon the issue that he had a right to have it remain in the case, and its sufficiency tested by a proper motion, or by a finding of the court upon the final submission of the case, so that upon the record he could, if such ruling or finding was adverse to him, be in a position to have the question here reviewed, and that this was a substantial right of which he was deprived by the ruling of the court. It was said in *McFarland v. Bellows*, 49 Mo. 311: "There is no law in this state authorizing the court at the close of plaintiff's case to strike out his testimony on the ground that the same is insufficient to make out a case for plaintiff." What is there stated we may with equal propriety say as to this jurisdiction, nor is it contended by defendant that there is here precedent for the rule invoked by him.

For the error committed in sustaining defendant's motion to strike out plaintiff's testimony the judgment is reversed, and a new trial granted.

POTTER, C. J., and BEARD, J., concur.

(14 Wyo. 503)

### HARDMAN v. KING.

(Supreme Court of Wyoming, April 23, 1906.  
On Rehearing, June 12, 1906.)

#### 1. ANIMALS—TRESPASS—CATTLE STRAYING ON UNINCLOSED LANDS.

No actionable trespass is committed on uninclosed lands by reason of cattle straying thereon from adjoining lands.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, §§ 143, 158, 335.]

#### 2. SAME—UNINCLOSED LANDS.

Lands not separated from government lands by a fence are to be regarded as uninclosed in respect to cattle straying thereon from adjoining lands.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, § 330.]

#### 3. PUBLIC LANDS—UNLAWFUL INCLOSURE—EXCLUSIVE POSSESSION.

By unlawfully inclosing government lands with his own, one acquires no right to the exclusive possession of such government lands; nor can he, by the inclosure, deprive others from peaceably turning cattle thereon.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 25.]

#### 4. ANIMALS—TRESPASS—ACTIONS—PLEADING AND PROOF.

Where plaintiff inclosed with his own land certain government lands and also defendant's homestead, and cattle were driven into the inclosed land through a part of the fence owned by defendant, defendant could show, under a general denial, in an action by plaintiff to recover damages by reason of the cattle straying on his land, in contradiction of plaintiff's evidence that the cattle were driven from defendant's lands onto plaintiff's, that they were only being driven from defendant's lands onto the government land.

#### 5. SAME—TRESPASS—WHAT CONSTITUTES.

Where cattle stray onto uninclosed land, the driving of them therefrom by their owner does not constitute an actionable trespass.

Error to District Court, Albany County; Charles E. Carpenter, Judge.

Action by James King, Sr., against James Hardman. Judgment for plaintiff, and defendant brings error. Reversed.

N. E. Corthell, for plaintiff in error. H. V. S. Groesbeck, for defendant in error.

BEARD, J. The defendant in error, James King, Sr., commenced this action against the plaintiff in error, James Hardman, in the district court of Albany county, to recover damages for alleged trespass upon his lands. The petition is in two counts one charging a continuing trespass in 1903, and the other a like trespass in 1904. Both counts are identical except as to the year, and allege that on the 1st day of June of said years and on divers other days between that day and the 7th day of September in said years, said defendant unlawfully and with force broke and entered the close of plaintiff situated around and inclosing the following lands and premises of plaintiff, to wit: Sections 3, 5, 9, 16, and 17, township 13 N., Range 75 W., in Albany county, Wyo., and depastured the same and said lands of plaintiff with cattle, trod down the grass and crops of

plaintiff, and converted the same to his own use, and otherwise injured the said lands and premises of plaintiff, to his damage in the sum of \$100, for which sum, with interest, he prayed judgment. The defendant's answer to each count of the petition was a general denial. The case was tried to a jury, resulting in a verdict for plaintiff on both counts. A motion for new trial was denied by the court, judgment entered on the verdict, and defendant brings error.

It was admitted at the trial that King was the owner of sections 3, 5, 9, and 17, and that he had a lease of section 16. It was also conceded in argument in this court that King's lands, except a small fraction of section 17 and a part of section 16, were inclosed by a fence, which inclosure also included sections 4, 8, W.  $\frac{1}{2}$  10, and part of S. E.  $\frac{1}{4}$  10, which were vacant unoccupied government lands, and also included the N. E.  $\frac{1}{4}$  of section 10, upon which Jessie K. Hardman, daughter of plaintiff in error, had a homestead filing. King owned the greater part of this fence, but there was a small part of it, extending across the southeast corner of said homestead, which belonged to Hardman or to said entrywoman, in which piece of fence there were bars opening onto the county road. It was through these bars that Hardman turned his cattle onto said homestead and allowed them to roam at will. There is no evidence in the record that he at any time drove the cattle from either said homestead or the government lands onto King's land. The cattle were peaceably put upon said homestead and without objection from any one, and from there they strayed upon King's land; there being no fence separating his lands from said homestead or the government lands included in the inclosure. Two witnesses on behalf of King testified that on one occasion, about June 20 or 21, 1904, Hardman's son drove the cattle from the west part of section 16 onto section 17, while Hardman's son, who did this driving of the cattle, testified on behalf of his father that he drove them from section 16, through a part of section 9, onto section 8, a government section. That is about the only conflict in any material part of the testimony. It was agreed at the trial that the value of pasturage for cattle in that section of the country was 25 cents per head per month.

The court, over the objection of counsel for Hardman, instructed the jury as follows: "The jury are instructed to find for the plaintiff, James King, Sr., upon the two causes of action of his petition, and to assess such damages under each cause of action as they shall find from the evidence that said plaintiff is entitled to for the trespasses alleged in the said causes of action on his petition." This was the only instruction given to the jury, except one as to interest. Counsel for Hardman requested the court to instruct the jury that "under the evidence the plaintiff

cannot recover anything upon the first cause of action. You are therefore instructed to find for the defendant upon that cause of action." A like instruction was requested as to the second cause of action. Counsel for Hardman also requested the court to give the following instructions: "The plaintiff cannot recover for any damage done by the defendant's cattle to the plaintiff's lands, or for any grass consumed by them, except such as may have been caused by the act of the defendant, or his agent, in driving, herding, or keeping his cattle upon plaintiff's lands." Also: "The law does not allow recovery for damages caused by straying cattle. It is the duty of the landowner to fence against them. Only where cattle are herded, put, or kept by the owner upon another's land can there be any such recovery." A number of other instructions, embracing the same idea as in the last two above set out, but in different language, were requested. The court refused to give any of the instructions so requested. To the giving of the instruction which was given, and to the refusal of the court to instruct as requested, counsel for Hardman duly excepted, and assigns such giving and refusal as error. It was also made a ground in the motion for a new trial that the verdict was not sustained by sufficient evidence.

The theory of counsel for defendant in error seems to be that all he was required to do was to show that the cattle were upon the land and that that constituted a trespass for which King was entitled to recover damages unless Hardman could justify by proving that the cattle had strayed there from the adjoining lands; and this seems to have been the view taken by the court. It is settled in this state that no actionable trespass is committed upon uninclosed lands by reason of cattle straying thereon from adjoining lands. *Cosfriff Bros. v. Miller*, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977; *Martin v. Platte Valley Sheep Co.*, 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093; *Haskins v. Andrews*, 12 Wyo. 458, 76 Pac. 588. In this case the lands of King must be regarded as uninclosed. They were not separated from the government lands nor from said homestead by a fence, and King could acquire no right to the exclusive possession of the government lands by reason of having unlawfully inclosed them with his own, nor could he by such inclosure deprive Hardman or anyone else from peaceably turning cattle thereon. *Clemmons v. Gillette* (Mont.) 83 Pac. 879. He did not own the fence or the bars through which the cattle were driven into the inclosure, nor the land upon which they were turned loose. In order therefore to make out a case of trespass under such circumstances it was necessary for him to allege and prove that the cattle were put upon his land, and it was not sufficient to show that they had been put on adjoining lands and were afterwards found on his land. *Merritt*

v. Hill, 104 Cal. 184, 37 Pac. 893; Walker v. Bloomingcamp, 34 Or. 391, 43 Pac. 175, 56 Pac. 809. The burden was upon King to prove a trespass, and to do so he offered evidence that at one time the cattle were driven by Hardman's son from section 16 to section 17, thus tending to show that they were being herded and kept on his land. To negative the holding or herding Hardman introduced evidence that they were not so driven but were being driven from King's lands onto the government land. This evidence was not in the nature of a justification but in denial of a herding of the cattle on King's land and was admissible under the general denial, and the question as to which of these statements was true should have been submitted to the jury under proper instructions. If the former was true King would be entitled to recover such damages as the evidence showed he sustained by such wrongful act; but, on the other hand, if the cattle had strayed onto King's land and were simply being driven therefrom, that fact would not constitute an actionable trespass for which he could recover damages.

The district court erred in giving the peremptory instruction to the jury to find for King on both causes of action, and in refusing to instruct to find for Hardman on the first cause of action and in refusing to instruct that King could not recover for any damages done by cattle straying upon his uninclosed lands from adjoining lands. For the errors above pointed out, the judgment of the district court is reversed, and the cause remanded for a new trial.

Reversed.

POTTER, C. J., and SCOTT, J., concur.

On Rehearing.

SCOTT, J. Defendant in error has filed a petition for rehearing. His chief contention is that he was the owner of the fence and bars through which the cattle were driven into the inclosure. This question was considered in the opinion filed. Besides the record fails to disclose any evidence or claim of title by him to the fence or the bars or the land upon which they were situated. The fence and bars through which the cattle were turned into the inclosure were located and upon land covered by a homestead filing, and for which act the entryman did not complain; nor could King, he being a stranger to the title. In so far as King's rights were concerned, the cattle were then lawfully within the inclosure, which included unappropriated public land, and if they strayed or roamed at will upon and depastured deeded or leased land no trespass was committed; and Hardman also had the undoubted right to have his cattle, they being lawfully within the inclosure, graze upon the unappropriated public lands therein. Hecht v. Harrison, 5 Wyo. 279, 40 Pac. 306. No question is pre-

sented in the petition which was not carefully considered in the opinion filed.

Rehearing denied.

POTTER, C. J., and BEARD, J., concur.

SWANSON v. GROAT et al.

(Supreme Court of Idaho. March 6, 1906.)

1. APPEAL—PROCEEDINGS NOT IN RECORD—MOTION TO STRIKE OUT.

On an appeal from a judgment where no bill of exceptions or statement has been settled, a motion made in the trial court to strike from the complaint certain matter therein contained, is not properly a part of the judgment roll under section 4456, Rev. St. 1887, and cannot become a part of the record on appeal under the provisions of section 4818, Rev. St. 1887.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2352.]

2. SAME—TRANSCRIPT—CORRECTION—STRIKING OUT.

Where matter has been improperly inserted in the transcript on appeal, the same will be stricken from the record on motion of the adverse party.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2823-2825.]

3. ANIMALS—RUNNING AT LARGE.

Under the laws of this state, live stock, with certain exceptions, may run at large and roam and graze over and upon any of the uninclosed lands of the state, and the same will not amount to an actionable trespass against the owner of such live stock.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, §§ 143, 335.]

4. SAME—TRESPASS—WILLFULLY DRIVING ON ANOTHER'S LAND.

One who willfully, deliberately, and knowingly drives his live stock upon the lands of another, whether inclosed or uninclosed, and holds, herds, and grazes them upon such lands over the protests and objections of the owner, is liable in damages for the trespass.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, § 335.]

(Syllabus by the Court.)

Appeal from District Court, Bannock County; Alfred Budge, Judge.

Action by Theodore Swanson against Niel Groat and others for the willful, deliberate, and unlawful trespass in the herding and grazing their sheep upon the lands of the plaintiff and within two miles of his dwelling house. Judgment for plaintiff, and defendants appeal. Affirmed.

Holzheimer & Holzheimer, for appellants. Standrod & Terrell, for respondent.

AILSHEE, J. The respondent has filed and presented a motion to strike from the transcript in this case all matter found on page 6 thereof, which appears to be a motion and notice of motion to strike certain paragraphs from the complaint. This appeal is from the judgment only, and no statement or bill of exceptions has ever been settled or filed in the case. It therefore follows that under sections 4456 and 4818 of the Revised Statutes of 1887, the motion and no-

tice to strike certain matter from the complaint has no place in the judgment roll and could only be brought to this court by a bill of exceptions or statement. *Williams v. Boise Basin M. & D. Co.* (Idaho) 81 Pac. 646; *Stickney v. Hanrahan*, 7 Idaho, 424, 63 Pac. 189; *Graham v. Linehan*, 1 Idaho, 780; *Gamble v. Dunwell*, 1 Idaho, 268; *Ray v. Ray*, 1 Idaho, 705; *Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239; *Anderson v. Shoshone Co.*, 6 Idaho, 76, 53 Pac. 105; *Bank v. Sampson*, 7 Idaho, 564, 64 Pac. 890. The motion will be sustained and page 6, containing the matter designated, will be stricken from the transcript. After sustaining the foregoing motion the case is left for the consideration of only one assignment of error, namely, that "the court erred in overruling the demurrer interposed by the appellants to respondent's amended complaint."

This action appears to have been instituted by the plaintiff under sections 1210 and 1211 of the Revised Statutes of 1887, commonly known in this state as the "Two-Mile Limit Law." The defendants demurred to the complaint on the grounds that it "does not state facts sufficient to constitute a cause of action." Leaving the two-mile limit law entirely out of our consideration, we think the complaint states a cause of action against the defendants for a willful and unlawful trespass. In paragraph 3 of the complaint we find, among other things, the following allegations: "That on or about the 17th of March, 1905, the said defendants willfully, knowingly, and unlawfully drove their flock of sheep, about 2,500 in number, upon the lands of the plaintiff, and ever since said date up to the 22d day of March, 1905, defendants continuously herded, held, pastured, and grazed said sheep upon the lands of the plaintiff, and during the time aforesaid the defendants willfully, knowingly, and unlawfully held, herded, fed, grazed, and pastured said 2,500 head of sheep upon the lands of the plaintiff and \* \* \* against the will and without the consent of the plaintiff and over the plaintiff's protests and objections, and refused to drive said sheep away from said premises \* \* \* until said defendants had fed and pastured to their said sheep all of the grass and feed upon said lands." The foregoing allegation is followed by the usual allegation as to the character and amount of damage sustained by reason of the unlawful acts of the defendant. While it is lawful in this state for live stock, with certain exceptions, to run at large and graze upon any of the uninclosed lands of the state, it is still true that one who willfully and deliberately drives his stock upon the lands of another, whether inclosed or uninclosed, and holds, herds, and grazes them upon such lands over the "protests and objections" of the owner, is liable in damages for the trespass. Such willful, deliberate, and intentional conduct cannot be justified upon the theory that the stock had a right of their own ac-

cord to roam over and graze upon such land. *Harrison v. Adamson*, 41 N. W. 34, 76 Iowa, 337; *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. 477, 38 L. Ed. 363; *Delaney v. Errickson*, 10 N. W. 451, 11 Neb. 533; *Powers v. Kindt*, 13 Kan. 74; *Larkin v. Taylor*, 5 Kan. 446; *Kerwhacker v. Cleveland, etc.*, R. R. Co., 62 Am. Dec. 246; 12 A. & E. Ency. of Law (2d Ed.) 1044, 1045; *Walker v. Bloomingcamp (Or.)* 43 Pac. 175; *St. Louis Cattle Co. v. Vaught*, 1 Tex. Civ. App. 388, 20 S. W. 835; *Willard v. Mathesus*, 7 Colo. 76, 1 Pac. 690. The complaint stated a cause of action and the demurrer was properly overruled.

The greater portion of appellant's brief is devoted to a discussion of what constitutes proper elements of damage that may be shown in a case prosecuted under sections 1210 and 1211 of the Revised Statutes of 1887. It is suggested that evidence was admitted tending to show the future value to plaintiff of public lands within two miles of his dwelling. The evidence, however, has not been brought up on this appeal, and we must therefore assume that only competent evidence was admitted.

The judgment is affirmed, with costs in favor of respondent.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

## BROWN v. NEWELL.

(Supreme Court of Idaho. March 8, 1906.)

### 1. WATER RIGHT—DIVERSION AND APPROPRIATION.

Where H. in 1899 settled on unsurveyed public lands and opened up an old ditch, which had been constructed and used by a previous settler, and put in a headgate and conveyed the waters of a stream 150 feet to and upon the lands claimed by him, and in the following year extended the ditch so as to better distribute the water over his claim, the water right so acquired is entitled to date from the time when the water was actually delivered upon the ground for the use of which it was diverted.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 10.]

### 2. SAME—SALE OF WATER RIGHT—INTERVENING APPROPRIATOR.

Where B. entered into an agreement and contract with H. for the purchase of a claim or squatter's right on unsurveyed lands of the United States, and the ditch and water right belonging thereto and used therewith, and paid a part of the purchase price, and was thereupon let into possession which he held continuously thereafter, and two years later received a deed from H. for such property, B.'s chain of title will not be broken by such contract and change of possession, so as to allow an intervening appropriator a priority over B.'s water right.

### 3. TRIAL—REOPENING CASE.

Question as to power of the trial court to reopen a case for the introduction of further evidence, after adjournment of the term at which the case was tried and submitted, reserved.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 167.]

(Syllabus by the Court.)

Appeal from District Court, Elmore County; Littleton Price, Judge.

Action by Peter Brown against William W. Newell. Judgment for plaintiff. Defendant appeals. Affirmed.

This is a contest between two appropriators and users of the waters of Deer creek in Elmore county. It appears from the evidence that Richard Horton, the predecessor in interest of the plaintiff, settled upon unsurveyed government land on Smith's prairie in Elmore county about August 1, 1899. Horton testified on behalf of the plaintiff as follows: "I went upon the land belonging to the plaintiff about August 1, 1899. That fall I cleaned out what ditch there was dug there—that is, a little—and ran it down through there and then went on with the survey and found out that the ditch was an old survey by Peterson who had been on the ground before I was there, was too high. I resurveyed it and cut out some brush, and then winter was on, and I went down to Highland Valley, and stayed that winter. Within 150 feet of the headgate the ditch struck the line of my land. The water was running in that ditch when I went there. I cleaned it out and had a little more put into it before I left that fall. I cut between 25 and 30 acres of hay in 1900, and had about one-half of an acre in garden and a little patch of wheat for a trial patch. There was no person on the Newell lands when I went there. I improved the lands during the summer of 1900, and also irrigated it and cut hay from it in 1901. Mr. Pierce cut the hay that year. In 1902 I sold to the plaintiff Brown. I judge that the ditch would carry 200 inches after I cleaned it out in the fall of 1899. In 1900 and 1901 I used all of the water of the creek along in July and August. The man who was on the land before me had abandoned it. I put in a headgate, and cleaned out the ditch a little. It was a little over 100 feet long when I went there. I put in a small headgate made of old dry goods boxes, and one thing and another. I made a sort of temporary gate, done well enough, I took a couple of hours to make it and put it in. It took me about one-half day to clean out the ditch, using pick and shovel. That ditch ends right in the field, a little draw that runs down onto the place. I went on the ground some time in August and the work above mentioned was done about two months later. I left the property in December. The survey run too high—either on a dead level or up. The water has been running in that ditch ever since I turned it in in the fall. It is running in there now. From the end of that ditch I commenced my survey. I used that portion of it dug. I began constructing the ditch next spring, the latter end of April, and worked on and off all the time till I got it done, up into the latter end of June. I had water running in on that place, I got the ditch dug the latter end of June, 1900. The

hay on the place is wild hay. I sold to plaintiff May 20, 1902. He took possession at that time. I used all the water there was in the creek during July and August of 1900 and 1901."

The plaintiff Brown testified that he took possession of the land on May 20, 1902, receiving possession from Horton; that he had a written agreement with Horton which was left in escrow with one Baker. That Baker thereafter died and that plaintiff prior to the trial made inquiry of Baker's wife concerning this escrow, and that she could not find it, and that he (plaintiff) did not know the whereabouts of that agreement or contract. He further testified that by virtue of the contract or agreement, Horton conveyed the land and water right in question to the plaintiff, and that plaintiff had paid the sum of \$40 on the purchase price at the time the agreement was made and possession delivered. On June 2, 1904, Horton executed and delivered to plaintiff a deed for the land and water right described in the complaint, whereby he conveyed all of his rights, title, and interest in and to the property in question. Plaintiff continued to cultivate and irrigate the land from the time of his purchase from Horton until the trial of this case. On May 9, 1900, the defendant Newell settled on a part of the unsurveyed public domain which now belongs to him. Two days previous to that time, his brother, who claimed to be a partner, had made settlement and commenced to open up an old ditch, and within a couple of days the two completed the ditch and turned water through it onto their land and have continued ever since to use the water in the irrigation of their land. Defendant is the successor by purchase to all the interest of his brother. At the trial, after the plaintiff had shown the settlement, appropriation and diversion by his predecessor and grantor, Horton, and his purchase from Horton and entry into possession, and subsequent use and application of the water, he offered to prove the nature of the agreement entered into between him and Horton at the time he took possession. The defendant objected on the grounds that it was not the best evidence and plaintiff had not shown diligence in his effort to produce the original contract which was in writing. The district court appears to have ruled with the defendant upon this objection, and thereupon the defendant introduced evidence showing his settlement, and also his appropriation and diversion of the waters of Deer creek. The case appears to have been closed and submitted to the court on November 3, 1904, with the understanding that briefs were to be furnished by the respective counsel within 10 days thereafter. The court immediately adjourned the term. No briefs were furnished by either side, but on the 10th day of December, the plaintiff filed and served a motion to reopen the case and allow him to introduce the written instrument which had

been entered into and executed by Richard Horton to the plaintiff on the 21st day of May, 1902. This motion was supported by the evidence of Mrs. N. J. Nauerth, who was at the time the agreement was executed, the wife of L. B. Baker, the holder of the escrow. Thereafter, and at the February 1905 term of the court, plaintiff's motion to reopen the case was heard upon the affidavit and agreement which was sought to be introduced, and the motion was granted by the court over the objection of defendant, and thereafter the case was called for hearing further evidence, and the agreement was offered in evidence by the plaintiff and admitted by the court, and is as follows: "Smith's Prairie, Ida., May 21, 1902. Article of Agreement. This article of agreement, by and between R. Horton, of Smith's Prairie, Elmore county, Idaho, party of the first part, and Peter Brown of the same place, party of the second part, witnesseth, that for the consideration of three hundred (\$300) dollars, that the said R. Horton, bargains, sells and by these presents does convey to the said Peter Brown, all his rights, title and interest to a piece of land, known as the 'Buckley Ranch,' situated on Deer creek, Smith Prairie, Elmore county, Idaho, together with all appurtenances belonging thereto. The considerations wherein the said party of the first part conveys and quitclaims the above-described property, are that the party of the second part, in payment thereof turns over to the party of the first part, one chestnut sorrel mare, age six years, branded with — on left shoulder, white strip in face, weight about 900 pounds, also one saddle mare and saddle, valued at forty dollars, also July 31, 1902, the party of the second part is to pay the party of the first part one hundred dollars (\$100), also on October 25, 1902, the party of the second part is to pay to the party of the first part one hundred and sixty (\$160) dollars. Richard Horton, Peter Brown. Witness: L. B. Baker, M. J. Baker."

The case was finally submitted to the court and he thereupon made and filed his findings of fact and conclusions of law. The court found that the plaintiff is entitled to a water right of 150 inches from Deer creek, to date from March 28, 1900, and that defendant is entitled to a right of 150 inches to date from May 12, 1900. The court appears to have found that plaintiff's appropriation should date from the posting of his notice of water location. Judgment was entered decreeing the rights and priorities of plaintiff and defendant in accordance with the findings. Defendant Newell has appealed from the judgment and order denying the motion for a new trial.

Wyman & Wyman, for appellant. E. M. Wolfe, for respondent.

ALLSHIE, J. (after stating the facts). It is contended by appellant that the acts of di-

version and appropriation done by Horton in 1899 did not amount to an actual appropriation. It clearly appears from the evidence that the ditch was opened in the fall of 1899, and a headgate was put in and the water to the amount of about 200 inches was actually delivered on the Horton claim. These acts were followed up the next year by extending the ditch so as to more completely distribute the water over the entire claim, and this in turn was followed by cultivation of a larger acreage of the claim. We think the facts bring this case within the well-established rules of law both as to what constitutes an appropriation as well as the reasonable time in which the appropriator may apply the water to the intended use. *Conant v. Jones*, 3 Idaho, 606, 32 Pac. 250; *Pyke v. Burnside*, 8 Idaho, 487, 69 Pac. 477; *Sand Point W. & L. Co. v. Panhandle D. Co.* (Idaho) 83 Pac. 347.

Appellant further contends that the deed of June 2, 1904, from Horton to respondent Brown did not pass sufficient title to a possession with which he had parted some two years previously so as to entitle the water right to date from the original diversion and appropriation by Horton. In support of this position appellant relies on the case of *McGinness v. Stauffer*, 6 Idaho, 372, 55 Pac. 1020. That case differed from this in some respects. Here it clearly appears that Brown's possession was obtained from Horton by contract of purchase and that a part of the purchase price was paid at the time. It is clear that if the balance of the purchase price was thereafter paid that Brown became the equitable owner and entitled to a conveyance, and that a court of equity would have so decreed, in which case the chain of title to the ditch and water right would have been continuous and complete from the perfecting of Horton's right. If a court of equity would enforce a conveyance it must follow that a voluntary conveyance made by the grantor under the same state of facts would convey as good a title as the court could decree. On the other hand, if the purchase price was never paid by Brown in accordance with the contract, the title (except as against the government) remained in Horton, and Brown's possession remained, in contemplation of law, the possession of Horton. In either view of the case the water right was entitled to date from the original appropriation and application thereof by Horton. For the foregoing reasons it is unnecessary for us to consider the validity of the water-right notice and claim posted by Horton on March 28, 1900, or of the subsequent steps taken by him under that notice in his endeavor to comply with the law. The actual diversion and application of the water had preceded that date, and it therefore becomes unnecessary for us to consider the steps taken in regard to the posting and recording the notice, and the prosecution of work thereafter.

Appellant complains of the action of the court in reopening the case and permitting the plaintiff to introduce the contract, agreement, or conveyance of May 21, 1902, which had been placed in escrow with Baker by Horton and Brown. Without passing upon the question as to the right of the trial court to reopen a case after the adjournment of the term at which it was tried (a question, the consideration of which, we specifically reserve in this case), we are content to rest our decision on the point that it clearly appears in this case that the defendant was in no manner injured or prejudiced by the action of the court in this respect. It appears that upon the trial of the case the defendant had notice of the nature and character of the agreement or contract and that when it was actually produced in evidence it only confirmed the position taken and evidence previously produced by the plaintiff. The title had already passed by deed of June 2, 1904, which was in evidence. As stated above, we do not think anything we have said in this case is in conflict with the McGinness-Stanfield Case, but if it should be so understood, then it is the purpose of this decision to overrule anything contained in that case in conflict with what we have herein said.

The judgment of the lower court will be affirmed, and it is so ordered. Costs in favor of respondent.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

#### CORKER v. PENCE.

(Supreme Court of Idaho. March 8, 1906.)

##### 1. OFFICERS—REMOVAL FROM OFFICE—INFORMATION—SUFFICIENCY OF ALLEGATIONS.

Under the provisions of section 7459, Rev. St. 1887, the allegations of the information should be made positively, when the facts are of record and accessible or within the personal knowledge of the informant; otherwise, they may be made on information and belief.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Officers, § 101.]

##### 2. SAME—SUFFICIENCY.

Under the provisions of section 7459, Rev. St. 1887, the information is sufficient if it charges the defendant with knowingly, willfully, and intentionally charging and collecting illegal fees, specifying them, or with knowingly, willfully, and intentionally refusing to perform or neglecting to perform an official duty pertaining to his office, specifying such duty.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Officers, § 101.]

##### 3. SAME.

Under the provisions of said section there are but two offenses for which a defendant may be removed from office. The first is the charging and collecting illegal fees for services rendered or to be rendered in his office; and, second, neglecting to perform official duties pertaining to his office required by law.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Officers, § 96.]

##### 4. COUNTIES—COUNTY OFFICERS—REMOVAL.

County officers, for all other willful or corrupt misconduct in office, other than that men-

tioned in section 7459, may be removed, under the provisions of sections 7445 et seq., Rev. St. 1887.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Counties, § 102.]

##### 5. OFFICERS—PROCEDURE—PROSECUTION.

Under the provisions of said section 7459, Rev. St. 1887, a corrupt official may be prosecuted by a private person for the acts therein specified, while under the provisions of section 7445, the accusation must be by the prosecuting attorney, or presented by the grand jury, for other willful or corrupt misconduct in office.

##### 6. COUNTIES—BOARD OF EQUALIZATION—EVIDENCE.

Where a board of equalization meets and proceeds to equalize the assessments of the property of their county, but fails to make such equalization and assessment in accordance with the views of others, and if they willfully and corruptly equalize such assessments, they cannot be removed from office under the provisions of said section 7459. The remedy is provided by the provisions of section 7445.

##### 7. SAME—INFORMATION—ALLEGATIONS.

The allegation in an information that the board of county commissioners did not make "necessary" and "proper" rules and regulations to prevent the outbreak and spread of contagious and infectious diseases is not a sufficient allegation that no rules or regulations in regard thereto had been made.

##### 8. SAME.

A failure to properly itemize a claim against the county is not a cause for the removal of an officer, under the provisions of said section 7459.

##### 9. SAME.

An allowance of a claim against the county without its being accompanied by a proper voucher is not a cause for removal, under the provisions of section 7459. Under the provisions of an act approved March 14, 1901 (Sess. Laws 1901, p. 226), which provides for the payment of actual and necessary expenses of certain county officers, includes the board of such officers when absent from their residences in the performance of the official duties of their several offices.

(Syllabus by the Court.)

Appeal from District Court, Elmore County; Littleton Price, Judge.

Action by C. E. Corker against John Pence, a county commissioner, to remove him from office, under Rev. St. 1887, § 7459. Demurrer to complaint sustained, and plaintiff appeals. Affirmed.

W. C. Howie, for appellant. E. M. Wolfe, Perky & Blaine, and Morrison & Pence, for respondent.

SULLIVAN, J. This action was brought under the provisions of section 7459, Rev. St. 1887, to remove the respondent from the office of county commissioner of Elmore county. Two separate causes of action are set out in the information. In the first cause, after alleging that appellant is a citizen and a taxpayer of the state of Idaho, and that respondent is one of the duly elected, qualified and acting county commissioners of said county, appellant alleges on information and belief that the respondent had "willfully, knowingly, and intentionally failed, neglected, and refused to perform the official duties pertaining to his office." Then follow eight specifications of instances in which it is al-

leged he has so failed. The first specification refers to his action in conjunction with the other members of the board of county commissioners acting as a board of equalization, and states two matters in which it is alleged he knowingly, willfully, and intentionally failed to perform the duties of his office: (1) That he failed, neglected, and refused to equalize the taxes of said county for the year 1905; (2) that he failed, neglected, and refused to enforce and compel an assessment of the property of said county at a fair cash value, but that he, in conjunction with the other members of said board, raised the valuation of the property of many of the taxpayers of the county to more than its fair cash value and to more than other property of the county of equal value, and more in proportion than other property of the county, and failed to raise others to their fair cash value or to the same as other property of equal value or to the same in proportion as other property of the county, and then particularly sets out the original assessments and the actions of respondent, acting and voting with the other members of the said board in regard to the lots in the original townsite of Mountain Home and Glens Ferry, and also two instances of contiguous ranch lands, with allegations of the nature of the said lots and the relative values thereof, and further alleges that the remainder of the lands of said county were as unequally assessed as those given, but alleges his inability at that time to give detailed facts of the same, and, by way of illustration of the matters alleged, attached copies of the plats of the said towns. The second specification is that respondent failed to organize a board of health and failed to make or establish any rules or regulations necessary and proper to prevent the spread of contagious or infectious diseases, and that there had repeatedly been cases of smallpox in the county requiring such rules and regulations. The third specification alleges that there were several cases of smallpox at three different specified times and places in said county during respondent's term of office, their liability to spread and become epidemic, and that it was necessary that said cases be quarantined, and that in each case he failed to quarantine the case or to take any other legal steps to prevent the spread of such disease. The remaining five specifications relate to the illegal allowance of bills, and ordering county warrants issued in payment thereof. Specification 4 alleges that respondent allowed eight bills amounting to \$362.45 for services and supplies in relation to smallpox patients, and that none of such claims were legal charges against the county for the reason that they had not been authorized by any board or person having authority in the matter, and that they failed to perform their official duty in not rejecting and disallowing said claims. Specifications 5, 6, 7, and 8 allege the allowance of various bills

of county offices which were neither itemized nor accompanied by vouchers, alleging that he failed to perform the duties of his office in not rejecting said claims or in not requiring vouchers to be furnished therewith. The second cause of action after the formal allegations allege on information and belief that respondent has willfully, knowingly, and intentionally been guilty of charging and collecting illegal fees for services rendered in his office in the following particulars, to wit: (1) That he did knowingly, willfully, and intentionally present to the board of county commissioners of said county at their July, 1905, meeting, a claim for board while acting as a member of such board of commissioners, amounting to the sum of \$6, which said claim was verified according to law, thereafter allowed by said board and a county warrant ordered to be drawn and issued therefor to the respondent, and that respondent did knowingly, willfully and intentionally accept and receive said county warrant. Then follows a prayer that a citation issue and that upon a return thereof the court proceed to consider this information and the evidence in support thereof, and that the judgment be entered depriving the respondent of his said office and in favor of appellant for the sum of \$500 and costs and such further relief as to the court shall seem proper.

To that information the respondent filed a demurrer on the following grounds: "(1) That several causes of action have been improperly united, to wit: That said complainant informs against the defendant as a member of the board of equalization and in the same count alleges against him as a member of the board of county commissioners. (2) That the first cause of action in the said complaint is ambiguous, unintelligible, and uncertain. 1. That it is ambiguous for the following reasons, to wit: (a) That it cannot be determined from paragraph 3 in the first cause of action whether informant alleges against the defendant as member of the board of county commissioners or as a member of the board of equalization. (b) It cannot be determined from subdivision 2 and 4 of the complaint and from the complaint at all whether the allegations are made against the defendant as a member of the board of county commissioners or as a board of health, or both, or at all. (c) It is alleged that defendant refused to equalize the assessment of Elmore county, and, immediately following said allegations proceeds to set out in detail the action of the defendant in equalizing the said assessment. (d) It is alleged that defendant failed, as a member of said board, to compel an assessment of the said property set out in the complaint at its full cash value, and in the same paragraph alleges in detail the action of the defendant as a member of said board, the assessment at certain values therein set out. (4) That the second cause of action set out in plaintiff's complaint does not state facts sufficient

to constitute a cause of action. Also, second, that the first cause in the said complaint does not state facts sufficient to constitute a cause of action." A motion to strike was also interposed, moving to strike out all of the specifications of the first cause of action as frivolous, for the reason that they were alleged on information and belief, and also to strike out all the specifications of the second cause of action on the grounds that the court had no jurisdiction of such matter, and that the charges could not be considered by the court; that if any cause of action existed it was under sections 7445 and 7447, Rev. St. 1887. The cause came on for hearing on said demurrer and motion, and the court sustained both the demurrer and motion. Thereupon appellant refused to plead further, and judgment of dismissal was entered. This appeal is from that judgment.

As the motion to strike and the demurrer are based largely on the same grounds, we will dispose of them both together. One of the points raised is that an information, under the provisions of section 7450, Rev. St. 1887, cannot be made on information or belief. That point appears in the case of *Hays v. Simmons*, 6 Idaho, 651, 50 Pac. 182, and the information in that case was based wholly on information and belief. If the facts set forth in the information are matters of record and accessible, or within the personal knowledge of the informer, the allegations should be made positively and not on information and belief; otherwise the allegations may be made on information and belief. The effect of most of the objections made by the motion and demurrer is that the information does not state facts sufficient to constitute a cause of action under the provisions of said section 7450, *supra*, which is as follows: "When an information in writing verified by the oath of any person, is presented to a district court, alleging that an officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the information was presented, and on that day or some other subsequent day, not more than twenty days from that on which the information was presented, must proceed to hear, in a summary manner, the information and evidence offered in support of the same, and the answer and evidence offered by the party informed against; and if on such hearing it appears that the charge is sustained, the court must enter a decree that the party informed against be deprived of his office, and must enter a judgment for five hundred dollars in favor of the informer and such costs as are allowed in civil cases." The information must contain language suffi-

cient to charge the defendant with being guilty of charging and collecting illegal fees for services rendered or to be rendered in his office, or language sufficient to charge him with refusing or neglecting to perform official duties pertaining to his office. The information charges that the defendant "willfully, knowingly, and intentionally failed, neglected, and refused to perform the official duties pertaining to his office in the following particulars, to wit:" Then follows a number of specifications of particulars.

It is contended by counsel for respondents that, under the provisions of said section, the defendant must be charged with something more than "knowingly, willfully, and intentionally" doing something, as doing a thing "knowingly, willfully, and intentionally" does not imply guilt, and that said statute declares that the defendant must be guilty of doing the thing or things therein charged. There is nothing in that contention, for if an officer is accused of knowingly, willfully, and intentionally charging and collecting an illegal fee, that clearly charges his guilt and his unfaithfulness in office, and if he is charged with knowingly, willfully, and intentionally refusing to perform or neglecting to perform an official duty pertaining to his office, that is a sufficient allegation of unfaithfulness in office. The allegation "that the defendant knowingly, willfully, and intentionally charged and collected illegal fees" must be followed by a specification of the particular fee claimed to be illegal, or if he is so charged with refusing or neglecting to perform an official duty, that particular official duty must be specified and alleged in the information. Such allegations convey the idea that the officer informed against is accused of having charged and collected illegal fees knowing them to be illegal, and is accused with refusal and neglect to perform official duties pertaining to his office. Under the provisions of said section there are only two things for which a defendant may be prosecuted and removed from office. The first is charging and collecting illegal fees for services rendered or to be rendered in his office; and, second, neglect to perform official duties pertaining to his office. Proceedings for removal for the causes therein mentioned may be initiated by a private person. No proceedings can be maintained against an officer for any other kind of misconduct in office than the two kinds mentioned therein under the provisions of said section. The proceedings for the removal of officers for all other willful or corrupt misconduct is provided by sections 7445 et seq. of the Revised Statutes of 1887, and the accusation must be by the prosecuting attorney, or presented by the grand jury.

Certain allegations of refusal or neglect to perform official duty are in regard to the failure of the defendant acting as a member of the board of equalization, in that said

board neglected to equalize the assessment of the property of the said county, and particularly of the property in the towns of Mountain Home and Glens Ferry, and that board is also charged with having failed and neglected to enforce and compel an assessment of the property within their county at its fair cash value. Numerous instances are set forth in the information wherein it is alleged they failed to equalize the assessment of the property in said county, and where they failed to assess such property at its fair cash value. It is also shown that the board of equalization did meet as such board and undertook to equalize the assessments, and, if the allegations in the information are true, which, for the purposes of this appeal, must be taken as true, they show that such assessments and equalizations were not such as were contemplated by the law. While absolute equality and justice are unattainable in the equalization of assessments and in the assessment of property, the allegations would indicate that the board came about as far from equalizing assessments and assessing the property of their county at its fair cash value as could have been done. But the allegations show that the board of equalization did meet and act. That being true, they did not neglect or refuse to act as such board. If they acted corruptly in the equalization of assessments, they could not be removed from office under the provisions of section 7459. The provisions of section 7445 were intended to meet that class of misconduct.

The defendant is accused of knowingly, intentionally, and willfully, as a member of the board of commissioners, neglecting and refusing to make or establish for Elmore county sanitary rules and regulations to prevent the spread of contagious or infectious diseases. Section 1151, Rev. St. 1887, as amended by Sess. Laws 1903, p. 365, provides that the board of health must make such sanitary rules and regulations "as they may deem necessary and proper to prevent the outbreak and spread of dangerous, contagious, and infectious diseases." It has been held that the powers of boards of health as imposed by statute are to be liberally construed, and it is not alleged or shown but what the board of health that preceded the present board had established rules and regulations. And the board of which respondent is a member, in all probability continued to act under the former rules and regulations established by the predecessor board. The board of health is a continuing body, and its rules and regulations continue until supplanted by new ones, and, in the absence of any allegation that no rules had been adopted by the predecessor board, the presumption is that such board had adopted rules and regulations and that the present board had continued to operate under them. It is alleged that the board failed to organize a board of health. Under the provisions of

section 1150, Rev. St. 1887, as amended by Laws 1903, p. 364, the board of county commissioners are required to appoint an experienced and skillful physician, and that such physician, together with the board of county commissioners, constitute the board of health, and such board continues until their successors are appointed and qualified. That completes the organization. It is alleged that said board refused to make or establish any sanitary rules and regulations necessary and proper to prevent the outbreak or spread of contagious, etc., diseases. That allegation would clearly indicate that some rules or regulations had been made for that purpose, and that the informant did not deem them "necessary" and "proper" to prevent the outbreak or spread of such diseases, or that such rules did not meet the approval of the informer. The allegations on this point are not sufficient, and do not state a cause of action against respondent under the provisions of such section 7459.

The remaining specifications of the information relate to the action of the respondent in connection with the other members of the board of county commissioners in allowing certain bills to himself and other persons. It is alleged that certain bills were allowed which were "not properly itemized, and were not accompanied by any vouchers." And it is contended that, as the law requires bills to be itemized and vouchers furnished therewith, the defendant had failed and neglected to disallow said bills and thus violated his official duty. The provisions of section 1773, Rev. St. 1887, provides that the commissioners must not hear or consider any claim in favor of an individual against the county, unless upon an account properly made out, giving all the items of the claim, etc. Now, under that section an allegation that a claim was not "properly" itemized is not sufficient. It is not sufficient to show that the bills did not give "all items of the claim." It is also alleged that proper vouchers did not accompany said bills or claims—such vouchers as are required by the provisions of section 1773, Rev. St. 1887, as amended by Sess. Laws 1899, p. 405. The failure to properly itemize a claim or to furnish vouchers therewith is not a cause for the removal of an officer, under the provisions of said section 7459. It is not a neglect or refusal to perform an official duty under the provisions of said section. It is not a charging or collecting of illegal fees for services rendered or to be rendered. Corrupt or willful allowance of illegal claims by the county commissioners may be reached by proceedings under section 7445 or by appeal, but not by proceedings under the provisions of section 7459.

In the second cause of action the informer alleges the collection of illegal fees by the respondent in that he presented a claim for \$6 for board while attending meetings of the board. In *Stookey v. Board*, 6 Idaho,

542, 57 Pac. 312; *Reynolds v. Board*, 6 Idaho, 787, 59 Pac. 730; *Clyne v. Bingham County*, 7 Idaho, 75, 60 Pac. 76, this court held that an officer was not entitled to compensation for his board. In 1901, after the above cases had been decided by this court, the Legislature, by an act approved March 14, 1901 (Laws 1901, p. 227, § 3), defines "actual and necessary expenses," and includes therein all traveling expenses incurred by any county officer when absent from his residence in the performance of duties of his office. This was clearly intended to allow to the officers their board when absent from their residence in the performance of the duties of their office. That being true, the board was authorized to allow the respondent his claim for board when absent from his residence in the performance of his official duties. It is clear to the court that if the respondent is liable to removal from office under any of the charges made in the information, he must be proceeded against under the provisions of section 7445, and not under the provisions of section 7459. The views herein expressed in no wise conflict with the conclusions reached in *Rankin v. Jau-man*, 4 Idaho, 53, 36 Pac. 502; *Id.*, 4 Idaho, 394, 39 Pac. 1111; *Hays v. Simmons*, 6 Idaho, 651, 59 Pac. 182; *Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824; or *Ponting v. Isaman*, 7 Idaho, 581, 65 Pac. 434.

The judgment of the trial court is affirmed, with costs in favor of respondent.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

#### CORKER v. WARD.

SAME v. ELLIOTT.

(Supreme Court of Idaho. March 8, 1906.)

Appeal from District Court, Elmore County; Littleton Price, Judge.

Actions by C. E. Corker against W. L. Ward and against S. W. Elliott. Judgment for defendants, and plaintiff appeals. Affirmed.

SULLIVAN, J. By stipulation the above-entitled cases were submitted with the case of C. E. Corker, Appellant, v. John Pence, Respondent, 85 Pac. 388, and were to abide the decision of this court in that case. On the authority of that case the judgment of the trial court is affirmed in each of said cases, with costs in favor of the respondents.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

#### JONES, DOWNS & CO. v. CHANDLER et al.

(Supreme Court of New Mexico. March 2, 1906.)

#### 1. APPEAL—JOINDER IN ERROR.

Unless exception is filed or taken to the assignment of errors, in cases brought to the

Supreme Court, the opposite party shall be deemed to have joined in error upon the assignment of error so filed, and no formal joinder is necessary.

#### 2. SAME—OBJECTIONS NOT RAISED BELOW—PARTIAL PAYMENTS—APPLICATION.

There is no material error in the computation of the amount for which judgment was given in the case at bar. If there had been, it was the duty of the counsel for the appellant to have called it to the attention of the court below at the time the decree was signed, so that the trial judge might have corrected the same.

(Syllabus by the Court.)

Appeal from District Court, Grant County; before Justice Frank W. Parker.

Action by Jones, Downs & Company against Weld C. Chandler and others. Judgment for plaintiff, and defendants appeal. Affirmed.

This is an action to foreclose a certain mortgage and to apply the proceeds derived from the sale of the mortgaged property to the payment of two promissory notes. The mortgage and the notes secured thereby were executed by the appellant, and by him delivered to one F. J. Davidson, the mortgagee and payee named therein, who afterwards assigned them to appellee. Both of the notes are dated, May 15, 1901, and bear interest at the rate of 8 per cent. per annum from date, until paid. One of the notes was for the sum of \$5,000, and on it a payment of \$2,500 was made on April 28, 1902, and the other note was for the sum of \$6,000, but no payment has been made on it. Both notes were past due when suit was brought to foreclose. On September 10, 1904, judgment was entered in the district court of Grant county against Chandler, the maker of the notes in the sum of \$11,016.60 for the principal and interest due on the notes, and a foreclosure of the mortgaged property was ordered. From this judgment, one of the defendants, Weld C. Chandler, appealed; but the other defendants have not joined in the appeal.

Weld C. Chandler, pro se. R. M. Turner, for appellee.

MILLS, C. J. (after stating the facts). The record in this case is not at all voluminous. The appellant introduced no evidence, nor were any exceptions saved to any of that introduced by the appellee. Appellant claims that no joinder in error was filed in the Supreme Court within the statutory time as required by section 3140, Comp. Laws 1897. We do not think in the case at bar that the point is well taken, for section 3140, Comp. Laws 1897, was repealed by section 3, c. 114, p. 324, Laws 1905, and the law now is that "unless exception is filed or taken to the assignment of error the opposite party shall be deemed to have joined in error upon the assignment of error so filed." In this case, as no exception was filed or taken by appellee to the assignment of errors filed by appellant, no formal joinder in error was necessary. But two errors are assigned, to wit: (1) That the amount for which judgment was

rendered by the district court was excessive; and (2) that the computation of the interest included in the judgment of the district court is erroneous, and that the interest covered thereby is excessive.

The main point discussed in the briefs is as to the manner in which interest should be computed upon the note for \$5,000, on which the sum of \$2,500 was paid. There is no question as to the \$6,000 note, as no payment has been made upon it. An examination of the record discloses that on April 26, 1902, which was after the note became payable, \$2,500 was paid, and the payment was indorsed upon the \$5,000 note (neither the principal nor any interest then being due on the note for \$6,000) in the following words: "Paid upon within, April 26, 1902, \$2,500." This indorsement does not disclose that an application of the payment was made by either the maker or the holder of the note, consequently, it became the duty of the court to direct its application. 18 Am. & Eng. Encycl. of Law (1st Ed.) p. 245, note 1. This the court did by following the Massachusetts, and not the Connecticut, rule; that is, the partial payment, instead of being applied directly to the discharge of the principal, was first applied to the payment of the interest then due on the note, and there being more than enough to pay the interest, the remainder was applied, as far as it would go, to the payment of the principal of the note. The Massachusetts rule for computing interest, when partial payments are made, is the one used by most of the courts of this country, including the Supreme Court of the United States, and is, we think, the proper one. *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200; *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471; *Hart v. Dorman*, 2 Fla. 447, 50 Am. Dec. 285. There seems to have been no error in the computation of interest or in the amount of the judgment given by the court below. Even if there had been, we think that it was the duty of the counsel for appellant to have called it to the attention of the court below at the time the decree was signed, so that the trial judge might have corrected the same.

Appellee asks that damages be awarded him under section 3142, Comp. Laws 1897, claiming that the appeal taken was trivial and was made only for the purpose of delay. We have carefully examined the entire record, and have come to the conclusion that this is a proper case in which to award damages against the appellant, and the appellee is therefore awarded the sum of 5 per cent. damages upon the sum of \$11,016.60; that being the amount of the judgment recovered in the lower court by appellee.

We therefore affirm the judgment complained of, and remand the cause to the district court of the county of Grant, and direct the said district court to add to the judgment already given, the sum of \$550.83, that being 5 per cent. upon the sum of \$11,016.60,

the original amount of the judgment, and that said sum of \$550.83 shall bear interest at the rate of 6 per cent. per annum from the date of the filing of this opinion until paid, and it is so ordered.

ABBOTT, McFIE, POPE, and MANN, JJ., concur. PARKER, J., having tried the cause below, took no part in this decision.

(13 N. M. 386)

UNITED STATES v. RIO GRANDE DAM & IRRIGATION CO. et al.

(Supreme Court of New Mexico. March 2, 1906.)

1. PLEADING — SUPPLEMENTAL COMPLAINT — LEAVE OF COURT — HEARING OF APPLICATION — NOTICE.

Under Code Civ. Proc. § 104, as amended by Laws 1901, p. 29, c. 11, providing that "any hearing \* \* \* unless trial by jury is necessary, may be had in any case out of regular term time upon five days' notice in writing to the opposite party or his attorney or solicitor. \* \* \* Such hearing may be had during the term of court at any time in the discretion of the court"—where a supplemental complaint was filed in term time and on the same day that it was served on defendant's counsel, no notice of hearing the application for leave to file was necessary.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 833.]

2. SAME—DISCRETION OF COURT.

The granting of leave to file a supplemental complaint is within the discretion of the federal courts.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 833.]

3. SAME — SUPPLEMENTAL COMPLAINT — DIFFERENT RELIEF.

Code Civ. Proc. § 87, provides that a party may be allowed on motion to make a supplemental complaint, answer, or reply, alleging facts material to the cause, or praying for any other or different relief. Section 89 provides that in every complaint, answer, or reply, amendatory or supplemental, the party shall set forth in one entire pleading all matters which may be necessary to the determination of the action. Section 33 provides for the blending of legal and equitable remedies and defenses in one action. *Held*, that these sections allow the allegation in a supplemental complaint of such facts as authorize the granting of other and different relief than that sought by the original complaint.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 839.]

4. APPEAL—PROCEEDINGS IN LOWER COURT—ISSUES NOT DETERMINED.

Where there had never been a trial upon the merits of the original cause of action, such matter will still be before the lower court upon the remanding of the cause, and, where matter is set up in a supplemental complaint after the remand, the mandate could not refer to issues thus raised for the first time, so as to prohibit their consideration.

5. PLEADING — SUPPLEMENTAL COMPLAINT — CONSISTENCY WITH FORMER PLEADING.

The original complaint alleged that defendant threatened and was about to construct numerous dams, reservoirs, canals, and ditches for the purpose of accumulating the waters of the Rio Grande to be used in irrigating; that such construction would check the flow of the waters of such stream and interfere with the navigability thereof; that said acts were in vio-

lation of certain acts of Congress—and prayed for an injunction. The amended complaint was, in the main, identical with the original, except in that it made another corporation a defendant and contained allegations to the effect that the latter company was an English corporation organized as an adjunct and agent of the former company, and that the former had entered into a contract to convey all its rights in such system to the latter company. The prayer for the injunction was the same, but against both corporations. An alternative writ of injunction having issued, defendant filed pleas and answer alleging compliance with the acts of Congress authorizing the construction of such irrigation system. The supplemental complaint contained a detailed statement of all the proceedings, and alleged that defendant had forfeited its right by failure to complete the work within the time limited by the act referred to in defendant's answer, and prayed for the forfeiture of defendant's right to construct its irrigation system and also for an injunction. *Held*, that such supplemental complaint did not set up a cause of action irreconcilable and inconsistent with the amended complaint.

#### 6. SAME—INDEPENDENT CAUSE OF ACTION.

In an action to restrain the diversion of the waters of a navigable river, the plea of defendant relied upon an act of Congress granting it the right to divert such waters. The supplemental complaint alleged that since the commencement of the action defendant had forfeited its rights granted by such act by reason of its failure to comply therewith during the time limited by the act, and prayed that defendant's rights under such act be forfeited. *Held*, that the supplemental complaint was not objectionable as setting up an independent cause of action.

#### 7. SAME — OFFICE OF SUPPLEMENTAL COMPLAINT.

A supplemental complaint is the proper method of bringing before the court a cause of action relating to the same matter which did not exist at the time the suit was brought.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 832.]

#### 8. APPEAL — MANDATE TO LOWER COURT—JURISDICTION AFTER REMAND.

Where the lower court had jurisdiction both of the parties and the subject-matter, it did not lose either by the remanding of the cause by the Supreme Court on appeal.

#### 9. PROCESS—NECESSITY AFTER FILING SUPPLEMENTAL COMPLAINT.

The filing of a supplemental complaint which in no sense states a new cause of action does not require service of a new process on defendant, where the supplemental pleading is filed in open court and a copy served on one of defendant's attorneys of record.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, § 5.]

#### 10. JUDGMENT—CORRECTION OF CLERICAL MISTAKE.

Where a clerical mistake was made in a decree, in that the date of an act of Congress was given as 1901, when it should have been 1891, as alleged in the pleadings, the court had authority to correct such mistake at the next regular term by modifying and re-entering the decree in full.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 598.]

#### 11. SAME—JUDGMENT FOR WANT OF ANSWER.

Where defendant failed to answer a supplemental complaint within 20 days from the date of filing, as required by statute, and failed to secure additional time to plead, it was proper for the court to render a decree for want of an answer.

#### 12. SAME—MOTION TO SET ASIDE JUDGMENT—TIME.

Under Code Civ. Proc. § 184, which provides that a motion to set aside a judgment rendered out of term time will not be entertained unless the same is filed and a copy served on the opposite party within 10 days after such judgment was rendered, and section 187, which provides that judgments may be set aside for irregularity on motion filed within one year, where there was no irregularity in the rendition of the judgment, it could not be set aside on motion filed more than 10 days after rendition and notice thereof.

#### 13. SAME—NEGLECT OF ATTORNEY AS EXCUSE FOR DEFAULT.

Where a judgment has been rendered against a defendant for want of an answer, he cannot plead the negligence of his attorneys as ground for a motion to set aside the judgment.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 284.]

#### 14. NAVIGABLE WATERS—DIVERSION—FORFEITURE OF RIGHT.

Where an act of Congress giving an irrigation company the right to divert the waters of a navigable river provided that, if the canal or ditch should not be completed within five years, the rights granted should be forfeited, a forfeiture was properly declared where more than five years elapsed after the dissolution of an injunction originally granted restraining the company from proceeding to construct its system, where the work was still incomplete.

Appeal from District Court, Third District; before Justice Frank W. Parker.

Action by the United States against the Rio Grande Dam & Irrigation Company and another to restrain defendants from constructing certain dams, reservoirs, and ditches for the diversion of the waters of an alleged navigable river. From a judgment for plaintiff, defendants appeal. Affirmed.

This cause was remanded a second time to the district court of the Third judicial district by the Supreme Court of the territory, April 28, 1902, under a mandate from the Supreme Court of the United States (22 Sup. Ct. 428, 46 L. Ed. 619), by which court the same had been reversed and remanded for the second time, for further proceedings therein. On the 7th day of April, 1903, and during a regular term of said court, the appellee applied for and obtained leave to file a supplemental complaint, and upon the same day filed the same. The record shows that upon the same day the supplemental complaint was filed the same was served upon A. B. Fall, Esq., one of the attorneys of record of the appellants. On the 21st day of May, and 44 days after the supplemental complaint was filed and served upon appellants' counsel, no answer or other pleading being filed, the court rendered the following decree of forfeiture and injunction, in favor of the appellee: "This cause coming on to be heard upon the motion of the plaintiff, by the United States attorney, W. B. Childers, Esq., and it appearing to the court that a supplemental bill was filed herein, by its leave, on the 7th day of April, A. D. 1903, and that copies of the said bill were served more than 30 days past upon the attorney of record of the defendants in said cause, and it

further appearing from the certificate of the clerk of the said court that no demurrer, answer, or other pleading has been filed to said supplemental bill by the defendants in said cause, and the court being fully informed in the premises, the court does find that the allegations of said supplemental bill are confessed and are true; and further specially finds that the articles of incorporation and the map survey of the reservoir of the defendant corporation, the Rio Grande Dam & Irrigation Company, were filed with the Secretary of the Interior prior to the 26th day of June, A. D. 1897, and were prior to said date approved by the Secretary of the Interior; and it further finds that the said defendants have not completed its said reservoir or said ditch, or any section thereof, within five years after the location of the said reservoir and its said ditch line, or within five years after the approval of the same by the Secretary of the Interior; and the court further finds that five years since the filing and approval of the said articles of incorporation, proof or organization, maps and surveys of the said reservoir and ditch line of the defendants had long since lapsed prior to the filing of the said supplemental bill, and that the defendants had not complied with the requirements of the act of Congress approved March 3, 1901, under which the same were filed, but has failed to construct or complete within the period of five years after the location of the said canal and reservoir any part or section of the same. Whereof, it is ordered, adjudged, and decreed by the court that the rights of the said defendants, or either of them, to construct and complete the said reservoir and said ditch, or any part thereof, under and by virtue of the said act of Congress of March 3, 1901, be and the same are hereby declared to be forfeited. It is further ordered, adjudged, and decreed by the court by reason of the premises that an injunction be, and the same is hereby granted, against the said defendants, enjoining them from constructing or attempting to construct the said reservoir, or any part thereof, and that the same be made perpetual." An error having been made in the decree as to the date of the approval of the act of Congress, in that it was given as "1901," whereas it should have been 1891, an amended decree was entered nunc pro tunc inserting "1891," instead of "1901," that said decree would conform to the allegation of the supplemental complaint. The original decree, thus amended, was re-entered at length on the 5th day of October, 1903, during a regular term of said court; no appearance or action of any kind having been taken by appellants up to this time.

On the 31st day of October, 1903, a motion was filed by counsel for appellants, Messrs. Klock & Owen, to vacate and set aside the order of April 7, 1903, allowing the supplemental complaint to be filed; to open the default; to vacate and set aside the decree and amended decrees of the court, and for permis-

sion to file answer which was tendered with said motion. Long affidavits of Nathan E. Boyd and Allen Wood Ellington, stockholders of appellant corporation, were filed in support of the motion. The answer, which was also verified, raises substantially the same issues sought to be raised by the motion, and denies appellee's right to relief by way of supplemental complaint for reasons preserved in the assignments of error. On the 29th day of January, 1904, the court overruled the motion and entered the following order: "This cause coming on to be heard upon the motion of the defendants, the Rio Grande Dam & Irrigation Company and the Rio Grande Land & Irrigation Company, Limited, to vacate and set aside the order entered in this cause on the 7th day of April, A. D. 1903, at Las Cruces, Dona Ana county, New Mexico, granting to the plaintiff herein the privilege and right to file a supplemental bill of complaint in this cause, and praying leave of the court to oppose said motion for leave to file said supplemental bill of complaint and permit the defendants to have a hearing thereon, and that the order granting to the plaintiff herein the privilege and right to file said supplemental bill of complaint be vacated and set aside upon the ground that the court had no power to permit the plaintiff to file said supplemental bill of complaint, and praying that the decree entered in this cause upon the default of the defendant in answering the said supplemental bill of complaint be vacated and set aside and declared to be of no effect, and that the amended decree in this cause filed in this court on the 5th day of October, 1903, upon said plaintiff's application, be vacated and set aside and held of no effect, said decree having been granted upon defendants' default to answer said supplemental bill of complaint, and that the defendants herein, should this court determine not to relieve said defendants from that default upon said motion of plaintiff, or file said supplemental bill of complaint, be permitted to come in and answer said bill of complaint and present their issues on the merits of said supplemental bill of complaint, and to relieve the defendants from their default therein, and that the defendants have such other and further relief as to this court may seem just and equitable. And the court, having heard counsel for the plaintiff and defendants and being fully advised in the premises, doth find that the motion for leave to file said supplemental bill of complaint was served upon the attorneys of record of the said defendants, and that there was no irregularity in the filing of said supplemental bill of complaint, and that it has no power to set aside the decree entered upon said bill at this time upon said application, doth overrule said motion."

Klock & Owen, for appellants. William B. Childers, U. S. Atty.

McFIE, J. (after stating the facts). A large number of errors are assigned, but

they may fairly be grouped into four, namely: (1) The court erred in permitting the supplemental complaint to be filed. (2) The court erred in rendering decree upon default of appearance and answer within the time allowed by law. (3) The court erred in its order modifying original decree *nunc pro tunc*. (4) The court erred in overruling motion to vacate said order and decrees and to reopen said cause for the filing of an answer.

As to the first objection, it would seem to be a sufficient answer that, at the time the court granted appellee leave to file the supplemental complaint, the court was in session during a regular term. It was not a vacation order, therefore, but one made in open court. This is a matter of practice and governed by the Code of Civil Procedure. Subsection 104 of the Code, as amended by chapter 11, p. 29, Laws 1901, provides that: "Any hearing of any kind, whether interlocutory or final, unless trial by jury is necessary, may be had in any case out of regular term time upon five days' notice, in writing to the opposite party, or his attorney or solicitor, but the court or judge may, upon application, for good cause shown, extend the time of hearing. Such hearing may be had during the term of court at any time in the discretion of the court." Counsel for appellants insists that it was error for the court to allow the filing of the supplemental complaint without notice. The section above referred to provides for notice of five days for hearings in vacation, but there is no such requirement as to hearings in open court during a regular term. The record discloses that this cause had been pending in the court for almost one year, awaiting further proceedings, and Mr. Boyd in his affidavit admits Mr. A. B. Fall and Mr. W. A. Hawkins were attorneys of record for appellants at the time the supplemental complaint was filed. The record further shows that the supplemental complaint was served upon Mr. Fall on the same day it was filed, April 7, 1903. Attorneys of record are presumed to be present during terms of court wherein their causes are pending, and in contemplation of law chargeable with notice of all proceedings transpiring in open court in causes wherein they are such attorneys. There being no requirement for five days' notice, under the facts of this case, counsel are presumed to have been present and to have such notice as the law requires of matters transpiring in open court on the day on which leave was granted to file the supplemental complaint, and the same was filed and served upon them. *Yonge v. Broxson*, 23 Ala. 684; *Saunders v. Savage* (Tenn. Ch. App.) 63 S. W. 218. The court was vested with discretion by the last clause of subsection 104, *supra*, which does not seem to have been abused, nor was there any abuse of the general discretion to allow an amended or supplemental bill in equity conferred upon the courts of the United States, as may

be seen by reference to the case of *Berliner Gramophone Co. v. Seamon*, 113 Fed. 750, 51 C. C. A. 440, in which it was held that: "The granting of leave to file an amended and supplemental bill is a matter within the discretion of the court, and its action will not be reviewed in an appellate court unless there has been a gross abuse of this discretion."

The second group of errors assigned relate both to the order allowing the supplemental complaint to be filed and the rendering of the decree and amended decree thereon, and challenges the power of the court to do either, first, because the supplemental complaint sets up a cause of action irreconcilable and inconsistent with the cause of action set forth in the original and amended complaints; second, it sets up an independent cause of action which did not exist when the original and amended complaints were filed; third, because the decrees were rendered without service of summons. That the court has power to allow a supplemental complaint to be filed appears from subsections 87 and 89 of the Code, which are as follows:

"Subsec. 87. A party may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the cause, or praying for any other or different relief, order or judgment."

"Subsec. 89. In every complaint, answer or reply, amendatory or supplemental, the party shall set forth in one entire pleading all matters which, by the rules of pleading, may be set forth in such pleading, and which may be necessary to the proper determination of the action or defense."

It being understood that our Code provides for the blending of legal and equitable remedies and defenses in one action (subsection 33, Code), these sections clearly allow the allegation of such facts as will authorize the granting of other and different relief than that sought by the original complaint; the object, of course, being to end the litigation in a single action. This court had this subject under consideration in the case of *Bremen Min. & Mill. Co. v. Bremen*, 79 Pac. 806. In the case this court said: "The only limitation upon the right of amendment to be drawn from a majority of the decided cases is that an entirely new and different cause of action, founded upon facts wholly foreign to the transaction attempted to be set up in the original complaint, cannot be set up by amendment." *Ency. Pl. & Pr.*, Vol. 1, 548. In the present case, the matter set up in the supplemental complaint grows out of and is connected with the same transaction as that alleged in the original and amended complaint. The original complaint alleged that the Rio Grande was a navigable stream, and as such under the jurisdiction of the United States; that the Rio Grande Dam & Irrigation Company threatened and were about to com-

mence the construction and maintenance of numerous dams, reservoirs, canals, ditches, and pipe lines for the purpose of accumulating large quantities and possibly all of the waters of the Rio Grande into such reservoirs, canals, ditches, and pipe lines to be used in irrigating large tracts of land; that the construction of the large dam at Elephant Butte will check the flow of the waters of such stream and interfere with or destroy the navigability and commercial value thereof; alleged that the said acts were in violation of certain acts of Congress therein set forth, and prayed for injunction restraining the defendant company from proceeding with the construction of its proposed irrigation system. The amended complaint was, in the main, identical with the original, except in that it made the Rio Grande Irrigation & Land Company, Limited, also a defendant, and contained allegations to the effect that the latter company was an English corporation organized as an adjunct and agent of the former company, for the purpose of securing funds for the construction of the irrigation system, and that the Rio Grande Dam & Irrigation Company had entered into a contract to convey all of their rights in such system to the latter company. The prayer for injunction is the same, but against both corporations. An alternative writ of injunction having issued, by order of the court, on the 25th day of May, 1897, on the 25th day of June the defendant corporation filed joint and separate pleas and answer, denying the navigability of the Rio Grande, denying that the proposed action of the defendant corporation was unlawful, and alleging full compliance with the acts of Congress authorizing the construction of such irrigation system, part of which pleas and answer is as follows: "That such application, map, and survey of such dam and reservoir has a long time prior hereto and prior to the filing of the bill of complaint herein been approved by the Secretary of the Interior of the United States, and is yet so approved, and the construction of such dam and reservoir duly authorized under the provisions of an act of Congress of March 3, 1891, under which said application for such right to construct such dam and reservoir was duly made as aforesaid." On the 27th day of June, counsel for the defendant corporations filed a motion to discharge the rule to show cause and dissolve the injunction upon the pleas, answer, affidavits, and correspondence on file. This motion was fully argued and was sustained by the court. The court gave as reasons that it would take judicial notice that the Rio Grande was not a navigable stream within the territory of New Mexico, and therefore the amended complaint failed to state a case entitling the complainant to the relief sought. The court dissolved the injunction and dismissed the cause.

There was no trial upon the merits in the court below, and when the cause was heard in the Supreme Court of the United States it was held that the lower court erred in dismissing the bill for want of equity, upon the sole ground that the Rio Grande was not to be nonnavigable in New Mexico, as to the navigability of the river outside of the territory was also within the scope of the bill. Nor was the second reversal by the Supreme Court of the United States a reversal upon the merits, as the court distinctly placed it upon the ground that the United States had not been allowed sufficient time to properly prepare and present its case, and the cause was remanded for that reason. As there has never been a trial upon the merits of the original cause of action, that matter was still before the lower court upon the remanding of the cause, but the matter set up in the supplemental complaint was never before the court until after the case had been remanded for the second time. The mandate, therefore, could not refer to issues thus raised for the first time so as to prohibit their consideration. "The Circuit Court may consider and decide any matters left open by the mandate of this court, and its decision of such matters can be reviewed by a new appeal." *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414; *Hinckley v. Morton*, 103 U. S. 764, 26 L. Ed. 607; *Mason v. Pewabic Mining Co.*, 153 U. S. 361, 14 Sup. Ct. 847, 38 L. Ed. 745.

The supplemental complaint contains a detailed statement of all the proceeding had during the progress of the case and to the pleadings and specifically to the pleas filed by the appellants in which they rely upon the act of Congress of March 3, 1891, c. 561, 26 Stat. 1095 [U. S. Comp. St. 1901, p. 1535], as authority for the construction of their irrigation system. The supplemental complaint further alleges that: "Plaintiff further alleges that in and by section 20 of the said act of March 3, 1891 (26 Stat. 1102 [U. S. Comp. St. 1901, p. 1571]), above referred to, it was provided 'that if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch or reservoir, to the extent that the same is not completed at the date of forfeiture,' and that although five years since the filing and approval of said articles of incorporation, proofs of organization, maps and surveys have long since elapsed, defendant has not complied with the requirements of said act, but has failed to construct or complete within the period of five years after the location of said canal and reservoir any part of section of the same, and the same has by reasons thereof become forfeited." It is further alleged in the supplemental complaint that the temporary injunction was dissolved on the 30th day of July, 1897, and that the appellants were in "no

wise hindered, restrained, or prevented from complying with the provisions of the act by any judicial order or process whatsoever." The prayer is for forfeiture of all the rights the appellants may have or claim under said act of Congress of March 3, 1891, and for injunction and all other relief prayed for in the amended complaint. Under this state of the record, the objection that the supplemental complaint sets up a cause of action irreconcilable and inconsistent with the amended complaint is not well taken. Indeed, the prayer of the supplemental complaint is for the identical relief prayed for in the amended complaint. It is true that a forfeiture of the right of appellants to construct their irrigation system is also prayed for, but this only amounts to an additional reason why an injunction should be granted. The purpose of this entire litigation has been to restrain appellants from constructing the dams, reservoirs, canals, ditches, etc., for the diversion of the waters of the Rio Grande and the obstruction of the alleged navigable portion of said river. The supplemental complaint is entirely consistent and reconcilable with this purpose.

The next objection to the filing of the supplemental complaint and the decree rendered thereon, that it sets up an entirely independent cause of action, is equally untenable. The plea of the appellants, above referred to, relies upon the act of Congress of March 3, 1891, as the basis of all rights claimed by appellants. The forfeiture sought by the supplemental complaint is provided for in the same act. The supplemental complaint, therefore, is directly responsive to this defense, and clearly grows out of the same transaction or subject-matter of the litigation.

The third objection is that the supplemental complaint sets up a cause of action which did not exist at the time the suit was brought. This is true, but a supplemental complaint seems to be the proper method of bringing such a cause of action before the court. Such seems to be the office of a supplemental complaint. The case of *Jenkins v. International Bank*, 127 U. S. 484, 8 Sup. Ct. 1196, 32 L. Ed. 189, is a case wherein a judgment was pleaded in aid of the plaintiffs, which had been rendered after the commencement of the original suit. The court said: "Having been rendered after institution of the present suit, it was competent for the complaint to bring it forward, by a supplemental bill, as conclusive evidence of the amount due, for which it was entitled to take a decree, and as a complete answer to the defense set up by the plaintiff in error, as the assignee of the bankrupt, to the relief prayed for in the original bill, and to the relief sought by the cross-bill. It was strictly new matter arising after the filing of the bill, properly set up by way of supplemental bill, in support of the relief originally prayed for. It can in no sense be considered as a new

cause of action." In *Cedar Valley Land & Cattle Co. v. Coburn* (C. C.) 29 Fed. 587, the court said: "Now it is insisted that if anything had transpired since the filing of the original bills and cross-bills, changing and affecting the issues, such new matters should have been presented by supplemental bill. I think counsel are right and that such is the true practice." *Copen v. Flesher*, 1 Bond, 440, Fed. Cas. No. 3,211; *N. Y. Security & Tr. Co. v. Lincoln St. Ry. Co.* (C. C.) 74 Fed. 67; *Hazleton Tripod-Boiler Co. v. Citizens' St. Ry. Co.* (C. C.) 72 Fed. 325; *Maynard v. Green* (C. C.) 30 Fed. 645. In *Candler v. Pettit*, 19 Am. Dec. 399, and note, cited by appellants, it is held that a supplemental bill may be filed where the original bill states a cause of action. Tested by this rule, there was a clear right to file the supplemental complaint, as the Supreme Court of the United States in effect held when it reversed the lower court's ruling that the amended bill did not state a cause of action. The authorities above referred to are deemed sufficient to show that all of the objections to the order allowing the supplemental complaint to be filed and to the rendition of the decrees thereon must be overruled.

It is further insisted by counsel for appellants that the court had no jurisdiction of the parties or the subject-matter, and therefore no power to render a decree. As the court undoubtedly had jurisdiction both of the parties and the subject-matter of the action throughout the prior proceedings, the court did not lose either by the remanding of the cause. The filing of the supplemental complaint, under the circumstances of this case, "can in no sense be considered new cause of action." *Jenkins v. International Bank*, *supra*. It was not necessary for new process to issue and that there be service of the same. It was filed in open court and a copy was served upon one of the attorneys of record on the 7th day of April, 1903, and this was sufficient. No appearance having been entered and no answer or other pleading filed, a decree was rendered on the 21st day of May, 1903, declaring a forfeiture of all the right of the appellants to construct or complete the proposed irrigation system or any part thereof, and granting a perpetual injunction. At the next regular term of the court, there still being no appearance or pleading on behalf of the appellants, it appearing that there had been a clerical mistake made in the original decree, in that the date of the act of Congress was given as 1901, when it should have been 1891, the court ordered that the decree be modified so as to correct what was evidently a purely clerical error, as the supplemental complaint gave the date as 1891, and the decree thus modified was re-entered in full. There was no error in this action of the court, as our Code authorizes such action. Subsection 85, Code.

On the 31st day of October, 1903, Messrs.

Klock & Owen, attorneys for appellants, filed a motion to set aside and vacate the order allowing supplemental complaint to be filed and the decree rendered and that they be allowed to file an answer, which was tendered with the motion, and to make defense to the action. This motion was overruled, upon the ground that there was no irregularity in the proceedings, and that the court was not warranted in vacating the order and decree. Appellants assign error in this ruling. There being no error or irregularity in the court's order allowing the supplemental complaint to be filed, the same having been done in open court, and a copy of the same having been served upon one of the attorneys of record on the same day on which it was filed, the statute required an answer or other proper pleading to be filed within 20 days from the date of such filing, and, in the event of failure to plead or secure additional time to plead, neither of which were done in this case, it was perfectly regular for the court to render decree. *Gregory v. Pike* (C. C.) 29 Fed. 588. Appellants seek to be relieved from their own default by alleging neglect on the part of their attorneys. Mr. Boyd in his affidavit admits that Mr. Fall was, at the time, one of the attorneys of record of appellants. Mr. Boyd does not deny that a copy of the supplemental complaint was served upon Mr. Fall, nor does he state when the document was received by him. He states "that after the 7th day of April, 1903, the deponent, while at Philadelphia, Pa., received from J. H. McGowan by mail what purported to be a proposed supplemental bill of complaint in behalf of complainant." Mr. McGowan was also an attorney of the appellant. Mr. Boyd further admits that he had actual notice that the decree had been rendered October 19, 1903. More than 10 days having elapsed after this notice before this motion was filed and long after the decree was rendered, it could not be entertained under subsection 134 of the Code, which provides that a motion to set aside a judgment rendered out of term time will not be entertained unless the same is filed and a copy served upon the opposite party within 10 days after such finding or judgment was rendered. The motion, therefore, must be made under subsection 137 of the Code, which provides that: "Judgments may be set aside for irregularity, on motion filed at any time within one year after the rendition thereof." As has been pointed out, there was no irregularity in the rendition of this judgment.

Notice to an attorney of record is notice to client. 3 Am. & Eng. Ency. of Law (2d Ed.) 323. The client cannot plead negligence of his attorneys as grounds of relief. 3 Am. & Eng. Ency. of Law (2d Ed.) 324; *Putnam v. Day*, 22 Wall. 64, 22 L. Ed. 764; *Terry v. Commercial Bank*, 92 U. S. 454, 23 L. Ed. 620. There being service of a copy of the supplemental complaint upon one of the at-

torneys of record on the day on which it was filed, it was entirely regular for the court to render the decree when applied for 44 days after such service, in the absence of any appearance or pleading by the appellants. It is immaterial whether Mr. Boyd had notice or not, as he was not a party to the suit except as a director or the corporations or other officer thereof, but the appellant corporations were the parties to the suit, and they were represented by attorneys of record upon whom service was made. It is but fair to Mr. Fall to presume from Mr. Boyd's affidavit that he did forward the copy of the supplemental complaint served upon him to his co-counsel, Mr. McGowan, as soon as the same was delivered to him, as the affidavit says it was not received until after April 7, 1903; this being the same date on which the same was served upon Mr. Fall. However that may be, the court below distinctly found that no irregularity had intervened in the rendition of the decree, and overruled the motion for that reason, and we see no error in the action of the court.

From the views above expressed, it is apparent that it is not necessary to consider the answer tendered with the motion, and the filing of the same was refused for the same reason that justified the overruling of the motion. Appellant insists that they were restrained from constructing their irrigation system by the United States, and therefore no right of forfeiture existed, but the record before us shows that the injunction originally granted was dissolved July 30, 1897, and was never reinstated. The injunction granted upon the declaration of forfeiture was more than five years after the dissolution of the former injunction. This contention, therefore, does not appear to be well founded.

There being no error presented by the record in the case, the judgment of the court below will be affirmed. It is so ordered.

MILLS, C. J., and POPE, MANN, and ABOTT, JJ., concur. PARKER, J., having heard the case below, did not participate in this decision.

#### WILLIAMS v. JONES.

(Supreme Court of Arizona. March 30, 1906.)

##### 1. APPEAL—RECORD—EVIDENCE—REVIEW.

Where the appeal record disclosed that several exhibits were offered in evidence to show credits on the notes sued on, etc., and that such credits influenced the court in calculating and applying payments claimed by defendant as credits on the notes, and such exhibits were not in the record, the sufficiency of the evidence could not be reviewed.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 2910-2915.]

##### 2. SAME—RIGHT TO ALLEGE ERROR.

Where, in an action on notes, defendant's counsel expressed his willingness that the jury should be discharged if defendant was permitted to bring in the whole matter, that they had certain letters they desired to bring in for in-

spection, and the letters so referred to were presented to the court and went into the record, which disclosed that all of the credits claimed by defendant were allowed, he could not object on appeal that the court erred in discharging the jury as unnecessary.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3611, 3612.]

Appeal from District Court, Navajo County; before Justice Richard E. Sloan.

Action by Richard Jones against Anna Williams. From a judgment for plaintiff, defendant appeals. Affirmed.

J. E. Jones, for appellant. E. E. Ellenwood and F. C. Reid, for appellee.

DOAN, J. The plaintiff, appellee, brought suit in the lower court against the defendant to recover on five certain promissory notes of different dates and amounts. After the answer was filed, the plaintiff filed an amended complaint and a demand for an itemized statement of the affirmative matters pleaded in the answer. Such itemized statement mentioning the different amounts claimed as payments on the notes sued for was filed by the defendant, and at the October term, 1904, the cause was submitted to the court, and the defendant's demurrer was sustained to the first cause of action, being the first note sued on, and was overruled as to the second. A jury was impaneled to try the cause, but, after part of the evidence had been introduced, the court ruled that a jury was not necessary to pass upon the issues presented, and the jury was thereupon discharged. Thereafter the cause was tried to the court, and a judgment rendered in favor of the plaintiff for part of the amount sued for, from which judgment defendant has appealed, and has assigned as errors: "(1) That the judgment is contrary to the law and the evidence; (2) that the evidence does not sustain the judgment; (3) that the court erred in not allowing the defendant to testify as to the amount of money borrowed of plaintiff, and the amount of money she had paid him, and in not allowing her to explain as to the manner of giving the new notes, and the defendant keeping back the old notes; (4) that, upon request of defendant, a jury was impaneled, and, after a portion of the evidence was introduced, the court ruled that a jury was not necessary, and discharged the same to the defendant's injury, as there were disputed issues at trial; (5) that the court erred in refusing defendant to testify as to the manner in which plaintiff induced the defendant to execute the notes sued on, or to explain in any manner that the same covered an old indebtedness and how they were paid."

The record presented to this court contains the transcript of the oral testimony, but does not contain the exhibits referred to in the testimony, which were admitted in evidence, and on which, in part, the court based its findings and judgment. We learn

from the testimony of the plaintiff and defendant, who were the only witnesses examined in the case, that several exhibits, consisting of the five notes sued upon, and several other notes that had been given at other dates, were presented in evidence with the dates and amounts of the several payments indorsed thereon as credits at different times after the giving of the notes sued upon, and before the date of the trial, and these credits influenced the court in calculating and applying the payments claimed by defendant as credits on the notes sued upon. We have not these exhibits, and without the information they would furnish, we cannot review and pass upon the sufficiency of the evidence in the case. Not having all the evidence before us, the presumption is that the evidence presented to the lower court was sufficient to sustain the findings of the court. This will dispose of the first and second assignments of error.

The third assignment alleges that "the court erred in not allowing the defendant to testify as to the amount of money borrowed of plaintiff, and the amount of money she had paid him, and in not allowing her to explain as to the manner of giving the new notes, and the defendant keeping back the old notes." The record does not disclose any ruling of the court against the defendant on these subjects. The assignment, therefore, is not well taken.

The fourth assignment, that "the court ruled that a jury was not necessary, and discharged the same to defendant's injury," is not properly presented to us for review. A ruling of the court discharging the jury in the case, if made over the objection of the defendant, and an exception saved to the ruling, would be reviewed by this court. In this instance, the record not only fails to disclose any objection on the part of the defendant and any exception to the overruling of such objection, but affirmatively shows that the counsel for defendant consented to the discharge of the jury; his language being: "We are perfectly willing that the jury should be discharged, if we may be permitted to bring in the whole matter. We have some letters we desire to bring in for inspection." The testimony of witnesses, and the language of counsel in the presentation of such testimony, shows that the letters referred to were presented to the court and went into the record, but, like the other exhibits, have not been brought up on the appeal. The record shows that the plaintiff admitted all of the payments set up in defendant's itemized statement, except three, and the court found those three in favor of the defendant.

The fifth assignment, that "the court erred in refusing to permit the defendant to testify as to the manner in which plaintiff induced the defendant to execute the notes sued on, or to explain in any manner that the same covered an old indebtedness, and how they were paid," is not sustained by the record.

Upon an examination of the testimony presented in the bill of exceptions and the reporter's transcript, we do not find any ruling of the court excluding any testimony offered by the defendant on either of these points, but, under the character of the pleadings, the execution of the notes having been admitted in the answer, and payment alleged and no plea of fraud or want of consideration having been presented, if such testimony had been offered and excluded, the ruling of the court would have been eminently proper.

No error appearing in the record, the judgment of the lower court is affirmed.

KENT, C. J., and CAMPBELL and NAVE, JJ., concur.

(10 Ariz. 162)

**SOUTHERN PAC. CO. v. WILSON.**

(Supreme Court of Arizona. March 30, 1906.)

**1. DEATH—ACTION FOR WRONGFUL DEATH—STATUTES—CONSTRUCTION.**

Rev. St. 1901, pars. 2764-2768, giving an action for death by wrongful act, authorizing such action to be brought by the personal representative of the deceased, and providing that in such case the jury shall give such damages as they shall deem just, not exceeding \$5,000, and the amount recovered shall not be subject to the debts of deceased, and shall be distributed in accordance with the law relating to the distribution of personal estate, creates an action for the benefit of the estate of a decedent killed by wrongful act, and the damages recoverable are distributed as assets of the estate, not subject to decedent's debts, and an administrator suing for the death of his intestate need not allege or prove the existence of beneficiaries or the amount of damages suffered by them.

**2. DEPOSITIONS—SUPPRESSION—GROUNDS—SUFFICIENCY.**

The fact that the solicitor for a witness giving his deposition read to the witness the interrogatories contained in the commission does not warrant the suppression of the deposition where the answers to the interrogatories were given in the presence of the commissioner, though the witness was beneficially interested in the cause.

**3. SAME—ADMISSIBILITY IN EVIDENCE—IRREGULARITIES.**

A commissioner was authorized to take the deposition of a witness. He returned his deposition, and in the same envelope he returned the answers of a third person to the interrogatories propounded to the witness. *Held*, that the fact that the commissioner exceeded his power, and administered the interrogatories to a person not named in the commission did not render the deposition of the witness named therein inadmissible.

**4. DEATH—DAMAGES—EXCESSIVE DAMAGES.**

In an action for death, it appeared that decedent was a mining engineer, 27 years of age, sober, industrious, in good health, and earning \$100 a month. *Held*, that an award of \$5,000 as damages would not be set aside as excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 125-130.]

**5. TRIAL—INSTRUCTIONS—INSTRUCTIONS AFTER SUBMISSION OF CAUSE.**

Rev. St. 1901, par. 1410, provides that no further instructions shall be given after the argument begins. After the jury had retired they came into court and requested further instructions. The court reread the entire instructions given, and, in response to a question from a juror, stated that it could give no fur-

ther instructions. *Held*, that the refusal to give further instructions was not erroneous, especially where the complaining party objected to the giving of further instructions.

Appeal from District Court, Pima County; before Justice John H. Campbell.

Action by Thomas F. Wilson, administrator of Hugh MacKenzie, deceased, against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Action by an administrator to recover damages for the death of one Hugh MacKenzie, alleged to have been caused by the negligence of the defendant. From a judgment in favor of the plaintiff, the defendant has appealed.

Frank Cox and Alfred Franklin, for appellant. Kingan & Wright, for appellee.

KENT, C. J. The complaint in this action alleges that MacKenzie, while a passenger on a train of the defendant, met his death by reason of injuries received in a collision, and that such death was caused by the wrongful act, neglect, and default of the defendant; that at the time of his death the said MacKenzie left him surviving his father and other relatives, and that by reason of the premises the plaintiff, as administrator, has sustained damage to the estate in the sum of \$5,000. The demurrer of the defendant was overruled, and upon the trial upon the issues raised by the general denial of the defendant judgment was entered upon a verdict of the jury for the plaintiff in the sum of \$5,000. From this judgment, and an order denying a motion for a new trial, the defendant has appealed.

This action was brought, and has been maintained, upon the theory that under our statute damages for injuries resulting in death, occasioned by wrongful act, neglect, or default, are damages resulting to the estate of the decedent, and not to the beneficiaries, and that it is therefore not necessary in such case to allege and prove the existence of such beneficiaries, or to allege or prove the damages sustained by them. The correctness of this theory is the principal question presented for our determination upon this appeal. The statutes which have been adopted in the various jurisdictions in this country followed the enactment in England in 1846 of Lord Campbell's act (9 & 10 Vict. 93), entitled: "An act for compensating the families of persons killed by accidents." This act did not provide for a survival of a right of action for injuries which might have been maintained by the person injured had he not died, but it created a new action dependent upon the death of the person, when such death was caused by such wrongful act, neglect, or default, as, had death not ensued, would have entitled the party injured to maintain an action. The act further provided that the action is for the exclusive benefit of the wife, husband, parent, and child of the person whose death is caused, to be brought, however, in the name of the exec-

utor or administrator of such person; and, further, that the jury may give such damages as they may think proportioned to the injury resulting from such death, to the parties, respectively, for whom and for whose benefit such action is brought, to be divided among them in such shares as the jury may direct. The salient features of this act, therefore, are: (1) That it creates a new cause of action, and this action is for the death of the person injured; (2) that the action is for the exclusive benefit of certain designated members of the family of the deceased; (3) the damages recoverable are such as result to the beneficiaries from the death. *Tiffany, Death by Wrongful Act*, §§ 22, 23. In most of the jurisdictions in this country the first feature of Lord Campbell's act has been preserved, and the action created therein is a new action. In a few states, however, this feature of Lord Campbell's act has not been followed, but their statutes provide for a survival of the right of action which the person injured may have had during his lifetime, or would have had if he had survived the injury. About one-half of the states in this country also follow, in their statutes, Lord Campbell's act in its second feature, and provide that the action is for the benefit of certain designated persons. A number of other states, in preserving the third distinguishing feature of the act, also in effect adopt the second feature thereof, in that, although they do not directly provide that the action is for the benefit of certain designated persons, they provide that the damages to be recovered are such as shall have been sustained by certain designated persons, to whom they shall be distributed. Where the beneficiaries are named, or where the damages to be awarded are such only as the persons designated shall have sustained, the courts have universally held that there must be allegation and proof of the existence of such persons, and of the damages sustained by them. Indeed, the second and third features of the act are closely related and dependent upon each other, and where either one has been substantially preserved in the statutes the effect is the same with respect to the allegations and proof necessary to sustain the action as if both features were specifically set forth. In all such cases, as in the parent act, the action is for the benefit of certain designated persons, and the damage is the loss to them by reason of the death. Their existence and the loss to them must, therefore, necessarily be alleged and proved.

In a number of states, however, the statutes neither make mention of designated beneficiaries, nor provide that the damages recoverable are such as shall have been sustained by persons designated. In other words, they do not preserve either the second or the third features of the original act. Under such statutes the question that arises is, whether, notwithstanding the failure to preserve in terms these features, the action

is nevertheless one for the benefit of the family or next of kin, so as to require allegation and proof of their existence and the loss to them, as if they had been designated; or, in other words, whether the action is one for damages to beneficiaries or for damages to the estate. The materiality of the inquiry is evident, since it is apparent that the element of damages differs greatly in the two cases. In the one, the question is the amount of damage to the designated persons themselves by reason of the death; in the other, the amount of damages to the estate by reason thereof. As has been said: "that [the damage] to the estate is measured as nearly as can be by the value of the life lost, and that to the beneficiaries by the value of the life lost to them." *Carlson v. Oregon Short Line (Or.)* 23 Pac. 497. In the one case, allegation and proof of the existence of the beneficiaries and the loss to them is necessary; in the other, such allegation and proof is unnecessary, the proof being directed to the loss to the estate. In the states whose statutes fall within the class last referred to, the courts quite generally have adopted the view that as the action is a statutory action purely, there is no reason to read into the statute any intendment not expressed therein; that in the absence of any designated beneficiaries, or any direction as to recovery by or distribution to such persons, the action must be held to be one for the benefit of the estate, rather than to the beneficiaries; and this, too, both when the act in terms provides that the damages shall be disposed of as property belonging to the estate, or be treated as assets thereof; and also when it does not in terms so provide, and where it is provided that the damages recovered shall not be subject to the debts of the deceased. *James v. R. & D. R. Co. (Ala.)* 9 South. 336; *Perham v. Portland Electric Co.*, 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730; *Holmes v. O. & C. Ry. Co. (D. C.)* 5 Fed. 523; *B. & O. Ry. Co. v. Wightman*, 29 Grat. (Va.) 431, 26 Am. Rep. 384; *Madden's Adm'r v. C. & O. Ry. Co.*, 28 W. Va. 610, 57 Am. Rep. 695; *Warner v. R. R. Co.*, 94 N. C. 250; *Roach v. Imperial Mining Co. (C. C.)* 7 Fed. 698; *Hendrick v. Ilwaco Ry. Co. (Wash.)* 30 Pac. 714; *Andrews v. C. M. & St. P. Ry. (Iowa)* 53 N. W. 399; *Givens' Adm'r v. K. C. Ry. (Ky.)* 12 S. W. 257; *Sutherland on Damages* (3d Ed.) § 1261; 13 Cyc. 343.

The appellant contends that the Arizona statute should not be construed as one authorizing damages to the estate, but that proof of the damages to the beneficiaries must be given. In the Revised Statutes of 1887 it was provided (paragraph 2145 et seq.) that such an action might be maintained when the death of any person is caused by the wrongful act and negligence of another, if of a character such as would, if death had not ensued, have entitled the party injured to maintain an action for injury; that

such should be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of such person, and that the amount recovered therein should not be liable for the debts of the deceased; and that the action might be brought by all the parties entitled thereto, or by any one or more of them for the benefit of all, or by the executor or administrator, if not brought by the parties entitled within six months after the death of the deceased. The act further provided that the damages should be such as the jury should think proportioned to the injury resulting from the death, the amount recovered to be divided among the persons so entitled to the benefit of the action in such shares as the jury should find. The action provided for by this statute of 1887 followed Lord Campbell's act in all essential respects. Under it, it was clearly necessary to allege and prove the existence of the beneficiaries, and the amount of damages sustained by them. Prior, however, to the death of MacKenzie and the bringing of this action, the Legislature, in 1901, passed the following act repealing the statute of 1887: "Whenever the death of any person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree or manslaughter. Every such action shall be brought by and in the name of the personal representative of such deceased person; and provided, that the father, or in the case of his death or desertion of his family, the mother, may maintain the action for the death of a child; and the guardian for the death of his ward; and the amount recovered in every such action shall be distributed to the parties and in the proportions provided by law in relation to the distribution of personal estate left by persons dying intestate. In every such case the jury shall give such damages as they shall deem fair and just, not exceeding five thousand dollars, and the amount so recovered shall not be subject to any debts or liabilities of the decedent. Provided, that every such action shall be commenced within one year after the death of such deceased person. If the defendant in any such action die pending the suit, his executor or administrator may be made a party and the suit be prosecuted to judgment as though such defendant had continued alive. The judgment in such case, if rendered in favor of the plaintiff shall be paid in due course of administration." Rev. St. Ariz. 1901, pars. 2764-2766. This act, as ap-

pears from the report of the code commission, was taken from the statutes of Wyoming. The statute, however, in so far as the questions before us are concerned, has not received an interpretation by the courts of that state. As in Lord Campbell's act, the Arizona act of 1901 creates a new cause of action. Clearly it is not to be classed with the statutes which provide merely for a survival of the right of action of the deceased. In the first feature, therefore, it corresponds with Lord Campbell's act, and with the former act of 1887. The second feature of the act, however, has clearly been changed. Where Lord Campbell's act and the act of 1887 designated the persons for whose benefit the action should be maintained, the act of 1901 is silent in that regard. So, as to the third distinguishing feature, instead of providing that the damages shall be proportionate to the injury resulting from such death, to be divided among the persons entitled to the benefit of the action, the act of 1901 provides that the jury shall give such damages as they deem fair and just, and that the amount recovered in every such action shall be distributed to the parties and in the proportions provided by law in relation to the distribution of personal estate left by persons dying intestate.

We think the statute of 1901 can only be construed as creating an action for the benefit of the estate, the damages recoverable to be distributed as assets of the estate, not subject, however, to debts. The fact that the act does not in terms state that the action is for the benefit of the estate, or that the damages are such as result to the estate, or that the act provides that such damages are not to be subject to the debts of the deceased, does not authorize us, in effect, to read back into the statute a provision that the action is for the benefit of the beneficiaries, which provision the Legislature has stricken out. To do so would be to disregard its action, and what seems to us to be its evident intent and purpose in the change made by it. Such seems to have been the view of the Supreme Court of West Virginia under a similar change made in the statutes of that state. "In *Railroad Co. v. Gettle*, 3 W. Va. 376, which was an action brought under chapter 98, p. 113, Acts 1863, it was held that the declaration was fatally defective for the reason that it failed to aver that the decedent had a widow or next of kin. After that decision the statute was changed so as to provide that the amount recovered shall be distributed to the parties entitled under the law to the personal estate of the decedent; but it shall not be liable for his debts, instead of providing, as the statute then did, that the amount recovered shall be for the exclusive benefit of the widow and next of kin of the decedent. Since this modification of the statute, it has not been regarded as essential that the declaration should aver that the decedent had a widow or next of kin, or to mention his dis-

tributees by name, or otherwise, and I think such is the proper interpretation of the statute." *Searle's Adm'r v. Kanawha* (W. Va.) 9 S. E. 249. The theory on which allegation and proof of the existence of beneficiaries, and the damages sustained by them must be made, is that, as the statute names such persons as beneficiaries, and provides for their compensation, it follows that there must be proof to sustain the requirements of the statute. But where the statute is silent as to such persons, the reason for such allegation and proof no longer exists, since, as no persons are named as beneficiaries, the statute does not create a cause of action in favor of any designated persons, and as no persons are designated it follows that the damages to be recovered are not such as have been sustained by any particular persons, but are such as have been caused to the estate by reason of the death, to be distributed as provided by law to the persons entitled by law to such estate. This construction is in accord with that generally given to the statutes in the several jurisdictions which resemble our own, as shown in the cases already cited, and seems to us to correctly interpret both the language of the act and the intent of the Legislature. We think, therefore, that it was not incumbent upon the plaintiff in this action to allege or prove the existence of beneficiaries, or the amount of damages suffered by them.

A commission was issued to Australia in this case, to take the deposition of Hugh G. MacKenzie, the father of the deceased, upon interrogatories attached to the commission. The commissioner made due return of the commission according to law, with the answers of the witness thereto attached. The certificates of the commissioner, however, was as follows: "I, William Henry Cubley, do hereby certify that the foregoing answers of Hugh Gallie MacKenzie, the witness before named, were made in answer to Mr. Joseph Woolf, solicitor for Hugh Gallie MacKenzie, before me, and were sworn to and subscribed before me by the said witness." The appellant contends that the trial court erred in receiving the deposition in evidence, since it appears from such certificate that the solicitor of the person beneficially interested in the case was present at the taking thereof, and that the answers of the witness were, as appears from such certificate, made in answer to such solicitor. An examination of the original commission shows clearly that the answers made by the witness were not answers to independent questions propounded by such solicitor, but were answers to questions attached to the commission. It would appear from the certificate of the commissioner that such questions were propounded by this solicitor; but the certificate shows that it was done in the presence of the commissioner, and that the answers were sworn to and subscribed by the witness before the commissioner. We have no statute or rule of court that pro-

hibits the presence of counsel at the taking of such a deposition. We do not think a court should suppress a deposition because of the presence of counsel at the taking thereof, however undesirable or improper it may be for counsel to attend thereat, in the absence of some showing that the witness was influenced in some way thereby, with regard to the answers given by him. In the case before us the solicitor present was the solicitor of the witness, and the fact that he read off to the witness the interrogatories contained in the commission, the answers thereto being given in the presence of the commissioner, does not warrant us in assuming that the witness was led thereby to answer the interrogatories untruthfully. *Nutter v. Ricketts*, 6 Iowa, 92; *Farrow v. Commonwealth*, 18 Pick. (Mass.) 53, 29 Am. Dec. 564; *Commercial Bank v. Union*, 11 N. Y. 203; *New Jersey v. Nichols*, 32 N. J. Law, 166.

It was further objected that the commissioner authorized to take the deposition of H. G. MacKenzie also returned in the same envelope containing such commission answers of one Adams to the same interrogatories propounded to MacKenzie; Adams not being a witness named in the commission. The commissioner had no authority or power, whatever, to administer these interrogatories to the witness Adams; but inasmuch as no attempt was made by the plaintiff to introduce the answers of the witness Adams upon the trial, no harm resulted to the defendant from the action of the commissioner in that regard, and no error can be predicated to the trial court in that respect. The jury found a verdict for the plaintiff for \$5,000. The appellant claims that this verdict should be set aside, as being excessive and evidently awarded by the jury under influence of passion and prejudice. As we have seen, under our view of the Arizona statute, the damages to be awarded are not damages to the beneficiaries, but to the estate. This question was clearly left to the jury upon the charge of the court, which correctly set forth the law in regard thereto. The evidence shows that the deceased was a mining engineer, a man 27 years old, sober, industrious, and in good health, and that he was earning \$100 a month. The statute provides that the jury shall give such damages as they deem fair and just, not exceeding \$5,000. Where there are no fixed rules to ascertain the amount of damages, the amount must be left to the sound sense and good judgment of the jury, upon all the circumstances of the case; and such verdict should not be set aside, unless it appears that the jury acted under some bias or prejudice, or other improper influence. *Sutherland on Damages* (3d Ed.) §§ 1256, 1277; *Kansas v. Cutter*, 19 Kan. 83; *Railroad v. Spence*, 93 Tenn. 173, 23 S. W. 211, 42 Am. St. Rep. 907; *McDermott v. Iowa Falls Ry. Co.* (Iowa) 47 N. W. 1037; *Rose v. Des Moines Valley Ry. Co.*, 39 Iowa, 246. Upon the evidence before us, we cannot say that the verdict of

the jury as to the amount of damages sustained by the estate was excessive, or that the verdict was brought about by passion or prejudice; and we are, therefore, not justified in disturbing it. We have examined the instructions of the court complained of by the appellant, but we find no reversible error in that regard. After the jury had retired to consider their verdict, they came into court and requested further instructions of the court. The court re-read to the jury the entire instructions given to the jury by the court. In response to a question from a juror, the court stated that it could give the jury no further instructions. The appellant now claims that the court erred in not instructing the jury at the request of such juror. Our statute provides: "No further instructions shall be given to the jury after the argument begins." Paragraph 1410, Rev. St. 1901. The court, therefore, was simply following the statute in its refusal to give further instructions; furthermore, it appears by the record that the counsel for appellant at the time objected to any further instructions being given to the jury. The remaining assignments of error are disposed of by the views we have expressed in regard to the nature of the action, under our statute.

We find no error in the record, and the judgment of the district court is affirmed.

SLOAN and NAVE, JJ., concur.

LEATHERWOOD et al. v. HILL, Auditor.  
(Supreme Court of Arizona. March 30, 1906.)

1. STATUTES—REPEAL—RE-ENACTMENT.

Acts 1897, p. 93, No. 53, entitled "An act in relation to the Arizona Pioneers Historical Society," which was repealed by the Twenty-First Legislative Assembly, was not re-enacted by Acts 1905, p. 151, No. 69, subd. 34, providing, among other things, that a certain sum be appropriated to be disbursed by the board of directors of the Arizona Pioneers Historical Society to enable it to carry on its work and duties for the years 1905 and 1906, in the manner provided for and set forth in said Act No. 53, as the fact that the Legislature, in the belief that a corporation exists, makes an appropriation therefor and provides how it shall be disbursed, does not serve to revive a corporation, if the same has in fact ceased to exist.

2. SAME—SPECIAL LAWS.

Under Act July 30, 1886, 1 Supp. Rev. St. T. S. 1874-1891, p. 503, c. 818, commonly known as the "Harrison Act," providing that the Legislature of territories shall not pass local or special laws granting to any corporation, etc., any special or exclusive privilege, immunity, or franchise, and that in all other cases where a general law can be made applicable no special law shall be enacted, Acts 1897, p. 93, No. 53, entitled "An act in relation to the Arizona Pioneers Historical Society," making such society the trustee of the territory for the expenditure of money received from the territory for the uses and purposes directed by law, and conferring certain powers and privileges on it, if construed as an act reincorporating such society, which was originally incorporated under the general laws of the territory as the "Society of Arizona Pioneers," was a special law in a case where the general incorporation laws were

applicable, and was an act granting to a corporation a special franchise, and obnoxious to such Harrison act, in so far as it attempted to confer additional powers and duties on the society.

3. SAME.

Acts 1897, p. 93, No. 53, entitled "An act in relation to the Arizona Pioneers Historical Society," does not purport to reincorporate such society, but to change the name of a society incorporated in 1884 under the general laws of the territory as the "Society of Arizona Pioneers," and to add to its powers and duties.

4. MANDAMUS — APPLICATION — PLEADING — CONSTRUCTION—INTENDMENT.

Every intendment is against the petitioner in an application for a writ of mandamus.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 296-298, 313.]

5. SAME—SUFFICIENCY.

An application by a corporation for a writ of mandamus compelling the territorial Auditor to issue his warrant for the express purpose of paying such corporation a legislative appropriation, and setting forth an act of the Legislature making such corporation trustee for the money and empowering it to dispense the same, which act as to such powers was invalid, and not setting forth the powers conferred on the corporation by its articles, was demurrable for failure to show qualification to administer the trust sought to be imposed.

Original application by R. N. Leatherwood and others, directors of the Arizona Pioneers Historical Society, and another, against Wesley A. Hill, Auditor, for a writ of mandamus. Demurrer to application sustained.

Kingan & Wright, for petitioners. E. S. Clark, Atty. Gen., for respondent.

NAVE, J. This is an original proceeding before this court. The Arizona Pioneers Historical Society and its board of directors seek a writ of mandamus to compel the Auditor of the territory to issue his warrant to the plaintiffs for the purpose of paying to them an appropriation made by the last legislative assembly. The petitioners aver, in substance:

(1) That the Arizona Pioneers Historical Society is a corporation duly organized and existing under the laws of this territory; that the other petitioners are the board of directors thereof; that the defendant is the Territorial Auditor.

(2) That on March 18, 1897, was enacted Act 53 of the Nineteenth Legislative Assembly of this territory, which act (Acts 1897, p. 93, No. 53), in the language of the application, "is entitled 'An act in relation to the Arizona Pioneers Historical Society,' and which act had direct reference to the plaintiff herein and in words and figures is as follows," whereupon the act is set out in full. This act provides as follows:

"Section 1. That the Society of Arizona Pioneers, organized February 9, 1884, under the incorporation laws of the territory, shall continue to be recognized as worthy of the fostering care of the territory, and from and after the passage of this act shall be known and designated as the 'Arizona Pioneers Historical Society.' Said society shall

be the trustee of the territory, and as such shall faithfully expend and apply all money received from the territory to the uses and purposes directed by law, and shall hold all its present and future collections and property for the territory, and shall not sell, mortgage, transfer or dispose of in any manner, any part of the same, without authority of law; provided, that this shall not prevent the sale or exchange of any duplicates that the society may have or obtain. There shall continue to be a board of directors of said society, to consist of as many members as the society shall determine, and who shall have the same powers as the present board of directors.

"Sec. 2. It shall be the duty of the society to collect books, maps and other papers and materials illustrative of the history of Arizona in particular and of the west generally; to procure from the early pioneers narratives of events relative to the early settlement of Arizona and to the early explorations, Indian occupancy and overland travel in the territory and the West; to procure facts and statements relative to the history and conduct of our Indian tribes, and to gather all information calculated to exhibit faithfully the antiquities and the past and present condition, resources and progress of the territory, to purchase books, to supply deficiencies in the various departments of its collections, and to procure by gift and exchange such scientific and historical reports of the Legislatures of other states and territories, of railroads, reports of geological and other scientific surveys, and such other books, maps, charts and materials as will facilitate the investigation of historical, scientific, social, educational and literary subjects, to cause the same to be properly bound; to catalogue the collections of said society for the more convenient reference of all persons who may have occasion to consult the same; to biennially prepare for publication a report of its collections and such other matters relating to its transactions as may be useful to the public, and to keep its collections, arranged in suitable and convenient rooms, to be provided and furnished by the secretary of the society, as the board of directors shall determine; the rooms of the society to be open at all reasonable hours on business days for the reception of the citizens of the territory who may wish to visit the same without fee. Provided, that no expenditures shall be made under this act, or expense incurred except in pursuance of specific appropriations therefor, and no officer of said society shall pledge the credit of the territory in excess of such appropriations.

"Sec. 3. The board of directors shall keep a correct account of the expenditures of all money which may be appropriated in aid of the society, and report biennially to the Governor a detailed statement of such expenditures. To enable the society to augment its

collections by effecting exchanges with other societies and institutions, sixty bound copies each of the several publications of the territory and of its societies and institutions, except the reports of the Supreme Court shall be and are hereby donated to said society as they shall be issued, the same to be delivered to the society by the Secretary of the territory, or other officer having custody of the same; to include also for deposit in its collections one set of all the publications of the territory heretofore and hereafter issued, not excepting the Supreme Court reports. All bound and unbound volumes of newspapers now on file in the territorial library shall become the property of the Arizona Pioneers Historical Society upon the passage of this act, and shall be delivered upon the demand therefor, by and to the said society, by the Secretary of the territory."

Sections 4 and 5 thereof appropriated \$3,000 to be disbursed by the board of directors of the society.

(3) That the corporation and its officers and directors performed the duties imposed upon it by this act, and received the appropriation provided in it.

(4) That in the year 1901 the act above described was repealed by the Twenty-First Legislative Assembly.

(5) That the Twenty-First Legislative Assembly, in 1901, and the Twenty-Second, in 1903, and the Twenty-Third, in 1905, each made appropriations in substantially similar forms for this society; that the appropriation by the Twenty-Third Legislative Assembly reads as follows (Acts 1905, p. 151, No. 60, subd. 34): "That the sum of fifteen hundred dollars be and is hereby appropriated to be disbursed by the board of directors of the Arizona Pioneers Historical Society to enable it to carry on its work and duties for the years 1905 and 1906 in the manner provided for and set forth in sections 1, 2, 3, and 4 of Act No. 53 of the Nineteenth Legislative Assembly incorporating said society and making it the trustee for the territory."

(6) That the petitioners have demanded the allowance of this appropriation by the Territorial Auditor, and that he refuses to allow it.

(7) That the petitioners have at all times and in detail complied with all the requirements of law placed upon it by the various acts of the legislative assemblies referred to.

To the application the Territorial Auditor has interposed a general demurrer.

Petitioners contend that the several acts of appropriation have had the effect of a re-enactment of Act No. 53 of the Nineteenth Legislative Assembly. They seek to apply to this case the general principle laid down by Mr. Sutherland in his work on Statutory Construction, par. 257, as follows: "Where a statute is incorporated in another the effect in the same as if the provisions of the former were re-enacted in the latter for all

purposes of the latter statute." Neither this statement nor any statement of the law to be deduced from the cases cited to us by the petitioners, is broad enough to support the proposition that where a statute specially incorporating a society has been repealed, it is re-enacted by an act making an appropriation for the benefit of such society. Assuming that such an appropriation as this may lawfully be made, and that the recipient pointed out by the act exists, it might forcefully be urged that the provision that the society disburse the money "to enable it to carry on its work and duties in the manner provided for and set forth in Act No. 53 of the Nineteenth Legislative Assembly" serves to re-enact that act to the extent of fixing the manner of disbursement and defining the purpose of the appropriation; but certainly it can operate no further. The fact that the Legislature, in the belief that a corporation exists, makes an appropriation for it and provides how the appropriation shall be disbursed, cannot serve to revive the corporation if in fact it has ceased to exist. Furthermore, the act of Congress of July 30, 1886 (1 Supp. Rev. St. U. S. 1874-1891, p. 503, c. 818), familiarly known as the "Harrison Act," provides as follows: "That the Legislatures of the territories of the United States \* \* \* shall not pass local or special laws in any of the following enumerated cases, that is, to say: \* \* \* Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted in any of the territories of the United States by the territorial Legislatures thereof." If Act 53 of the Nineteenth Legislative Assembly is to be construed as an act reincorporating this society, it was a special law in a case where the general incorporation laws are applicable; and moreover was an act granting to a corporation a special franchise. Manifestly, it was obnoxious to the Harrison act, in so far as it attempted to confer additional powers and duties upon the society; therefore, the act was, at least in part, void.

Petitioners and respondent, in presenting their views, have proceeded upon the theory that the society was reincorporated by Act 53 of the Nineteenth Legislative Assembly and survives or falls with that act. The several subsequent appropriation acts set forth in the application refer to this act as an act "incorporating such society and making it the trustee of the territory." It is to be observed, however, that Act 53 does not purport to reincorporate this society, but purports to change the name of a society incorporated in 1884 under the general laws of the territory of Arizona as the society of Arizona Pioneers, and to add to its powers and duties. It may well merit determination whether the Society of Arizona Pioneers may not lawfully receive the appropriation made

by the Twenty-Third Legislative Assembly, and withheld by the Territorial Auditor; but we are precluded from directing our inquiry to this point, by reason of the failure of the petitioners to set forth facts sufficient for its determination. No showing, whatever, is made of the powers conferred upon the society by its articles of incorporation. As pointed out, Act 53, supra, in so far as it attempts to confer additional powers upon that society, is invalid. Therefore, the only powers possessed by it are those conferred by its articles. If it does not possess under them such general powers as would enable it to accept and perform the trust imposed, in accordance with its terms, its acts in attempting to do so would be ultra vires. It seems to us, for example, quite manifest that a corporation organized solely to conduct a manufacturing business cannot be made the instrument of the Legislature to disburse public funds. Inasmuch as every intentment must be against the petitioners in this case, we cannot assume that the society is qualified to administer the trust sought to be imposed. In view of this defect in the complaint, it is unnecessary to determine whether, in any event, a private corporation can be made the agent of the public in the disbursement and administration of an appropriation from the public funds.

The demurrer to the application is sustained.

KENT, C. J., and SLOAN, DOAN, and CAMPBELL, JJ., concur.

#### LANNING v. GAY.

(Supreme Court of Kansas. July Term, 1904.)

WILLS—PROBATE—RIGHT TO CONTEST EXECUTION OF WILL—ESTOPPEL.

A legatee accepting a legacy under a will with knowledge of the circumstances surrounding its attestation, cannot afterwards, on tendering back what he has received, attack the sufficiency of its execution.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 556, 557.]

On petition for rehearing. Denied.

For former opinion, see 78 Pac. 810.

PER CURIAM. Counsel for plaintiff in error, in their petition for rehearing, assert that the only question involved in the proceeding in error was whether plaintiff below was estopped, by accepting a legacy, from contesting the will. They say that the question whether the will was void by reason of the husband's being a witness was not before this court. In the brief of counsel for plaintiff in error there are 10 printed pages devoted to the question of the competency of Frank V. Gay as an attesting witness to the will, with many authorities cited. Again, counsel for plaintiff in error in their reply brief took up the question of the disqualification of the husband and wife to

testify for or against each other, and cited authorities. The question was argued orally by both parties, and the court considered it as properly involved.

We have gone over the record again, and think that the second conclusion of law—that Lanning was estopped, by accepting a legacy, from raising the question of insufficiency of the attestation and probate of the will—is sustained by the evidence. The law would not permit a legatee, with the knowledge possessed by Lanning of the circumstances surrounding the attestation of the will, to accept a legacy under it and afterwards attack its sufficiency, after tendering back what he had received.

The petition for rehearing is denied.

#### SMYSER et al. v. FAIR.

(Supreme Court of Kansas. March 10, 1906.)

##### 1. CONTRACTS—CONSTRUCTION.

The law will not imply a relation between parties contrary to their agreement covering the subject.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 730.]

##### 2. NOTICE—WAIVER—EFFECT.

A party cannot be heard to say that a notice which he expressly waived was not given.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Notice, § 15.]

##### 3. TRIAL—GENERAL VERDICT.

Where a party desires a general verdict as well as special findings, he must ask for it before the jury to which he submitted his case is discharged.

Error from District Court, Reno County; W. H. Lewis, Judge.

Action by D. J. Fair against W. C. Smyser and another. From a judgment in favor of plaintiff, defendants bring error. Affirmed.

Geo. A. Vandever and F. L. Martin, for plaintiffs in error. Prigg & Williams, for defendant in error.

**PER CURIAM.** In addition to the advisory findings of the jury the court made findings of its own which bring to the support of the judgment all the facts and all the inferences of fact derivable from the evidence most favorable to the plaintiff, even although opposed by strong evidence to the contrary. The findings of the jury themselves entirely preclude the notion that the attempted return of the windows can be tacked to the tender of the \$250 so as to make a legal tender of payment of the balance due the plaintiff. The transaction amounted to no more than a belated attempt to return damaged property to a vendor on the ground that it did not comply with the contract of sale. The record contains ample evidence to support Fair's position that he was under no legal duty to receive and give credit for the windows when Smith brought them back, and Smyser is clearly chargeable with them if he is the principal debtor. The evidence and findings

are that Smyser was not a surety at all but that he agreed to pay for the material for his house himself. The law will not imply a relation between parties contrary to their agreement covering the subject. First Nat. Bank of Concordia v. McIntosh & Peters (opinion filed Jan., 1906) 84 Pac 535. The case is quite like that of Carney Bros. v. Cook, 80 Iowa, 747, 45 N. W. 919, and bears no resemblance to Fisher v. Stockebrand, 26 Kan. 545. Smyser cannot be heard to say that a notice was not given which he expressly waived, and if he desired a general verdict he should have asked for it before the jury to which he submitted his case was discharged.

The judgment of the district court is affirmed.

#### MISSOURI PAC. RY. CO. v. PERU-VAN ZANDT IMPLEMENT CO.

(Supreme Court of Kansas. March 10, 1906.)

##### 1. CARRIERS—DELAY IN SHIPMENT—ACTION BY CONSIGNEE.

When property has been consigned by the general owner to an agent, who has a special interest therein as factor, or commission agent, and the goods so consigned are negligently delayed in transit and converted by the carrier, so that sales thereof previously made by the consignee are canceled and lost, such consignee may maintain an action in its own name against the carrier for the recovery of damages on account of such lost commission, and also for the value of the property converted.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 266-269.]

##### 2. SAME—PAYMENT OF FREIGHT—CONVERSION.

When a common carrier negligently delays the delivery of goods, so that the damages occasioned by such delay exceed the amount of freight due for the transportation of such goods, the consignee may rightfully demand the delivery of the goods without payment of freight, and a refusal by the carrier to surrender possession upon such demand is wrongful and amounts to a conversion.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 435, 858, 876.]

##### 3. SAME—DELAY IN DELIVERY—NOTICE OF EFFECT.

Common carriers are supposed to take notice of such natural events as are familiar to ordinary people. They will be held to a knowledge of seed time and harvest and the general customs relating thereto in the territory where they do business. A common carrier, that on June 12, 1903, received at the factory in Port Huron, Mich., threshing machines, consigned to an implement dealer of Hutchinson, Kan., to be delivered at Larned, Kan., with stopover, to partly unload at Seward, Kan., will be deemed to have notice that such machines are for immediate sale, if not already sold, and that a delay of delivery until the entire threshing season has passed will defeat the purpose of shipment.

##### 4. SAME—MEASURE OF DAMAGES.

An action was brought against a common carrier by the consignee of threshing machines. On the trial it appeared that the plaintiff had sold the machines as agent for the consignor, and was entitled to receive out of the proceeds of the sale a commission of 40 per cent. of the price for which the sale was made. It also appeared that the carrier negligently delayed the delivery of the goods until the sales were for that reason canceled, and the commis-

sion thereby lost. It further appeared that the carrier converted the machinery to its own use. An action was brought to recover for the loss of commission and the value of the property converted. *Held*, that the price for which the sale had been made was the proper measure of damages in such action.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 451.]

(Syllabus by the Court.)

Error from District Court, Reno County; P. J. Galle, Judge.

Action by the Peru-Van Zandt Implement Company against the Missouri Pacific Railway Company. Judgment for plaintiff. Defendant brings error. *Affirmed*.

The Port Huron Engine & Thresher Company, of Port Huron, Mich., manufactures threshing machines and sells them throughout the country through local agents. The plaintiff, defendant in error, is its agent at Hutchinson, Kan. By the contract of agency, it is the duty of the Peru-Van Zandt Implement Company, to advertise, introduce, and sell the machines to those desiring to purchase, and, when a sale is made, an order is taken from the purchaser, in writing, directing the Port Huron Company to ship the machinery desired, stating price, manner of payment, and other particulars constituting the conditions of sale, which order is signed by the purchaser and delivered to the local agent. This order is forwarded to the Port Huron Company by the agent making the sale. Upon this order the machinery is shipped by the designated route, consigned to the local agent. It is the duty of the agent to receive the machinery and hold possession thereof until payment is made or secured as stipulated in the order of the buyer. In completing the sale the agent takes in payment cash, notes, mortgages, or other security as directed, but delivers the machinery only after the sale has been approved by the Port Huron Company. Until such approval and delivery, the title to the machinery does not pass from the seller. The Peru-Van Zandt Company receives for its services in making such sales a commission of 40 per cent. of the selling price. If any machinery is taken back, or returned, the local agent takes charge thereof and may resell it, and receive a commission therefor. The local agent pays all expenses incident to the sales made. The buyer pays the freight, in addition to the price stipulated for the machinery. Where payment is made by the purchaser with notes, collection is made by the agents, and out of the proceeds, the commission is deducted. The commission always comes out of the proceeds of each sale when collected. The Peru-Van Zandt Company, under this employment, sold two machines for the aggregate sum of \$920, and took from the purchasers written orders therefor, which were duly forwarded to the Port Huron Company. Upon receipt of the orders, the machines were shipped over the road of the plaintiff in error, consigned to the Peru-Van Zandt Implement

Company, at Larned, Kan., with stopover to partly unload at Seward, Kan., being the points where the purchasers lived. The bill of lading contained nothing to indicate the relation existing between the consignor, the Port Huron Company, and the consignee, whether that of vendor and vendee, or principal and agent. The machines were shipped June 12, 1903, and in ordinary course would have arrived at destination within 10 days, but on account of negligent delays they did not arrive until some time in the month of August, long after the threshing season had closed and the sale contracts had, for that reason, been canceled. By the contract of shipment, the freight was payable before delivery of machinery to consignee. The consignee declined to pay the freight, claiming that the damages suffered on account of delay far exceeded the amount of the freight bill. The carrier refused to deliver the goods until the freight was paid. Thereupon the defendant in error demanded that the machinery be delivered to it without payment of freight, and, upon refusal, commenced this suit. The demand was made in the name of the Port Huron Company, by the Peru-Van Zandt Company as agent. The petition alleges that the plaintiff is the agent and factor of the Port Huron Company, and avers the facts constituting their relationship, substantially as hereinbefore set forth. In the first cause of action the plaintiff asks judgment for the amount of commission lost by it, and in the second cause of action it demanded judgment for the value of the machines. The carrier retained, and still keeps, possession of the machines. The plaintiff recovered judgment for the price for which the machines were sold. Plaintiff in error brings the case here for review.

Prigg & Williams, J. H. Richards, and C. E. Benton, for plaintiff in error. Geo. A. Vandever and F. L. Martin, for defendant in error.

GRAVES, J. (after stating the facts). Many assignments of error have been presented, but they are substantially covered by three: (1) It is insisted that the plaintiff has no interest in the machinery in controversy, and, therefore, cannot maintain an action for its conversion; (2) that the proper measure of damages in case of a recovery is the difference between the market value of the machinery at the time and place of delivery, and the market value thereof when it in fact arrived at such place; (3) that damages for loss of commission cannot be recovered, because a sale of the property was not within the contemplation of the parties when shipment was made.

Concerning the first proposition, there is considerable confusion among the authorities as to whether the consignee or consignor is the proper party plaintiff in an action against a carrier, but the rule that a suit for the conversion of goods must be brought by the owner,

or one having a beneficial interest in the property converted, seems to be fairly well established. *Hutchinson on Carriers*, §§ 731-734; 6 *Cyc.* 510; *Woods' Brown on Carriers*, § 599. The consignee is always presumed to possess the necessary ownership, until the contrary is shown. *Ray on Carriers of Freight*, p. 1006; *Griffiths v. Ingledew*, 6 *Serg. & R. (Pa.)* 420, 9 *Am. Dec.* 444; *Smith v. Lewis*, 3 *B. Mon. (Ky.)* 229; *Arbuckle v. Thompson*, 37 *Pa. S.* 170; *Pennsylvania Co. v. Poor*, 103 *Ind.* 553, 3 *N. E.* 253. The ownership need not be extensive. An agent, factor, broker, bailee or other person having rights in the property to be protected, may maintain an action, and recover both for himself and the general owner. *Chamberlain v. West*, 37 *Minn.* 54, 33 *N. W.* 114; *Harrington v. King*, 121 *Mass.* 269; *Finn v. Railroad*, 112 *Mass.* 524, 17 *Am. Rep.* 128; *Green v. Clarke*, 12 *N. Y.* 343; *Railroad v. Mower*, 76 *Me.* 251.

We think the plaintiff in this case had sufficient interest in the property to enable it to maintain this action. In *Railroad v. Mower*, *supra*, a case very similar to this, the court said: "Ordinarily, when a plaintiff sustains his action, it is presumed that the whole amount of damages recovered will belong to him. In fact, the injury to him or to his property is the measure of the damages. But, while this is the general rule, there are exceptions, not to the extent or measure of damages, but to the interest the plaintiff may have in them. It is true that an action cannot be maintained unless the plaintiff has an interest in the subject-matter of the suit, but he may do so when he is not interested to the full extent of the damages to be recovered. Such are the familiar cases of injury to property in which there is a general and special owner, as bailor and bailee, consignor and consignee, principal and factor. In such cases the action may not be brought in the names of the two jointly, but may in the name of either. In the action now in question the subject-matter was mowing machines, and parts of mowing machines. The damage claimed rests upon a neglect of the carrier by which the property was improperly delayed in its transit. The facts show that the title to the property was in the mower company; that it had consigned and forwarded the machines to Dunham by virtue of a contract under which Dunham was to sell them for a specified commission and account to the company for them at a specified price. Dunham was also to pay the freight. This contract, while it did not change the title in the machines and pieces, gave Dunham such a special property in them as to enable him to maintain the action in his own name, and the consignment and forwarding the property, thus setting it apart and putting it into the hands of the carrier for his benefit, gave him a constructive possession sufficient for that purpose; and as the injury was the result of a single wrongful act to the whole property the damage could not be ap-

portioned but must all be recovered in that one action, the judgment in which would be conclusive against any suit by the general owner. Hence, Dunham, in his suit, is entitled to recover, not only his own damages, but such as have accrued to the mower company as general owners. The measure of damages as held by the court in that case can be applicable upon no other theory. If then Dunham should receive the whole damage recoverable in his suit he would be entitled to retain his own share, and the balance he would hold as trustee for the mower company." In the case of *Express Co. v. Armstead*, 50 *Ala.* 352, it is said: "The consignee of goods has a right to sue for their loss by the carrier, notwithstanding another party may be the owner of them. The obligation is to deliver to him. Generally the property vests in him by the mere delivery to the carrier. Although the absolute or general owner of personal property may support an action for any injury thereto, if he have the right of immediate possession, this does not necessarily divest the right of the consignee to sue, notwithstanding he has never had the actual possession."

A judgment in favor of the plaintiff can work no harm, as it is a bar to an action for the same injury by the Port Huron Company. *White v. Bascome*, 28 *Vt.* 268; *Green v. Clarke*, *supra*; *Harker v. Dement*, 9 *Gill (Md.)* 7, 52 *Am. Dec.* 670; *Little v. Fossett*, 34 *Me.* 545, 56 *Am. Dec.* 671. The plaintiff holds in trust for the Port Huron Company, whatever remains of the amount recovered, after payment of its commission. *Chamberlain v. West*, *Finn v. Railroad*, *White v. Bascome*, and *Little v. Fossett*, *supra*. A consignee has a right to withhold freight bill when its damages exceed that amount, and in such a case the refusal of the carrier to deliver the goods until the freight is paid amounts to a conversion. 5 *A. & Eng. Enc. of Law (2d Ed.)* 232; *Miami Powder Co. v. Port Royal, etc.*, (S. C.) 16 *S. E.* 339, 21 *L. R. A.* 123; 6 *Cyc.* 497; *Railroad v. Goodholm*, 61 *Kan.* 758, 60 *Pac.* 1006. The measure of damages is compensation for the injury sustained. An amount which will place the injured party in the same condition he would have occupied, if no loss had occurred, will satisfy this requirement. If in this case the machinery had been delivered according to contract, the price for which it had been sold would have been realized. Out of this amount the commission due the plaintiff would have been deducted. The freight would have been paid by the purchasers of the machinery. The selling price at place of delivery seems, therefore, to be the true measure of damages. We think the amount recovered in the district court fairly compensates all parties for the losses sustained. Out of this amount the plaintiff will retain a sum equal to the commission lost, and must account to the Port Huron Company for the remainder.

Finally, it is insisted, that a sale of the

machinery was not within the contemplation of the parties at the time of shipment, and therefore commission is not a proper element of damages. A railroad company must be held to know facts familiar to ordinary people. It is fair to assume that a carrier of threshing machines knows what they are used for and that the only purpose implement dealers have for shipping such property into the heart of a great wheat country is to sell it. When a shipment of threshing machines is made in June of any year, the inference follows that, if they are not already sold, an immediate sale is intended. We think, therefore, that the loss of commission is not so remote as to be excluded as an element of damage in this case. The general rule that damages caused by the loss of a sale, not within the contemplation of the parties, cannot be received, has no application to the facts here shown.

No error appearing, the judgment of the district court is affirmed. All the Justices concurring.

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BARNETT v. SCHAD, Sheriff.

(Supreme Court of Kansas, April 7, 1906.)

ACTION—COMMENCEMENT—INJUNCTION.

Where the statutes authorize the clerk of a district court to do a certain act and authorize the judge of the same court to do another act and the authority of each to act is dependent upon the previous action of the other, either may act first and the two acts will be regarded in law as done at the same time, provided the act of the other follows within such reasonable time as, under the particular circumstances of the case, the difference in time may be regarded as inconsiderable.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by Alice E. Barnett against Henry Schad, sheriff of Sedgwick county, Kan. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

This action was brought by plaintiff in error to enjoin the defendant as sheriff of Sedgwick county from selling land, which she alleged was her property, on an execution issued against another person. At the commencement of the action a temporary injunction was allowed by the judge of the district court. Afterward the court, on motion of the defendant, issued an order dissolving such temporary injunction, and the plaintiff brings the case here for review upon such order of dissolution.

Hohnes & Yankey, for plaintiff in error.  
I. P. Campbell & Son, for defendant in error.

SMITH, J. (after stating the facts). Six grounds were set forth in the motion to dissolve the temporary injunction; the first, second, third, and sixth of which relate to the failure to issue a formal order, addressed to the defendant, and under the

seal of the court. The temporary order was allowed at the time of commencing the action, and "Injunction allowed" was indorsed on the summons which was issued and served. Section 4690, Gen. St. 1901. But, it is urged in defendant's brief, the words "Injunction allowed" were not indorsed by the clerk, but were written on the summons by plaintiff's attorney. In the absence of any evidence on the subject, it must be presumed the indorsement was made by the clerk. A forgery will not be presumed. It follows that these grounds for dissolution should have been overruled.

The fourth and fifth grounds of the motion were really one, and it was that the verified petition was not filed with the clerk before it was presented to the judge for the allowance of the order. The principal controversy on the hearing seems to have been whether the order was made by the judge immediately before the filing of the petition or immediately thereafter. Much evidence pro and con was introduced and we assume from the ruling of the court that it found this issue in favor of the defendant. It is not within our province to weigh this evidence, and we disregard it as immaterial, except so far only as there is no conflict. The uncontroverted evidence shows that the plaintiff, with her attorney, appeared in the clerk's office about the time the court opened in the adjoining room of the courthouse, and the clerk being absent, the attorney presented the petition to the deputy clerk and requested him to swear the plaintiff to the same, which he did, she subscribed her name to the oath, and he affixed his jurate and seal. The attorney either did or did not request the deputy to file the paper, but immediately took the same to the judge and requested him to allow the order, which was done, and immediately thereafter the attorney returned the same to the deputy clerk when the papers were marked "Filed," including a precept for summons. An injunction bond was filed, security for costs given, and summons issued and indorsed as before stated. The statute (section 4686, Gen. St. 1901) provides: "The injunction may be granted at the time of commencing the action. \* \* \*" Section 4487 provides: "A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon." If the petition is used as the evidence upon which the injunction order is obtained, the filing thereof and the order thereon cannot well be made at the same instant of time. Neither is it requisite.

It is urged that a judge has no jurisdiction to make any order except in an action actually pending and this may be admitted as the general rule. Under the facts of this case, however, the concurrence of the granting of the order and of the commencement of the action being practically simultaneous

will be regarded as actually simultaneous. Since the granting of the order is entirely ineffective until the order is issued and served or until a summons with the indorsement "Injunction allowed" is issued and served the rights of a defendant cannot be affected even if the allowance of the order in fact precedes the filing of the petition by a moment's time. Further, it may be said, the law necessitates the granting of the injunction before the commencement of the action. Procuring the issuance of a summons is as essential to the commencing of an action as is the filing of a petition, and the indorsement "Injunction allowed" should, if desired, be made upon the summons at the time it is issued. If this were done before the judge or court had, in fact, granted the injunction, another objection, with equal force, might be based thereon. While the act of the judge and the act of the clerk must, of necessity be separated by some inconsiderable interval of time, the law regards both acts as done at the same time, regardless of which precedes the other.

The order of the district court dissolving the temporary injunction is reversed, and the case is remanded. All the Justices concurring.

#### KANSAS CITY SOUTHERN RY. CO. v. FIELDS & SLAUGHTER CO.

(Supreme Court of Kansas. April 7, 1906.)

#### APPEAL—REVIEW—NEW TRIAL.

This court will not reverse an order of the trial court granting a new trial, unless the record shows the order was clearly and manifestly in violation of some principle of law.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3860-3876.]

(Syllabus by the Court.)

Error from District Court, Crawford County; W. L. Simons, Judge.

Action by the Fields & Slaughter Company against Forrester Bros. Judgment for plaintiff, and garnishee summons issued against the Kansas City Southern Railway Company. Verdict for garnishee was set aside and a new trial ordered, and the garnishee brings error. Affirmed.

Cyrus Crane, W. J. Watson, and S. W. Moore, for plaintiff in error. Paul F. Coste and J. M. Wayde, for defendant in error.

GREENE, J. The Fields & Slaughter Company obtained a judgment against Forrester Bros. to satisfy which they garnished the Kansas City Southern Railway Company. It answered that it was not indebted. Upon this answer the Fields & Slaughter Company took issue. The jury returned a verdict for the garnishee. Upon application of the plaintiff the verdict was set aside and a new trial ordered. The garnishee prosecutes error to reverse this order.

There were no pleadings, consequently the contentions of the parties can only be ascertained from the statements made by counsel, and the questions which appear to have been tried. From these it appears that the Fields & Slaughter Company claimed that Forrester Bros. were engaged in buying and shipping corn and oats; that about September 27, 1901, they entered into a contract with certain railroads running between Omaha and Council Bluffs and other common northern points to Kansas City, called the northern connecting lines, and with the Kansas City Southern Railway Company, for the transportation of corn and oats from Council Bluffs and other common points on these roads to Kansas City and over the Kansas City Southern to Shreveport, La., and other common points in the south, at a rate of 16½ cents per hundred weight; that the Kansas City Southern agreed to accept as its proportion of this rate 8 cents per hundred; and agreed to ship the corn over its line from Kansas City at the rate of 8 cents per hundred; that Forrester Bros. commenced to ship the corn about the 1st of October, 1901, and continued shipping until February, 1902; that the Kansas City Southern charged 8 cents per hundred until October 31st, after that it raised the rate to 10 cents, and subsequently to 14 cents; that Forrester Bros. paid this excess amounting to about \$10,000. Therefore it was claimed that the Kansas City Southern was indebted to Forrester Bros. for this excess. It was this alleged indebtedness of the Kansas City Southern to Forrester Bros. that the Fields & Slaughter Company were attempting to apply upon their judgment against Forrester Bros.

The Kansas City Southern denied that it had ever made a contract with Forrester Bros. or any one representing them for the shipment of corn and oats from Kansas City to Shreveport or other common points at eight cents; but claimed that during the months of September and October, 1901, it had declared and published a rate of 10 cents per hundred pounds on corn and oats from Kansas City to Shreveport, Texarkana, and other common southern points and that this rate had been filed with the Interstate Commerce Commission at Washington, as required by the interstate commerce act, and that this rate was in force until October 31st, about which time it changed its schedule and advanced the rate to 14 cents, which rate was also published, and filed with the Interstate Commerce Commission; that if any contract existed by which Forrester Bros. were to receive a special rate lower than that so declared and published, such contract would be in violation of the interstate commerce act and void. It was also contended by the garnishee that its only agreement concerning the shipment of corn and oats coming to it over the northern connecting lines was made with one Shauffler, traffic agent for such lines, by which it agreed to divide

the sum of the two local rates with the northern connecting lines, on a more advantageous basis for the northern lines than its proportion of the two local rates; that no time was fixed for the expiration of this agreement of the division of the two local rates from the northern points to the southern points, and that before any grain was received by the Kansas City Southern, the northern lines forwarded a statement or schedule of such division of rates to the Kansas City Southern according to which the agreement was to terminate on October 31, 1901; and that none of the alleged overcharges were made by the Kansas City Southern prior to that date.

It was also contended by the garnishee that the contract relied on by plaintiff as a basis for its liability to Forrester Bros. was so indefinite and uncertain, both as to the quantity of grain to be shipped and the time within which it should be actually shipped, that it was nonenforceable; and also that the alleged contract if made as claimed by plaintiff would be void for want of mutuality in that Forrester Bros. did not agree to ship any grain over its line, and was not bound to do so. Another contention by the garnishee was that Forrester Bros. paid the rates charged without protest, complaint, or objection, therefore the payment was voluntary. All of these facts were passed upon by the jury, which found for the garnishee. Upon a motion for a new trial, the court was required to review all of the evidence produced on the trial tending to establish or refute these disputed facts. We are not informed upon what grounds the court set aside the verdict and granted a new trial. The granting of a new trial is, however, not looked upon unfavorably by the law and it is a matter so largely within the discretion of the trial court that this court has seldom found it necessary to reverse such orders. The trial court, on a motion for a new trial, is not required to determine that the party applying has not had a fair trial, but if he entertains a reasonable doubt upon the question a new trial may be granted. It is the purpose of the law that every litigant should have his right fairly and honestly adjudicated in accordance with its rules and forms, and that no advantage may be taken the matter of granting new trials is very largely a matter of judicial discretion. Upon an application for a new trial where many material issues of fact have been involved and determined by the jury, the trial judge must review, and weigh all the evidence passed upon by the jury and also take into consideration everything transpiring on the trial. It may happen that incidents may take place on the trial which could not be put into a record, and which would fully justify the court in granting a new trial. Such incidents cannot be made to appear to this court. For these reasons this court has not the opportunity of knowing what indu-

ced the trial court to grant the new trial, in the absence of a statement in the record. It was said in the syllabus of the City of Sedan v. Church, 29 Kan. 190, that: "The Supreme Court will not reverse the order of the trial court granting a new trial unless the Supreme Court can see beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some pure, simple and unmixed question of law, and that except for such error the ruling of the trial court would not have been made as it was made, and that it ought not to have been so made."

The judgment is affirmed. All the Justices concurring.

#### GIBSON v. TRISLER et al.

(Supreme Court of Kansas. April 7, 1906.)

##### 1. TAXATION — TAX DEED—VALIDITY — PRESUMPTIONS.

Where a tax deed has been filed for record for more than five years before it is attacked, all presumptions are in favor of the regularity of the prior tax proceedings.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1504, 1606.]

##### 2. SAME.

Where the only objection made to such deed is that a statutory recital is omitted or insufficiently stated, the deed will not be declared void, if, by giving other recitals contained therein fair and liberal constructions, it can be said that such omitted recital is fairly supplied.

##### 3. SAME — SALE — TAX CERTIFICATE — SUBSEQUENT DELINQUENT TAXES.

Where lands have been bid off by the county treasurer for the county for delinquent taxes, the assignee of the tax sale certificate therefor is required to pay only the amount of taxes, costs, and charges which the county treasurer should have charged on the book of tax sales for unpaid taxes under the provisions of section 7654 of the General Statutes of 1901. Subsequent delinquent taxes, not so chargeable at the time of the assignment, are not liens upon the land within the meaning of the section.

(Syllabus by the Court.)

Error from District Court, Crawford County; W. L. Simons, Judge.

Action by Charles E. Gibson against William Trisler and Lloyd Anderson. Judgment for defendants, and plaintiff brings error. Affirmed.

Rossington & Smith, for plaintiff in error. D. H. Woolley, for defendants in error.

GREENE, J. This was an action in ejectment. The only question reserved for our determination is the validity of the tax deed relied upon by the defendant which had been of record more than five years. If this deed is valid on its face, the judgment must be affirmed; if invalid, it must be reversed. The deed, after showing that the taxes on the lots in question were delinquent for the year 1892, and that they had been advertised for sale for such delinquent taxes in September, 1893, and not having been

sold were "therefore bid off by the county treasurer for the sum of \$12.82, contains the following recitals: "And whereas, for the sum of thirty-one (31) dollars and fifteen (15) cents paid to the treasurer of said Crawford county on the 9th day of April, 1895, the county clerk of said county did assign the certificate of sale of said property and all the interest of said county in said property to Crawford and McMurray of the county of Crawford, state of Kansas; and whereas, the subsequent taxes of the years 1893, 1894, 1895, amounting to the sum of thirty-eight (38) dollars and eighty (80) cents, have been paid by the purchasers as provided by law, and whereas, three years have elapsed since the date of said sale and the said property has not been redeemed therefrom as provided by law: Now, therefore, I, John Ecker, county clerk of the county aforesaid, for and in consideration of the sum of sixty-five (65) dollars and ninety-six (96) cents, taxes, costs and interest due on said land for the years 1892, 1893, 1894 and 1895, to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained and sold and by these presents do grant, bargain and sell unto the said Crawford and McMurray. \* \* \*

The objection to the deed is stated by the plaintiff in error as follows: "It is our contention that under a fair interpretation of these recitals, as to payments made and taxes existing on the property, it is evident that section 7649 of the General Statutes of Kansas, 1901, was not complied with. Section 7649 of the General Statutes provides that no certificate of sale shall be made to any person unless there be paid into the county treasury a sum of money equal to the cost of redemption at that time, of any land or lots sold to the county \* \* \* that inasmuch as the land was bid off for taxes and charges in September, 1893, for \$12.82, and the certificate of sale was not assigned until April 9, 1895, the interest on this sum at the statutory rate of 15 per cent. would require that a purchaser of the county's certificate for the taxes of 1892 pay the sum of \$15.74. It is likewise apparent that the subsequent taxes for the years 1893 and 1894, being past due and a lien on the land, must have been paid by the assignee of the tax certificate in order to entitle him to obtain a good and valid assignment." The tax deed recites that the certificate was assigned April 9, 1895, for the sum of \$31.15. Counsel argue that this amount is less than the taxes, interest, and costs then payable could possibly have been since the taxes and charges for 1892 would at that time amount to \$15.74, which deducted from the total amount paid, there would remain only \$15.41 to be applied to the delinquent taxes for the years 1893 and 1894. The error into which counsel have fallen is in presuming that the assignee of the certificate on April 9, 1895, was re-

quired to pay the delinquent taxes of 1894. It presumptively appears from the deed, that the taxes for 1893 became delinquent and that the lots were advertised to be sold therefor in September, 1894, and that the county treasurer charged such delinquent taxes and charges on the book of tax sales of the year in which the lots were sold to the county. Such taxes would thereupon become a lien upon the property and the county could not legally assign the certificate until such taxes were paid. It also appears that the taxes of 1894 were delinquent. It was the duty of the county treasurer to advertise such lots for sale for such delinquent taxes in September, 1895, and if the county still retained the certificate the county treasurer should charge such delinquent taxes and charges on the book of tax sales of the year in which the lots were sold to the county. But in this case, the tax sale certificate was assigned April 9, 1895. Therefore the taxes of 1894 had not been and could not have been charged upon the book of tax sales until the lots had been advertised for sale, which sale could not take place until September, 1895. When the certificate was assigned the taxes for 1894, although delinquent, were not a lien upon the lots in the hands of the county by virtue of its tax certificate, and were not collectible or receivable by it under the certificate.

It is also contended by the plaintiff in error that the deed is void on its face because it does not recite that the lots were bid off by the county treasurer for the county. The recital is "Whereas, at the place aforementioned said property could not be sold for the amount of the taxes and charges thereon and was therefore bid off by the county treasurer of said county for the sum of \* \* \*; and whereas, for the sum of \* \* \* paid to the treasurer of said Crawford county, \* \* \* the county clerk of said county did assign the certificate of sale of said property and all the interest of said county in said property." These recitals, considered with the provisions of the statute which require the county treasurer as such officer to bid the unsold lands off for the county, are sufficient to supply the omission in the deed of which complaint is made. They are sufficient to satisfy us that the county treasurer was not acting for himself as an individual when he bid the lands off, but that the bid was for the county. And the additional recital that the deed was made by the county clerk of Crawford county to Crawford and McMurray apparently in pursuance of the purchase made by the county leaves no room to doubt that the treasurer bid the land off for the county. Counsel have, no doubt, been misled into making this contention by the decision of this court in *Penrose v. Cooper* (Kan.) 81 Pac. 489, which they cite as authority. A rehearing was granted in that case and it was subsequently held that: "Where a tax

deed has been of record for more than five years it will not be held to be void because of the omission of express recitals required by the statute, if the substance of such omitted recitals can be supplied by inferences fairly to be drawn from statements elsewhere made in the deed, by giving to the language employed a liberal interpretation to that end." *Penrose v. Cooper*. The recitals in the deed in this case are substantially those in the deed under consideration in *Penrose v. Cooper*, supra.

As we discover no defects on the face of the deed, the judgment is affirmed. All the Justices concurring.

**MISSOURI, K. & T. RY. CO. v. WADE.**  
(Supreme Court of Kansas. April 7, 1906.)

**1. APPEAL—REVIEW—EXCESSIVE DAMAGES.**

In an action for personal injuries where there is testimony which would warrant the allowance of damages for physical pain, mental anguish, loss of time, and permanent injury, and the jury allowed in their general verdict a sum not unreasonable or excessive if applied to all the damages shown by the testimony, and in answer to special questions submitted by defendant in which their attention is not directed to any of these elements of damages, except mental pain and anguish, state that the entire sum is allowed for mental pain and anguish caused by the injury, the court cannot say that the failure to allow anything for the other elements of damages is an indication that the jury were influenced by passion or prejudice, or that the sum allowed is excessive.

**2. TRIAL—REMARKS OF COUNSEL.**

Certain remarks of counsel in argument before the jury considered, and held to have been proper.

(Syllabus by the Court.)

Error from District Court, Cherokee County; W. B. Glasse, Judge.

Action by Frank M. Wade against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John Madden, W. W. Brown, and R. W. Blue, for plaintiff in error. Charles Stevens and Skidmore & Walker, for defendant in error.

PORTER, J. Frank M. Wade was employed in June, 1901, in unloading a car of lumber standing upon a side track of plaintiff in error at Mineral, in Cherokee county. His duty was to pass the lumber out of the car to a person on the outside who loaded it upon a wagon. Plaintiff in error was switching cars back and forth on the side track, and backed some cars against the one in which he was thus engaged. The force of contact shifted the lumber in the car and Wade's ankle was caught, and the injury for which he brought this action occasioned. He recovered a verdict and judgment for \$1,250, to reverse which plaintiff in error brings this appeal.

There is in the case no question of the

liability of plaintiff in error for whatever damages defendant in error sustained. There are but two errors relied upon. The first is with respect to the amount of the damages. It is claimed the amount is excessive. The testimony of several physicians showed that defendant in error sustained what is known as a green-stick fracture of the tibia. One of the physicians had made an examination of the fracture in the winter following the accident by means of an X-ray instrument and found evidences of an injury which he describes as an indentation or depression on the tibia bone, with the surrounding flesh and nerves tender. He regarded the injury as permanent. Several witnesses, among whom were physicians, testified to the fact that at various times they had heard defendant in error give exclamations of then existing pain and suffering. This is complained of, but under several rulings of this court such testimony was competent. *A., T. & S. P. Rld. Co. v. Johns*, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609; *Railroad Co. v. Burrows*, 62 Kan. 89, 98, 61 Pac. 439. The testimony tended to show that for two years defendant in error had lost considerable time by reason of the injury; that he had suffered much pain, physical and mental, and there was evidence that the injury was permanent in its character.

Plaintiff in error submitted certain special questions to the jury and the principal contention here is that the damages allowed are excessive for the reason that it is evident from the answers to these special questions that the jury allowed nothing at all for loss of time, medical attendance or permanent injury, and allowed the entire amount of the verdict for mental suffering and anguish. Plaintiff in error was careful in preparing special questions in reference to damages to ask only the following: "Fifth. If you find for the plaintiff, what, if anything, do you find and assess his damages for mental suffering and anguish by reason of the injury which plaintiff claims was inflicted? Answer. \$1,250. Sixth. If you find for the plaintiff, what, if anything, do you find and assess for doctor's bills or compensations for physicians and surgeons for service to plaintiff, by reason of the injuries claimed to have been received? Answer. Nothing." It is conceded that it is well settled in this state that damages may be recovered for mental suffering or anguish of mind resulting from physical pain and suffering arising from the injury. *Railroad Co. v. Chance*, 57 Kan. 40, 47, 45 Pac. 60, and cases cited. It is clear that the jury allowed for this element of damages the sum of \$1,250. The contention is that, because the jury allowed nothing for permanent injury, or for loss of time, or for doctors' bills, there is, therefore, a want of any foundation or basis for the allowance of damages for mental suffering. But before

this court would be justified in setting aside a verdict as excessive, it must appear from the amount allowed, or from some other fact or circumstance in the record, that the damages were given as the result of passion or prejudice. *Railway Co. v. Frazier*, 66 Kan. 422, 427, 71 Pac. 831. Conceding for the purpose of the argument that the amount allowed for mental suffering was excessive, this alone is not sufficient to warrant the granting of a new trial. *M., K. & T. Rly. Co. v. Weaver*, 16 Kan. 456; *U. P. Rly. Co. v. Mitchell*, 56 Kan. 324, 43 Pac. 244; *Railway Co. v. Frazier*, supra. There is nothing in these answers however to indicate passion or prejudice of the jury. The amount allowed for mental pain and suffering seems large only by reference to the omission to allow any damages for loss of time, physical suffering and permanent injuries. The evidence, however, would have supported a verdict for a reasonable amount for all of these additional elements of damages which undoubtedly plaintiff suffered by reason of the injuries. The answer to the sixth question is supported by the evidence, for plaintiff's testimony shows that he had never paid anything for doctor's bills. But there is evidence of substantial damages for which the jury apparently allowed nothing, perhaps, because their attention was not directed to these other elements of damages by the two questions asked. Is plaintiff in a position to take advantage of this somewhat technical oversight on the part of the jury? We think not. If the jury had allowed substantial damages for loss of time, for physical pain, for permanent injury, and, in addition, had allowed \$1,250 for mental pain, it might have shown such passion and prejudice as would warrant the setting aside of the verdict; but in the absence of an allowance for substantial damages which were clearly established, we cannot say that the amount allowed is so excessive that it ap-

pears to have been given under the influence of passion and prejudice. The failure of the jury to allow damages for the other matters, when they might well have done so, is something which, instead of being prejudicial, may have been beneficial to plaintiff in error; at least it is no indication of passion or prejudice.

Finally, it is complained that one of the counsel for defendant in error was guilty of misconduct in his argument to the jury. Plaintiff in error submitted three other special questions to the jury with reference to whether defendant in error remained in the car while it was being moved by the switching crew. It is claimed that it became important for defendant in error to establish by the findings that he was not in the car at this time. It is said that Judge Skidmore argued to the jury that they must make their special findings harmonize with their general verdict, and it is contended that as this court has held it to be error for the court to instruct the jury that their answers to special questions of fact submitted should be consistent with their general verdict, therefore this argument of counsel was objectionable for the same reason. *Brick Co. v. Zimmerman*, 61 Kan. 750, 60 Pac. 1064. The record does not support the contention of plaintiff in error in this respect. The incident is brought upon the record by the affidavit of R. W. Blue, counsel for plaintiff in error, filed in support of the motion for a new trial. The affidavit does not state that counsel argued that the jury must make their special findings consistent with their general verdict. It states the language of Judge Skidmore, as follows: "That if the jury answered the said special questions, yes, then their verdict must be for the defendant." In our opinion this was legitimate argument, as well as a fair statement of the law.

The judgment will be affirmed.

## RITCHIE v. STATE.

(Supreme Court of Washington. June 5, 1906.)

## ATTORNEY GENERAL—POWER TO CONTRACT.

Under Const. art. 3, § 21, making the Attorney General the legal adviser of state officers, and requiring him to perform such other duties as may be prescribed by law; Act. March 20, 1895 (Laws 1895, p. 188, c. 95) § 3, requiring him to act as counsel for the state in all actions brought against it; Act March 7, 1895 (Laws 1895, p. 58, c. 35) § 1, making it unlawful for officers of any department of the state to incur liability for more than is appropriated for the use of such department; and Laws 1901, p. 122, c. 72, making the following appropriation for the Attorney General's office: "Court expenses, advanced per diem, and mileage for witnesses before courts and land department, \$300"—the Attorney General has no implied authority to employ an expert to assist him in the defense of an action against the state, though it is in the interest of the state, and to make the state liable for the services of such expert.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig: Attorney General, § 5.]

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by W. A. Ritchie against the State of Washington. Judgment for plaintiff. Defendant appeals. Reversed, with directions to dismiss.

See 81 Pac. 79.

John D. Atkinson, Atty. Gen., and A. J. Falknor, Asst. Atty. Gen., for the State. Vance & Mitchell, for respondent.

RUDKIN, J. In the year 1902 the F. H. Goss Construction Company, contractor for the construction of the annex to the State Capitol Building, brought an action against the state in the superior court of Thurston county for the recovery of approximately \$25,000 for making alterations and furnishing extras in the construction work, not called for by the original contract. The action involved the construction or interpretation of the original plans, specifications, and drawings, and the true intent and meaning thereof. The then Attorney General employed the plaintiff, who was the supervising architect for the building, as an expert to assist him in preparing his defense and defending the action on the trial. The present action was brought against the state to recover the value of the services performed under this employment and the expenses necessarily incurred in their performance. The court below found in favor of the plaintiff in the sum of \$1,550 for services and \$629.20 for expenses, and entered judgment against the state for the aggregate of these amounts. From this judgment the defendant appeals.

The appellant does not question the correctness of the court's findings as to the value of the services or the amount of the expenses in this court, but rests its defense solely upon the ground that it is under no legal obligation to pay the same, and that is the only question here for our consideration. Sections 1 and 2 of the act of March 7, 1895

(Laws 1895, p. 58, c. 35), provide as follows:

"Section 1. That it shall be unlawful for any of the state officers or trustees, managers, directors, superintendents or boards of commissioners of any of the public institutions of the state of Washington, or for the officers of any of the departments of the state of Washington, to create a deficiency, incur liability, or to expend a greater sum of money than is appropriated by the Legislature for the use of said public institution or department.

"Sec. 2. Any officer, trustee, manager, director, superintendent or commissioner, enumerated in section 1 of this act, who shall violate the provisions of this act by creating a deficiency, incurring a liability, or expending a greater sum than is appropriated by the Legislature for any public institution or department of this state in any one year, shall be individually liable for the same, and shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one thousand dollars."

Section 3 gives a right of action to the "person, copartnership or corporation with whom a liability is attempted to be incurred or debt contracted," against the officer and his official bondsman for the full amount of the liability incurred or debt contracted, and section 4 provides for certain emergencies, but does not include the Attorney General or his office. The Legislature of 1901 made the following appropriation for the Attorney General's office: "Court expenses, advanced per diem, and mileage for witnesses before courts and land department, \$300." Laws 1901, p. 122, c. 72. We might state here that the respondent does not seek to recover out of, or by reason of, this appropriation.

The appellant contends that the contract of employment relied on by the respondent is illegal, or at least without authority of law, by reason of the foregoing statutory provisions and that no recovery can be had. The respondent, on the other hand, contends that by article 3, § 21, of the Constitution, the Attorney General is made the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law; that by section 3 of the act of March 20, 1895 (Laws 1895, p. 188, c. 95), the Attorney General or his assistant must appear and act as counsel for the state in all actions brought against it; and that by virtue of these provisions the Attorney General has implied authority to employ an expert to assist him in the defense of any such action whenever the public interest demands it. With this latter contention we are unable to agree. A court is treading upon dangerous ground when it rests the authority of a public officer to bind the state on some unforeseen emergency or the law of necessity. The Legislature has in effect said to the Attorney General: "You must appear as counsel in all actions brought against the state. You are allowed \$300 to

defray the expenses of all such actions for the period of two years, and if you create a deficiency or incur a liability beyond this you are personally liable and subject to criminal prosecution." It is very difficult to find room for implied power in all this.

The respondent cites *Brown v. Travelers' Life & Accident Ins. Co.*, 26 App. Div. 544, 50 N. Y. Supp. 729, but that was an action between private parties, and there was no limitation on the authority of the attorney. Had the authority of the attorney been limited in that case as in this, and had the expert undertaken the performance of his contract with full knowledge of such limitation, it would scarcely be contended that a recovery could be had beyond the limit imposed; for it is elementary that an agent can only bind his principal while acting within the scope of his authority, and that a person dealing with a public officer is bound to know the limit of his powers. Counsel's chief reliance is on the case of *Rauch v. Chapman*, 18 Wash. 568, 48 Pac. 253, 36 L. R. A. 407, 58 Am. St. Rep. 52. It was held in that case "that the constitutional limitation of county indebtedness in section 6 of article 8 of our Constitution does not include those necessary expenditures made mandatory in the Constitution, and provided for by the Legislature of the state, and imposed upon the county." We fail to see the applicability of that case to the facts before us. Certain positive duties are imposed on counties by the Constitution and Laws of the state, but no duty was imposed on the Attorney General to employ the respondent in this case. The law enjoined upon him the duty to appear in the action and defend the interests of the state to the best of his ability with the means which the Legislature had placed at his command, but nothing more. If the interests of the state should suffer because the Legislature unduly curtailed the power of its representative, the responsibility for the miscarriage of justice would rest with the Legislature, and not with the Attorney General or the courts. The policy of permitting the state to be sued generally, and allowing the Attorney General but \$300 to defray the expenses for a period of two years may be unwise, but the policy of such a law and such a limitation on the authority of the Attorney General is for the Legislature, and not for the courts.

This case cannot be distinguished on principle from *Young v. State*, 19 Wash. 634, 54 Pac. 36. There the Governor employed the plaintiff to examine, expert, and report upon the books and accounts, vouchers, and the condition of affairs generally, with reference to the financial management of the state penitentiary during the term of Warden Coblenz, who had committed suicide. The plaintiff complied with his contract of employment and brought an action against the state to recover the value of his services. This court adhered to the well-settled rule "that public officers have, and can exercise,

only such power as is conferred upon them by law, either statutory or constitutional, and that the government is not bound by the unauthorized acts of its officers or agents," and held that there could be no recovery. This, too, was prior to the passage of the act of 1895 above cited. The employment in that case, as in this, was no doubt in the interest of the state, and there was perhaps as much reason to imply power in the one case as in the other. Conceding, for the purpose of the argument only, that contingencies may arise where one of the officers of the executive department of the state will be authorized to incur a liability against the state in the absence of legislative authority and the absence of an appropriation for the purpose, we are convinced that no such case is presented here. The equitable character of the respondent's claim has been established by the judgment of the court below, and the Legislature may provide for its payment; but the claim lacks legal sanction, and we cannot affirm the judgment. While the fact is immaterial, in deference to the former Attorney General we will say that he fully advised the respondent of the situation confronting him, and did not attempt to create a deficiency or incur a liability against the state.

The judgment is reversed, with directions to dismiss the action.

MOUNT, C. J., and FULLERTON, HADLEY, and DUNBAR, JJ., concur.

#### FEDERAL IRON & BRASS BED CO. v. HOCK.

(Supreme Court of Washington. June 9, 1906.)

##### 1. DAMAGES—CONTRACT—BREACH—LOSS OF PROFITS.

For breach of contract by which plaintiff agreed to furnish defendant for a year goods manufactured by it, defendant to sell the same, defendant may recover loss of profits which he was reasonably certain to have made but for the breach.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 74-76.]

##### 2. PLEADING—STRIKING OUT PART OF ANSWER—WAIVER OF ERROR.

Defendant does not waive the error in striking out and sustaining a demurrer to portions of the answer by going to trial on the pleadings as thus modified.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1426, 1403.]

##### 3. FRAUDS, STATUTE OF—PART PERFORMANCE.

An oral contract is taken out of the operation of the statute of frauds by part performance.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 287-292.]

##### 4. CONTRACTS—CONSIDERATION.

Neither consideration nor mutuality was wanting in a contract by which plaintiff was to supply goods for a year for defendant to sell, and defendant was to confine his sales to plaintiff's goods and build up a market therefor.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 344, 345.]

Appeal from Superior Court, Pierce County; Thad Huston, Judge.

Action by the Federal Iron & Brass Bed Company against A. Hock. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

Samuel F. McAnally and Hastings & Stedman, for appellant. Charles L. Westcott, for respondent.

ROOT, J. This appeal is from a judgment rendered in two suits which were consolidated for the purpose of trial, said actions being based upon promissory notes. The alleged facts involved are substantially as follows: The respondent, a manufacturer of iron beds in Illinois, having no representative or market for its goods in the Northwest, entered into a contract with the appellant, a jobber and manufacturer's agent in Tacoma, about May 1, 1903, said contract covering the period to January 1, 1904, after which a new contract was to be made if mutually desirable, whereby appellant should sell only respondent's products, and be sole agent therefor in the agreed territory. By reason of appellant's inability to operate otherwise, credit was to be given. Notes were to be executed for balances due for goods to be furnished at an agreed price until January 1, 1904. The appellant spent considerable money in handling respondent's goods, and opened up a market for the same, and paid a number of the notes as they became due. Then while appellant had on hand remnants of said stock which were unsalable without similar goods of different prices, and specifications to mix with them to fill orders, and having outstanding but not due three notes given under said agreement, the respondent about September, 1903, at a time when appellant could not obtain goods elsewhere, refused to deliver to the latter any more goods. The two actions were brought on the three notes when they became due, and the consolidated cases were tried by a jury. After the consolidation and before the trial the court, on plaintiff's motion, struck from appellant's answer and counterclaim all reference to, or claims for, loss of profits in defendant's business, and subsequently sustained a demurrer to the affirmative defense and counterclaim in the actions thus consolidated. The trial resulted in a judgment in favor of respondent from which this appeal is taken.

The action of the trial court in striking the affirmative answer and counterclaim, and in sustaining the demurrer is assigned as error as is also the denying of appellant's motion for a new trial. We think these rulings of the trial court were erroneous. It is doubtless true that prospective profits are oftentimes speculative, indefinite, and imaginary, but there is a reasonable certainty as to some future profits. There was nothing in the allegations of these answers stricken as aforesaid to indicate that they were all

merely speculative and conjectural, or of a character incapable of legal ascertainment. Oftentimes in the breach of a contract of this character the only damages sustained are those of future profits. These may be of a substantial character in contemplation of law, and such as the injured party should be entitled to recover from the party who has without justification broken the contract. The recovery must, of course, be limited to the amount which from all the surrounding conditions, may be deemed to have been reasonably certain had the breach not occurred. In the case of *Wakeman v. Wheeler and Wilson Mfg. Co.*, 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676, the Court of Appeals of New York said: "Most contracts are entered into with the view to future profits, and such profits are in contemplation of the parties, and so far as they can be properly proved, they may form the measure of damage. As they are prospective they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rule of damages, to determine the compensation to be awarded for the breach." See, also, *Lumber Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077; *Shepard v. Gaslight Co.*, 15 Wis. 349, 82 Am. Dec. 679; *Goldhammer v. Dyer*, 7 Colo. App. 29, 42 Pac. 177.

It is urged by respondent that the appellant waived any error the court may have made in striking part of the answer and sustaining a demurrer thereto, by going to trial upon the pleadings as thus modified. We do not think this contention should be upheld. After the order to strike had been made and the demurrer sustained, the appellant did not plead over, but went to trial upon the pleadings as they then stood. We think it is better practice to permit a party to do this than to require him to hazard an immediate appeal, which, if lost, would deprive him of a hearing on the merits, and if sustained would necessitate another trial in the lower court, and probably another appeal here, thus resulting in the case being tried piecemeal.

It is also urged by respondent that the contract was oral, and therefore void under the statute of frauds, and that it was also void for want of consideration and mutuality; there being no obligation on the part of the defendant to purchase any definite amount of the goods, but only the quantity he might desire. As to the first objection, it is answered by the fact that the contract was partially performed, and thereby taken out of the operation of the statute. As to the second objection, we think neither consideration nor mutuality was wanting. Appellant was required to confine his sales to respond-

ent's goods and to build up a market therefor; and respondent was to supply the goods. Each had other obligations, and good faith was enjoined upon each.

The judgment of the honorable superior court is reversed, and the cause remanded, with instructions to deny the motion to strike from appellant's affirmative defense and counterclaim, and overrule the demurrer to the same. A new trial shall be had, at which appellant will be permitted to show such profits as would naturally and reasonably have accrued to him, had the contract been faithfully observed by respondent.

MOUNT, C. J., and RUDKIN, HADLEY, CROW, DUNBAR, and FULLERTON, JJ., concur.

STATE ex rel. ROCK et al. v. CASE, County Clerk.

(Supreme Court of Washington. June 9, 1906.)

**1. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR BENEFITS—OBJECTIONS—FILING FEE.**

A filing fee is required as a condition precedent to the filing of objections to assessments for benefits on the opening of a street.

**2. SAME.**

1 Ballinger's Ann. Codes & St. § 1610, provides that defendants or other adverse or intervening parties, appearing separately from others, shall pay, when his or their appearance is entered in the cause, a fee of \$2. Held that, where several property owners joined together in a common answer or objections to assessments for benefit on the opening of a street, it was not necessary that each of the objectors should pay a separate appearance fee of \$2, but one fee of such amount was sufficient.

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Mandamus by the state, on the relation of Thomas Rock and others, to compel Otto A. Case, as county clerk of King county and clerk of the superior court of such county, to receive and file certain objections of relators to assessments made on their properties on the opening of a street. From a judgment sustaining a demurrer to the application and dismissing the cause, they appeal. Reversed, and cause remanded, with instructions to receive and file the exceptions upon the payment of a filing fee.

Austin E. Griffiths, for appellants. Kenneth Mackintosh, Pros. Atty., and R. W. Prigmore, Deputy Pros. Atty., for respondent.

DUNBAR, J. Commissioners were appointed by the lower court to assess property benefited to pay for the damages and compensation awarded in the opening of a street. Assessment rolls were prepared, and notices were issued designating a time for hearing and requiring parties interested who so desired to appear and defend. The relators, 11 in number, joined together on one com-

mon answer or set of objections to the assessments made upon their properties, and engaged one of their number to act as their attorney, and jointly tendered to respondent, as clerk of the superior court of King county, their common answer, and asked that the same be received and filed as the only appearance, answer, and objections of relators, and at the same time tendered a filing fee in the sum of \$2, which fee the clerk refused to receive, and refused to file said objections, upon the ground that each of the 11 objectors should pay a separate appearance fee of \$2. With this demand the relators refused to comply, and thereupon applied to the superior court for a writ of mandamus to compel the clerk to receive and file these objections, either without or with the payment of the sum of \$2 as a filing fee. A demurrer was sustained to this application, and the cause dismissed. Thereupon this appeal was taken.

Two points are urged by the appellant: First, that no filing fee at all is required as a condition precedent to the filing of these objections; second, that in any case where the objectors do not appear separately, but employ the same attorney and unite in their objections, not more than \$2 should be charged. The first proposition was in principle decided adversely to appellant's contention in State of Washington, on the Relation of Clark v. Neterer, as Judge of the Superior Court of Whatcom County, 33 Wash. 535, 74 Pac. 668; but on the second proposition we are of the opinion that the court erred, and that where the objectors appear by the same attorney and unite in their objections separate fees should not be exacted. This seems to us to be in harmony with the other statutes relating to costs, and especially with section 1610 of the fee bill, found in 1 Ballinger's Ann. Codes & St. p. 392, which provides that the "defendants or other adverse or intervening parties appearing separately from the others, shall pay, when his or their appearance is entered in the cause, etc., a fee of \$2." In this case but one fee is required so far as the plaintiff is concerned, and if the defendants see fit to unite their cause presumably for the purpose of economy in the matter of costs there seems to be no good reason for exacting separate fees. In addition to this, this question was practically decided in favor of appellant's contention in Re Seattle, a recent decision of this court reported in 82 Pac. 740; and while that case involved a question of cost on appeal we are unable to distinguish it in principle from the case at bar.

The judgment is reversed, and the cause remanded, with instructions to the lower court to receive and file the objections upon the payment of the sum of \$2 as a filing fee.

MOUNT, C. J., and ROOT, CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

McPHEE & MCGINNITY v. FOWLER et al.  
(Supreme Court of Colorado. March 5, 1906.)

1. APPEAL—ABSTRACT—SUFFICIENCY.

Assignments of error as to rulings on evidence will not be considered where the abstract does not contain the objections or exceptions to the rulings, as required by the rules of court, though in the assignment of errors the questions and answers are given and the statement made that the rulings were made over the objection of defendant, and the bill of exceptions is referred to.

2. BILLS AND NOTES—ORDERS—DRAWER'S FAILURE TO PERFORM CONDITION.

Where the drawee of an order held property of the maker sufficient to pay the order, he was liable under his contract to accept the order, though there was a condition attached to his agreement to accept which had not been performed by the maker.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 143, 144, 150.]

Appeal from District Court, Arapahoe County; Booth M. Malone, Judge.

Action by Joseph Y. Fowler and others against Charles D. McPhee and another, doing business as McPhee & McGinnity. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Patterson, Richardson & Hawkins, for appellants. W. E. Richards, for appellees.

STEELE, J. McPhee & McGinnity, lumber dealers in Denver, and W. W. McAlpine, who was operating a sawmill in New Mexico, were dealing with each other under a contract by the terms of which McAlpine was to manufacture and sell to McPhee & McGinnity the lumber produced at McAlpine's mill, and McPhee & McGinnity were to buy, at a stipulated price, all the lumber produced by McAlpine. During the month of June, 1893, certain orders on McPhee & McGinnity were drawn by McAlpine and purchased by Fowler & Co., the appellees. These orders were O. K'd by the representative of McPhee & McGinnity at the McAlpine mill, and the orders were thereafter sent to the firm in Denver. Checks were drawn for the amount of each order, and the amount charged to McAlpine's account. Payment was stopped on the checks, and the orders were never paid. The firm of Fowler & Co. brought suit in the district court of Arapahoe county upon these orders, and the trial resulted in a judgment for the defendants. Upon review, the Court of Appeals reversed the judgment; the case being reported in 13 Colo. App., at page 185, 56 Pac. 1118. Upon the second trial, a judgment was rendered in favor of the plaintiff for the sum of \$1,754.95, from which judgment the defendants appealed to the Court of Appeals.

The defendants admitted that they gave McAlpine authority to draw orders, but contend that a condition was attached to the agreement, and that McAlpine failed to perform the terms of the agreement. The testimony of J. J. McGinnity, with whom the agreement

concerning these orders was made, presents the defendants' version of it. Mr. McGinnity's testimony upon the subject of the agreement is set out in the abstract as follows: "I saw Mr. McAlpine at our office on the morning of June 19th. He asked for a statement of his account, and I had one prepared and gave it to him showing the balance of \$845.40. He told me he would have to have more money before going home. He said the account was all right, but there was not money enough to pay his bills. I told him we could not advance him any more money, and gave him a check for the amount due, \$845.40. He said he would have to have more money before going home; that he was owing his men about \$2,700 or \$2,800, and other bills for supplies to the mills approximating \$2,000; and that unless he could pay his men they would not continue to work and he could not run the mill. I told him that we did not have any money to loan; that money was very hard to get. I explained that to him, but, if he would come around in the afternoon, I would in the meantime talk to Mr. McPhee and see what was best to do. That was the substance of the conversation. In the afternoon he came and made the statement to us that he could not continue to operate the mill and his men would not work unless he got this money, and he would have to have at least \$2,500 in addition to the amount of the check that he got in the morning, in order to continue to operate his mill. I explained to him that it was very necessary for him to operate the mill, on account of the contract which he had with the Maxwell Land Grant Company, to which we were parties; that the mill had to be operated. He assured us that if he had this and could pay his men one-half he was satisfied they would continue to work; if he could pay his men half of what he was owing and could pay part of his other bills, he was satisfied he could continue operating his mill; and we finally consented that, if he was sure he could do this, we would advance to him the \$2,500, provided he would return the \$845 check, so that we would know the money was applied to paying the men or paying for supplies. Instead of taking the cash, he would give orders on us for the amount. And we further stated that we did not want the money which we advanced to be applied to paying the men who worked for the Smith and McAlpine or the Red River mill as we knew it, and, in order that that should not be done, we asked him to have our man who was loading lumber there to make a notation on the orders he gave for paying labor that this man worked for McAlpine at his plant, at the mill that was supplying us with lumber. He said he had no objection to having that done, and I told him we would advise our lumber loader, Mr. Gibson, down there to make a notation on the orders, so that we would know the money went to paying men who worked at the mill that supplied us with lumber. That

is the substance of it. He said he was satisfied that if he got this amount of money, which was about half of what he owed, he could arrange to keep the mill running. It was upon that condition that the money was advanced." On cross-examination, McGinnity said: "Mr. McAlpine assured us that if we would advance the money that he could make arrangements with his men to operate the mill; that if he did not get this money he could not do it. We told him that we would advance it to him upon that assurance. Nothing was said as to the quantity of lumber he was to manufacture, nor as to the number of days he was to run the mill. He was simply to run the mill according to the general contract. Mr. McAlpine deposited this check with us before leaving our office, and about the same time we charged up the interest against him. That was 5 per cent. on \$2,500. When Mr. McAlpine left our office everything had been agreed upon by us with reference to this arrangement, and he left the office with full authority to draw the orders. I am not sure that I remained in Denver until any of the orders came in that were drawn under the arrangement by Mr. McAlpine. We paid them promptly on their presentation. We trusted Mr. McAlpine with regard to running the mill. The checks will show that the amount of orders paid under the agreement was \$1,413.73."

The letter sent by McPhee & McGinnity to E. A. Gibson, their representative at Catskill, N. M., is copied into the abstract as follows: "Denver, Colo., June 21st, 1893. E. A. Gibson, Esq., Catskill, New Mexico—Dear Sir: Mr. McAlpine will probably give orders to some of his men on us besides what he may pay them. Any orders that he asks you to O. K., you will note the same memorandum on that you did last time: 'This man worked for McAlpine at his mill.' You understand our reason for this is that we do not want to pay any men except those working at the mill from which he supplies us with lumber. The only reason we ask him to give orders is that if he got the cash he might pay Red River men, instead of the men he should pay. We are in no way responsible for the men's wages, directly or indirectly. You need not say anything to anybody about this. Simply write on the order as you did before, if you are asked to. Yours truly, McPhee & McGinnity."

We shall not consider the assignments of error relative to receiving and refusing to receive testimony, for the reason that the abstract contains no objection nor exception to the ruling of the court. The abstract contains the evidence in the narrative form, and the questions and answers, and the ruling of the court upon objections to testimony are not given. True it is that in the assignment of errors the questions and answers are giv-

en, and the statement is made that the testimony was received over the objection of the defendant, and we are referred to the bill of exceptions. But the rules of the court require that the abstract shall show the objections and the rulings thereon and the exceptions taken thereto.

Nor shall we discuss the other assignments of error, for the reason that we are of opinion that, upon the defendants' testimony, the plaintiff is entitled to recover. We do not regard the condition claimed by the defendants as such a condition as will defeat the plaintiff's right of recovery, and we agree with the Court of Appeals, in its opinion given at the time the case was before that tribunal, when it says: "The condition annexed to the agreement would not relieve them, even conceding its existence. What the rule would have been had McPhee & McGinnity been advancing their own money, or what the rule would have been if it was determined that they would suffer loss by the acceptance and payment, we need not determine. The drafts were really drawn by an authorized agent on his own funds, and were a specific appropriation of these funds to the payment of the bills or orders which he drew. McPhee & McGinnity had no right to stop the payment of the checks which they had sent to pay these orders. The orders were drawn with authority, and under the promise of the drawees. They had been bought by Fowler and Underwood on the faith and strength of that promise \* \* \* and before any breach of the condition and before any right to rescind had accrued." McAlpine left with McPhee & McGinnity the sum of \$845. He was charged with the sum of \$125, being 5 per cent. of \$2,500, the rate they charged for the use of the money for one month. The letter written by the firm to their representative in New Mexico directed him to O. K. the orders and to make a memorandum on the orders, "This man worked for McAlpine at his mill," and stated: "You understand our reason for this is that we do not want to pay any men except those working at the mill from which he supplies us with lumber. The only reason that we ask him to give the orders is that if he got the cash he might pay Red River men, instead of the men he should pay." These orders were all indorsed, as directed, by the representative of McPhee & McGinnity. They were charged to McAlpine's account. Checks were drawn and sent to New Mexico for the purpose of paying them. Payment of the checks was stopped, but the orders were never returned.

We find no prejudicial error in the record which would warrant us in disturbing the verdict. The judgment is therefore affirmed.

The CHIEF JUSTICE and CAMPBELL, J., concur.

**COSTILLA COUNTY BANK v. WILLIS.**  
(Supreme Court of Colorado. March 5, 1906.)  
**APPEAL—QUESTIONS REVIEWABLE—OBJECTION NOT MADE AT TRIAL.**

Where the only objection made at trial to evidence of a custom was that it was immaterial, the objecting party could not be heard to urge on appeal that the evidence was inadmissible because it did not show that the custom was reasonable or general.

Appeal from District Court, Rio Grande County; Chas. C. Holbrook, Judge.

Action by the Costilla County Bank against William M. Willis. From a judgment for defendant, plaintiff appeals. Affirmed.

Ira J. Bloomfield, for appellant.

**CAMPBELL, J.** The appellant bank, as plaintiff below, brought suit against the appellee, defendant below, to recover a balance due on promissory notes. The defendant admitted that the balance sued for was due, and in his answer set up a counterclaim that he was a customer of the bank, and as such had made deposits of money therewith from time to time, and had drawn checks against the account; that there was a balance due him on this account for a sum larger than the balance which he admitted to be due to plaintiff on the notes; and for this difference he asked judgment against the plaintiff. Upon trial before a jury there was a verdict for defendant against the plaintiff in the sum of \$14.84. To reverse this judgment this appeal is prosecuted.

The only question seriously argued is that the court admitted improper evidence with respect to a custom prevailing among bankers. There was a sharp conflict between the testimony of plaintiff's witness and the defendant with reference to the state of the bank account. The defendant, without objection from plaintiff, sought to show by plaintiff's cashier that when the bank furnished its customer with a passbook it was customary for the book to show all of the deposits made and all the checks drawn against it. This custom was denied by plaintiff's cashier, and defendant produced the cashier of another bank in that vicinity who testified that, in such circumstances, the custom was for the passbook to show the entire transaction between the parties. Defendant's passbook, as plaintiff claimed and as defendant denies, did not fully and completely show the state of the bank account. This testimony was introduced for the purpose of throwing light upon that issue and as bearing upon the credibility of the respective witnesses. The objection now made by counsel for appellant to the ruling of the court in admitting this testimony is that the evidence did not show that the custom or usage was certain, reasonable, and sufficiently notorious and universal to afford a presumption that it was generally known

or prevailing in that part of the country. Cases to that proposition are cited. A careful examination of this record shows that the appellant should not now be heard upon this objection. At the trial it was not represented by the learned counsel who appears in its behalf in this court. No objection whatever was made below to the examination by defendant's counsel of the plaintiff's cashier with respect to this custom. When defendant later produced the cashier of another bank and questioned him with respect to it, the only objection plaintiff's counsel made was that it was immaterial whether or not the custom existed; not that the custom relied upon was not general, or that it was not established. No motion was made to strike out the testimony upon the ground that it did not establish a general custom, nor was there a request by plaintiff's counsel to have the jury instructed to disregard the evidence because of its insufficiency in that respect, or that a custom must be shown to be general, etc. In short, plaintiff took no steps whatever to bring to the attention of the trial court in any way the particular objection which, for the first time, it raises on this appeal. Of course, if the question of custom was an ultimate fact, proof of which was essential to a recovery, the objection that such proof was lacking would be pertinent at any time. But it would be manifestly improper for this court to pass upon an objection which the trial court was never given an opportunity to consider, and when the party complaining took no steps whatever below to get a ruling of the court upon it. This court sits to review questions that are tried below, not to pass upon matters raised for the first time here.

The additional objection that the evidence is not sufficient to sustain the verdict is not good. There was confessedly a conflict in the testimony, and the solution of the controversy depended largely upon the credibility of the witnesses, which was a matter exclusively for the jury to determine. Upon the grounds relied upon we cannot interfere with this judgment, and it is accordingly affirmed.

Affirmed.

**GABBERT, C. J., and STEELE, J., concur.**

#### **HARDING v. HARDING.**

(Supreme Court of Colorado. March 5, 1906.)

##### **1. DIVORCE—CRUELTY AS GROUND.**

Under the direct provisions of *Stats. Laws 1893, p. 236, c. 80, § 1*, the injured party to the marriage relation may obtain a divorce if the other has been guilty of extreme or repeated acts of cruelty, which may consist as well in the infliction of mental suffering as of bodily violence.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 62-83.]

## 2. SAME—EVIDENCE—SUFFERING.

Where the treatment complained of as ground for divorce is brutal and inhuman, from which mental suffering naturally results, and the jury so find, their verdict cannot be nullified merely because plaintiff does not expressly say that her life was actually endangered or her health injuriously affected thereby, or because defendant denies such treatment.

## 3. APPEAL—VERDICT—CONCLUSIVENESS.

Where the jury finds the allegations of cruel treatment as ground for divorce to be true, and they are sustained by the trial judge on a motion for a new trial based, even in part, on the insufficiency of proof, the Supreme Court is not justified in setting aside the decree.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3948-3950.]

## 4. DIVORCE—CONDONATION.

Where, after some of the acts of cruelty, in a bill for divorce, alleged to have been committed by the husband, the wife temporarily absented herself with her children from him and afterwards returned to him, and they again cohabited as husband and wife, and the husband after resumption of that relation was guilty of similar offenses, she is not barred by condonation from asking for a divorce.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 185-187.]

Appeal from Weld County Court; Chas. E. Southard, Judge.

Action by Jessie Harding against Walter J. Harding for divorce. From a decree for plaintiff, defendant appeals. Affirmed.

L. R. Rhodes and P. W. Lee, for appellant.  
Charles F. Tew, for appellee.

CAMPBELL, J. Action for divorce by the appellee, Jessie Harding, against Walter J. Harding, the appellant, on the ground of extreme cruelty. The jury found defendant guilty, as charged, whereupon the court rendered a decree dissolving the bonds of matrimony, and awarded the plaintiff \$600 permanent alimony, and the custody of their minor child. Defendant appeals.

The fifth subdivision of section 1 of our divorce act of 1893 (Sess. Laws 1893, p. 230, c. 80) provides that the injured party to the marriage relation may obtain a divorce if the other party thereto has been guilty of extreme or repeated acts of cruelty, which may consist as well in the infliction of mental suffering as of bodily violence. This is a legislative affirmation of the doctrine previously in force in this jurisdiction, announced in *Sylvia v. Sylvia*, 11 Colo. 319, 17 Pac. 912, and followed in *Rosenfeld v. Rosenfeld*, 21 Colo. 10, 40 Pac. 49. The only grounds relied on for reversal are that the evidence was not sufficient to sustain the verdict and decree, but if so, the plaintiff, by condonation, is estopped to claim a divorce. No fault is found with the sufficiency of the complaint. It charges generally a course of cruel and inhuman treatment of the plaintiff by the defendant, and this general averment is followed by six specifications of particular acts of cruelty which are alleged to have occurred at different times. No physical violence was inflicted upon the plaintiff, the evidence being

confined to acts and conduct of defendant which caused her great mental suffering, impaired her health, and endangered her life. The particular objection to the evidence is that it does not sufficiently show that plaintiff's mental suffering in any wise impaired her health, or endangered her life.

1. It would serve no useful purpose to detail the disgusting facts which the record discloses. It is sufficient merely to say that there is evidence tending to show persistent and continuous ill treatment of the plaintiff by the defendant consisting of inattention and neglect during her pregnancy, the use of profane, obscene, and filthy language towards her, and the denial of the paternity of one of the children born to the plaintiff during the marriage relation. There is also some evidence, though not very satisfactory, that defendant refused to provide medical treatment and care for the plaintiff during an illness; but if that were the only evidence of extreme cruelty, it would, of itself be insufficient to warrant a dissolution of the marriage relation because of its uncertainty. If defendant was guilty of the conduct and ill treatment to which plaintiff testifies, there can hardly be a reasonable doubt that it caused her great mental suffering, and, as she expresses it, rendered life almost intolerable to her. We do not understand that it is absolutely essential that plaintiff should directly testify that such mental suffering endangered her life or injuriously affected her health. If the treatment complained of is so brutal and inhuman, from which mental suffering naturally results, and if it be naturally calculated to impair health or endanger life, and the jury so find, their verdict cannot be nullified, merely because plaintiff does not expressly say that such results have actually occurred, or because defendant denies such treatment. Defendant's ill treatment, vile language, neglect, indifference, and coldness, which plaintiff's evidence tended to fasten upon him, were calculated to impair, and must have endangered, her health or life, being, as she was apparently, a woman of a nervous temperament. At all events, we do not feel justified in setting aside the decree, since the jury found such allegations to be true, and they were sustained by the trial judge on a motion for a new trial based, in part, on the insufficiency of proof.

2. The second ground relied on for reversal is that, even if the evidence establishes the extreme cruelty charged, defendant's conduct was condoned by the plaintiff. Condonation is not an absolute term applicable alike to all circumstances. Its application may vary as the different offenses alleged to have been condoned may vary. Condonation is upon the implied condition that the offense shall not be repeated, and that plaintiff thereafter shall be treated with conjugal kindness. Hence, even though it be true, as defendant claims, that after some of the acts of

cruelty were committed, plaintiff temporarily absented herself with her children from him, and afterwards returned to him, and they again cohabited as husband and wife, since defendant after resumption of that relation was guilty of similar offenses, the alleged condonation is not a bar to plaintiff's right to ask for a dissolution of the marriage relation. 8 Cyc. 539 and cases there cited.

This court is not disposed to uphold decrees of divorce for trivial causes, or those resting on inadequate proof, and when satisfied that good and sufficient grounds have not been established, it is not slow to set them aside. Upon plaintiff's evidence, supposing it to be true, and the inferences properly deducible therefrom, the jury were warranted in the verdict they returned. They, as well as the trial judge who approved their finding, saw the witnesses and heard them testify, and were better able than we are to determine their credibility.

For the reasons given, the judgment is affirmed.

Affirmed.

GABBERT, C. J., and STEELE, J., concur.

# GIBBS v. PEOPLE.

(Supreme Court of Colorado. April 2, 1906.)

## RAPE—ASSAULT WITH INTENT TO RAPE—INFORMATION.

Under Mills' Ann. St. § 1211, declaring that every male person over a certain age who shall have carnal knowledge of a female under a certain age, with or without her consent, shall be guilty of rape, and section 1215, punishing an assault with intent to commit rape, an information charging an assault with intent to rape a female under the age of consent need not allege that the assault was made with the intent to carnally know the female forcibly and against her will; for, in rape of a female under the age of consent, force on the part of the accused and want of consent on part of the female are immaterial.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Rape, §§ 38, 40, 41.]

Error to District Court, San Juan County; Jas. L. Russell, Judge.

Frank H. Gibbs was convicted of an assault with intent to rape, and he brings error. Affirmed.

W. J. Miles, for plaintiff in error. N. C. Miller, Atty. Gen., for the People.

GABBERT, C. J. The question presented for determination in this case is whether or not an information, in order to charge an assault with intent to commit rape upon a prosecutrix under the age of consent, must state that such assault was made with intent to carnally know her forcibly and against her will. Counsel for plaintiff in error contend that the offense set out in the information, to which the accused pleaded guilty, and on which plea he was sentenced to the penitentiary, did not charge an assault with intent to commit rape, but simple assault

only, for the reason it did not state intent on the part of the accused to use force against the will of the prosecutrix to accomplish his purpose in making the assault, although it was charged that she was under the age of 18 years. The statute provides that rape is the carnal knowledge of a female forcibly and against her will, and also that every male person over a specified age who shall carnally know any female under the age of 18 years, with or without her consent, shall be adjudged guilty of the crime of rape. Section 1211, 1 Mills' Ann. St. Both offenses, as defined, are rape. In the first, the employment of force on the part of the accused against the will of the prosecutrix is an essential element; but not so with the second, because, where the prosecutrix is under the age of consent, force on the part of the accused and want of consent of the female are immaterial. This being true, it logically follows that facts which are not material to establish the accomplished offense are immaterial in charging an assault with intent to commit such offense, for the reason that in charging an assault with intent to commit rape it is only necessary to charge acts which would have resulted in the commission of the principal crime had the purpose of the assault been accomplished. Thus tested, it is apparent the information is sufficient. The statute makes an assault with intent to commit rape a felony. Section 1215, 1 Mills' Ann. St. From the averments of the information it appears the defendant did actually assault the prosecutrix with intent to carnally know her, and that she was under the age of 18 years, so that, under the statute, had he succeeded in accomplishing the purpose for which he assaulted her, he would have been guilty of the substantive crime of rape, regardless of the degree of force used or the question of consent upon her part. *State v. Johnston*, 76 N. C. 209; *State v. Dancy*, 88 N. C. 608; *Davis v. State*, 31 Neb. 247, 47 N. W. 854; *Singer v. People*, 13 Hun (N. Y.) 418; *Territory v. Keyes*, 5 Dak. 244, 38 N. W. 440; *Hayes v. People*, 1 Hill (N. Y.) 351; *State v. Riseling* (Mo. Sup.) 85 S. W. 372; *People v. McDonald*, 9 Mich. 150; *State v. Meinhart*, 73 Mo. 562. Other cases bearing on the subject are *Glover v. Commonwealth*, 86 Va. 382, 10 S. E. 420; *Murphy v. State*, 120 Ind. 115, 22 N. E. 106; *McKinny v. State*, 20 Fla. 565, 10 South. 732, 30 Am. St. Rep. 140.

There are cases cited by counsel for defendant which hold contrary to our views. Some of these are based upon the proposition that the statute does not make the act of intercourse with a female under the age of consent rape, but an offense punishable the same as rape. Our statute on the subject is not susceptible of this construction. Other cases hold there can be no assault upon a consenting female. This, however, does not seem logical; for, when the law

renders her legally and conclusively incompetent to consent to intercourse, it likewise renders her legally incapable of consenting to or waiving those physical acts amounting to an assault in an attempt to commit an act to which, in law, she cannot consent. The assent of the female being void as to the substantive crime, it is equally so with respect to all acts of the offender intended to lead up to its commission. The purpose of the Legislature was to protect the female under a certain age from an accomplished act, without regard to her consent, and certainly it was not intended that she should be left unprotected from assaults made upon her with intent to accomplish that act.

The judgment of the district court is affirmed.

Affirmed.

GUNTER and MAXWELL, JJ., concur.

### BEAMAN, Sheriff, v. INTERSTATE NAT. BANK.

(Supreme Court of Colorado. Feb. 5, 1906.  
Rehearing Denied April 2, 1906.)

#### 1. CHATTEL MORTGAGES—RIGHT TO POSSESSION OF PROPERTY.

A chattel mortgagee in actual and exclusive possession of the property is entitled to replevy it from an officer holding it under a writ of attachment against the mortgagor.

#### 2. SAME—ACTUAL POSSESSION—EVIDENCE.

A bank held notes secured by a chattel mortgage on cattle. The mortgagor desired to remove the cattle to another state for pasturage, and the bank consented, on condition that the security be not impaired and sent a representative with the cattle, who notified the owner of the pasture that the cattle were not to be removed without instructions from the bank. This notice was afterwards renewed by letter and telegram, and the owner of the pasture replied that he would hold the cattle subject to the bank's order. Held sufficient to show that the bank was in actual possession of the cattle.

#### 3. SAME—DESCRIPTION OF PROPERTY—INACCURACY—RIGHTS OF CREDITOR OF MORTGAGOR.

Where, in replevin by a mortgagee of cattle to recover them from an officer holding under a writ of attachment against the mortgagor, the evidence identified the cattle which plaintiff recovered by the writ of replevin as the same cattle included in the mortgage, and of which the mortgagee had actual possession at the time of the attachment, the fact that the brands described in the mortgage did not correspond with those upon the cattle recovered was not material, and the attaching creditor was not misled or prejudiced by the description in the mortgage.

Steele and Gunter, JJ., dissenting.

En Banc. Error to District Court, Pueblo County; John H. Voorhees, Judge.

Action by the Interstate National Bank against James L. Beaman, as sheriff. There was judgment for plaintiff, and defendant brings error. Affirmed.

Crane & Patrick, A. J. Fires, Duncan Smith, and Waldron & Thompson, for plaintiff in error. Chas. E. Gast, for defendant in error.

GABBERT, C. J. Defendant in error, as plaintiff, brought suit in replevin to recover from plaintiff in error, as defendant, the possession of certain cattle. These cattle were held by defendant, as sheriff, under a writ of attachment, and were originally located in Butler county, Kan., and owned by G. A. Yantis. He executed certain chattel mortgages thereon to the firm of Tamblyn & Tamblyn, which mortgages, together with the notes secured thereby, were transferred to the plaintiff bank, or the Kansas City Cattle Loan Company. Yantis was desirous of moving these cattle to Colorado. The bank and Tamblyn & Tamblyn had no objection, provided their security was not impaired. For the purpose of obviating any question on this score, Yantis and Tamblyn & Tamblyn, with the knowledge and consent of the bank, executed an agreement which provided, in effect, that the cattle should be shipped in the name of the plaintiff bank to pastures in Colorado furnished, or to be furnished, by Yantis or Tamblyn & Tamblyn; that the freight charges, pasturage, and expenses incurred should be borne by Yantis and Tamblyn & Tamblyn; that a representative of the plaintiff bank was to be present and assist in tallying the cattle on the cars, and in a general way, look after its interests. This agreement further recited that its terms should not in any way interfere with the liens created by the chattel mortgages or impair any of the conditions thereof. Under this arrangement the cattle were shipped to Colorado in the name of the bank, in care of Yantis. A representative of the bank came to Colorado with the last train load. The cattle were placed in the Knight pasture. There seems to be some question whether this pasture was controlled by W. L. or Clarence Knight, father and son; but both were notified by a representative of the bank to hold them, subject to the bank's order, and not to permit any of them to be removed without instructions to that effect from the bank. Later, W. L. Knight was notified by the bank by wire and letter not to permit the cattle to be moved without definite instructions from the bank. He answered that he would hold the cattle subject to the bank's order. Thereafter a creditor of Yantis brought suit in attachment, and under the writ issued therein the defendant sheriff levied upon the cattle. To recover the possession of the cattle the bank brought its action in replevin. In its complaint the plaintiff alleged that the possession of the cattle had been transferred by Yantis to it, and that it was in such possession at the time of the levy of the writ. The court instructed the jury to the effect that if they believed that the possession of the cattle was turned over to the bank, and that the bank thereafter held exclusive possession of them, down to the date of the levy of the attachment, that it could maintain replevin. A trial resulted in a verdict for defendant in the sum of several thousand dollars, which apparent-

ly was the value of the cattle which the jury found the bank was not entitled to hold, either by virtue of the chattel mortgages or the agreement under which the cattle were shipped to Colorado, and awarded the plaintiff the possession of the remainder of the cattle in controversy. The defendant sheriff brings the cause here for review on error. His contention is that the bank was not entitled to the possession of any of the cattle taken under the writ of replevin. In support of this claim, his counsel raise many interesting questions touching the validity of the mortgages as against creditors, and the extent the bank was bound by the particular brands by which the cattle were described in the mortgages, none of which, we think, are material because in our opinion two questions are conclusive of the case, which must be resolved in favor of the plaintiff: (1) Plaintiff was in the actual and exclusive possession of the cattle awarded it by the verdict at the time of the levy of the writ of attachment; and (2) such cattle were the identical ones described in the chattel mortgages.

The cattle were shipped to Colorado in the name of the bank, in care of Yantis. This was for the purpose of enabling him to receive them. They were placed in the pasture which the parties had previously agreed upon. The bank was not to be put to any expense on account of the removal, or for the pasture. Yantis and Tamblyn & Tamblyn were to pay these expenses. These matters, however, would only be material in the event the bona fides of the transaction, as between the bank and Yantis and Tamblyn & Tamblyn was questioned. Regarding the good faith of all these parties, there is no doubt, because it clearly appears from the testimony that the bank held paper of Yantis and Tamblyn & Tamblyn which it was intended should be secured by these cattle. When they were placed in the pasture the Knights were expressly notified by the representative of the bank that they should not allow them to be moved without orders from the bank. Mr. W. L. Knight evidently recognized that he was in the possession of the cattle for the bank, for we find later that when he was notified again, by wire and letter, not to permit the cattle to be moved except on instructions from the bank, he replied that he held them subject to its order. Yantis was in Colorado, and perhaps in the vicinity of the cattle; but he was exercising no control over them, and could exercise none, except through the order of the bank. We think this testimony clearly demonstrates that the actual and exclusive possession of the cattle was in the bank at the time of the levy of the writ of attachment.

It may be claimed, however, that there is a conflict in the testimony on the subject of possession by the bank. If there is, that conflict was resolved in favor of the plaintiff by the jury, who were directed that in deter-

mining this question it was their duty "to consider all the facts and circumstances that attended the handling of the cattle, such as shipping of the same from Kansas to Colorado; the manner in which they were controlled when they were in the Knight pasture, and all other facts in evidence relative to the handling of said cattle." On behalf of the sheriff it is urged that the creditors of Yantis were not bound by any description of the cattle except such as appeared in the chattel mortgages. They were described by certain brands, and it is contended that these brands did not correspond with those upon the cattle awarded the plaintiff. The brands would aid in identifying the cattle, but were not the only aids which could be resorted to for that purpose. The testimony, independent of the brands, established that the cattle awarded the plaintiff were the identical cattle included in the mortgages shipped to Colorado, and which it was in the actual and exclusive possession of at the time the writ of attachment was levied. In these circumstances the attaching creditor of Yantis was neither misled nor prejudiced by any description by brands.

The judgment of the district court will be affirmed.

Affirmed.

STEELE and GUNTER, JJ., dissent.

# WHITMORE et al. v. GASTON.

(Supreme Court of Colorado. April 2, 1906.)

## JUDGMENT—OPENING DEFAULT—INSUFFICIENCY OF PROCESS.

Where the record showed that a summons was issued by plaintiff's attorney, as authorized by Mills' Ann. Code, § 33, the day the complaint was filed, and the summons, together with the proof of personal service, was filed and returned into court, the court could not set aside a default judgment and dismiss the action, on the ground that it had no jurisdiction and because no summons was issued within one month after the filing of the complaint as required by statute.

Appeal from District Court, Teller County; Wm. P. Seeds, Judge.

Action by A. B. Whitmore and another against John C. Gaston. From a judgment setting aside a default judgment in favor of plaintiffs and dismissing the action, plaintiffs appeal. Reversed.

Potter & McCarthy, for appellants.

CAMPBELL, J. This is an action in support of an adverse claim filed in the United States land office. There was a default judgment in plaintiffs' favor in April, 1901. After the expiration of the term when it was rendered, and in August of the same year, the defendant appeared specially and moved to set aside and vacate that judgment and to dismiss the cause, because the court acquired no jurisdiction of the person of the defendant, and because no summons was

issued within one month after the commencement of the action or the filing of the complaint. The court sustained the motion, vacated the judgment, and dismissed the action, and from that judgment the plaintiffs appeal.

The defendant relied upon the record to sustain the facts set up in his motion, there being no other proof. The complaint was filed March 27, 1900. On the same day a summons was signed and issued by the plaintiffs' attorney which was afterwards personally served, and with proof thereof filed and returned into court. The court, in rendering judgment for the plaintiffs, found as a fact that summons had been duly served, and that the defendant had not seasonably, or at all responded thereto, whereupon defendant's default was entered, and judgment duly given against him in plaintiffs' favor. The record shows that when, in August, 1901, the court set aside the judgment and dismissed the action, this summons, with proof of service, was on file in the action. It also appears that on the same day that the complaint was filed, and the summons was signed and issued by the plaintiffs' attorney, another summons was duly issued by the clerk of the court, which was not served and apparently was not on file at the time the judgment was set aside, and the action dismissed, although it was duly filed before the formal decree or judgment of dismissal, as signed by the judge, was filed with the clerk. In *Stevens v. Carson*, 21 Colo. 280, 40 Pac. 569, it was held that a motion to dismiss an action and strike the complaint from the files because no summons has been issued within 30 days from the filing of the complaint as required by section 33 of the Code is addressed to the sound discretion of the court. We are at a loss to know upon what possible ground the court reached the conclusion that the judgment entered in plaintiffs' favor in April, 1901, should be vacated and the action dismissed. The only ground which defendant specified was that the summons was not issued within one month after the filing of the complaint. Just why two summons were issued, one signed by the clerk, the other by plaintiffs' attorney, or which was first issued, we are not advised. At the time of the hearing of defendant's motion there was on file in the action the return upon the summons issued by the plaintiffs' attorney showing due service of defendant, and the record shows that because the defendant did not respond to this summons his default was entered and judgment rendered against him.

We do not think the court can ignore the facts disclosed by the record. We apprehend, although the fact does not appear from the abstract but from the original transcript, that as the summons which was issued by the clerk of the court was not actually returned at the date of the hearing of defend-

ant's motion, this fact was considered controlling by the court that no summons was issued within the month. But this return and filing were made before the judgment of dismissal was entered, though the fact that the clerk had within the legal time issued a summons may not have been actually brought to the attention of the court at the time of the hearing of the motion. However that may be, it does appear, without dispute, that summons was issued by the plaintiffs' attorney, as was proper under section 33 of the Code, the very day the complaint was filed. The grounds set up in the motion are contradicted by the record itself, and the motion, therefore, should have been overruled.

The judgment must be reversed, and the cause remanded; and it is so ordered.

Reversed.

GABBERT C. J., and STEELE, J., concur.

(36 Colo. 348)

WHITMORE et al. v. GASTON.

(Supreme Court of Colorado. April 2, 1906.)

Appeal from District Court, Teller County; Wm. P. Seeds, Judge.

Action between A. B. Whitmore and another against John C. Gaston. From a judgment for the latter, the former appeals. Reversed.

Potter & McCarthy, for appellants.

CAMPBELL, J. The facts in this case are the same as in *Whitmore et al. v. Gaston*, 85 Pac. 427, and the decision there must govern here. For the reasons stated in the opinion in that case, the judgment must be reversed, and the cause remanded.

Reversed.

GABBERT, C. J., and STEELE, J., concur.

(36 Colo. 353)

CARR v. WILLOUGHBY & CO.

(Supreme Court of Colorado. April 2, 1906.)

1. APPEAL—BILL OF EXCEPTIONS—NECESSITY.

A statement of facts agreed on as the facts of the case is not part of the record unless embodied in a bill of exceptions.

2. SAME.

A motion to vacate an order of dismissal, not being such a motion as *Mills' Ann. Code*, § 387, declares part of the record, is not available on appeal unless presented by bill of exceptions.

3. SAME—PRESUMPTION OF REGULARITY.

The judgment of the county court, a court of general jurisdiction, in dismissing an action for want of prosecution and refusing to reinstate it, will be presumed regular; the facts on which it acted not being in the record.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3743.]

Appeal from Summit County Court; Wm. Thomas, Judge.

Action by Mark E. Carr against Willoughby & Co. Judgment for defendants. Plaintiff appeals. Affirmed.

J. T. Hogan, for appellant.

MAXWELL, J. July 7, 1900, there was filed in the county court of Summit county a transcript on appeal from a justice court. September 3, 1901, the county court made and entered the following order in the action: "Now on this 3d day of September, 1901, it was ordered by the court that this cause be, and the same is, hereby dismissed for the want of prosecution. It is further ordered that a procedendo issue herein."

The errors relied upon for a reversal are that the trial court was wrong (1) in dismissing said action, and ordering a procedendo to issue, for the reason that no notice of the motion to dismiss said action was ever given or served upon defendant or his attorney; (2) in denying defendant's motion to set aside the judgment entered September 3, 1901, and to reinstate said cause, for the reason that said judgment was contrary to law and was entered without authority of law. No bill of exceptions was preserved or filed, and no order with reference thereto was made by the court. There is copied into the record a motion of defendant, appellant here, to set aside and vacate the order of dismissal entered September 3, 1901, and what purports to be a statement of the facts agreed upon as being the facts of the case. This motion was not such a motion as comes within section 387, Mills' Ann. Code, and is not a part of the record proper, nor is what purports to be the agreed statement of facts, upon which the motion was presented to the court, a part of the record proper. Such matters can only become a part of the record by being embodied in a bill of exceptions, and rulings on the motion and consideration of the agreed statement of facts in support thereof are available on appeal, only in case the same are preserved by bill of exceptions. *Wagner-Stockbridge Co. v. Goddard*, 33 Colo. 387, 80 Pac. 1038; *Everett v. Wilson* (Colo.) 83 Pac. 211. The facts upon which the court acted in dismissing the action, and in refusing to reinstate the same, not being preserved by bill of exceptions, are not before us. The judgment being that a court of general jurisdiction, having jurisdiction of the subject-matter, and of the parties with power to enter the judgment in question, we must presume that the judgment was regular in every respect, unless the contrary appears in the record. *Carnahan v. Connelly*, 17 Colo. App. 98, 68 Pac. 836.

There being nothing in the record to indicate irregularity in the judgment, it must be affirmed.

Affirmed.

The CHIEF JUSTICE and GUNTER, J., concur.

(30 Utah, 391)

NIELSON v. PETERSON et al. (PETERSON, Intervener).

(Supreme Court for Utah. May 11, 1906.)

MORTGAGES—PARTIES—VALIDITY—JOINDER OF WIFE.

Under Rev. St. 1898, § 1155, providing that, if the owner of a homestead is married, no conveyance or incumbrance of the premises, selected and recorded as a homestead prior to the conveyance or incumbrance, is valid, unless both husband and wife join in the execution of the same, and section 1150, authorizing either a husband or wife to select and record a homestead, where no declaration of homestead was made by either the husband or wife, a mortgage given by the husband alone was valid, and foreclosure and sale thereunder transferred the title to the mortgagee subject to the right of redemption and to the wife's one-third interest should she survive the husband.\*

Straup, J., dissenting in part.

Appeal from District Court, San Pete County; Ferdinand Erickson, Judge.

Action by Swen O. Nielson against Otto Peterson, in which Ellen Peterson intervened. From a judgment in favor of plaintiff, intervener appeals. Affirmed.

The record in this case shows that on April 1, 1901, and for a long time prior thereto, Otto Peterson and his wife, Ellen Peterson, owned, claimed, and occupied lot 1, in block 24, plat A, of Fairview city, San Pete county, Utah, as their homestead. On April 19, 1901, Otto Peterson, who held the legal title to the homestead, executed and delivered to Swen O. Nielson, respondent herein, a mortgage to secure a debt of \$311, which he (Peterson) was owing to said Nielson. The mortgage was duly recorded in the records of San Pete county, where the property sought to be incumbered is situated. Default having been made in the payment of the indebtedness for which mortgage was given, Nielson, on the 4th day of April, 1905, brought suit in the Seventh judicial district court in and for San Pete county for the foreclosure of the mortgage. Summons was duly issued and served on Otto Peterson, who failed to appear or answer in said suit. His default was duly entered. Ellen Peterson (wife of Peterson), who had not joined in the execution of the mortgage, filed her complaint in intervention, alleging, in substance, that she was the wife of the defendant, that the mortgaged property described in plaintiff's complaint was her home, was exempt as such, and that the mortgage executed by her husband, Otto Peterson, was void because she had not joined in its execution. On June 5, 1905, the cause came on for hearing, and the court, after hearing the evidence, found the facts in accordance with plaintiff's complaint, made and entered a decree and order of sale which is in the usual form in such cases, except that it provides for the sale of the defendant's (Otto Peterson's) interest only in and to the mortgaged premises, with the following proviso: "The intervener herein. El-

\*Cook v. Higley, 10 Utah, 223, 37 Pac. 336.

len Peterson, who is the wife of the defendant herein, and whose rights to the said premises and every part thereof is not affected by this decree." And again, at the conclusion of the order of sale: "Subject, however, to any and all legal rights which the said Intervener, Ellen Peterson, as the wife of Otto Peterson, may have in and to said property, and every part thereof." From this decree, Ellen Peterson, Intervener, has appealed to this court.

W. D. Livingston, for appellant. Jacob Johnson, for respondent.

McCARTY, J., after making the foregoing statement of the case, delivered the opinion of the court.

Appellant insists that the mortgage is absolutely void, for the reason that she did not join in its execution and was in no way a party to it. On the other hand, it is contended that Otto Peterson, the mortgagor, had a right to mortgage the land in question, notwithstanding it was occupied by himself and family and was their only home, subject to the statutory one-third interest of his wife, which interest, respondent contends, is an inchoate and contingent interest which would take effect only upon the death of Otto Peterson, should his wife survive him.

The sections of the Revised Statutes of 1898 of this state relating to homesteads, so far as material here, are as follows:

"Sec. 1147. A homestead consisting of lands and appurtenances, which lands may be in one or more localities, not exceeding in value with the appurtenances and improvements thereon the sum of fifteen hundred dollars for the head of the family, and the further sum of five hundred dollars for his wife, and two hundred and fifty dollars for each other member of his family, shall be exempt from judgment lien and from execution or forced sale, except as provided in this title.

"Sec. 1148. If the homestead claimant is married, the homestead may be selected from the separate property of the husband, or, with the consent of the wife, from her separate property.

"Sec. 1149. Any person who is the head of a family may make a declaration of homestead in the manner provided in the next two sections, but a failure to make such declaration shall not impair the homestead right.

"Sec. 1150. In order to record a homestead, the husband or other head of the family, or, in case the husband has not made such selection, the wife must execute and acknowledge a declaration of homestead, and file the same for record in the office of the recorder of the county or counties in which the land is situated.

"Sec. 1151. The declaration of homestead must contain: (1) A statement showing the person making it to be the head of a family; or, when the declaration is made by the wife,

showing that her husband has not made such declaration. (2) A description of the premises. (3) An estimate of their cash value."

The foregoing provisions of our statutes relating to the exemption and selection of homesteads are, in the main, taken from the Revised Code of North Dakota of 1899, section 3608 of which is as follows: "The homestead of a married person cannot be conveyed or incumbered, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." The Codes of California, Iowa, Nebraska, and several other states contain provisions almost identical with section 3608 of the Revised Code of North Dakota of 1899. The courts of those states have uniformly held that under this provision a husband cannot legally incumber the homestead, unless his wife joins in the execution and acknowledgment of such conveyance or incumbrance. Section 1155 of the Revised Statutes of Utah of 1898, provides: "If the owner is married, no conveyance or incumbrance of, or contract to convey or incumber, the premises selected and recorded as a homestead prior to the time of such conveyance, incumbrance, or contract, is valid unless both the husband and wife join in the execution of the same." By a comparison of this provision of the statutes of this state with the corresponding provision of the Codes of the states mentioned, it will be seen that that portion of section 1155 of our Code which we have italicized is not incorporated in the provision of the Codes relating to the same matter of the states referred to. Therefore, the decisions of those states bearing upon the decisive question under consideration, viz., the validity of the mortgage, are of but little, if any, value as a guide in construing section 1155 of our own Code. It would seem, however, that, if the Legislature had intended this section to receive the same construction as is given the corresponding section of the Codes of the states mentioned, it would not have limited the conveyances, incumbrances, etc., therein mentioned to such premises only as may be "selected and recorded as a homestead prior to the time of such conveyance," etc. It is a well-settled rule, and one that has been recognized and followed in this state, that a married man who holds the legal title to the homestead may, unless prohibited by statute, convey or incumber such homestead (subject to his wife's one-third interest in case she survives him), without the wife joining in the execution of the instrument. *Cook v. Higley*, 10 Utah, 228, 37 Pac. 336; 15 A. & E. Enc. Law (2d Ed.) 665-666; *Waples, Homestead & Exemp.* 370; *Thompson, Homestead & Exemp.* 230.

The foregoing provisions of the statute do not confer upon the wife a vested estate or property right in the premises claimed as a homestead when such premises are owned by, and the legal title thereto is in, the hus-

band. A. & E. Enc. Law (2d Ed.) 668. "The wife has not an estate in homestead during the life of the husband, but a mere right of occupancy, or the right to have same exempted from her husband's debts, except where she unites in the conveyance, with privy examination; but, by uniting, she does not convey an estate of which she is seised, but merely consents that her husband may convey his estate, so as to waive her right to an exemption." *Creath v. Creath*, 86 Tenn. 659, 8 S. W. 847. In the case of *Gee v. Moore*, 14 Cal. 472, this same question was involved (the nature and extent of the wife's interest in the homestead), and in the course of the opinion in that case the court say: "It is the alienation by the owner, if a married man, which the statute declares shall be invalid without the signature of the wife. The power of alienation, and not the nature of the husband's estate, is thus affected. And this power is restricted only so far as it may be necessary for the protection of the homestead. The invalidity only goes to the extent essential to this object. The husband can neither mortgage, sell, or otherwise alienate, the homestead, without the signature of the wife, so as to deprive themselves of the benefit of the humane and wise provisions of the law. For this purpose, the restriction was designed, none other. Subject to the protection thus extended, the absolute power of the husband continues. In *Jenness v. Cutler*, 12 Kan. 500, it is said: "It requires no instrument in writing to create such an interest, nor does it require any instrument in writing to destroy it. A merely going upon the premises, and occupying the same as a homestead, will create the interest. The abandonment of the premises as a homestead will destroy the interest; and, if the wife should die while occupying the premises as a homestead, she would have nothing that would descend to her heirs, or go to her executors or administrators, and nothing that she could devise or bequeath. The whole estate would continue to belong to her husband, and after her death he could sell and convey the same by a deed executed by himself alone." *Smith v. Sherck*, 60 Miss. 491; *Godfrey v. Thornton*, 46 Wis. 677, 1 N. W. 362; *Stewart v. MacKey*, 18 Tex. 58, 67 Am. Dec. 609; *Howe v. Adams*, 28 Vt. 541.

The only restrictions placed upon a married man in this state to prevent him from disposing of or incumbering the homestead, without his wife joining in the execution of the instrument by which it is sought to convey or incumber such homestead, are contained in section 1155. As we have heretofore observed, this section renders a conveyance or incumbrance of a homestead by a married man void only when such homestead has been selected and recorded prior to such conveyance or incumbrance, and both husband and wife have not joined in the execution of the instrument by which the home-

stead is conveyed or incumbered; but the statute nowhere prohibits the husband, when he holds the legal title to the homestead, from conveying or incumbering it when no declaration of homestead has been made and recorded as provided in sections 1150 and 1151, *supra*. While it is evident that the Legislature intended to place it within the power of the wife to protect the home, when, because of the husband's improvidence, financial misfortune, or for any other reason, he seeks to convey or incumber the homestead without her concurrence, we think it is also apparent that, under the provision of section 1155, in order for the wife to exercise the right thus given her, she must execute and acknowledge a declaration of homestead and file the same for record as provided in sections 1150 and 1151. In the case before us no declaration of homestead was made and recorded by either the husband or wife. Therefore the mortgage under consideration was valid, and the foreclosure and sale of the premises transferred the title from the mortgagor to the mortgagee, subject to the right of redemption and to the intervener's (wife of mortgagor's) one-third interest should she survive her husband, the mortgagor.

The judgment is affirmed, with costs.

BARTCH, C. J., concurs.

STRAUP, J. (concurring in part; dissenting in part). I concur in the judgment to the extent of holding the mortgage valid so far as it affects the defendant Otto Peterson, but dissent from the holding that the mortgage impaired or defeated the right of the intervener, Ellen Peterson, to claim and preserve the homestead, or that the mortgage was at all binding upon her, or that it in any way affected any of her rights. It may be conceded that a mortgage executed only by a married man upon a homestead not selected and not recorded is not void as to him, as it would be if the homestead were selected and recorded, and that he may lawfully mortgage whatever interest he may have in and to the property. But he cannot, by his act alone, mortgage or convey any right or interest that the wife may have in and to the homestead sought to be mortgaged or conveyed. The undisputed evidence shows that the realty in question was the only real estate owned or possessed by the Petersons, that it did not exceed \$800 in value, that at the time of the execution of the mortgage and long prior thereto the property was and had been occupied by them as their home and residence, that the defendant was a married man and that the intervener was his wife, and that all these facts were known to the plaintiff at the time of the execution of the mortgage. It is conceded by Justice McCarty that the husband alone by his deed of conveyance cannot de-

feat or impair the wife's statutory interests given her in lieu of dower in and to the real estate possessed by him at any time during the marriage. Now the homestead statute gives the wife as well as the husband the right to claim and preserve the homestead. In addition to the sections of the statute quoted by Justice McCARTY, section 1152 provides: "It shall be the privilege of either the husband or the wife to claim and select a homestead to the full extent prescribed in this title, on the failure of the other, being the judgment debtor, to make such claim or selection." It is not claimed that the husband made any kind of claim to this or to any other realty as a homestead, or that the Petersons owned or possessed any other realty. The right, then, which is given to the wife by the homestead statute to claim and preserve the homestead cannot be defeated or impaired by a mortgage executed alone by the husband and to which she had not given her consent. So far as affecting her interest, she had the same right to claim and preserve the homestead as though the mortgage had not been given. All that section 1155, declares is that no conveyance by a married man of a homestead selected and recorded is valid, unless both the husband and the wife join in the execution of the same; that is, if the instrument in such case is not executed by both, it is absolutely void, even as to the married person who alone executed it. But the section cannot be construed to mean that, if it is otherwise executed alone by the husband and under conditions so as to be binding upon him, therefore it is also binding upon another, who did not execute it, and who has a right or interest in and to the thing conveyed. Under such circumstance he can convey whatever interest he may have in and to the property, but he cannot, by his act alone, impair or defeat whatever right the wife has to claim and preserve the homestead, or any other right which she may have in and to the property. Mr. Waples, in his work on Homestead and Exemption, on page 545, says: "The owner cannot waive any vested rights of his wife and children. When by law, through his dedication of his own property as a homestead, they become entitled to certain rights or interests in it, he alone cannot deprive them of it by any agreement to forego claiming exemption. Where 'estate of homestead' is created with this effect in favor of the wife, and where beneficiaries other than the owning head of the family have such rights, interests, or privileges conferred, though there be no such 'estate' recognized, the owner alone cannot waive exemption to their injury. No such act on the part of a husband or father, or of a wife or widow, or of any person, as might estop him or her personally from claiming a homestead right, can possibly debar others, who have rights therein, from their interest."

The case of Cook v. Higley, 10 Utah, 228, 37 Pac. 336, is cited to support the doctrine that the husband can convey "his homestead without the wife's consent, subject only to her dower right on his death." That ruling was made under the exemption or homestead statute of 1888. Thereunder no one but "the debtor who was the head of a family" could claim the exemption or benefit of a homestead. The wife herself, unless she was the debtor and the head of a family, was given no right whatever to lay any kind of claim to the homestead, and had no right or interest in or to the property, except the right of dower. In construing and speaking of that statute, the court said: "Therefore, independently of the husband, who is the head of the family, the wife has no claim upon the homestead, so long as he is living, except her right of dower, unless it be her separate property." That statute is very unlike the one here under consideration. If not by the very letter, certainly in spirit, the statute which we now have expressly gives the wife the right to claim and preserve the homestead, and I cannot see how the mortgage not signed nor consented to by her can impair or defeat that right. It is conceded by Justice McCARTY that this statute gave the wife a right to claim the homestead, and that the Legislature intended to place it within the power of the wife to protect the home against the improvidence or misfortune of the husband, or where he, for any other reason, sought to convey or encumber the homestead without her concurrence; but that, in order that she may do so, under the circumstances of this case, it was a prerequisite that she make and record a declaration. Had she made and recorded a declaration, then, of course, the mortgage would have been absolutely void, even as to the husband who alone executed it. But what is the wife's right with respect to claiming the homestead when no declaration was made and recorded, and, for that reason, the mortgage held valid and binding as to the husband? To say that she is barred from claiming the homestead under such circumstance is because she failed to make and record a declaration, not because the mortgage was given. As to her, the mortgage has nothing to do with it. To say that under such circumstance she is barred from claiming the homestead is to say that no one can claim a homestead unless a declaration has been made and recorded. This the statute does not mean, for it, in express terms, declares, in section 1149, that a failure to make a declaration shall not impair the homestead right. And I do not understand the intended effect of the decision of the majority court to be that, unless a declaration is made and recorded, a claimant is barred from claiming a homestead, but that, because of the execution of the mortgage by the husband, the wife is not in position to claim and preserve the homestead, because a declaration was

not made and recorded by her. This court, in several cases, held, under the statute of 1896, which provided for the exemption of a homestead "to be selected by a judgment debtor consisting of land and appurtenances," that the homestead claimant was not required to formally select the premises as a homestead, but that the selection of the homestead is sufficiently manifested by the fact of ownership, residence, use, or occupation, and that a sale thereof under execution may be set aside. *Kimball v. Lewis*, 17 Utah, 381, 53 Pac. 1037; *Kimball v. Salisbury*, 19 Utah, 161, 56 Pac. 973. It was, however, urged by counsel on argument that a distinction should be made between those cases and the one at bar because they were execution sales, while this is a foreclosure sale. The language of the statute is that a homestead consisting of lands, etc., is exempt "from execution or forced" sale. So far as the wife is concerned, a sale of property on foreclosure of a mortgage not signed nor consented to by her is just as much a forced sale, and an involuntary alienation, as is an execution sale. Here the property was not charged with a lien and right of sale by any act on her part, or with her consent. As to her status, she is in no worse position than if the husband had voluntarily confessed judgment on a note, and, for value, waived all exemptions and benefits of homestead.

The necessary effect of the decision of the majority court ousts the possession of the defendant and of his family at the expiration of redemption, and lets the purchaser in with all right of title and possession, save alone the wife's inchoate or statutory interest given her in lieu of dower, which can only be asserted on the death of the husband. A holding which leads to such a result, I think, subverts rather than accomplishes the purpose of the statute, which is intended to secure and protect the home, not only for the benefit and protection of the husband, or the head of the family, but also for the benefit and protection of the wife and children as well and as a means of their support, and is intended to give the wife a privilege or right to lay claim to and preserve the home for herself and family. However, the decree, as made by the lower court, probably did not prejudice the right of the intervenor, for the decree and the order of sale were subject to "any and all legal rights" which she may have in and to the property, and that her "rights to the said premises and every part thereof" are not to be affected by the decree. The court ought to have defined and adjudicated what those rights are. Neither by the findings nor the decree, or otherwise, did it do so. But the majority court has defined and adjudicated them to be that only of a dower right, from which I dissent.

## STATE v. WINSLOW.

(Supreme Court of Utah. May 12, 1906.)

## 1. CRIMINAL LAW — EXPERT TESTIMONY — INCEST—FORCIBLE INTERCOURSE.

Where, in a prosecution for incest, the female testified that the intercourse was by force, expert testimony tending to show that there had been a forcible penetration of the vagina was admissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1060.]

## 2. INCEST—EVIDENCE—COMPLAINT BY PROSECUTRIX.

Where, in a prosecution for incest, the female testified that the act was committed with force, and against her will, testimony that she had made a complaint shortly after the offense was admissible.

## 3. SAME.

In a prosecution for incest, a question as to whether prosecutrix had made complaint of her father having had carnal knowledge of her was objectionable, because assuming and stating the name of the accused.

## 4. INCEST—ELEMENTS OF OFFENSE—INTERCOURSE BY FORCE.

Under Rev. St. 1898, § 4211, declaring that if any person related to another person within the fourth degree of consanguinity shall have sexual intercourse with such other related person with knowledge of the relationship the person so offending shall be deemed guilty of incest, a father having intercourse with his daughter may be convicted of incest, though the daughter did not consent, and the intercourse was had by force.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Incest, § 6.]

## 5. INDICTMENT—INCEST—CONVICTION OF ATTEMPT.

Under Rev. St. 1898, § 4893, declaring that the jury may find the defendant guilty of any offense necessarily included in that with which he is charged or of an attempt to commit the offense, a person indicted for incest may properly be convicted of an attempt to commit that crime.

Appeal from District Court, Second District; J. A. Howell, Judge.

J. H. Winslow, Jr., was convicted of attempt to commit incest, and appeals. Affirmed.

Henderson & MacMillen, for appellant. M. A. Gruden, Atty. Gen., and Geo. Halverson, Dist. Atty., for the State.

STRAUP, J. 1. The defendant was convicted of an attempt to commit incest on his daughter, then between 11 and 12 years of age. At the time in question the defendant occupied a cot in a sleeping room, and his daughter, with several smaller children, occupied a bed in the same room. Defendant's wife, who, about two weeks prior to the commission of the offense, was confined, occupied, with an attendant, an adjoining room. On the evening in question the defendant had retired and when his daughter entered the room, also to retire, and commenced undressing, he called to her to lie down with him. She did so. He caressed her and then unplanned and raised her garments and attempted to have sexual intercourse with her. She said he penetrated her "about that far," (indi-

cating) which counsel, on cross-examination, said was about three-quarters of an inch, and she said, "about that." She testified that she did not consent to the act, and tried to pull away from the defendant but was unable to do so because he held her; that he attempted intercourse with her the second time, and then dropped off to sleep; she said it hurt her, but she did not call out to her mother because she was frightened. After the second attempt she left his cot, and sat on her bed thinking whether she should tell her mother. After a few minutes she went into her mother's room and told her. Her mother asked her to go with her into the defendant's room and there repeat in his presence what she had said to her. At first the girl hesitated because of her excitement and fear of the defendant, but finally did so. The defendant said, "I didn't, did I, Mandy?" She said that he did. The defendant arose, knelt before his wife and begged forgiveness. She told him to take his bed and go in the kitchen. The defendant went into the kitchen and there walked back and forth crying and calling himself names. The chief of police and several other officers testified that the defendant, at the time of his arrest, said that he had attempted to have intercourse with his daughter, but then thought of the wrong he was doing, and quit.

2. The first error assigned relates to the admission of testimony. Dr. Forbes, on behalf of the state, testified that he, on a certain date, which was five or six days after the offense was alleged to have been committed, made an examination of the vaginal parts of the prosecutrix and was asked to state what he observed about their condition. This was objected to as being irrelevant, incompetent, and immaterial "for the reason that you cannot prove incest in this manner." The objection being overruled, the witness answered, that there was a superficial inflammation of the mucus membrane of the vagina or the entrance to it, an irritation or redness and a soreness. On cross-examination he said that the inflammation extended as far as he could observe; that he thought it not possible for a full grown man to enter the vagina very far, but that it might be done for three-quarters of an inch; and that he couldn't tell when the injury which caused the inflammation took place, or what caused it. Thereupon a motion was made to have the testimony stricken, which was also overruled. It is now claimed by appellant that incest involves a voluntary connection, and, while this evidence might be material and competent in rape, it is immaterial and incompetent in incest, and, further, because it was not shown that the girl was in the same condition at the time of the examination as at the time of the commission of the offense. We see no force to these objections. The testimony was properly received as tending to corroborate the statement of the prosecutrix that her person had been violated. The time was not so remote but

that a jury might say it was the defendant's act that caused the condition of the prosecutrix as described by the witness. *People v. Stratton*, 141 Cal. 604, 75 Pac. 167; *Commonwealth v. Lynes*, 142 Mass. 577, 8 N. E. 408, 56 Am. Rep. 709.

3. Mary Eastman, a witness on behalf of the state, was asked: "Did Amanda Winslow [the prosecutrix] make any complaint to you at any time about her father having any carnal knowledge of her?" Over defendant's general objection, she answered, "Yes, sir." She did not remember the date, but said that she remembered the day that the girl went to the doctor's office and that it was three or four days before that. The witness could not remember whether the prosecutrix told her the day it (the injury) occurred. On cross-examination she said that she knew the prosecutrix went to the doctor's office from what she told her. A motion was made that all the evidence be stricken. Court: "I think the whole may go out excepting that portion concerning a complaint made to the witness." Defendant's counsel: "About the injury?" Court: "About the injury." The testimony, therefore, left standing, was to the effect that the prosecutrix made complaint to the witness about the injury. The prosecutrix having herself been a witness in the case, the state had the right to show whether she made complaint of injury, when and to whom, and had the right to prove such fact by the person to whom the complaint was made. *State v. Neel*, 21 Utah, 155, 60 Pac. 510; 3 Greenleaf Ev. § 213.

The appellant concedes this right in a rape case, but denies it in a case of incest. This might well be true in a case of incest where the act of intercourse was a concurring assent of both parties and where, therefore, the female would be an accomplice. But here the prosecutrix had not consented as a matter of fact; and, because of her age, under the statute, she was legally incapable of yielding consent. In such a case we perceive no good reason why the rules of evidence here under consideration do not obtain the same as in a case where the charge is rape. The reasons, as stated by the authorities, rendering this kind of evidence admissible in a case of rape, equally exist in all cases where the person of the female was, or was attempted to be, violated forcibly, and without her consent, and where she is not an accomplice. It is, however, urged by appellant that to make the evidence admissible it must be part of the *res gestæ*. That is not the rule. When the complaint is a part of the *res gestæ*, then not only the fact of the complaint may be given in evidence, but also the particulars and the things said and done as a part thereof. When it is not a part of the *res gestæ*, as this was not, then only the fact that complaint was made of the injury, to whom it was made and when, may be given, except when elicited on cross-examination, or by way of confirming

the testimony of the prosecutrix after it has been impeached. It is admitted, not on the theory of *res gestæ*, but as a fact corroborative of the testimony of the prosecutrix. *State v. Neel*, supra, and cases cited. The evidence being restricted as it was by the court, no error was made in the ruling. While it was not shown definitely on what day the complaint was made to the witness, it was, however, sufficiently made to appear to have been recently after the commission of the alleged offense. Besides, no objection was made on this ground, and no complaint is here made, that the evidence lacks the required proof that the complaint was made recently. Again, the question asked the witness whether the prosecutrix made complaint of her "father" having carnal knowledge of her is objectionable, under the authorities, because assuming and stating the name of the person who committed the assault or injury. *Bean v. People*, 124 Ill. 576, 16 N. E. 656; *Stephen v. State*, 11 Ga. 225; *People v. Lambert*, 120 Cal. 170, 52 Pac. 307; *Thompson v. State*, 38 Ind. 39; *State v. Robertson (La.)* 58 Am. Rep. 201; 1 Wharton Crim. L. § 566; *Bish. Crim. Pro.* But no such or other sufficient objection was made. *Bean v. People*, supra. Nor is there any such complaint made here. Though it were conceded to have been objectionable, we think whatever error, if any, was committed with respect thereto, was cured by the court's striking all objectionable matter.

4. It is further urged that the court ought to have directed a verdict for the defendant, because the evidence on the part of the state showed that the prosecutrix had not yielded consent; and, therefore, the defendant was guilty of rape or an attempt to commit rape, and could not, for that reason, be convicted of incest or an attempt to commit incest. This presents the question as to whether a defendant charged with incest can be convicted thereof if the evidence shows that he forcibly had carnal knowledge of the female, and without her consent. It seems, under some statutes, it has been held that he cannot be so convicted. *DeGroat v. People*, 39 Mich. 124; *State v. Jarvis*, 20 Or. 437, 26 Pac. 302, 23 Am. St. Rep. 141; *State v. Ellis*, 74 Mo. 385, 41 Am. Rep. 321. This conclusion is reached by the courts in the foregoing authorities largely because of the wording of the statute defining incest—shall have intercourse "together," or with "each other," which, they say, necessarily implies a concurrent act and the consent of both parties; and if one of the parties is compelled by force to submit to the act, there can be no consent of such party, and, therefore, the act cannot be committed "together," or with "each other." But the great weight of authority is to the effect that when the incestuous fornication is shown to have been committed by the defendant with full knowledge of the relationship between himself and the other participant, though he used force in the

accomplishment of his object, he may, nevertheless, be convicted of the crime of incest. If the female be not guilty because of a want of consent to the act, it does not change the character of the act so far as the defendant is concerned, if, on his part, it was willingly and knowingly done. He must be held to answer for the consequences of his own act done with his knowledge and consent. When the defendant, with full knowledge of the relationship between himself and the female, willingly on his part, has sexual intercourse with the female, the crime of incest, so far as he is concerned, is complete. His own guilt is not made to depend upon the mental condition of the female. The defendant's guilt here is measured by his knowledge and intent, and not by the knowledge and intent of his daughter on whom he committed the offense. *People v. Stratton*, 141 Cal. 604, 75 Pac. 166; *People v. Kaiser*, 119 Cal. 456, 51 Pac. 702; *Norton v. State*, 106 Ind. 163, 6 N. E. 126; *State v. Nugent*, 20 Wash. 522, 56 Pac. 25, 72 Am. St. Rep. 133; *David v. People*, 204 Ill. 479, 68 N. E. 540; *Smith v. State*, 108 Ala. 1, 19 South. 366, 54 Am. St. Rep. 140; *State v. Hurd*, 101 Iowa, 391, 70 N. W. 613; *State v. Kouhns*, 103 Iowa, 720, 73 N. W. 353; *Ralford v. State*, 68 Ga. 672; *Porath v. State*, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954; *Shelly v. State*, 95 Tenn. 152, 31 S. W. 492, 49 Am. St. Rep. 926; *Commonwealth v. Bakeman*, 131 Mass. 577, 41 Am. Rep. 248; *Schwartz v. State*, 65 Neb. 196, 91 N. W. 100; *Bishop Stat. Crimes*, § 660. We are also led to this conclusion because of the language of the statute, which is unlike those where the courts hold a mutual consent essential. Section 4211, Rev. St. 1898, defines incest as follows: "If any person related to another person within and not including the fourth degree of consanguinity, computed according to the rules of the civil law, shall \* \* \* have sexual intercourse with, such other so related person, knowing her or him to be within said degree of relationship, the person so offending shall be deemed guilty of incest." Whatever force there is to the argument that mutual consent is necessarily implied by the use of the terms, shall have sexual intercourse "together," or with "each other," it does not equally apply to the Utah statute, "have sexual intercourse with, such other so related person." *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691; *Norton v. State*, supra. The request was properly denied.

5. It is also urged that the defendant, on the charge of incest, cannot properly be convicted of an attempt to commit incest. Section 4893, Rev. St. 1898, provides: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or of the attempt to commit the offense." When a party proceeds far enough in the perpetration of a crime as to clearly indicate his intention, coupled with

an attempt to carry it into effect, and thereafter desists or fails to consummate the crime he may be found guilty of an attempt. We see no reason why an exception should be made in the crime of incest. None is made by the statute, nor by the authorities. It is said, "an attempt to commit incest has been said to contain two elements—an evil intention and a simultaneous resulting act which, if fully performed, would constitute the substantive crime." 16 Am. & Eng. Enc. L. 141. The authorities generally hold that on a charge of incest the defendant may be convicted of an attempt to commit incest. *State v. McGilvery*, 20 Wash. 240, 55 Pac. 115; *People v. Gleason*, 99 Cal. 359, 33 Pac. 1111, 37 Am. St. Rep. 50; *State v. Decker*, 36 Kan. 717, 14 Pac. 283; *State v. Blythe*, 20 Utah, 381, 58 Pac. 1108. If the defendant had sexual intercourse with his daughter, he committed incest. If he attempted to have sexual intercourse with her, but failed, we see no reason why he cannot properly be convicted of an attempt to commit incest. Here the evidence shows the defendant, with a criminal intent to commit incest, proceeded to the extent of a sexual contact, even to a penetration, as some of the evidence shows.

The record does not disclose any error. The judgment of the court below is therefore affirmed.

MCCARTY, J., concurs. GARTCH, C. J., concurs in result.

(30 Utah, 410)

### BRIGHAM CITY v. CHASE.

(Supreme Court of Utah. May 12, 1900.)

#### 1. EMINENT DOMAIN—CONDEMNATION PROCEEDING—OWNERSHIP OF LAND—PLEADING.

A person who had filed a homestead entry on a tract of land, and thereafter relinquished and canceled the entry pursuant to a contract with the state board of land commissioners, by which they agreed to select the lands under grant to the state from the United States, to preserve the entryman's rights, and to sell the land to him at a certain price, all of which was done, the entryman thereafter remaining in possession of and claiming the land, was an owner, within Rev. St. 1898, § 3504, relative to condemnation proceedings, and providing that the complaint in such proceeding must contain the names of the owners of the property.

#### 2. SAME—PARTIES—PERSONS CLAIMING INTEREST IN LAND.

Under Rev. St. 1898, § 3505, relative to condemnation proceedings, and providing that all persons in occupation of or having or claiming an interest in the property sought to be condemned may, though not named in the complaint, appear and defend each as to his own interest, it is not necessary that the complaint in condemnation proceedings make all of the owners or alleged owners parties.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 478.]

#### 3. SAME—SALE PENDING PROCEEDINGS.

Under Rev. St. 1898, § 2920, providing that where, during the pendency of a suit, a party transfers his interest, the action or proceeding may be continued in the name of the original party, the sale of property sought to be condemned after the commencement of the con-

demnation proceedings, does not require the purchaser to be made a party.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 478, 479.]

Appeal from District Court, Box Elder County; before Justice W. W. Maughan.

Condemnation proceedings by Brigham City against George R. Chase. There was judgment for plaintiff, and defendant appeals. Affirmed.

This was a proceeding instituted by Brigham City against the defendant for the purpose of condemning a right of way over certain lands for a pipe line. It is alleged in the complaint, substantially, that the pipe line is being constructed by the plaintiff to convey water for an electric light plant owned and controlled by the municipality; that the pipe line runs across land occupied by the defendant, and claimed by him "by virtue of a certain state contract of sale"; that the land sought to be condemned is necessary for a public use, the width desired being four rods; that without it the plant cannot be completed, and injury will result to the municipality and its inhabitants; that the petitioner has been and is now unable to agree with the defendant upon a price for the right of way; that he refuses to sell the use of the same at any price; that it is the intention, on the part of the city, to complete the plant in good faith; and that all the preliminary steps required by law, to institute proceedings, have been taken. The location of the right of way, and the value of the land to be condemned are also alleged. To these allegations the defendant, in his answer, entered a general denial. At the trial, upon the first witness being sworn, the defendant objected to proceeding upon the merits, basing the objection on the ground that the complaint failed to confer jurisdiction upon the court to proceed to condemn the land because no allegation therein contained, "as a party, the name of the owner of the land," as required by statute where the owner is known. The objection was overruled, and the court proceeded with the trial. The point, of want of jurisdiction, was again made by motion for nonsuit and dismissal of the action, at the close of the plaintiff's testimony, upon the grounds that the evidence failed to show that the defendant, at the commencement of the action, had any title or interest in the land sought to be condemned; that, as shown by the evidence, the sole owner and the one entitled to the possession, was the United States; that it was shown that the owner had not been made a party to the action; and that it affirmatively appeared from the evidence that the defendant "never, at any time, either at the commencement of the action or down to the time of making this motion, had any interest or claim upon the land sought to be condemned, which vested this court with any jurisdiction to make any order or judgment" respecting the land. The motion was denied, and upon

the defendant declining to recognize the jurisdiction of the court and to present any evidence upon the question of damages, stating that to be the only issue that could be determined, after the denial of the motion for nonsuit and of dismissal, and claiming he was not entitled to damages and that the court had no jurisdiction to assess any to him, the court decided that the property was subject to condemnation, and necessary for the public use for which it was sought to be condemned. Findings of fact were made in accordance with the allegations of the complaint, the court, among other things, finding, "that said land, at the time plaintiff began this suit, was subject to the right of eminent domain, and said defendant, George R. Chase, was the owner and occupant thereof and had such an interest, property, title, and right therein as was subject to condemnation, and was and is a proper and necessary party to said action." Damages in the sum of \$25 were awarded to the defendant, the amount of land condemned being 4.27 acres.

Jno. A. Street, for appellant. B. H. Jones and W. H. King, for respondent.

BARTCH, C. J., after stating the facts, delivered the opinion of the court.

The decisive question presented, upon this appeal, is whether the appellant had, at the commencement of these proceedings, such a claim to and interest in the property, as vested the court with jurisdiction to adjudicate the matter in controversy as to him. The appellant insists that he had no interest in the premises sought to be condemned; that the title thereto, at the commencement of the proceedings, was in the United States; that as the right of eminent domain could not be exercised against the government, no jurisdiction could be obtained to condemn the right of way by suit against the defendant; and that therefore the proceedings and judgment are void. On the other hand, the respondent contends that, notwithstanding the fact that, at that time, the legal title to the land in controversy had not passed from the United States, the appellant had such an interest and equitable ownership in the land as could be condemned for public use under our laws.

From the evidence relating to the question thus presented and facts found by the court it appears that at the time of the commencement of this action the municipality was constructing an electric light plant, for the purpose of lighting its streets and furnishing light to its inhabitants. The plant was to be operated by water power and the water for that purpose had to be conveyed from Box Elder creek, a mountain stream, by means of a pipe line, which was constructed along the mountainside in the canyon. In order to preserve the grade of the pipe line, it was necessary to cross the land, in controversy, which was claimed

by and in the possession of the defendant, and was mountainous land, steep and rocky. On June 30, 1898, the defendant Chase filed a homestead entry on a tract of government land which included the land sought to be condemned. On February 4, 1899, he relinquished and canceled his homestead entry. The relinquishment he delivered to the state board of land commissioners and entered into an agreement with the state wherein the state agreed to file his relinquishment and select the land, embraced within the homestead entry, under its grant of lands from the United States for the purposes of an agricultural college; to preserve the defendant's rights to the land; and to sell it to him at \$1.25 per acre, one-tenth of the amount to be paid down and the balance in nine annual payments, the defendant agreeing to purchase the same and pay therefor accordingly. Thereupon, on the same day, the state land board filed, in the land office, the relinquishment and a selection of that land made by the board under the Agricultural college land grant. Thereafter, on February 8, 1899, the local land office approved and allowed the selection and forwarded the same to the General Land Office at Washington, and the state land board filed with its records the defendant's agreement and application to purchase. On September 16, 1902, these proceedings for condemnation were instituted, by the filing of the complaint and service upon the defendant, and an order made permitting the plaintiff to occupy the premises for the purpose of constructing its pipe line. At that time the defendant was in possession of the tract, had worked upon it and made some improvements on part of it, but not on the strip in controversy, among the same being a small ditch to irrigate a parcel of his land. He had some fruit trees and a small vineyard thereon, claimed to be the owner of the tract and exercised exclusive control over it. The plaintiff had offered to purchase the right of way from him but he refused to sell it. On January 19, 1903, the Box Elder Power & Light Company was incorporated under the laws of the state of Wyoming. Its articles of incorporation were filed in this state on February 18th following. The defendant ever since its organization and at the time of the trial was the secretary of that corporation, and on the 1st of June, 1903, he assigned all his interest in that land to the corporation and filed the assignment with the state land board. On June 30, 1903, the selection of the land by the state was approved by the Commissioner of the General Land Office, and on July 9th following, by the Secretary of the Interior. Thereafter the register's certificate of purchase, as provided by law, was issued to the corporation, and on September 4, 1903, the corporation having paid in full, the state conveyed the land to it by patent.

On March 9, 1904, the defendant filed his answer in this case.

Had, then, the defendant, under the facts and circumstances thus appearing, at the time of the institution of this proceeding, such an interest in the land as was the subject of condemnation, under the statute relating to eminent domain; or, in other words was he an owner or claimant of the property within the meaning of the statute, and was the petition or complaint sufficiently specific in alleging ownership? We think the answer must be in the affirmative. The statute, in section 3594, Rev. St. 1898, provides: "The complaint must contain: (1) The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff. (2) The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants. (3) A statement of the right of the plaintiff. (4) If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding. (5) A description of each piece of land sought to be taken, and whether the same includes the whole or only part of an entire parcel or tract. All parcels lying in the county and required for the same public use may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties." Considering the complaint and the proof with reference to this enactment, the principal question is as to what interest in and dominion over property constitutes a person an owner or claimant. In this instance the complaint alleged occupancy by the defendant and claim of property by virtue of a certain contract, and while the allegations, in this regard, were not as artistically drawn as they might have been, they were, doubtless, in the absence of a specific demurrer or plea on this point, sufficient to raise the issue of ownership upon the defendant's denial, and, so far as the allegations of ownership were concerned, to confer jurisdiction upon the court to hear the case.

Was, then, the evidence of such character as to warrant the court in holding that the defendant, when the suit was brought, was the owner or claimant of the land, and in rendering judgment of condemnation? It seems clear that it was. The proof shows that he had made a homestead entry upon the land, and that when the complaint was filed and the action commenced he was in possession of the land, claimed it as his own, worked upon it, had made some improvements upon it, constructed an irrigating ditch, planted fruit trees and a small vineyard, and, upon being approached with an offer to pur-

chase a right of way for the pipe line, refused to sell or permit the construction of the pipe line over the land. These things were all indicative of ownership. To all appearances his dominion was exclusive and absolute, and his claim of being the owner unquestioned. It is true he had in fact relinquished his homestead entry, but this was under the agreement with the state whereby he had the right finally to secure the title to the premises in fee. Under that contract, upon the selection of the land by the state, by virtue of its grant from the general government, and the approval of the selection by the proper officers, his right to acquire the land became a vested right subject only to be defeated by a failure, on his part, to perform the contract. Created by his entry and contract and the acts which led up to the contract, that right constituted, at least, an equitable interest which the owner could sell or assign, although he had not yet acquired the legal title to the land, and which he afterwards did assign to a private corporation, of which he was secretary; and it perfected the title to the property by performing his covenants in the contract. That he had the lawful right to assign his interest in the land, or that his assignment to the corporation was lawful and transferred his interest, is not controverted. Having been, then, the owner and claimant of an interest, which was the subject of lawful disposition, he was the owner and claimant of an interest subject to disposition under the laws of eminent domain.

The word "owner" is a comprehensive term, and is applied to any person who has dominion of a thing, real or personal, corporeal or incorporeal and right of enjoyment and disposition. Bouvier. When the term is employed in the statutes, relating to eminent domain, to designate the persons, who are to be made parties to the proceedings, and who are entitled to receive compensation for land taken against their will, it should be held to include all those who have any lawful interest in the property to be condemned. So the term "claimants" should be held to embrace any person who has an interest in the land and whose rights will be affected by a judgment of condemnation. Doubtless this is the sense in which the Legislature used the terms in section 3594, above quoted. "The word owner in statutes," says Mr. Lewis in his work on Eminent Domain, vol. 2, § 335, "when used to describe those to whom compensation should be made or who should be made parties to proceedings, has been held in a general way to include all persons having an interest in the land to be taken. More particularly, the term owner has been held to include lessees, whether for years or from year to year, tenants for life, mortgagees, vendees in possession, and the owner of a ground rent." And in section 341, same volume, the author, referring to constitutional provisions declaring that pri-

vate property shall not be taken for public use without just compensation, and that no person shall be deprived of his property without due process of law, says: "The word 'property,' therefore, in these provisions should be held to include every valuable right and interest which a person can have in or appurtenant to land. Due process of law requires that the owner of any such right or interest should have a reasonable opportunity to be heard upon the question of compensation before he can be deprived thereof for public use. This is a matter of constitutional right, and not dependent upon the will of the Legislature. Statutes should be so construed, if possible, as to harmonize with the Constitution, and, consequently, words descriptive of parties to proceedings or of the persons entitled to compensation or notice should be held to include the owner of any such right or interest as above indicated. Thus the word 'owner' may always be so construed without any violence whatever to its ordinary meaning, and we do not call to mind the language of any statute which is incapable of such construction." In *Gerrard v. O., N. & B. H. R. R. Co.*, 14 Neb. 270, 15 N. W. 231, it was decided: "The word 'owner' as used in the statute applies to any person having an interest in the estate." In *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897, a case very like the one at bar, the state of Washington owned certain "tide and shore lands," and Trimble held, by assignment, an executory contract which had been made with the state through its officers for the purchase of a part of those lands, and possession of the land in controversy had been delivered to him by his assignor. Afterwards, while the contract was in force, a railroad company sought to condemn the land by instituting suit against Trimble, under a statute which, among other things, provides that the petition shall describe the property sought to be appropriated, and shall set forth "the name of each and every owner, encumbrancer, or other person or party interested in the same, or part thereof, so far as the same can be ascertained from the public records," etc. The proceedings were resisted upon substantially the same grounds as are here urged by the appellant. The Supreme Court, in the course of an opinion affirming the order of condemnation, said: "While it is true that the state holds the naked legal title to these tide lands as trustee for the relators and their assigns, and is, to that extent, interested therein, it is also true that it is no more concerned in the condemnation suit than it would be in a voluntary transfer by the relators of their interest to the respondent herein. The state cannot be involuntarily deprived of its title by condemnation or otherwise, and the fact that it was not made a party to the proceeding cannot affect its rights or those of the relators in any manner or degree whatever. All that the re-

lators are entitled to is just compensation for their interest in the land, and such compensation can readily be determined without regard to the rights of the state or any other person or party." *Kerr v. Day*, 14 Pa. St. 112; *Com'rs of Smith Co. v. Labore*, 37 Kan. 480, 15 Pac. 577; *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Ryder v. Horsting*, 130 Ind. 104, 29 N. E. 567, 16 L. R. A. 186; *B. & O. R. R. Co. v. Thompson*, 10 Md. 76; *Watson v. N. Y. Central R. R. Co.*, 47 N. Y. 157; *Burlington, K. & S. W. R. Co. v. Johnson* (Kan.) 16 Pac. 125; *Northern R. R. Co. v. Gould*, 21 Cal. 255.

Whether or not the appellant was the sole owner of the land in question, is not material. That all the owners of the property sought to be condemned are not made parties is not fatal to such an action. This seems clear from the statute which provides that "all persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damage for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint." Section 3595, Rev. St. 1898. Every party who is in possession of, or who has an interest in, the property, thus having the right to appear and defend, whether named in the complaint or not, it would be a strained construction that would hold the omission of the name of one such party fatal to the action, so that the court would be without jurisdiction to proceed as to those named and made parties. We are of the opinion that, when, in an action of this character, any owner or claimant is made a party, the court has jurisdiction to proceed, as to his interest, whether all the owners, or claimants, or occupants, are made parties or not. Where such persons are not all named as parties or not served, the judgment of condemnation will simply be a nullity as to those omitted. "The omission of any proper party will not invalidate the proceedings as against such persons as are made parties. The only consequence is that as against the omitted persons the condemnation will be nugatory." 7 *Ency. Pl. & Pr.* 504. In *State (Nat. Ry. Co.) v. Easton & A. R. R. Co.*, 36 N. J. Law, 181, it was said: "The proceeding for condemnation is strictly between the company and the persons who are made parties to it. The omission of the owner of any estate in the lands, or any part owner of the fee, or of the holder of any lien, or encumbrance thereon, whose estate or interest is essential to a perfect and indefeasible title in the company, will not invalidate the proceedings as against such persons as are made parties. The consequence will be merely that as against such omitted persons, the condemnation will be nugatory. To this extent the company proceeds at their peril." 2 *Lewis, Eminent Domain*, § 339; *Porter v. State*, 73 Ind. 3; *Dodge v. O. & S. W. R. R.*

Co., 20 Neb. 276, 29 N. W. 936; New Orleans, M. & T. R. R. Co. v. Southern & A. Tel. Co., 53 Ala. 211; Milhollin v. Thomas, 7 Ind. 165; California Southern R. Co. v. Colton L. & W. Co. (Cal.) 2 Pac. 38; St. L. & D. R. R. Co. v. Wilder, 17 Kan. 239; Columbus & W. Ry. Co. v. Witherow, 82 Ala. 190, 3 South. 23. Nor did the failure, after the assignment by the defendant of his contract with the state to the Wyoming corporation, to make that corporation a party, abate the action, or affect the judgment as to the defendant. Where, during the pendency of a suit, a party thereto transfers his interest, "the action or proceeding may be continued in the name of the original party." Section 2920, Rev. St. 1898.

We do not deem it important to discuss any other question presented. The record presents no reversible error.

The judgment is affirmed, with costs.

**MCCARTY and STRAUP, JJ., concur.**

(30 Utah, 422)

#### STATE v. McBRIDE.

(Supreme Court of Utah. May 12, 1906.)

##### CRIMINAL LAW—EVIDENCE—HANDWRITING.

In a prosecution for statutory rape, in which prosecutrix claimed to have received certain letters from defendant but admitted that she had never seen him write nor seen a specimen of his handwriting admitted to be genuine, and was not an expert at handwriting, she was not competent to testify that the letters were written by defendant, although she claimed that he had admitted having written two of the letters.\*

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1047, 1055; vol. 20, Cent. Dig. Evidence, §§ 2211-2213.]

Straup, J., dissenting.

Appeal from District Court, Sixth District; John F. Childester, Judge.

Albert McBride was convicted of crime, and appeals. Reversed and remanded.

A. J. Weber and S. R. Thurman, for appellant. M. A. Breeden, Atty. Gen., and Jos. H. Erickson, Dist. Atty., for the State.

**BARTCH, C. J.** The defendant was prosecuted for and convicted of the offense of carnally knowing a female over the age of 13 and under the age of 18 years, and was sentenced to imprisonment in the penitentiary. He thereupon appealed to this court. At the trial the prosecuting witness, so far as material here, testified, in substance, that she first met the defendant in March, 1904; that at that time she had a conversation with him, went buggy riding with him, and that when they returned he walked home with her; that she saw him again two days later. She says she saw him next at the post office April 1st; met him at the Johnston hotel, and saw him again at the same hotel on April 29th, between 8 and 9 o'clock in the

evening; and that she walked with him to the depot, then back to the hotel and up to his room; that he told her his name was Jack McAuliffe; that on both occasions, April 1st and 29th, they had sexual intercourse; and that he accomplished his designs through force and persuasion. She identified four letters, Exhibits C, D, E, and F, signed "Jack McAuliffe," as letters she had received, and claimed he had talked to her about two of them, but she never saw him write. The defendant, testifying in his own behalf, denied the truth of all the material statements of the prosecuting witness. He testified that he never knew her until he saw her in the courtroom, after this prosecution had been instituted; that he never had any association with her, and never wrote to her either over his own signature or that of Jack McAuliffe; that he did not write the letters which were introduced in evidence, and never admitted to the prosecuting witness that he had written them; and that he "never had anything to do with her, or say to her, in any relation whatever." In his testimony he also gave an account of his whereabouts during the evening of April 29th, the time when, it was charged, he committed the offense, and in this he is corroborated by several witnesses. As to the commission of the act, on either occasion, the statements of the prosecuting witness are not corroborated by any other direct evidence.

The principal question presented on this appeal has arisen out of the introduction in evidence of the letters referred to above. Counsel for the prosecution, upon offering in evidence those letters, interrogated the prosecuting witness as follows: "Referring again to this letter marked state's Exhibit C, I will ask you as to whose handwriting this is?" To this the defense objected upon the ground that no foundation had been laid, it not having been shown that the witness was competent; that it had not been shown that she knew the defendant's handwriting; nor that she was an expert; nor that she had ever seen him write. The objection was overruled, and the witness answered that it was his handwriting. Practically the same proceedings were had respecting each of the other letters. It is contended, in behalf of the appellant, that the court erred in permitting the witness to thus testify, and we are of the opinion that this contention is well founded. Her own evidence showed her incompetency to testify on the subject of his handwriting, for she admitted that she never saw him write, and that she was not an expert on handwriting. It is true that, as to two of the letters, she claimed he acknowledged to her that he wrote them or sent them, but this he positively denied, and there was nothing to corroborate her statement. To identify the several letters as those of the accused, the prosecution called the witness Brewerton, who claimed to know the defendant's handwriting, but the witness said:

\*Tucker v. Kellogg, 28 Pac. 870, 8 Utah, 11.

"I couldn't say positively that McBride wrote either one of those letters, because I don't know. Didn't see him write them, and don't know that he wrote them. My knowledge of his handwriting is so vague that the slightest little circumstance that I think he might not have been there would have a tendency to raise a serious doubt about whether he wrote a certain letter that is exhibited to me." In the opinions of other witnesses, familiar with the accused's handwriting, none of the letters were written by him.

To say the least, in view of such evidence, the authenticity of even the two letters above referred to, and which she claimed he acknowledged he had written, was in serious doubt, and hence could not become the basis of comparison which was her only means of determining the genuineness of the other two; for there was no other paper in evidence, nor did the witness, so far as appears, ever have in her possession any instrument of any kind from the accused, the genuineness of which was not in dispute. The law is well settled that for the admission of such evidence it is essential that the authenticity of the paper, which becomes the standard of comparison, be established by positive proof and not left in uncertainty and doubt. Therefore, "before a witness will be permitted to testify as to a person's handwriting from knowledge derived from seeing papers purporting to have been written by him, it must be clearly shown that such papers were in his handwriting." 15 Am. & Eng. Ency. Law, 257. "It is a prerequisite," says Mr. Wharton, "to the admission of such proof that the writings from which the witness has drawn his knowledge should be genuine. It will not be enough that the witness obtains his knowledge from letters whose genuineness is in dispute." Whart. Crim. Ev. § 552. Mr. Rogers, in his work on Expert Testimony (section 138), says: "The general rule moreover is that the proof of the genuineness of the instrument thus offered must be positive. It should be proved either by the admission of the party when the standard is not offered by himself, or else by the testimony of persons who testify directly and positively to having seen the party write the paper." In *Martin v. Maguire*, 7 Gray (Mass.) 177, it was said: "The mode of proving the genuineness of the paper in controversy, by comparison merely with other documents, has often been questioned elsewhere, though with us it is always allowed. But the paper with which the comparison is to be made must be unquestionably a genuine paper, and that must be shown beyond a doubt." This court, in *Tucker v. Kellogg*, 8 Utah, 11, 28 Pac. 870, said: "The common law excludes a comparison of handwriting as proof of signature. But to the general rule there is this exception: That if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some

other purpose in the case, the signature or paper in question may be compared by the jury, with or without the aid of experts. The principal reasons given for the exclusion of evidence by comparison of handwriting are (1) the danger of fraud in the selection of specimens, and (2) if admitted, their genuineness may be contested, and collateral issues introduced into the trial. These reasons do not apply against the introduction of writings conceded by the parties to be genuine as specimens, because, if either party entertains a suspicion that the writing offered is spurious, he will not concede it to be genuine; and if all the parties concede the specimen to be genuine, no collateral issue can arise upon it. Therefore, we think there should also be an exception to the general rule excluding evidence by comparison admitting writings as specimens for comparison conceded by the parties to be genuine." *McKeone v. Barnes*, 108 Mass. 344; *Cochran v. Butterfield*, 18 N. H. 115, 45 Am. Dec. 363; *Pavey v. Pavey*, 30 Ohio St. 600; *Nat. Un. Bank v. Marsh*, 46 Vt. 443; *Gibson v. Trowbridge F. Co.*, 96 Ala. 357, 11 South. 365; *Cohen v. Teller*, 93 Pa. 123; *Hyde v. Woolfolk*, 1 Iowa, 159; *Cunningham v. Hudson River Bank*, 21 Wend. 557; *Calkins v. State*, 15 Ohio St. 222; *Sartor v. Bollinger*, 59 Tex. 411; *Strother v. Lucas*, 6 Pet. (U. S.) 763, 8 L. Ed. 573.

In the case at bar, as we have seen, the genuineness of all the letters was in dispute, and, therefore, while it may be conceded that in view of the testimony of the prosecuting witness, that they had been received by her, and that two of them had been the subject of conversation between her and the accused, the prosecution had a right to have the letters themselves, or at least the two which had formed such subject, admitted in evidence and read to the jury, it was not entitled to the admission of the testimony in question. Under the conflicting evidence it was the province of the jury to consider the letters in determining the question of the defendant's guilt or innocence, and to give them such weight, in connection with all the other evidence, as the jury in its judgment deemed them entitled to receive; but the testimony in question ought to have been excluded. Considering all the evidence, and the circumstances disclosed, with the fact that there was no direct testimony, as to the commission of the act alleged as constituting the offense charged, except that of the prosecuting witness, we are unable to say that the admission of the testimony in question was not prejudicial to the rights of the accused. Having reached such conclusion, it is not deemed important to discuss any other question presented. The judgment must be reversed, and the cause remanded, with directions to the court below to grant a new trial.

It is so ordered.

McCARTY, J., concurs.

STRAUP, J. I dissent. The prosecutrix testified that the defendant told her his name was Jack McAuliffe, and that she became acquainted with and knew him by that name; that he wrote and sent to her some seven different letters under such name. They were posted, and received by her in the regular course of mail. It was shown that the defendant was at the various places where, and at the times when, the letters bore their postmarks. Four of these letters, "C, D, E, and F," she produced at the trial. The first letter referred to a ring sent to her under a separate cover. After receiving the letter and the ring, she met the defendant, and he asked her if she had received the letter signed by the name of Jack McAuliffe, and the ring therein referred to. Upon her replying that she had, he told her that he wrote the letter, and sent the ring. Another letter referred to some handkerchiefs. After receiving that letter she had a conversation with him about it and the handkerchiefs, in which he told her that he wrote the letter, and gave the handkerchiefs, therein referred to, to her. The four letters were all identified by the witness as having been received by her from the defendant in the course of mail. She then was asked by the state: "Q. Do you know his handwrite? A. Yes, sir. Q. Referring again to this letter marked 'C,' I will ask you whose handwrite this is." Here counsel for the defendant made the statement that the prosecution was qualifying the witness as an expert, and he desired to examine her on the voir dire. He then asked her: "Q. You have studied handwriting a great deal? A. I have studied it enough so I can tell his handwriting in that letter there. Q. You have seen him write, have you? A. No, sir. Q. Do you pretend to be an expert on handwriting? You never saw him write? A. He acknowledged to me that he wrote those letters. Q. You say it is his handwriting, do you pretend to be an expert on handwriting, do you? A. No, sir." Defendant's Counsel: "I object to her saying whose handwriting this is. She has not qualified as an expert. She hasn't seen him write, either." The State: "Did he acknowledge to you having written this letter? A. Yes, sir. Q. Did you have any conversation with him about other letters that he had written to you? A. Yes, sir. He asked me if I had received his letters during that time, and signed Jack McAuliffe, and I told him I had. Q. Do you know the defendant's handwrite? A. That is his handwriting. [Referring to Exhibit C.] The signature is his handwriting. Q. I call your attention to Exhibit D, and ask you if you know the handwrite, the signature and also the address? A. Yes. It is McBride, the defendant's." In like manner she testified concerning Exhibits E and F, of course, all over the defendant's objection as heretofore set forth. She also testified that she had a conversation with the defendant about Exhibit D, wherein she asked him why

the letter was not stamped at American Fork, and he told her because it was mailed on the train.

The witness Brewerton testified that he had been acquainted with the defendant for more than a year, during which time he and the defendant both worked for the same wholesale house at Salt Lake City; that the defendant was a traveling salesman for the house; that the witness checked the defendant's orders, which were two or three a week and sometimes more; and that he also helped to fill some of them; and that at several times when the defendant was making out his expense account, the witness saw him write. Then, on part of the state, he was further interrogated: "Q. Now, I will ask you, do you know the handwrite of McBride? A. Yes, sir, I think I can recognize it all right. Here defendant's counsel interrogated the witness on the voir dire: "Q. You say you know the handwriting of Mr. McBride? A. Yes. Q. Now do you know it from having frequently seen him write, or from claiming to be an expert on handwriting? A. I know it more so by the orders that have come in. Q. What do you have to do with his orders that come in; what is your business in relation to them? A. I have filled some of them, but my real business with them was to check off the orders. Q. In doing that, did you pay particular attention to the handwriting for any reason, or just take a casual glance at it? A. Well, just by the way, I say, I don't know that I studied it. just by seeing them come in. Q. You know his signature, do you? A. Yes, sir. Q. You can't be mistaken as to that? A. I don't think I can, No, sir. Q. Your familiarity goes to that extent that you think you know his handwriting and you know his signature? A. Yes, sir. Q. You don't claim to be an expert? A. No, sir." The witness was then again interrogated by the state, and was shown the letters in question and was asked if he knew whose handwriting they were, and he said that he did, and stated positively that they were in the handwriting of the defendant, except Exhibit F, of which the witness said: "I am not sure but that it looked like the defendant's handwriting, and I should say that it was his handwriting." On cross-examination he said that he had no doubt about the letter being in the handwriting of the defendant, unless two persons could write so much alike. "Q. If one were trying to imitate, they might write a great deal alike, mightn't they? A. Yes, sir. Q. You won't say, will you, without some kind of qualification, that McBride wrote either one of those letters?" Here considerable discussion followed between counsel, in which counsel for the defendant insisted that the most that could be claimed for the testimony of the witness was that it is his opinion merely that the writing is the defendant's. The witness was then asked by the defendant's counsel: "Q. You wouldn't say,

would you, positively, that McBride wrote either one of those letters? A. Well, I couldn't say positively because I don't know. Q. Well, that's what I am asking, and now you have answered. A. As near as I know. Q. Well, as near as you know. You didn't see him write them? A. No, sir. Q. You don't know that he wrote them, do you? A. No, sir." The witness was then asked why he hesitated about Exhibit F, dated July 1st. He answered that the last day of July (he probably meant June) was pay day, and that one or two days after pay day he and the defendant took dinner together at Salt Lake City, and for that reason there might be a question as to whether the defendant was at the place where the letter purports to have been written, on July 1st. Then follows the question, the substance of which is stated in the opinion by the majority court: "Q. Your knowledge of his handwriting is so vague that the slightest little circumstance that you think he might not have been there would have a tendency to raise a serious doubt about whether he wrote a certain letter that is exhibited to you? A. Yes, sir."

It is apparent, of course, that these matters, on cross-examination, go merely to the weight of the testimony, and not to the competency of the witness. It is conceded by the appellant that the witness Brewerton sufficiently qualified to express a belief or opinion as to the defendant's handwriting, because of the testimony of the witness that at different times he saw the defendant write. The appellant concedes, also, that all of the letters in question were sufficiently proved by the state to be the defendant's handwriting so as to entitle their admission in evidence. The particular complaint made in this regard is that the prosecutrix should not have been permitted to express an opinion or belief that the letters were the defendant's handwriting, because she at no time had seen him write, and because she was not an expert on handwriting. From the objections made in the court below by counsel for the defendant, and from their brief on appeal, they seem to entertain the view that there are but two ways by which a witness may qualify so as to express an opinion as to the handwriting of another. One is by having seen the person write. The other is by comparison. The majority court seem to entertain the same view. For they say: "Her own evidence shows her incompetency to testify on the subject of his handwriting, for she admitted that she never saw him write, and that she was not an expert on handwriting." It being conceded that the prosecutrix had not at any time seen the defendant write, her testimony in the prevailing opinion is considered from the standpoint of identifying handwriting by comparison, the collation of two papers in juxtaposition for the purpose of ascertaining by inspection if they were written by the same person. Of course, when that kind of testimony is sought, it is es-

sentia that the writing or standard, with which the disputed writing is compared, be proved or admitted to be genuine, and that the witness making the comparison must be shown to have special skill and experience in making it, before he is entitled to express an opinion. It is to that kind of evidence that the authorities cited and quoted by the majority court, refer. But the prosecutrix was not called to give, nor did she give, that kind of testimony. The statement made by defendant's counsel that the state was qualifying her as an expert is erroneous. The state was not attempting to so qualify her, nor did she in the least qualify as such, and from that alone it is sufficient to say that she was not entitled to testify as an expert. But this witness, like the witness Brewerton, did not testify as to defendant's handwriting by comparing a disputed writing with another writing, and by expressing a belief that the writings were written by the same person, or that if the defendant wrote one he also wrote the other. They testified as to his handwriting from their knowledge of and familiarity with his handwriting. It may be said, in a very general sense, that all evidence of handwriting, except where the witness saw the disputed document written, is, in its nature, comparison. That is, it is the belief or opinion which the witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. But that is not what is meant in law by proof of handwriting by comparison. *Berg v. Peterson*, 49 Minn. 420, 52 N. W. 37; *Burdick v. Hunt*, 43 Ind. 381; *Travis v. Brown*, 43 Pa. 9, 82 Am. Dec. 540; 6 Enc. of Ev. 386; 15 A. & E. Enc. L. 263. I think we can well eliminate the question of expert testimony as to handwriting, for it is not involved in the case. The question here is, was sufficient knowledge of or familiarity with the defendant's handwriting shown on the part of the prosecutrix to make her competent to express an opinion or belief as to whether the letters were in his handwriting. This leads to the inquiry, from what source or sources, other than seeing a person write, may a witness derive knowledge of or familiarity with the handwriting of such person so that the witness may be qualified to speak, from his knowledge and familiarity, as to such person's handwriting? In speaking of the qualifications and sources of knowledge of such a witness, in volume 6, p. 370, Enc. Ev., it is said: "Any person who has seen the purported author write and has thus acquired a standard in his own mind of the general character of his handwriting is competent to testify as to the genuineness of the signature in question. In showing familiarity with handwriting the witness is not restricted to the single means of having seen the person write. It is sufficient that the witness may have acquired knowledge of the handwriting by having seen writings admitted by the

purported author to be his, or with his knowledge acted upon as his, or so adopted in the ordinary business of life as to create a reasonable presumption of genuineness."

Mr. Jones, on the Law of Evidence (volume 2, § 559), says: "It has also been held that a witness is competent to testify as to the handwriting of another, although he has not actually seen him write, if the witness has seen writing which such person has acknowledged or admitted to be his. Such acknowledgment may not only be in express terms, as where a person has formally acknowledged his signature or other writing to have been executed by him, but may be inferred as will be seen from other facts and circumstances or from the course of business. But when a witness has testified that he has neither seen a person write, nor any writing which he knew to be the writing of the person, his opinion as to the genuineness of such writing is not admissible." In the case of *Flowers v. Fletcher*, 40 W. Va. 107, 20 S. E. 871, it is said: "The law is that a witness who has any personal knowledge of a signature in controversy, however slight, has the right to give his opinion, and the weight of that opinion is a question for the jury, and not for the court. A witness who has seen a person write but once, and then only his abbreviated signature, may testify regarding the same; or if he has seen a signature admitted by the owner to be genuine." Illustrations are also given by the court in *Redding v. Redding*, 69 Vt. 502, 38 Atl. 231: "One is deemed to be acquainted with the handwriting of another person when he has seen him write, though but once, and then only his name; or when he has received letters or other documents purporting to be written by that person in answer to letters or other documents written by the witness or under his authority and addressed to him; or when he has seen letters or other documents purporting to be that person's handwriting, and has afterwards personally communicated with him concerning their contents, or has acted upon them as his, he knowing thereof and acquiescing therein; or when the witness has so adopted them into business transactions so as to induce a reasonable presumption and belief of their genuineness; or when in the ordinary course of business documents purporting to be written or signed by that person have been habitually submitted to the witness." To the same effect, also, are the following: 1 Greenl. Ev. § 577; 1 Wigmore Ev. §§ 700, 701; *Berg v. Peterson*, supra; *Hammond v. Varian*, 54 N. Y. 398; *Kinney v. Flynn*, 2 R. I. 319; *Hammond's Case*, 2 Me. 33, 11 Am. Dec. 39; *Atl. Ins. Co. v. Manning*, 3 Colo. 224; *Gordon v. Price*, 32 N. C. 385.

The prosecutrix having testified that she saw, and had in her possession, writings, admitted to her by the defendant to have been written by him, and to be genuine; that she and the defendant conversed about matters

and things therein referred to, the subject-matter of which the defendant, in effect, acknowledged; and that, from having seen such writings, she was able to and could identify the defendant's writing, thereby made herself competent, in my opinion, to speak upon the subject. Such sources gave her a means of knowledge, and afforded an opportunity of becoming acquainted with the defendant's handwriting, equally as well as if, at some time, she had seen him once write his name. When it is said that a person, who has seen another write, may testify to that other's handwriting; that is but an illustration of identifying handwriting from knowledge. The witness in such case is qualified to speak, not merely because he saw such other write, but because he knows his handwriting from having seen him write. When a witness shows personal knowledge, not from having seen another write, but from having seen writings admitted by him to be his, or with his knowledge acted upon as his, that is but another way of also identifying handwriting from knowledge. But it is claimed that the testimony of the prosecutrix shows that the defendant only admitted or acknowledged to her that letters "C" and "D" were written by him, and that inasmuch as he, in his testimony, denied making such admissions or of writing any of the letters, "C" and "D" could not become the basis of comparison, which was her only means of determining the genuineness of the other two—"E" and "F"—because of the essential that the standard of comparison must be established by proof of genuineness. But the prosecutrix did not testify by comparison, but from knowledge. Whatever may be the rule and the reasons therefor, in that regard, when evidence is sought by comparison, they do not apply when the witness speaks from personal knowledge of the handwriting. When a witness testifies that at some previous time he saw the defendant write, if only his name, and for that reason he knows his handwriting, that qualifies the witness to speak as to the defendant's handwriting of a document or signature exhibited to the witness. Because the defendant denies the fact that such witness ever saw him write, it does not render the testimony of the witness incompetent, nor is it essential before the witness is permitted to speak upon the subject that the admission of the defendant of such fact be first had. All that is necessary is that the fact of the witness having seen him write be proved, which generally is done by the witness himself. Now, when a witness qualifies himself by showing knowledge of the defendant's handwriting from having seen letters or writings acknowledged or admitted by him to the witness as his handwriting, the fact that the defendant may or does deny that he made such acknowledgment or admission, or that he wrote the writing with respect to which the admission is claimed, does not render the witness incom-

petent, in such instance, any more than in the other. All that is essential is that proof be made of such an admission or acknowledgment, which, of course, may be done by the witness. The competency of the witness is a matter for the court upon the showing made at the time when the witness is asked to express his belief. If sufficient knowledge on the part of the witness as to the handwriting of the purported author is shown, his testimony on the subject may be received. Whether the statements of the witness in regard to his knowledge are thereafter controverted by the defendant or by other testimony, goes merely to the weight of the testimony and to the credibility of the witness, and not to his competency in the first instance. It certainly was proper to have the prosecutrix state that the defendant admitted to her that he wrote Exhibits C and D. That alone was sufficient proof that he wrote them. It also was proper for her to state that the defendant corresponded with her, and that she received letters purporting to come from him in the regular course of mail, and that after they were received by her, she and the defendant conversed about their contents; the subject-matter of which the defendant acknowledged and in which he acquiesced. From such sources sufficient knowledge on her part may be obtained to enable her to speak as to the defendant's handwriting, not only as to Exhibits C and D, but as to E and F as well, or as to any other writing purporting to have been written by him. And the fact that the defendant thereafter, in his testimony, denied that he made any such admissions or that he wrote the letters, or that he ever saw the witness until in the courtroom, or that because he was corroborated as to his alibi, or because the prosecutrix was not corroborated by any "direct evidence" as to the acts of sexual intercourse, did not, in my judgment, destroy her competency.

**In re LOWHAM'S ESTATE. In re ECCLES' ESTATE. In re MURRAY'S ESTATE.**

(Supreme Court of Utah. May 12, 1906.)

**1. EXECUTORS AND ADMINISTRATORS — APPOINTMENT OF ADMINISTRATOR — EXISTENCE OF ASSETS.**

Rev. St. Wyo. 1899, §§ 3448, 3449, provide that on death by wrongful act the party liable shall be liable in an action brought in the name of the personal representative of decedent and that the proceeds of such action shall be distributed as provided for the distribution of personal estates of intestates. *Held* that, though a claim for damages under the statute is not a general asset of the decedent's estate, it is a sufficient asset for the purpose of appointing an administrator.\*

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 25.]

**2. DEATH — ACTION — JURISDICTION—LAW OF OTHER STATE.**

The right given by the Wyoming statute to recover for wrongful death may be enforced in Utah through the medium of an administrator appointed by the courts of Utah, though the decedent's domicile at the time of his death was in Wyoming and though the injuries occurred there.†

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 50.]

Appeal from District Court, Second District; J. A. Howell, Judge.

Judicial proceedings on the settlement of the estate of Joseph P. Lowham, deceased. From an order sustaining a motion by A. I. Stone, the administrator, to dismiss a petition filed by the Union Pacific Railroad Company praying for the revocation of the letters of administration, and sustaining the administrator's demurrer to the petition, the railroad company appeals, with which were consolidated similar proceedings in the estate of Benjamin Franklin Eccles, deceased, and of William Murray, deceased. Affirmed.

P. L. Williams, Geo. H. Smith, and J. G. Willis, for appellant. W. L. Maginnis, for respondents.

McCARTY, J. The same questions being involved in the foregoing cases they were consolidated on this appeal and heard together, and it was stipulated that the judgment rendered in the matter of the estate of Joseph P. Lowham, deceased, A. I. Stone, administrator, Union Pacific Railroad Company, appellant, should control, and be determinative of the other two cases. On March 30, 1905, William R. Lowham, a resident of the state of Wyoming, filed his petition in the district court of Weber county, Utah, praying that letters of administration of the estate of Joseph P. Lowham be issued to one A. I. Stone. The petition alleges in substance that on Nov. 12, 1905, at Evanston, Wyo., Joseph P. Lowham died intestate; that deceased left an estate in Weber county, Utah, consisting of a cause of action against the Union Pacific Railroad Company for injuries resulting in his death; that deceased at the time the injuries were received, and at the time of his death was a resident of Wyoming. Then follows the names and ages of the heirs at law of deceased. It further appears that at the time the petition was filed, the petitioner was the administrator of the deceased in the state of Wyoming. Letters of administration were duly and regularly issued to A. I. Stone by the district court of Weber county, as prayed for in said petition.

It is admitted that the injuries which resulted in the death of the deceased were sustained by him in the state of Wyoming, and that letters of administration were obtained in the district court of Weber county, Utah,

\*In *Tasanen's Estate*, 25 Utah, 396, 71 Pac. 984.

†*Utah Sav. & Trust Co. v. Diamond Coal & Coke Co.*, 26 Utah, 299, 73 Pac. 524.

for the sole and only purpose of bringing suit in this state against the railroad companies mentioned, to recover damages for the death of decedent. It further appears that on the 24th day of April, 1905, A. I. Stone, as administrator of Joseph P. Lowham, deceased, brought an action in the district court of Weber county, Utah, against the Union Pacific Railroad Company, to recover damages in the sum of \$20,000, on account of the death of said Lowham, which action is still pending and undisposed of. The Union Pacific Railroad Company filed its petition in the district court of Weber county, in which the foregoing facts are recited and set out, praying that the letters of administration issued to A. I. Stone, in said estate, be revoked, vacated, and set aside, and that he be discharged as such administrator. Stone appeared and demurred, and filed a motion to dismiss and strike the petition from the files for the reason: (1) That the Union Pacific Railroad Company is not interested in the estate of said Joseph P. Lowham, and has no legal capacity or authority to appear therein. (2) That the petition does not state facts sufficient to authorize the court to grant the relief prayed for. The court made and entered an order sustaining the motion and demurrer, and the petition was accordingly dismissed, from which order the Union Pacific Railroad Company has appealed to this court.

Appellant's first contention is that the right created and given by the statute of Wyoming, to recover damages for the death of a person caused by the wrongful act of another in that state, is not such an asset of the estate of the deceased as will authorize the appointment of an administrator to bring suit to recover damages for death caused by such wrongful act. Section 3448, Rev. St. Wyo. 1899, provides: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the wrongful act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amounts in law to murder in the first or second degree, or manslaughter." Section 3449 of the same act provides that "every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and in the proportions provided by law, in relation to the distribution of personal estates left by

persons dying intestate \* \* \* and the amount so recovered shall not be subject to any debts or liabilities of the deceased."

While a claim for damages for death by wrongful act is not a general asset of the estate under the foregoing provisions of the Wyoming statutes, we think it is a sufficient asset of the estate for the purpose of appointing an administrator. This court, in effect, so held in the case of *In re Estate of Tasanen*, 25 Utah, 396, 71 Pac. 964. The doctrine declared in that case is not only in harmony with the great weight of authority, but is, we think, supported by the better reason. *Brown v. Railroad Co.*, 97 Ky. 228, 30 S. W. 639; *Findlay v. Railroad Co.*, 106 Mich. 700, 64 N. W. 732; *Hutchins v. Railroad Co.*, 44 Minn. 5, 46 N. W. 79; *Merkle v. Bennington* (Mich.) 35 N. W. 846; *Griswold v. Griswold* (Ala.) 29 South. 437; *Railway Co. v. Reeves* (Ind. App.) 35 N. E. 199; *Robertson v. Railroad Co.* (Wis.) 99 N. W. 433; *Morris v. Railroad Co.* (Iowa) 23 N. W. 143; 11 A. & E. Ency. Law (2d Ed.) 828. Having determined that a claim for damages for death by wrongful act, under the statutes of Wyoming, is at least a special asset of the estate, the next question presented is, can the right thus given by the Wyoming statute be enforced in this jurisdiction through the medium of an administrator appointed by the courts of this state? This question was squarely presented and decided by this court in the case of *Utah Sav. & Trust Co. v. Diamond Coal & Coke Co.*, 26 Utah, 299, 73 Pac. 524.

In view of the elaborate discussion of this branch of the case by appellant, in its brief, we have again given the subject careful consideration, and while there appears to be some conflict in the authorities on this question, the doctrine declared in the case of *Utah Sav. & Trust Co. v. Diamond Coal & Coke Co.*, supra, is upheld by the decided weight of authority. *Morris v. Chicago, R. I. & P. R. Co.* (Iowa) 23 N. W. 143; *Stewart v. B. & O. R. Co.*, 168 U. S. 447, 18 Sup. Ct. 105, 42 L. Ed. 537; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439; *Boston & M. R. Co. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; *Louisville & N. R. R. v. Shively's Adm'r* (Ky.) 18 S. W. 944; *Sargent v. Sargent* (Mass.) 47 N. E. 121. It being admitted that the proceedings leading up to the issuance of letters of administration to A. I. Stone were in accordance with the provisions of the statute regulating such proceedings, we are of the opinion, and so hold, that the district court of Weber county had jurisdiction to issue said letters, and that it did not err in dismissing appellant's petition to have them revoked.

The judgment is affirmed, with costs.

BARTCH, C. J., and STRAUP, J., concur.

## STATE v. FRESHWATER.

(Supreme Court of Utah. May 14, 1906.)

## 1. CRIMINAL LAW — CONTINUANCE — ABSENCE OF WITNESSES—DILIGENCE.

A motion for a continuance because of the absence of witnesses was properly denied, where the affidavit in support of the motion, though reciting that defendant caused a subpoena to be issued for the witnesses, did not show that he communicated or attempted to communicate with them, nor that any other effort was made to procure their attendance, though they had expressed a willingness to testify, and where no facts were stated tending to show that there was a probability that they would be present at the ensuing term of court, or that their testimony could be procured within a reasonable time.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1335, 1336.]

## 2. SAME—EVIDENCE—HANDWRITING—IDENTIFICATION.

On an issue as to whether a certain letter was written by defendant, a witness who had seen defendant write but once was competent to testify.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1055.]

## 3. SAME — TYPEWRITTEN LETTERS — MACHINE USED—EXPERT TESTIMONY.

On an issue as to whether certain typewritten letters were written by defendant, testimony by an expert that a comparison of the letters with the work done by a certain typewriting machine in the town where defendant lived indicated, because of defects in the type and in the alignment thereof, that the letters were written on the machine in question, was competent.

## 4. SAME—SECONDARY EVIDENCE.

Where, in a prosecution for adultery, the state claimed that certain letters had been written by defendant's alleged paramour to defendant, and notified the defendant to produce these letters, which he did not do, evidence by the woman who wrote them as to their contents was admissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 886-888.]

## 5. SAME—LETTERS — IDENTIFICATION — SUFFICIENCY.

In a prosecution for adultery, the state claimed that a number of letters had been written by defendant's alleged paramour to him, and that she had received replies containing incriminating matter, all but one of which replies were typewritten, and all of which were unsigned. The alleged paramour, though admitting that she had seen defendant write but once, testified that the handwriting of the only letter not typewritten was that of defendant, and that the address on the envelope of one of the typewritten letters was also in defendant's handwriting. *Held*, that the letters were admissible in evidence against defendant.

Appeal from District Court, Fourth District; J. E. Booth, Judge.

John W. Freshwater was convicted of adultery, and appeals. Affirmed.

S. A. King, for appellant. M. A. Breeden, Atty. Gen., and D. D. Houtz, Dist. Atty., for the State.

McCARTY, J. The defendant was convicted of the crime of adultery alleged to have been committed on June 18, 1904, at Provo, Utah, with one Della Nance, an unmarried

woman, and was sentenced therefor to a term in the penitentiary. The record shows that the case was set for trial for December 5, 1904, but, on motion of the district attorney, a continuance was granted until December 21, 1904. Upon the case being called for trial on the last-mentioned date the defendant made a motion, supported by affidavit, for a continuance on the ground that three of his witnesses were absent from the state. The court denied the motion and a trial was had, which resulted in a disagreement of the jury. The case was, thereupon, immediately set for trial January 9, 1905. When the case was called for trial on said date, the defendant again moved for a continuance on the ground that his three witnesses were still absent from the state, and that he could not safely proceed to trial without them. The court overruled the motion and the trial was proceeded with. On January 13, 1905, a verdict of guilty was rendered. A motion for a new trial having been made and overruled, defendant appeals to this court.

The action of the court in denying defendant's motion for a continuance is now assigned as error. In support of the motion defendant filed an affidavit in which he, in substance, alleges he is informed that all three of the witnesses therein named are temporarily absent from the state; that one of the witnesses, Alto Carter, was in Colorado; that affiant (defendant), immediately upon the cause being set for trial (December 23, 1904, 16 days before the case was called for trial), caused a subpoena to be issued for said witness but that the "time was so short that it was impossible for this affiant to obtain the presence of said witness at this term of court, notwithstanding the fact that said witness has expressed a willingness to be present in court and testify in his behalf." The affidavit then proceeds to recite what affiant expected to prove by the absent witness. It does not appear, however, that defendant communicated or attempted to communicate with the witness, notwithstanding he was advised of her whereabouts and that she had expressed a willingness to be present at the trial and testify. Nor does it appear that any effort was made to procure her attendance. Neither does the affiant state facts tending to show that there was any probability that this, or either of the other two absent witnesses, would be present at the then next ensuing term of court, or that there was any probability that the evidence of these witnesses could and would be procured within a reasonable time. The same lack of diligence is shown with respect to procuring the attendance of the other two absent witnesses as was shown in the case of Alto Carter. Under these circumstances it was not an abuse of discretion for the court to deny the motion for a continuance. 1 Spelling, New Tr. & App. Pro. 137-140.

Della Nance, the woman with whom it is alleged defendant committed the crime of

which he stands convicted, was called as a witness and testified that defendant was criminally intimate with her on June 18, 1904, at Provo, Utah, and that, as a result of their criminal conduct, she became pregnant; that defendant, after he was arrested for the crime, prevailed upon her to go to her home in Colorado in order to avoid testifying against him; that on the night of September 5, 1904, the defendant took her to Springville in a buggy, at which point he gave her money, and she took the train for Colorado; that it was understood before they parted that defendant would ship her trunk to her later on; that soon after arriving at her destination in Colorado she received, through the United States mail, an unsigned typewritten letter postmarked at Provo, Utah; that she had seen the defendant write, and that the address on the envelope was in his handwriting; that soon after the receipt of this letter she wrote a letter to defendant, deposited the same in the post office, postage prepaid, and addressed to him at Provo, Utah, and stated to him in the letter that she wanted her trunk and if he didn't send it she would return to Provo and get it, and that she made inquiries about the criminal case pending against defendant; that soon thereafter she received another unsigned typewritten letter postmarked Provo, Utah, which was introduced in evidence, and, in part, states: "Your trunk will be there in a few days, so you need not worry about that. \* \* \* There hasn't been anything done yet and won't if you don't come back for a while. Of course, after this is settled in court, it would be all right for you to come. \* \* \*" She also testified that she wrote several other letters to the defendant, deposited the same in the post office, postage prepaid, and addressed to him at Provo, Utah, in which she discussed their relations and trouble, the contents of which letters it is unnecessary to here set out in detail, and that in due course of mail she received unsigned letters postmarked Provo, Utah, which were introduced in evidence and in which the subject-matter of her own letters was discussed; that one of the letters and the address on the envelope in which it came she recognized as being in the handwriting of defendant. A demand was made by the state on defendant to produce the letters alleged to have been written to him by the prosecutrix, but he denied having written any letters to her or of having received any from her. The court, thereupon, permitted the witness to testify to the contents of the letters which she claimed were written by her to defendant. E. H. Holt, who was shown to be an expert on typewriting and familiar with the mechanism of typewriting machines, was called as a witness by the state, and, over defendant's objections, testified that, in his opinion, the affidavits sworn to by defendant and filed in the case in support of his motions for

continuance and the typewritten letters received by Della Nance, hereinbefore referred to, and the addresses on some of the envelopes in which the letters were posted, were written on the same typewriter. He testified, and his evidence is not disputed, that the letters and affidavits showed that the type used in printing them was of the same class and size, that certain letters (type) were defective, broken and out of repair, that certain other letters were out of alignment, and the spacing between certain letters was too great; that those peculiarities and defects appeared in the affidavits and typewritten letters and the addresses referred to which were typewritten; that he examined 24 typewriting machines in Provo City, one of which had the same defective type which made lettering, lining, and spacing in exact conformity with the peculiarities in these respects of the affidavits, letters, and addresses on the envelopes. He also testified, that, while it might be possible for two machines out of repair to have precisely the same defects and to produce the same faulty printing in every respect that characterized the letters and affidavits mentioned, such a thing or coincidence is not at all probable.

It is now urged that the court erred in permitting Della Nance, who claimed to have seen the defendant write but once, to testify that the letter written by hand which she claimed was received by her, and the address on the envelope in which it came, was in the defendant's handwriting. The rule is well settled that writing may be proved by evidence of a witness who has seen the person write. In 1 Greenleaf on Ev. 577, it is said: "It is held sufficient for this purpose that the witness has seen him write but once and then only his name. The proof in such case may be very light, but the jury will be permitted to weigh it." In 2 Jones on Ev. § 550, the author says: "But whatever degree of weight his testimony may deserve, which is a question exclusively for the jury, it is an established rule that if one has seen the person write, he will be competent to speak as to his handwriting; and this is true, although the impression on the witness may be faint and inaccurate. Thus, the testimony has been admitted although the witness has not seen the person write for many years before the trial and although he has only seen the person write on a single occasion, and even though he only saw the person write his name, or even his surname." And again: "It is not necessary that the witness should be an expert. These are matters affecting not the admissibility but the weight of such testimony." McKelvey, in his work on Evidence, p. 360, says: "It has from early times been settled that no great degree of familiarity with handwriting is required to render a witness competent to give an opinion. If he has seen the person write a single time, it has generally been held sufficient." Ham-

mond v. Varian, 54 N. Y. 398; McNair v. Commonwealth, 26 Pa. 388; Rideout v. Newton, 17 N. H. 71; Pepper v. Barnett, 22 Grat. (Va.) 405; Keith v. Lothrop, 10 Oush. (Mass.) 453; Hopkins v. Meguire, 35 Me. 78; Edelen v. Gough, 8 Gill. (Md.) 87; 17 Cyc. 157.

Appellant's next assignment is that the court erred in permitting witness Holt to testify with respect to the letters and affidavits referred to having been written on a certain typewriting machine then in use in Provo, Utah, the town in which defendant was residing at the time the letters were written and affidavits made. While it is true that this evidence, standing alone, did not prove that defendant wrote the letters, yet the state was entitled to have it submitted to the jury as a circumstance tending to show, when considered in connection with other facts and circumstances in the case, that the letters were written at the same town where they purported to have been posted, and in which the record shows defendant resided, and thereby tending to establish a link in the chain of evidence necessary to connect the defendant with the writing and sending of the letters.

Appellant's next complaint is that the court erred, first, in permitting Della Nance to testify to the contents of the letters she claimed to have written to defendant from Colorado; and, second, by permitting the state to introduce in evidence the unsigned letters which she claimed to have received through the mails in Colorado purporting to be in answer to the letters which she claimed to have written to the defendant. The state having made a demand on the defendant to produce the letters in question, and he having failed to do so, it was proper for the state to introduce testimony of their contents. Nor do we think the court erred in permitting the state to introduce in evidence the unsigned letters received by her which were posted at Provo, Utah. The contents of these letters, as shown by the record, related to and were strictly confined to matters of an incriminating character against defendant which were peculiarly within his knowledge and concerning which the prosecutrix claimed to have written him from Colorado, and about which she testified they had talked over together before she went to Colorado. Under these circumstances, and in view of her testimony that she identified one of the letters which was not typewritten as being in the handwriting of defendant, the contents of which were concerning matters directly connected with the subject-matter of the correspondence, we think it was proper to resort to and read in evidence the contents of the letters as tending, when considered in connection with the contents of the letters which Della Nance claimed to have written to defendant, to prove their genuineness and that they were written by him. 111 Wigmore on Ev. 2149, 2153; Singleton v. Bremar, Harp. (S. C.) 201.

85 P.—29

We find no reversible error in the record. The judgment is therefore affirmed.

BARTON, C. J., and STRAUP, J., concur.

(29 Nov. 135)

BRANDON v. WEST et al. (No. 1,631.)

(Supreme Court of Nevada. May 2, 1906.)

1. APPEAL—PRESENTATION OF CAUSE—OBJECTIONS—REHEARING.

A notice of appeal stated that the appeal was taken from the judgment and from an order denying the motion for a new trial. The undertaking was conditioned for the payment of costs on appeal from the judgment and the transcript was entitled "Statement on Motion for New Trial and Appeal." Copies of all papers required by Comp. Laws, § 3300, to be embodied in the judgment roll, with the exception of the summons, were contained in the transcript, and no motion was made to dismiss the appeal from the judgment because of any alleged defect therein, nor was the regularity of the appeal questioned on the presentation of the cause; the case being briefed, argued, and presented as though the appeal was regular. *Held*, that respondent was not entitled to object on an application for rehearing that there was no appeal from the judgment.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3242.]

2. SAME—DISPOSITION OF CAUSE—RENDITION OF JUDGMENT.

In a suit to enforce specific performance of a contract plaintiff was defeated and appealed. He prayed that the judgment be modified by directing execution of a deed to plaintiff, or, if he was not entitled to such relief, but was entitled to a deed to certain sand and the exclusive right to remove the same, that judgment be rendered on appeal accordingly. Defendants offered no evidence, but prepared findings, which were signed, negating all allegations of the complaint with reference to a sale of the "land," which were approved. Plaintiff moved to strike such findings relative to a sale of the sand to plaintiff, which was denied, and defendants on appeal did not deny that the evidence was sufficient to establish a sale of the sand and license to remove the same. *Held*, that defendants could not object for the first time on rehearing that plaintiff was not entitled to the direction to a degree of specific performance of the contract for the sale of the sand, but that the court, on reversing the cause, should have remanded the case for a new trial.

Fitzgerald, C. J., dissenting.

On petition for rehearing. Denied.

For former opinion, see 83 Pac. 327.

On Rehearing.

TALBOT, J. The respondents petition for a rehearing in this action, or a modification of the order entered therein, on the following grounds: "That no appeal was ever taken from the judgment herein; that the only appeal which was taken was from the order denying plaintiff's motion for a new trial, and the jurisdiction of this court is limited to affirming or reversing that order; and that the order entered directing judgment for plaintiff is not warranted, even had an appeal been taken from the judgment. It is contended that the record

on appeal does not contain the judgment roll, and consequently that there can be no appeal from the judgment. The notice states that the appeal is from the judgment, as well as the order denying the motion for a new trial. The undertaking on appeal is conditioned for the payment of costs on appeal from the judgment. The transcript is entitled: "Statement on Motion for New Trial and Appeal." Copies of all the papers required under Comp. Laws, § 3300, to be embodied in the judgment roll, with the exception of the summons, are contained in the transcript. There was no motion made to dismiss the appeal from the judgment because of any alleged defect therein, nor was the sufficiency or regularity of the appeal questioned upon the presentation of the cause. The case was briefed, argued, and presented as though the appeal was entirely regular. Its sufficiency, therefore, cannot now be questioned upon petition for rehearing.

It is argued that this court, in any event, ought not to have directed that judgment be entered in favor of the appellant, upon reversal of the judgment, but that all that was proper to be done under such circumstances, was the granting of a new trial, the rule being, "that where there is an issue upon material facts, which may possibly be decided in more than one way on another trial, there should be a new trial ordered on a reversal of the judgment." Upon the trial of this cause the respondents offered no evidence, they submitted the case upon the testimony offered by the plaintiff. The court ordered judgment in favor of defendants. Findings prepared by defendants' counsel, which negatived the allegations of plaintiff's complaint that there was a sale of the land described therein, were approved by the court. Counsel for the plaintiff moved to strike out the findings so allowed, and made request for certain other findings. Upon the hearing of this motion and request, the court made, among others, the additional finding relative to the sale of the sand to the plaintiff and the right or license to remove the same, in pursuance of which finding judgment was ordered by this court to be entered in favor of appellant. Counsel for respondents, though participating in this hearing, may not have been called upon to except to this finding, if objection were had thereto; but, in any event, no objection was made or exception taken. In plaintiff's assignments of error in his statement on motion for a new trial and appeal the point is twice made that it was error in the court not to give plaintiff judgment in accordance with this finding. Counsel for appellant in their opening brief take the position that they were entitled to judgment at least to the extent of the sand and the exclusive license to remove the same, as found by the trial court. They close their brief with the following paragraph: "Wherefore plaintiff

and appellant prays that, inasmuch as all the evidence is before the court, the judgment be modified by directing the defendants to execute a deed of said property to plaintiff; and should the court find that plaintiff is not entitled to the relief prayed for in the complaint, but is entitled to the lesser relief of a deed to the sand and exclusive right to remove the same, that the judgment be modified accordingly. \* \* \*" It will be seen, therefore, that whether judgment by this court should be ordered entered in favor of the plaintiff upon the findings as they stood was squarely before the court. There was no intimation in respondents' brief that, in the event this court should conclude that the finding as to the sale of the sand was supported by the evidence and that the trial court should have given judgment to that extent in favor of the plaintiff, this court ought not to make an order directing such a judgment to be entered, instead of remanding the case for a new trial. There was no suggestion that, in the event this court agreed with the contention of appellant that judgment should have been entered in favor of the plaintiff upon the findings, that a new trial should be ordered, so that the defendants might have an opportunity to offer evidence upon the issues or that they had any evidence that might be so offered.

Counsel for respondents in the presentation of this case upon the hearing on appeal took the sole position that under the pleadings, findings, and evidence, the appellant was entitled to no relief whatever. Although counsel for appellant was asking that judgment be ordered entered in favor of plaintiff in accordance with the finding relative to the sale of the sand, this finding is nowhere directly attacked in respondents' brief; in fact, it is not denied that the evidence was sufficient to establish a sale of sand and a license to remove the same, although it was and is claimed that the proofs as to the limits within which the sand might be taken were too indefinite. Under this state of facts, we think the contention, now made for the first time, that the course pursued by this court was not a proper one, also comes too late. It is the rule that no new ground or position not taken in the argument submitting the case, or question waived by silence, can be considered on petition for rehearing. *Powell v. N. C. O. Ry. Co.*, 28 Nev. —, 82 Pac. 97; *Beck v. Thompson*, 22 Nev. 421, 41 Pac. 1.

It was contended by counsel for respondents upon the presentation of this case, and is again urged in the petition for rehearing that there was no satisfactory proof of the boundaries of the land referred to in the complaint, and within which the sand has been held to have been sold to the plaintiff. This point was considered, although not referred to, in the original opinion.

There was testimony to the effect that two of the sides, the south and the east, were laid out in the presence of B. G. Clow and the plaintiff and at Clow's direction. Counsel in their petition now only contend "that the record on appeal, fairly considered fails to show that the western boundary of the land claimed by appellant was ever indicated or marked by B. G. Clow." As the land in question is triangular in shape, the establishment of two of the sides would necessarily establish the third. The petition for rehearing is denied.

NORCROSS, J., concurs. FITZGERALD, C. J., dissents.

### ROBINSON v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 7, 1905. Rehearing Denied Jan. 11, 1906.)

#### 1. GRAND JURY—INDICTMENT—FINDING—NUMBER OF GRAND JURORS.

Under the provisions of section 5349, Wilson's Rev. & Ann. St. 1903, an indictment cannot be found, except by the concurrence of at least 12 grand jurors.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Grand Jury, § 6.]

#### 2. INDICTMENT—MOTION TO QUASH—GROUNDS.

By the language contained in section 5399, Wilson's Rev. & Ann. St. 1903, "when it is not found," is meant when not concurred in by at least 12 grand jurors, and has no reference to the kind or character of evidence received by the grand jury.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 480-487.]

#### 3. SAME—MOTION TO SET ASIDE.

By the provisions of the act of criminal procedure of this territory, the rights of a defendant indicted are defined, and the causes for which he may attack the indictment, the manner in which the attack must be made, and the time for making such attack, are prescribed. The reception by the grand jury of hearsay or secondary evidence is not one of the grounds for which the indictment must be set aside upon motion.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 480-487.]

#### 4. CRIMINAL LAW—APPEAL—JURY—CHALLENGE FOR CAUSE.

Under the provisions of the statutes of this territory, a challenge for cause for the reason of incompetency of a juror is a question to be tried by the trial court, and in the absence of a complete record of the examination upon that question the presumption is that the ruling of the trial court was right.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3023.]

#### 5. JURY—STATEMENT OF GROUNDS.

Under the provisions of the statutes of this territory, a party desiring to challenge a juror for cause must state the cause of his challenge, and unless the cause is stated the challenge may be disregarded by the court. It is not enough, at the conclusion of the examination of the juror, to say "I challenge the juror for cause."

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 559.]

#### 6. SAME—FAILURE TO OBJECT.

A known ground of disqualification of a juror before or during the progress of a trial

is waived by withholding it or refusing or declining to raise the objection until after verdict.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 504-514, 550-558.]

#### 7. HOMICIDE—EVIDENCE.

The ruling of the court excluding the testimony of the witness Sellers as to the details of a fight between Sellers and the deceased, a short time before the homicide, held not to be reversible error.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 292, 343.]

#### 8. SAME—SELF-DEFENSE.

Where, in a criminal action upon a charge of manslaughter in the first degree, the defendant admits firing the fatal shot, but seeks to justify on the grounds of necessary self-defense, and that he fired the shot, believing that he was then in danger of losing his life or suffering great bodily harm, in order to justify an acquittal the facts must be such that the jury, in the light of all of the facts and circumstances known to the defendant, can say that as a reasonable man he had grounds for such belief; and an instruction directing the jury that the defendant must have actually and in good faith have thought he was in danger of losing his life or of suffering great bodily harm, and that he had reason and cause for such belief, is not erroneous.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 158-163.]

#### 9. SAME—INSTRUCTIONS.

The use of the language "sound reason," and "honest belief," in connection with the instructions given in this case, can only be understood to mean that the defendant must actually in good faith have thought he was in danger of losing his life or suffering great bodily harm, and that he had reason and cause for such belief.

#### 10. SAME.

The instructions in plain and unambiguous language directed the jury as to whom the danger should appear.

#### 11. SAME—JUSTIFICATION—INSTRUCTIONS.

Where the jury are properly instructed that the killing was justifiable, if in response to some overt act, it is not error to in that connection instruct "that no man by his own lawless act can create a necessity for acting in self-defense, and thereupon assault and injure or kill the person with whom he seeks the difficulty, and then interpose as a defense the plea of self-defense. The plea of necessity is a shield only for those who are without fault in occasioning it and acting under it," where the evidence warrants such an instruction.

#### 12. HOMICIDE—PROVOKING DIFFICULTY—INSTRUCTIONS—APPLICABILITY.

Where there is evidence that just before the homicide the defendant, upon receiving information that the deceased was abusing him to his friends, went to his saloon, armed himself with the revolver with which he fired the fatal shot, and went to another saloon, where he met the deceased, accused him of abusing him to his friends, and, after but a few words, fired the fatal shot, held, that under such circumstances the instruction was applicable to the facts.

#### 13. SAME—CREATING DIFFICULTY.

The instruction, when taken in connection with the other instructions given by the court in this case, could not be construed as assuming that the defendant created the necessity by his own lawless act to produce a fear that his life was in danger by deceased, and taking advantage of the plea of self-defense made it necessary to kill.

#### 14. CRIMINAL LAW—INSTRUCTIONS—APPLICABILITY.

Instruction numbered 13, copied in the opinion, directed the jury that the defendant had the right to proceed with defensive acts until he was in a position of safety, and cannot

be construed, when taken as a whole, as saying that the defendant carried his acts of aggression further than he should have.

**15. SAME—REPETITION OF INSTRUCTIONS.**

It is not error for the court to refuse requests for special instructions, even though such requests correctly state the law, where they are fully covered by the instructions given by the court, although different to some extent in the language used.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 2011.]

**16. HOMICIDE—INSTRUCTIONS.**

Special instructions requested in this case examined, and held to be fully covered by the instructions given by the court.

**17. CRIMINAL LAW—SPECIAL INSTRUCTIONS.**

If, upon the trial of a criminal case, special instructions are desired by the defendant, he is required by the provisions of the statutes of this territory to present in writing to the court the instructions desired. The trial court cannot be expected, and is not required, to instruct upon every possible question.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2007.]

**18. SAME.**

It is not error for the trial court to omit to instruct upon some particular branch of the case deemed advisable by the defendant under his theory of the case, when he has not requested such instructions.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1996–2005.]

**19. SAME.**

Instructions Nos. 1 and 2 were fully covered by the instructions given by the court, and the court is not required to repeat the instructions given because requested by the defendant.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

**20. HOMICIDE — MANSLAUGHTER — INSTRUCTIONS.**

Where, in a criminal case, the indictment charges, and the evidence for the prosecution shows the killing to have been, manslaughter in the first degree, and the defendant admits the killing, and the evidence upon his part tends to show the killing to have been justifiable, it is only necessary that the instructions of the court shall cover the law of the case as shown by the evidence.

**21. SAME—LOWER DEGREES OF CRIME.**

On the trial of a criminal case, where the defendant is charged with the crime of manslaughter in the first degree, and the evidence of the prosecution tends to support the charge, and there is no evidence tending to support the lower degrees of the crime, but the evidence of the defendant tends to prove justifiable homicide, it is not necessary for the court to instruct the jury upon the law of manslaughter in the second degree.

**22. CRIMINAL LAW—INSTRUCTIONS.**

The instructions should in all cases state the law applicable to the facts, and to all proper and reasonable deductions to be made therefrom, and fair interpretations thereof, and not to questions not presented or supported by the evidence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1980, 1981.]

**23. SAME—APPEAL—AFFIRMANCE.**

Where, after an examination of the entire record, it appears that the defendant has had a fair and impartial trial, that no material error has been committed by the trial court, and the verdict is amply sustained by the evidence, this court will not disturb the verdict or judgment of the trial court.

(Syllabus by the Court.)

Error from District Court, Caddo County; before Justice Frank E. Gillette.

Samuel A. Robinson was convicted of manslaughter, and brings error. Affirmed.

Stillwell H. Russell, Charles H. Carswell, and Glitsch & Glitsch, for plaintiff in error. P. C. Simons, Atty. Gen. for the Territory.

BEAUCHAMP, J. Plaintiff in error, Samuel A. Robinson, was indicted for, and tried and convicted of, manslaughter in the first degree in the district court of Caddo county, and sentenced to the penitentiary for a term of eight years. From that judgment, he appeals, and brings the case here by petition in error and case-made.

After the return of the indictment by the grand jury, and upon arraignment, the plaintiff in error moved the court to quash the indictment upon two grounds: First, that said indictment was found by the grand jury without legal and competent evidence; second, that the grand jury which found and returned said indictment during the consideration of the case received incompetent, illegal, hearsay, and secondary evidence, and that the finding of said indictment was made upon incompetent, illegal, hearsay, and secondary evidence. A hearing upon the motion was had before the court, and the motion overruled, to which ruling the plaintiff in error excepted, and now urges this as his first ground as cause for reversal of the judgment against him. The record discloses that on the preliminary examination of the plaintiff in error the testimony was taken down in shorthand by a stenographer, and afterwards by her transcribed, and that the testimony as written out by her was introduced before the grand jury while investigating his case; that the testimony of some of the witnesses who testified before the examining magistrate was not contained in the transcript, and that the testimony contained in the transcript was not taken under the direction or order of the probate judge, before whom the examination was had; and that the transcript was not filed in the probate court, nor filed or deposited with the clerk of the district court of Caddo county. These are the grounds upon which the plaintiff in error relied to support his motion to quash. The record also discloses that a number of the witnesses who testified in person before the grand jury were eyewitnesses to the homicide, and upon whose evidence the grand jury were fully justified in returning the indictment.

It is contended that, by reason of the grand jury having received the transcript in evidence before them, that the indictment was not found as prescribed by the statutes of this territory, and that, by reason of the provisions of section 5399, Wilson's Rev. & Ann. St. 1903, the indictment should have been set aside by the court. Section 5399 reads: "The indictment must be set aside

by the court, in which the defendant is arraigned, and upon his motion, in either of the following cases: First: When it is not found, indorsed, presented or filed, as prescribed by the statutes of the territory. \* \* \*

And by section 5339, Wilson's Rev. & Ann. St. 1903, it is provided: "The grand jury may not receive hearsay or secondary evidence." Section 5349, Wilson's Rev. & Ann. St. 1903, provides: "An indictment cannot be found without the concurrence of at least twelve grand jurors. When so found, it must be indorsed, 'A true bill,' and the indorsement must be signed by the foreman of the grand jury." The Legislature has seen proper to provide for what causes an indictment must be set aside by the court upon the motion of the defendant, if made at the proper time, and, by section 5349, the indictment can be found only by the concurrence of at least 12 grand jurors, and when so found it is provided how it must be indorsed and signed. By the language contained in section 5399, "When it is not found" is meant when not concurred in by at least 12 grand jurors, and has no reference to the kind or character of evidence received by the grand jury, or to the other matters or proceedings prior to the vote of the grand jury upon which the indictment is found. By the provisions of our criminal procedure, the rights of a defendant indicted are defined; and the causes for which he may attack the proceedings, the manner in which the attack must be made, and the time for making such attack, are prescribed; and, the reception by the grand jury of hearsay or secondary evidence not being one of the grounds for which the indictment must be set aside upon motion, and the motion in this case being for that cause only, it was rightfully overruled. *Shivers v. Territory*, 13 Okl. 466, 74 Pac. 899.

2. The second assignment of error is that the court erred in overruling the challenge for cause made to the petit juror R. A. McCracken. The record discloses the following examination of the juror upon his voir dire: "Q. Are you a deputy sheriff in this county? A. I have a commission. I am not a regular working sheriff. Q. You hold a commission as a deputy sheriff? A. Yes, sir. (Defendant challenges juror for cause. Challenge is by the court overruled. Defendant excepts to ruling of the court.)" And immediately following is the certificate of the official court stenographer as follows: "This certifies that the above and foregoing is a true and correct transcript of my shorthand notes of that part of the examination of juror McCracken relating to his having a commission as deputy sheriff, together with the objection of counsel, the ruling of court, and the exceptions of counsel to said ruling." It is apparent that the record presented does not contain a complete record of the examination and testimony of the juror upon his voir dire. Under the provisions of the statutes of this territory, a challenge for cause is

an objection to a particular juror and is either: First, general, that the juror is disqualified from serving in any case on trial; or, second, particular, that he is disqualified from serving in the case on trial. General causes for challenge are: First, conviction for felony; second, want of any of the qualifications prescribed by law to render a person a competent juror, including a want of knowledge of the English language as used by the courts; third, unsoundness of mind, or such defect in the faculties of the mind or organs of the body as renders him incapable of performing the duties of a juror. Particular causes of challenge are of two kinds: First, for such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known as implied bias; second, for the existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging, and which is known as actual bias. A challenge for implied bias may be taken for the several causes set forth in the statute, and for no other. In a challenge for either implied bias or actual bias, the causes, therefore, must be stated. All challenges, whether to the panel or to individual jurors, shall be tried by the court. The juror and other witnesses may be examined to prove or disprove the challenge. See Wilson's Rev. & Ann. St. 1903, §§ 5469-5479. The entire record of the examination of the juror not being before us, it is impossible for us to determine for what reason the court overruled the challenge for cause.

Conceding, for the purpose of this question, that the juror, if a deputy sheriff, was incompetent to serve, it may be that if the record of the entire examination was before us, it would show that he was not in fact a deputy sheriff. The record presented simply discloses that the juror answered that he held a commission; that he was not a regularly working sheriff. What is meant by this particular language, standing alone, is not certain. Under the provisions of the statutes, more is required to constitute one a deputy sheriff than the mere issuance and delivery of a commission. Wilson's Rev. & Ann. St. 1903, § 3756. However, under the statutes before cited, if the juror had been challenged on the grounds of incompetency, it was a question to be tried by the court, and, in the absence of a complete record, the presumption would be that the ruling of the trial court was right. Again, the challenge was general. For what cause is not shown. Under the provisions of the statutes, the cause for the challenge shall be stated. Whether the challenge was overruled on the ground of insufficiency in form, or because unsupported by the evidence, does not appear from the record. It is

enough, however, if the ruling can be sustained on either of these grounds. In the case of *People v. Reynolds*, 16 Cal. 129, in the opinion of the court by Baldwin, J., it is said: "The statute enumerates several distinct causes for which a challenge for implied bias may be taken, and requires, in a challenge of this kind, that one or more of the causes thus enumerated shall be alleged. Act Regulating Proceedings in Criminal Cases, §§ 347, 349. Unless the cause be alleged, the challenge may be disregarded by the court. It is not enough to say, 'I challenge the juror for implied bias,' and then stop. The particular cause from which such bias is to be inferred must be stated. Such was the rule of the common law, and such is the direction of the statute in this state. In the present case the challenges were interposed in general terms 'for implied bias,' without a specification of the particular causes; and for this reason, if for no other, they were properly disallowed. 'When a juror is challenged for principal cause or for favor,' says the Supreme Court of New York, in *Freeman v. People*, 4 Denio, 31, 47 Am. Dec. 216, 'the ground of the challenge should be distinctly stated; for without this the challenge is incomplete and may be wholly disregarded by the court. It is not enough to say, 'I challenge for principal cause or for favor,' and stop there. The cause of the challenge must be specified.'" "A party cannot," says the Supreme Court of New Jersey, in *Mann v. Glover*, 14 N. J. Law, 195, "make a principal challenge, or a challenge to the favor, by giving it a name. A challenge, whether in writing or by parol, must be in such terms that the court can see, in the first place, whether it is for principal cause or to the favor, and so determine by which form it is to be tried; and, secondly, whether the facts, if true, are sufficient to support such challenge. It is the common practice in this state to interrogate a juror, when he is first called upon his voir dire, generally as to his qualifications, with a view to obtain information upon which to rest a specific challenge. This practice, though productive of some inconvenience, is one of necessity; for, unless it be followed, it will often be quite impossible to ascertain the qualifications of the juror. \* \* \* If, therefore, the challenge for implied bias be not taken before the juror is examined, the proper course to pursue is to make the challenge, stating distinctly its causes, immediately after the preliminary examination is closed. The district attorney can then except to the challenge, or deny the facts it alleges—that is, he can demur to its sufficiency or join issues on the truth of its averments. If the latter course be adopted, the juror can be further examined, and other witnesses called, and the matter be thus submitted to the court."

The statutes of California are identical with the statutes of this territory. In the present case the challenges were overruled,

but whether on the grounds of insufficiency in form, or because unsupported by the evidence, does not appear. It is enough if the ruling can be sustained on either of the grounds. *People v. Cochran*, 61 Cal. 549, and cases there cited. In the opinion in the case of *Johnson v. Holliday*, 79 Ind. 151, by Howk, J., it is said: "Of course the appellant was entitled, as was the appellee, to a fair trial of the issues in the cause by a jury of competent jurors. But we cannot assume that any of the jurors were incompetent. On the contrary, as all of the presumptions are in favor of the rulings and decisions of the trial court, it behooves the party who may wish to claim in this court that any of these rulings or decisions were erroneous to so save and present them in the record of the cause as to exclude every reasonable presumption in favor of such rulings or decisions. *Myers v. Murphy*, 60 Ind. 282; *Stott v. Smith*, 70 Ind. 298; *Bowen v. Pollard*, 71 Ind. 177; *Williams v. Potter*, 72 Ind. 354; *Kissell v. Anderson*, 73 Ind. 485; *Smith v. Kyler*, 74 Ind. 575." In view of the condition of the record presented and the authorities cited, we cannot say that there was error committed in overruling the challenge for cause. A known ground of disqualification of the juror before or during the progress of a trial is waived by withholding it, or refusing or declining to raise the objection until after verdict. *Queenan v. Territory*, 11 Okl. 261, 71 Pac. 218, 61 L. R. A. 324.

3. At the trial a witness, Frank Sellers, testified that between 6 and 7 o'clock in the evening, just a short time prior to the homicide, he called at the old "K. C." building, and there found Smith Brown, the deceased; that Brown made a violent assault upon him, cursed him, charged him with being a spy for Robinson, and threatened to kill him, and stated that he would kill the defendant, Robinson, before daylight; that Brown at that time was armed with a revolver, with which he punched the witness in the side several times. The territory objected to the testimony respecting the difficulty between the deceased and the witness. The court ruled that whatever the witness said in reference to Robinson was competent. The witness then testified in reference to the details of a fight that he had with the deceased, Brown, and thereafter, in response to an objection, the court instructed the jury that the testimony of the witness, in so far as it related to what Brown did in reference to the witness, was not competent, to which the defendant excepted, and now complains. Counsel argues that: "This brutal outburst constitutes a link in the chain of one hostile series of acts by the deceased down to the time he was shot. It showed the state of his mind toward the defendant in this: his assault on Sellers and the language used towards him was actuated solely from the fact that he regarded Sellers as an emissary of Robinson, and that the excluded testimony

of Sellers shows that the deceased was armed with a revolver about 30 minutes prior to the time he met his death." The testimony of the witness Sellers, with reference to Brown being armed with a revolver at the time of the difficulty between himself and Brown, was not excluded by the court. The court only excluded the testimony with reference to the details of the fight between witness and Brown, and in this the court certainly did not err. The witness was permitted to testify to everything that was said or done with reference to the defendant, and under what theory the details of a personal encounter between Sellers and Brown could be material or relevant to the questions at issue we are unable to see; but, even if the ruling of the court was erroneous, two other witnesses, who were eyewitnesses to the encounter between Sellers and Brown, were permitted to testify to all of the facts and details. Sellers testified that immediately after the encounter with Brown he told the defendant what Brown had said to him, and advised the defendant to look out for him; that he believed that Brown would kill him before daylight if the opportunity should present. The defendant testified that shortly after he received this information, he met the deceased in what is called the "Bell Top saloon" in Anadarko, and inquired of him why he was abusing him to his friends. Brown denied that he had made such statements, and inquired as to who was defendant's informant. Upon being informed it was Sellers, Brown made the remark, "That God damned son of a bitch I would not believe," to which remark, it seems, defendant took offense, and the encounter ensued in which the defendant shot and killed the deceased, in the presence of witnesses who were present and testified to all of the details at the trial. The defendant admitted the shooting, and claimed that Brown was in the act of drawing a revolver, and that he shot in self-defense. The record discloses that the court gave the defendant the greatest latitude in the introduction of evidence.

4. Exceptions were taken to instructions Nos. 9, 10, 13, 14, and 19 given by the court; and, while there was no exception taken to instruction No. 8, we are requested by counsel to notice it also, which instructions read as follows:

"(8) By the language 'lawful defense of the person' is meant what we sometimes term 'self-defense.' The right of self-defense is founded upon the natural right of a man to protect himself against the unlawful assault upon him by another. This defense having been made in this case, the jury should weigh each fact and circumstance that is offered as justifiable grounds in connection with all the other testimony in the case. Mere apprehension that a person designs to kill another or to commit some great bodily harm upon him is not sufficient to justify such other in first

making an attack and committing the act complained of in the indictment herein; and to perform such act, when the excuse therefor is mere apprehension, would not be sufficient to justify the act as one having been committed in the lawful defense of the person. In a case where a person attacks another, or attempts to execute a design upon the life of such other, and is in an apparent situation to do so, thereby creating a reasonable belief that such design is about to be accomplished, then the person so threatened may resist and use all necessary force to prevent the accomplishment of such design, even to the extent of taking life, and it is justifiable. Actual or positive danger is not indispensable to justify self-defense. The law considers that men, when threatened with danger, are obliged to judge from appearances and to determine therefrom the exact state of things surrounding them, and in such case, if a person acts from an honest conviction, induced by reasonable evidence, he will not be held criminally for a mistake as to the extent of actual danger. If the jury believe from the evidence that at the time the defendant is alleged to have shot the deceased the circumstances surrounding him were such as in sound reason would justify or induce in his mind an honest belief that he was in danger of receiving from the deceased some great bodily harm, and that the defendant in doing what he did was acting solely from the instincts of self-preservation, then he is not guilty, and you should so find.

"(9) The court instructs the jury that mere fear, however well grounded, that another intends to kill the defendant, or to do him some great bodily harm, will not justify a killing, unless there is some overt act indicating a purpose to immediately carry out such an intention; and you are instructed that it is not enough that the defendant should show that he believed himself in danger, unless the facts were such that in the light of all the facts and circumstances known to the defendant at the time, or by him then believed to be true, can see that as a reasonable man he had grounds for such belief.

"(10) In this connection you are instructed that no man by his own lawless act can create a necessity for acting in self-defense, and thereupon assault and injure or kill the person with whom he seeks the difficulty, and then interpose as a defense the plea of self-defense. The plea of necessity is a shield only for those who are without fault in occasioning it and acting under it."

"(13) The jury are instructed that if they find from the evidence that the deceased, C. S. Brown, made threats against the defendant which, if carried into execution, would endanger his life or subject him to great bodily harm, and the defendant feared or had reason to fear that such threats were liable to be carried into execution, then the

defendant might lawfully arm himself for the purpose of self-defense in anticipation of such threats being carried into execution; but you are instructed that the defendant could not lawfully assault the deceased on account of such threats, or because of fear induced thereby, unless the deceased at the time made some demonstration or performed some overt act that caused reasonable apprehension that such threats were about to be put into execution, and in case of such demonstration or overt act the defendant might lawfully become the aggressor only to the extent of putting himself in a position of safety as against the unlawful threatened acts of the deceased. If, under the circumstances and facts in this case, you find the defendant intentionally carried his act of aggression further than was reasonably necessary to place himself in a situation of apparent safety, his acts would be such as to render his act of aggression unlawful, and you should under such circumstances consider the evidence as a whole, together with such act of aggression in determining his guilt or innocence under the charge laid in the indictment.

"(14) The court instructs the jury that words spoken, no matter how vile or opprobrious, unaccompanied by other demonstrations which would cause a reasonable belief in the mind of the defendant that the deceased was about to do him some great personal injury, would not justify the defendant in shooting the deceased or in inflicting on the deceased any personal injury."

"(19) The court instructs the jury that the true nature of manslaughter is that it is a homicide mitigated out of tenderness to the frailty of human nature. Every man, when assailed with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection. If, during that period, he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood and violence of anger, and not through malice. The same rule applies to a homicide in mutual combat, which is attributed to sudden and violent anger occasioned by the combat, and not to malice. Where two meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up, in which blows are given on both sides, it is a mutual combat, without much regard to who is the assailant; and if no unfair advantage be taken in the outset, and an occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is regarded as homicide in the heat of blood, and under our statute is manslaughter in the first degree."

The criticism offered as to instruction No. 8 is as to the language used, "sound reason" and "honest belief." It is argued that "jurors might say that there was reason inducing belief, yet under the cue gathered from the

instruction would easily conclude that the reason was not a sound one or the belief an honest one. Again, that the defendant, in doing what he did, was acting solely from the instincts of self-preservation, else he is guilty." The defendant on the witness stand admitted the killing, and attempted to justify on the grounds of self-defense, and it was for the jury to determine, in the light of all the facts and circumstances in evidence, whether the defendant was justifiable, whether he was by the deceased assaulted in such a way as to induce in him a reasonable belief that he was in actual danger of losing his life, or of suffering great bodily harm, and that the defendant in doing what he did was acting solely from the instincts of self-preservation as claimed by him. The defendant testified that he believed that the deceased was armed with a revolver, and that he was then about to shoot him, and that he shot the fatal shot because he believed that the deceased was then about to kill him, and to preserve his own life. If the appearances were such, judging from the standpoint of the defendant, that the jury could say that he had reasonable grounds for the belief that he was then in danger of losing his life or suffering great bodily harm, then they were told that they should acquit him; but the jury must of necessity believe that such a belief was an honest belief, not a mere claim of belief, and one for which under all of the facts and circumstances in evidence, there was a reason for. The facts must be such that the jury, in the light of all the facts and circumstances known to the defendant at the time and by him believed to be true, can say that as a reasonable man he had grounds for such belief (see *Wells v. Territory*, 14 Okl. 436, 78 Pac. 124); and the use of the language "sound reason" and "honest belief," in connection with the instruction given, can only be understood to mean that the defendant must actually in good faith have thought he was in danger of losing his life or suffering great bodily harm, and that he had reason and cause for such belief. Again, it is said that "the instruction does not say to whom the danger, real or apparent, the sound reason, the honest belief, etc., should appear, and unless so instructed the jury has a right to conclude that these matters must be viewed from their standpoint." The language of the instruction is: "If the jury believe from the evidence that at the time the defendant is alleged to have shot the deceased the circumstances surrounding him were such as in sound reason would justify or induce in his mind an honest belief that he was in danger of receiving from the deceased some great bodily harm, and that the defendant, in doing what he did, was acting solely from the instincts of self-preservation, then he is not guilty." What language could have been adopted or used by the court to more clearly direct them as to whom the danger should appear, we cannot perceive;

for the language is plain and unambiguous, and expressly states to whom the reason and danger should appear.

The objections to instruction No. 9 are based upon the same line of reasoning, and therefore require no further notice.

It is contended that instruction No. 10 is not applicable to the case made by the evidence, and is equivalent to saying to the jury "that the plaintiff in error created the necessity by his own lawless acts to produce a fear that his life was in danger by the deceased, and, taking advantage of self-defense, made it a necessity to kill." This instruction was given in connection with instruction No. 9, where the jury were told that the killing was justifiable if in response to some overt act. There is testimony in this case that the defendant, just before the shooting occurred, went to his saloon, armed himself with the revolver with which he fired the fatal shot, and went to the Bell Top saloon, where he met the deceased and accused him of abusing him to his friends, and after but a few words fired the fatal shot. Under such circumstances the instruction was applicable to the facts. By instructions Nos. 16 and 17 the jury were told:

"(16) The court instructs the jury that a man has the right to seek and ask an explanation of one who has made threats about him, and, if in so doing an affray is precipitated, he has the right to defend himself from death or great bodily injury; and the jury are instructed that it is not necessary, in order that the defendant have the right of self-defense, that he be entirely blameless in the matter of bringing on the difficulty which resulted in the homicide. The mere fact that he armed himself for the purpose of defense, if you find from the evidence that the defendant did arm himself for that purpose, nor the fact that upon meeting the deceased he accosted him and asked for an explanation from him of threats alleged to have been previously communicated to him, the defendant, as having been made by the deceased, unless you further find from the evidence that such explanation was asked for the purpose and with the intent on the part of the defendant of bringing on the difficulty or conflict, and in such conflict to take the life of the deceased, and if you do find that such explanation was asked for the purpose and with the intent of bringing on a conflict intending in such conflict to take the life of the deceased, such act on the part of the defendant, if followed by a deadly assault on the part of the defendant, would render his act of aggression unlawful, and you should in such case consider the evidence taken in this case as a whole, together with such acts of aggression, in determining the defendant's guilt or innocence under the charge laid in the indictment.

"(17) If the defendant was in a place where he had a right to be, and the deceased was making an effort to draw a revolver for

the purpose of shooting or killing the defendant, and the defendant did not bring on the difficulty, and the circumstances surrounding him, in connection with any threats theretofore made against him by the deceased, were such as to induce in the defendant's mind a reasonable belief that the deceased intended to shoot and kill him, and the defendant did in fact so believe, then the defendant was not obliged to retreat, nor consider whether he could safely retreat, but had a right to stand his ground, and meet any attack made upon him with a deadly weapon, in such way and with such force as under all the circumstances he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his own life, or to protect himself from great bodily injury; and if, in such conflict between them, the defendant killed the deceased, the killing was justifiable, and it is your duty to find the defendant not guilty."

Under the facts in evidence in this case the jury would have been warranted in finding that the defendant went to the saloon where he found the deceased in search of him, and for and with the purpose and intention of killing him, and there is no intimation or claim that he withdrew or attempted to withdraw from the fight. It cannot be contended that a man can deliberately arm himself with a dangerous weapon and seek out another for the purpose of killing him, unlawfully and deliberately, and be heard to claim the right of self-defense, where he had not withdrawn or signified his intention or willingness to withdraw from the struggle. As was properly said by the trial court: "The plea of necessity is a shield only for those who are without fault in occasioning it and acting under it." The instruction, when taken in connection with the other instructions given by the court, fairly states the law applicable to the facts in this case, and could not be construed as assuming that the defendant created the necessity by his own lawless act to produce a fear that his life was in danger from deceased, and taking advantage of self-defense made it a necessity to kill, as contended by counsel for plaintiff in error, and therefore the instruction was not erroneous. *State v. Jones*, 78 Mo. 278.

Complaint is made of instruction No. 13, and it is argued: "One acting in resistance to an overt act is not an aggressor; but such resistance is a defensive act, and he has the legal right to proceed with such defensive acts until he is in a situation of actual safety—not of apparent safety." The instruction is copied in full in this opinion, and we are unable to see any justification for this criticism. The jury were told that defendant could not lawfully assault the deceased on account of threats, or for fear induced thereby, unless the deceased at the time made some demonstration or performed some overt act that caused a reasonable apprehension that such threats were about to be put into

execution, and, in case of such demonstration or overt act, the defendant might lawfully become the aggressor only to the extent of putting himself in a position of safety, and if he intentionally carried his act of aggression further than that, his acts would be such as to render his act of aggression unlawful, and that the jury should, under such circumstances, consider the evidence as a whole, together with such act of aggression, in determining his guilt or innocence; nor can the language used in the instructions, when taken as a whole, be construed as saying that the defendant carried his acts of aggression further than he should have. The instruction, when taken as a whole, is not open to the criticism offered, and fairly states the law applicable to the facts.

Exception was taken to instruction No. 14 given by the court, which is assigned as error; but counsel for plaintiff in error in their brief assign no reason why such instruction should be held to be erroneous, and we know of no reason that could be successfully urged to that end. Counsel insists that two instructions requested by them and refused by the court should have been given in lieu thereof. The instructions requested and refused are fully covered by the instructions given. While perhaps different to some extent in the language used, the substance is the same. It is not error for the court to refuse requests for instructions, even though such requests correctly state the law, where they are fully covered in the instructions given.

Instruction No. 19 was excepted to, and is now insisted upon as error. It is argued that "the vice in the instruction is: (1) It does not describe the character of the violence or of the blows; (2) It makes no difference as to who dealt the first blow following the words used; (3) It says that the law has no regard as to who dealt the first blow; (4) It does not explain or define what advantages would be unfair in the outset, if nothing but words were used; and (5) because if the two men met, not intending to quarrel, and angry words suddenly arose (and words not justifying an assault), it would not be a mutual combat if plaintiff in error simply defended himself from the attack of deceased; (6) in the opinion of counsel the law has regard as to who is the assailant, and (7) calling for an explanation was a legal right, and would not be 'an occasion sought for the purpose of gratifying malice.'" For the reason heretofore stated the instruction is applicable to the facts in this case. An instruction identical with this instruction was given in the case of *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, and approved by the Supreme Court of Massachusetts. Counsel for plaintiff in error admits that the instruction properly states the law where applicable to the facts. If counsel desired an instruction describing the character of the violence, of the blows, and defining what ad-

vantages would be unfair in the outset, if nothing but words were used, and the other matters of which they complain, they should have requested instructions covering those matters. The trial court could not be expected and is not required to instruct upon every possible question, and it is not error to omit to instruct upon some particular branch of the case deemed advisable by the defendant under his theory of the case, when the defendant has not asked for such instruction.

Complaint is made because of the refusal of the court to give defendant's instructions Nos. 1 and 2, which were requested by the defendant and refused. The instructions requested were fully covered in every particular by the instructions given, and even though the instructions requested correctly state the law, being fully covered by the instructions given, it was not error to refuse the requests. The court is not required to repeat the instructions given because requested by the defendant.

It is contended by counsel for plaintiff in error that the court erred in not instructing the jury on the law as to manslaughter in the second degree. As before stated, the defendant admitted the killing, and sought to justify on the grounds of self-defense. He testified to previous threats made by the deceased and communicated to him, and that, at the time he fired the fatal shot, he believed that the deceased was about to shoot him. Under the indictment and the evidence, the only question for the jury to determine, the shooting being admitted by the defendant, was whether he acted in self-defense. The court fully instructed the jury as to manslaughter in the first degree, and as to the law of self-defense applicable to the facts; and under the indictment and facts in evidence in this case, the defendant was either guilty of manslaughter in the first degree, or not guilty. The defendant did not request the court to give an instruction as to manslaughter in the second degree, and it has been held by the former decisions of this court that it is not error to omit to instruct upon some particular branch of the case deemed advisable by the defendant under his theory of the case, when the defendant has not asked for such instruction. If the defendant desired an instruction as to the lower degree of manslaughter, he should have asked the court to give such an instruction. Where the indictment charges and the evidence for the prosecution shows the killing to have been manslaughter in the first degree, and the defendant admits the killing, and the evidence upon his part tends to show the killing to have been justifiable, it is only necessary that the instructions of the court should cover the law of the case as shown by the evidence. In the case of *New v. Territory*, 12 Okl. 172, 70 Pac. 198, the defendant was indicted, tried for, and convicted of, murder. The defendant admitted firing the fatal shot, but claimed that he was justified on the

ground of necessary self-defense. The court instructed the jury as to the law of murder and of self-defense, but did not instruct the jury as to manslaughter in the first or second degree, and no such instruction was requested by the defendant. In the opinion by Justice Pancoast it is said: "In the case at bar there was no instruction upon this point. The instructions of the court simply covered the law of murder, nor did the defendant ask for any instructions covering the law of manslaughter in any degree. We think the plaintiff in error has not properly raised this question. If the defendant was entitled to instructions upon this point he should have asked the court below to instruct the jury upon the law of manslaughter, and, in the absence of such a request, it was not error for the court to omit to give such instructions. It is true that the court should instruct the jury upon all questions involved in the case, but when the court has covered the case with general instructions, it is not error to omit to instruct upon some particular branch of the case deemed advisable by the defendant under his theory of the case, when the defendant has not asked for such instructions. *Lovett v. State*, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705; *Kelly v. People* (Colo.) 29 Pac. 805; *State v. Estep* (Kan. Sup.) 24 Pac. 986; *State v. Hendricks* (Kan. Sup.) 4 Pac. 1050." Under the authority of the case of *New v. Territory*, supra, and the authorities there cited, the failure of the court to instruct the jury as to the law of manslaughter in the second degree was not error.

Having noticed and considered all of the assignments of error contained in the petition in error and argued by counsel for plaintiff in error, and from a careful examination of the record in this case we find no error that will justify a reversal.

The judgment of the district court of Caddo county is therefore affirmed, and ordered to be at once carried into execution, with costs to plaintiff in error. All the other Justices concurring, except GILLETTE, J., who tried the case below, not sitting.

# SOUTHERN PINE LUMBER CO. et al. v. WARD et al.

(Supreme Court of Oklahoma, Sept. 7, 1905.  
Rehearing Denied Jan 11, 1906.)

## 1. APPEAL—CASE—MADE—AMENDMENT.

Where counsel for plaintiff in error attaches to a case-made, after the same has been settled and signed by the court, a certificate of the clerk that the copies of documents therein contained from his office are true and correct, such certificate is not an amendment of the case-made, and can have no office with reference thereto, unless such case-made should at some time be used as a transcript.

## 2. SAME—RECITAL AS TO CONTENTS.

Where it is shown by a case-made that "all of said evidence so introduced at said trial in said action and the objections made and exceptions saved, and the orders and rulings of the court are in words and figures as fol-

lows, to wit:"—such declaration is a sufficient statement that the record contains all of the evidence.

## 3. TIME—COMPUTATION—EXCLUDING FIRST AND INCLUDING LAST DAY.

Where a judgment was rendered March 10, 1903, and a case-made was settled, signed, and filed in the Supreme Court, March 10, 1904; the same is filed within one year under the rule fixed by the statute of Oklahoma, which provides that "in the computation of time the first day shall be excluded and the last included."

## 4. APPEAL—CASE—TIME FOR SERVICE.

Where judgment was entered on the 16th day of March, 1903, and a motion for a new trial was made and filed the next day and considered and overruled April 4, 1903, at which time appellants were allowed 60 days in which to make and serve a case-made, the time so allowed commenced to run from the said 4th day of April.

## 5. SAME—PARTIES.

In an appeal to the Supreme Court from a determination of a district court, persons not affected by or interested in the result need not be made parties.

## 6. SAME—GROUNDS OF ERROR—PRESERVATION IN LOWER COURT.

Where a judgment is entered in the court below without exception, and a motion for a new trial is thereafter filed within three days, setting forth error in the proceeding by which judgment was obtained, the allegations of the motion for a new trial are a sufficient exception to bring before the court the questions of error raised by the motion, and if, upon a hearing of said motion, the grounds thereof are found to be well taken, the trial court or an appellate court, upon appeal, has jurisdiction to reverse or modify the judgment complained of.

## 7. SAME—RECORD—RECITALS—CONCLUSIVE-NESS.

A motion to dismiss a case-made, upon the ground that all the records are not therein contained, which were produced to the lower court, and examined and read by it, cannot be raised for the first time in the appellate court, and will not be considered, unless the court can determine from the record that evidence before the lower court has not been preserved in the record. A declaration in the case-made that it contains all the evidence, and a certificate of the lower court to the same effect, is sufficient, unless the contrary is manifest from the record itself.

## 8. JUDGMENT—COLLATERAL OR DIRECT ATTACK.

Where an action has been brought to foreclose a trust deed, and a defendant therein pleads a superior title in himself under and by force of a prior judgment in the same court, and a codefendant answers, admitting the plaintiff's cause of action upon the trust deed, and shows that he was the party who executed the same, and owned the property, and still is the owner of the equity therein, subject to the plaintiff's right under said trust deed; and by way of cross-petition shows that his codefendant had acquired no title under and by force of such former judgment, for the reason that the court rendering such prior judgment did not have jurisdiction of the parties, such pleading is a direct, and not a collateral, attack, upon such prior judgment; and where in such case the rights of the parties depend upon the validity or invalidity of such prior judgment, the question thus presented may be tried and determined, and the rights of the parties duly adjudicated.

## 9. SAME—JURISDICTION OF COURT.

The jurisdiction of any court exercising authority over any subject may be inquired into in every other court when the proceedings of

the former are relied on and brought before the latter by a party claiming the benefit of such proceeding. Following *Elliott v. Piersol*, 26 U. S. 329, 7 L. Ed. 164.

**10. SAME—PAYMENT—EFFECT.**

A judgment of a court of a sister state, shown to have been paid in full upon execution to the sheriff holding the same, is fully and completely satisfied, and cannot thereafter be made the basis of an action in this territory.

**11. SAME—JURISDICTION—ACTION BROUGHT WITHOUT AUTHORITY.**

Where an authorized person brings an action in the name of a party who has not consented thereto, such action is fictitious, and the court does not acquire jurisdiction of the plaintiff named, or of the subject-matter, and any judgment rendered in such proceedings is void.

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice Jno. H. Burford.

Action by W. B. Ward and others against S. E. Pentecost, as trustee, and others. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

This action was commenced in the district court of Logan county, by the defendant in error W. B. Ward, May 5, 1900, against S. E. Pentecost, trustee, and others, praying for foreclosure of a trust deed and sale of the property described in said trust deed to satisfy debt in the sum of \$11,082.50. The petition avers: The said deed of trust was executed by Grigsby Bros., a copartnership of Marlon county, Tex., composed of D. J. and G. M. Grigsby, to S. E. Pentecost, of Guthrie, trustee, to secure an indebtedness of said partnership in the sum of \$5,000 to the National Bank of Jefferson, at Jefferson, Tex. That the note and trust deed had been sold and assigned by the National Bank of Jefferson, cestui que trust, to the plaintiff W. B. Ward, before maturity. That the same was due and wholly unpaid, and that the sum of \$11,082.50 for principal, interest, and penalty, was due thereon at the time of bringing the action. That the defendant Southern Pine Lumber Company, a corporation, the Southern Pine Lumber Company, a partnership, J. W. McNeal, Charles Griswold, Hattie P. De Bois, J. D. Elder, Wm. H. Dungan, G. W. R. Chinn, and Mrs. G. W. R. Chinn claim to have some interest in the property included in said trust deed; but that they were mere trespassers upon the property, and had no legal or equitable claim thereto; and upon information and belief plaintiff averred that the title or claim of the last above-named defendants was based upon a sale of said property at an execution sale of the same by virtue of an execution issued out of the district court of Logan county, Okla., on a judgment of said court, in cause No. 1,524 therein, in favor of the American Exchange Bank, a corporation, of St. Louis, Mo., against T. L. L. Temple and Benjamin Whitaker, partners, as the Southern Pine Lumber Company, the Southern Pine Lumber Company, a corporation of Arkansas, D. J. Grigsby, G. M. Grigsby, T. L. L. Temple, partners, under the firm

name and style of the Union Lumber Mills Company, which judgment bore date of March 2, 1895, sale being made thereon July 18, 1895. That neither the plaintiff nor the National Bank of Jefferson, the cestui que trust, or S. E. Pentecost, trustee, were made parties to said action No. 1,524, and that neither the plaintiff nor defendant in said case No. 1,524, had or has any interest whatever in the property sold to satisfy the judgment, and that this plaintiff at the time said suit was filed, and at all times since, has held the legal title to said property by virtue of said trust deed, which was of record in the several counties in which said property was situated. That the sheriff of the several counties, who sold said property on said judgment in said action No. 1,524, together with the plaintiff and defendants in said cause, and the purchasers at said sale each had actual and constructive notice of the trust deed herein proceeded upon, and that plaintiff's title to said land was an unbroken chain. The plaintiff then avers that all proceedings had in said cause, No. 1,524, were null and void for want of notice to S. E. Pentecost, trustee, who was a resident of Guthrie, Okla., the cestui que trust named, or this plaintiff, and because no service was ever had, made or procured, upon or against any of the defendants in said action for the reason that the attempted service by publication was void.

To the petition of plaintiff, the defendant the Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn, and Mrs. G. W. R. Chinn, filed joint answer, admitting that Grigsby Bros., became indebted to the National Bank of Jefferson, Tex., and that a trust deed was executed to S. E. Pentecost, trustee, to secure such indebtedness, and that such trust deed covering the property involved in this action has never been discharged, but deny that the note of Grigsby Bros. to the National Bank of Jefferson, or the trust deed executed to S. E. Pentecost, as trustee was ever sold by the National Bank of Jefferson, or its trustee, for a valuable consideration to the plaintiff W. B. Ward, and they further deny that a sale of said instruments was ever legally made and completed either before or after the maturity of said note, and deny the transfer in good faith of the said deed of trust for a valuable consideration, and deny any interest of the plaintiff Ward, either legal or equitable, in either said note or trust deed herein sought to be foreclosed, and deny that there is due and unpaid on said note the sum of \$5,000, or any other sum, and deny that there is any amount or claim due to the plaintiff or any other person from Grigsby Bros. by reason of the execution of said note to the National Bank of Jefferson, Tex., or on account of the deed of trust executed to S. E. Pentecost, trustee. And for affirmative answer to the plaintiff's petition, the defendants set out that said note has been fully satisfied by payments to parties holding the same as legal representa-

tives of the bank of Jefferson, and that said note and security having passed by delivery to the receiver of the National Bank of Jefferson, and in his hands compromised and paid off by Grigsby Bros., by the payment of a sum less than its face value, and that upon such payment made by the said Grigsby Bros. said note was surrendered to them, and said deed of trust was assigned to them in blank after said note secured by said trust deed had been paid as aforesaid. The answer of defendants alleges that G. W. R. Chinn and Mrs. Chinn, through T. L. L. Temple, have a complete and perfect title to the Oklahoma City property mentioned in said trust deed, save and except the cloud existing by reason of said trust deed; and the Southern Pine Lumber Company have a perfect title to all of the property described in said trust deed situated in the city of Guthrie. The defendant for further answer states that the American Exchange Bank brought in the district court of Logan county, Okl., an action No. 1,524, the amended petition therein being filed on the 17th of December, 1894, against T. L. L. Temple and Benjamin Whitaker, partners, as the Southern Pine Lumber Company, the Southern Pine Lumber Company, a corporation of Arkansas, D. J. Grigsby, T. L. L. Temple, and G. M. D. Grigsby, partners of the firm name and style of the Union Lumber Mills Company, and that judgment was entered in said cause March 2, 1895, and that this property was levied upon and sold on the 18th of July, 1895, and further alleges that said sale was made so as to dispose of all the interests held by D. T. Grigsby, G. M. D. Grigsby, and T. L. L. Temple, partners under the firm name of the Union Lumber Mills Company. The defendants then aver that only the naked legal title to said property remained in said trustee Pentecost, with no rights therein, except his charges and costs, which the defendants then tender into court. That the plaintiff had never been known to any of the parties to these transactions save to the Grigsby Bros., they holding after settlement, the note given to the Jefferson County Bank and trust deed assigned in blank, both of which had served their purpose and been satisfied save upon the record; and as defendants verily believe suit thereon was brought by the plaintiff at the solicitation of Grigsby Bros., in this action; that there being no legitimate lien against said property by virtue of said trust deed, the same having been satisfied should be canceled, and that the trustee Pentecost should be directed by the court to satisfy the same, and plaintiffs petition be dismissed, and the property decreed to be in defendants, and for such further order as may quiet the title in the respective defendants.

To the petition of the plaintiff, and by way of cross-bill to the answer of the defendants, other than themselves, the defendants G. M. D. and D. J. Grigsby pleaded, admitting that they made the note and trust deed sued on,

and admitting the allegations of plaintiff's petition that the note to secure which the trust deed had been executed, and the trust deed had never been paid, canceled or released, and that \$5,000 interest and attorney's fees were due and unpaid thereon, and admitted that plaintiff W. B. Ward was the legal owner and holder of the note and trust deed, by assignment from the Jefferson National Bank of Jefferson, Tex., through H. F. Austen, receiver, who acted under orders of the Comptroller of the Currency, and the law governing national banks, and who had no other right or interest in said note. In response to the answer of defendants other than themselves, and by way of cross-bill, the defendants Grigsby and Grigsby allege and say that they each have been, and are now, bona fide citizens of the state of Texas; that their interests in the property involved is the equity therein after satisfying the demands of the plaintiff upon the note and trust deed aforesaid; that about July, 1891, the Union Lumber Mills Company, a copartnership composed of D. J. and G. M. D. Grigsby and T. L. L. Temple, and T. L. L. Temple personally, and the Southern Pine Lumber Company, copartnership, made and delivered to the American Exchange Bank of St. Louis its obligation in writing, which obligation was not paid, and said bank brought suit thereon in the district court of Dallas county, Tex., and on the 9th day of January, 1892, recovered judgment against each of the obligors above named, upon which execution was issued February 7, 1892, which was by T. L. L. Temple, judgment debtor aforesaid, paid and satisfied in full; after the payment of which, without demand for accounting or contribution, the said Temple, or the said Southern Pine Lumber Company, copartnership, or as a corporation, without right or authority in fact or in law, in the name of the said American Exchange Bank of St. Louis, Mo., filed suit in the district court of Logan county, Okl., against T. L. L. Temple and Ben Whitaker, partners, as the Southern Pine Lumber Company, the Southern Pine Lumber Company incorporated in Arkansas, and D. J. and G. M. D. Grigsby, and T. L. L. Temple, partners under the firm name of Union Lumber Mills Company, and caused attachment to be levied upon the property involved herein. That none of the defendants named in said suit, either individually or in their partnership or corporate capacity, made any appearance in said suit. On the 17th of December, 1894, an amended petition was filed in said cause, and on the 2d day of March, 1895, judgment was rendered therein. This action was cause No. 1,524 of the district court of Logan county, Okl. In July thereafter an amended judgment was entered in said cause, covering all the property involved in this action, under which said property was sold, and the Southern Pine Lumber Company, either as a partnership or as a corporation, purchased the

same at sheriff's sale. The defendants Grigsby and Grigsby aver: That they challenge the sufficiency and legality of each and all of the proceedings in said cause No. 1,524, and by their answer intend to and do directly attack as null and void, not due process of law, and as an actual fraud upon them and a fraud and imposition upon the court, each and all proceedings had in said cause. Said judgment and proceedings are declared to be void, because said Texas judgment was fully paid off and discharged when said suit No. 1,524 was brought. That it was brought in the name of the American Exchange Bank without the knowledge or authority of said bank, was brought by said Temple individually or as the then sole owner of the Southern Pine Lumber Company, a copartnership, and was therefore the real beneficiary in said suit using the name of the American Exchange Bank, as plaintiff, without its knowledge or consent, to avoid appearing in the capacity of both plaintiff and defendant. That as to G. M. D. Grigsby, the judgment is without pleading, and void. That the Southern Pine Lumber Company, a corporation of Arkansas, made defendant in suit No. 1,524, was not organized until September, 1892, and was not, therefore, in anywise liable on the Texas judgment, and was a fictitious party to said action. That the item in suit No. 1,524 showing an account for \$294.56 was not included in or a part of the Texas judgment, and was as alleged an account owing by the Union Mills Lumber Company to the Southern Pine Lumber Company. That the American Exchange Bank, plaintiff in said suit No. 1,524, never was the owner of said account, and was without knowledge thereof, and never at any time authorized an action to recover therefor in its name, and the court was therefore without jurisdiction to issue any process or render any judgment therein, and that it was in fact an indebtedness arising wholly outside of the territory of Oklahoma. That the service was by publication, was not made as required by law, and defendants D. J. and G. M. D. Grigsby never had notice, either actual or constructive, of the pendency of said action No. 1,524, and for that reason made default therein. That the writs of attachment issued after the 17th day of December, 1894, were issued without affidavits to support them, affidavits filed prior thereto, and prior to the 17th of December, 1894, having been set aside by order of the court when an amended petition was authorized to be filed. The service by publication was void, because the affidavit therefor did not show or allege that the defendants summoned thereby were nonresidents of the territory, or that with due diligence they could not be served therein. That the defendants Grigsby were able and would have paid T. L. L. Temple their pro rata share of the Texas judgment had the fact of his payment been brought to their notice; but that the said Temple concealed the fact of such pay-

ment with the intent and purpose to cheat and defraud these defendants by the institution of said suit, No. 1,524, the bringing of which in the name of the American Exchange Bank of St. Louis, as well as the suing out of writs of attachment on behalf of a plaintiff, which had no knowledge of the bringing of the action or interest in the subject-matter thereof, was a fraud and imposition, both upon these defendants and the court, and was further a fraud, because said Texas judgment had been fully paid to the American Exchange Bank by one of the judgment debtors therein, and said judgment would thereafter support no action, except for contribution between the several judgment debtors, and that, therefore, all judgments, decrees, or sales in said action 1,524 were illegal and void. And the defendants Grigsby pray that the same may be declared void, and of no force or effect, and that they be, by order of the court, held to have a direct interest in said property, subject to the payment of the plaintiff's note and deed of trust, and to the end that upon the payment of the said note and deed of trust their title in and to the property described therein shall be, and remain unclouded by the judgment and proceedings in said cause No. 1,524.

The defendants Grigsby, in addition to the allegation of the foregoing cross-petition, say: "That the indebtedness paid by Temple in paying the Texas judgment was a debt wholly due from him, primarily; that the Union Mills Lumber Company executed two notes to the American Exchange Bank; one for \$884.90, which was indorsed by T. L. L. Temple, the other for double that sum was indorsed by the Grigsbys; they receiving the proceeds of the one note they indorsed, and Temple the other. That each took the proportion of money due them as partners in the Union Lumber Mills Company. That Grigsbys paid their proportion, but that the amount Temple was primarily liable for went to judgment in Dallas, Tex., judgment hereinbefore referred to, which judgment was made the basis for the said action No. 1,524. That if the debt sued on in No. 1,524 is held to be just, they stand ready to pay such portion of the same as their interest in the Union Lumber Mills Company would represent. They further allege that T. L. L. Temple, acting as the Southern Pine Lumber Company, purchased the property at sheriff's sale, and that because of his fraudulent acts in procuring the judgment upon which the property was sold, he should be decreed to hold in trust for these defendants Grigsby, to the extent of their interest before the sale, if in the judgment of the court the title of said Temple, by virtue of such sale, may not be held void. That the title of defendants Chinn and Chinn is tainted with Temple's fraudulent acts, and that they purchased from Temple with full knowledge of the fraud, and without paying a valuable consideration, and ask that the title of each one

of the defendants claiming adversely to themselves be divested by decree of the court, and set aside as a cloud upon the title of the Grigsbys. To this cross-complaint of Grigsbys a general denial was filed by the defendants Temple, Chinn, and Chinn, and the Southern Pine Lumber Company. A trial was had in the district court of Logan county, without a jury, resulting in a judgment and decree holding the title of defendants acquired by purchase at the sheriff's sale upon the execution to satisfy the judgment in case No. 1,524, and all the proceedings in said case void, and decreeing the legal title to the property involved to be in the defendants Grigsby, and quieting the title in them; subject, however, to the lien of the plaintiff Ward, which is found to amount to \$5,797, which lien of the plaintiff Ward was foreclosed, and a sale of the property involved was ordered to satisfy said lien. The defendant Southern Pine Lumber Company, a corporation, and the Southern Pine Lumber Company, a copartnership, T. L. Temple, individually, and G. W. R. Chinn, and Mrs. G. W. R. Chinn filed motions for new trial, which were by the court considered and overruled, and the said defendant moving for a new trial, now brings the case to this court for review upon error. The opinion of the court sufficiently shows all other and necessary facts to a complete understanding of the case.

J. D. Cook, Harper S. Cunningham, and Cotterall & Hornor, for plaintiffs in error. F. H. Prendergast, for defendants in error Grigsbys. Buckner & Son, for defendant in error W. B. Ward.

GILLETTE, J. (after stating the facts). In the consideration of this case we have first presented for the determination of the court, certain motions to dismiss the petition in error, filed by the defendants in error Ward and G. M. D. Grigsy and D. J. Grigsby. As the motion filed on behalf of Grigsby and Grigsby adopts and approves the motion to dismiss filed by defendant in error Ward, we will determine the motion upon the grounds stated in his motion.

The first ground is that as the case-made was signed and settled by the trial judge, March 15, 1904, the plaintiff in error amended it by inserting therein a certificate of the clerk of the district court, to the effect that purported copies of pleadings, judgments, orders, etc., contained in said case-made were true; second, by inserting at page 87½ of the case-made a statement that "all of said evidence so introduced at said trial \* \* \* are in words and figures as follows:" We have examined the case-made at page 87½ of the record, as well as the record, and are unable to determine therefrom that it was "inserted" in the case-made or to verify from anything that appears of record, the allegations of the motion. There is nothing con-

nected with page 87½ of the record that could justify a statement that it was not there at the time the trial judge settled and signed the case, the same as it is at the present time, and must therefore be treated as a part of the case-made, which was settled and signed by the trial court; and with reference to the certificate of the clerk at page 104, being the last page of the record, and following the certificate of the judge to the case-made, it is no part of the case-made, and is not an amendment to it; the judge having certified that the record preceding his certificate is the case-made, which he signs and settles as such. The certificate of the clerk afterwards added does not refer to the evidence, but is a certificate to the correctness of the copies of the files which are on file in his office. Such certificate could serve no purpose connected with the case, unless possibly at some state of the proceedings the record as made up might be used as a transcript, instead of a case-made, in which case the certificate of the clerk, and not the certificate of the trial judge, would be of value.

The second and third grounds of the objection will be considered together. They allege that the case-made does not show that it contains all the evidence before, and considered by the lower court in the trial of the case. The case-made contains this declaration: "And at the trial of said action, the said cause was tried to the court without the intervention of a jury. The parties appearing, introduced their evidence, and certain orders and rulings were made at said trial, and certain objections made, and exceptions saved. All of said evidence so introduced at said trial in said action, and the objections made and exceptions saved, and the orders and rulings of the court, are in words and figures as follows, to wit:" It will be observed that the language used is that the record contains all of the evidence offered upon the trial. We are cited by counsel to a number of authorities, which are offered as sustaining this objection. An examination of them shows that the word "testimony" was used instead of "evidence." There is a broad distinction between the two words. The word "testimony" means statement by witnesses under oath, while the word "evidence," in its legal acceptance, includes all the means by which any alleged matter of fact under investigation is established or disproved. Testimony is not synonymous with evidence, as the word "evidence," when addressed to a particular cause, covers all the testimony, records, documents, papers, and proofs submitted for the consideration of a court or jury; and where, as in this case, the record shows that all the evidence introduced at a trial is contained in the case-made, in the absence of some showing to the contrary, it must be held to be all the evidence produced to or considered by the court below.

The fourth ground of the motion is that summons in error was not issued within one

year from the date of the judgment, to wit, March 16, 1903, and in this connection counsel for the defendants Grigsby and Grigsby move a dismissal of the case because no case-made was presented within three days after judgment was rendered, nor was an extension of time granted within three days; that the term of court was allowed to adjourn without time being granted within which to present and settle a case-made, and if it be considered that time was allowed, the same was not prepared and settled within the time so allowed. The judgment was entered on the 16th day of March, 1903, and summons in error was issued March 16, 1904. The record in this case shows that a motion for a new trial was made and filed March 17, 1903, was considered and overruled on April 4, 1903, at which time, the appellants excepted to the order overruling the motion, and were allowed 60 days in which to make and serve a case-made, and thereafter from time to time up to, and including, December 22, 1903, for good cause shown, the time was extended 60 days. On the 12th day of October, 1903, however, counsel for defendant in error Ward, acknowledged service of the case-made, and on October 15, 1903, counsel for defendants Grigsby and Grigsby, partners, also acknowledge the service of the case-made on behalf of G. M. D. and D. J. Grigsby, comprising the firm of Grigsby Bros., and each of them. On March 14th the case-made was presented to the trial judge for settlement, after due notice to Ward and the Grigsbys, and was settled and signed on March 15, 1904. As to each of the objecting defendants Ward and Grigsby, the case as shown by the foregoing record was served within the time allowed by the orders of the court extending the time. On the 12th day of September, 1903, the defendants in error, Blincoe, McNeal, Griswold and De Bois, in writing, waived service upon them of the case-made, and notice of signing and settlement of the same, also of the service of the summons in error. October 14, 1903, the American Exchange Bank of St. Louis waived service of case-made upon it, which provided that such waiver should not constitute an entry of appearance; and, afterwards, on the 18th of February, 1904, said bank by its president acknowledged service of the case-made. October 16, 1903, Benjamin Whitaker waived service of case-made, and notice of the time of settling same. March 5, 1904, the American Exchange Bank waived notice of the time and place of settling and filing the case-made. Under this status of the record we are unable to understand the contention of counsel. The language used with reference to the settling and signing of the case-made would seem to indicate that they understood the extension of time granted was an extension of time within which to have the case-made settled and signed by the court. It is argued by counsel for defendants Grigsby that the last extension, December 22, 1903, of 60

days, expired February 21, 1904, and case-made was not settled until March 14th, following, which was too late, as extension of time expired February 21st. The law of proceeding in error by case-made is manifestly misunderstood by counsel. The extension of time to make and serve a case-made is not an extension of time within which the same may be settled and signed by the court. The case-made must be made within three days of the rendition of judgment, and served upon the opposing party, unless for good cause such time is extended by order of the court or judge. After service of the case-made, the same may be settled and signed by the court or judge, when presented by either party upon notice to the other within one year of the date of rendition of judgment. The objection, therefore, that the case was not settled within the time allowed by the court is without foundation.

The objection that no case-made was presented within three days, and no extension of time granted within three days, and that the court adjourned without time being granted, presents no substantial ground for the motion to dismiss the appeal. Under the practice in this territory, the objections and exceptions taken and allowed upon the trial to the proceedings there had, and which are relied upon as error, are preserved by a motion for a new trial, which may be filed within three days after the rendition of judgment, or the return of a verdict, and until after this motion for a new trial is heard and passed upon by the court, there is no reason or grounds for the making and service of a case-made. The action is pending in the trial court upon the motion for a new trial, and may be disposed of upon the application of either party. The verdict or judgment, if one had been entered in the case, does not become final in the court below until such motion for a new trial has been heard and determined, and upon which hearing, if exceptions are taken to the rulings of the court upon the motion for a new trial, the court may then, for good cause, extend the time within which the case-made may be prepared and served by the party objecting, upon the adverse party. The grounds of the motion that summons in error was not issued within one year from the rendition of judgment cannot be sustained, even though it be granted that such case-made must be settled, and summons issued thereon within one year of the date of the rendition of judgment. The record shows judgment to have been entered March 16, 1903, and the case-made to have been filed in the Supreme Court and summons was issued thereon as conceded on the 16th day of March, 1904. Section 4918, Wilson's Rev. Ann. St. 1903, provides: "The time within which an act is to be done shall be computed by excluding the first day, and including the last; if the last day be Sunday, it shall be excluded." This statute was borrowed by this territory from the state of Kansas,

where it had been passed upon and construed many times prior to its adoption here. The precise point under consideration here was considered by the Supreme Court of Kansas in Board of County Commissioners of Smith County v. Labore et al., 15 Pac. 577. The court in that case say: "A proceeding in error, commenced in the Supreme Court on the same day of the same month of the next year after an order or judgment sought to be reversed, is made or rendered, is commenced within one year, and in proper time." This objection cannot, therefore, be sustained.

The fifth ground of the motion to dismiss is that the case-made was not served upon a number of necessary parties, naming S. E. Pentecost, trustee, his alleged representatives Dungan, Bannister & Elder, the Southern Pine Lumber Company, a partnership, or Grigsby Bros., partnership. It is not shown in what manner S. E. Pentecost was interested in the proceedings in error by which this case was brought to this court. He was neither judgment creditor or debtor, and had no personal estate in the property involved, was dead when the case was tried in the court below, and the case was tried without being revived as to him; his cestui que trust had parted with its interest in the property involved by an assignment thereof to the defendant in error Ward. His legal representatives were not in anywise affected or interested. The judgment in the court below did not and an affirmation or modification of that judgment could not affect his estate, nor could his legal representatives be held under the circumstances to be charged with any duty that he was charged with as trustee. We therefore hold that he was not a necessary party to the proceeding here sought to be reviewed. The case of Kuhnert v. Conde, 39 Kan. 265, 18 Pac. 193, is not in point. In that case the judgment creditor died, and his representatives were necessary parties.

As to the partnership Southern Pine Lumber Company, and Grigsby Bros. the record shows services of case-made on the two Grigsbys as partners, and each of them; and this record further shows that these persons were the partners composing the firm of Grigsby Bros. We are unable to understand what counsel meant by such an objection. A partnership is an inanimate thing, and is brought into court by service upon the individuals composing the firm, and, when so served, the individuals and the partnership are in court for all purposes of the case. The partnership, Southern Pine Lumber Company, was composed of T. L. L. Temple and Benjamin Whitaker, as shown by the record. Mr. Whitaker, October 16, 1903, waived service of case-made upon him, and notice of time and place of settling and signing the same. His partner, T. L. L. Temple, is one of the plaintiffs in error, and in fact the principal mover in that behalf, and is therefore in court for all the purposes of this case.

The sixth ground of the motion has less

reason for its support than the fifth. It is based upon the alleged fact that the American Exchange Bank of St. Louis, and G. M. D. and D. J. Grigsby, as individuals, are not by the petition in error made parties to this proceeding in error, and are necessary to its determination. This ground of the motion cannot be sustained. By the language of the petition in error, G. M. D. Grigsby and D. J. Grigsby are made parties defendant. There is no allegation which makes the partnership firm of Grigsby Bros. a party defendant; but the petition reads, "G. M. D. Grigsby and D. J. Grigsby, partners as Grigsby Bros." The words "partners as Grigsby Bros." must be held to be words descriptive merely of G. M. D. Grigsby and D. J. Grigsby; and these persons, having been summoned, entered a general appearance in this court as to this proceeding in error, this court having acquired thereby jurisdiction to determine their respective rights by virtue of the proceedings had in the court below. With reference to the American Exchange Bank of St. Louis, it appears from an examination of the record that the action was one to foreclose a trust deed in favor of defendant in error Ward, and against the defendants named, whose interest it is alleged was inferior to the rights of Ward under the trust deed. In this action the American Exchange Bank was not made a party defendant. Grigsby and Grigsby were made parties defendant, and they answered confessing the right of action of the plaintiff Ward, and claiming the equities in the property in question after the demands of Ward had been satisfied. In their cross-petition, they ask to have the American Exchange Bank made a party, but procured no order of the court making it a party. The American Exchange Bank, however, was summoned by publication, but made default. The president of the American Exchange Bank appeared as a witness on the trial of the cause, as did also the attorneys for said bank, without making a showing or claiming that any interest of the bank was involved in the suit; and later, upon appeal to this court, waived service of case-made; and later still, after a copy of case-made had been served upon it, waived notice of the time and place of settling the case-made, and has failed to appear to any of the proceedings had in this court. The court, upon examination of the record, is unable to determine that the presence of the bank is necessary to a complete determination of the issues in this case, or that it has any interest affected by the judgment of the court below, or that may be affected by the affirmation, reversal, or modification of the judgment, and is therefore of the opinion that the American Exchange Bank is not a necessary party to this proceeding.

The seventh ground of the motion is that no exceptions were taken or saved to the rendition of the judgment in the court below. The allegations of the motion for a new trial filed in due time are sufficient in this case to

bring before the court the questions of error contended for, and which if found sufficient will justify this court in making such order with reference to such final judgment as may be necessary to correct the same. We find, however, upon examination of the record, that the final judgment at the time of its rendition was objected to by the defendant Southern Pine Lumber Company, T. L. L. Temple, and Chinn and Chinn, plaintiffs in error.

The eighth and tenth grounds of objection are, in substance, that the judgment in the court below, having rendered on the 16th day of March, 1903, and the motion for a new trial determined April 4, 1903, at which time upon overruling said motion 60 days' time was allowed by the court in which to make and serve a case for the Supreme Court, that said 60 days' time began to run from the date of rendition of the judgment, and a second extension of time June 1, 1903, was out of time, because more than 60 days from the date of judgment. The subject-matter of this objection was partially considered in the determination of the fourth ground of the motion, supra, where we determined that upon the filing of a motion for a new trial within three days of the date of the rendition of judgment, the case was thereafter pending in the lower court, and further proceedings stayed until the motion for new trial was heard and determined. The record shows that the motion for a new trial was entered March 17, 1903, the next day after judgment, and was determined April 4th, following, at which time 60 days was allowed in which to make and serve a case-made. This 60 days did not relate back to or commence to run on the date of the rendition of the judgment, but did commence to run April 5th, under the rule of the statute excluding the first day in computation of time. The error then complained of was the overruling the motion for a new trial, and exceptions being taken, there was preserved thereby any error that may be found to have been made in overruling such motion, and in this manner the entire case is brought to this court for review upon all questions of error presented in the motion for a new trial; and if, upon consideration, it is found that the motion for a new trial is erroneously overruled, because of error of record properly presented by such motion, the judgment of the court below, which was stayed by the motion, will be modified accordingly. It is not error, therefore, to allow 60 days' time from the date of overruling the motion for new trial in which to make and serve case-made, which may be extended from time to time for good cause by the trial court, if each extension is allowed prior to the expiration of the last preceding one.

The ninth and last ground for consideration is upon the ground that the case-made does not contain all of the evidence which was before the lower court, and there considered

upon the trial. Counsel say: "All of the records of the lower court in case No. 1,524 was, as a matter of fact, produced to the lower court, and examined and read by it, but the stenographer did not get the offer in the record." This is an assumption by counsel, as the record shows that all the evidence is in the record, and if this fact of record is not correct, it should have been corrected by counsel for defendant in error, when the case-made was settled and signed. Such a question cannot be raised for the first time in this court by an allegation of this kind, and will never be considered, unless the court can determine from the record that evidence before the lower court has not been preserved in the record and brought to this court.

Having considered each of the grounds of the motion of the defendants in error to dismiss the proceedings in error, and being unable to concur in each or any of the grounds of said motion, the same is hereby overruled and denied. From the statement of facts in this case showing the issues as framed by the pleadings, it will be seen that the plaintiff sues to foreclose a trust deed, making numerous parties defendant, who are charged with claiming some interest in the property, but which are inferior to the plaintiff's right under his trust deed sought to be foreclosed.

The plaintiffs in error answering the petition, allege that their title is not inferior, that they are the owners of the property, holding under a title derived by purchase at a sheriff's sale of the same, pursuant to a judgment ordering and directing the sale of the same in a case No. 1,524 in the district court of Logan county, Okl., being the case of the American Exchange Bank of St. Louis v. T. L. L. Temple et al.; that in said sale all of the right, title, and interest of G. M. D. and D. J. Grigsby was foreclosed and disposed of, they at the time being the owners thereof. G. M. D. and D. J. Grigsby, defendants, answer plaintiff's petition admitting their indebtedness to plaintiff Ward, and the existence and validity of the trust deed by the plaintiff sought to be foreclosed, and aver that they are the owners of the equity in the property covered by the trust deed sought to be foreclosed, after their debt to the plaintiff has been satisfied. By way of answer and cross-petition to the allegations of the answer of T. L. L. Temple et al., they say that no interest, right, or title in the property was by him or his codefendants acquired under and by virtue of the sheriff's sale had pursuant to judgment, in cause No. 1,524, aforesaid; that said judgment and all proceedings thereunder in cause No. 1,524 were void; that said judgment was entered by the court without jurisdiction of the parties.

From the foregoing brief statement of the issue it is apparent that if the plaintiffs in error acquired no title to the property by

the proceedings had in case No. 1,524, Logan county, Okl., that being their only source of title, the judgment of the court below foreclosing the trust deed sued upon, is correct. Upon the trial of the cause the trial court, after hearing the evidence, found the judgment and proceedings in cause 1,524 to be void for want of jurisdiction in the court of the subject-matter, or of the parties, and entered judgment vacating and setting the same aside, and all proceedings had thereunder, and quieting the title to the property involved herein in G. M. D. and D. J. Grigsby, which was by the further decree of the court ordered sold to satisfy the indebtedness of said Grigsbys to the defendant in error Ward, in the sum of \$5,797. It is urged by the plaintiff in error that this finding and judgment was erroneous for want of authority to hear and determine in this action the question of the validity of the judgment in 1,524 and proceedings thereunder. It will be observed that the plaintiff in error and G. M. D. and D. J. Grigsby were brought into the court in this case for the purpose of foreclosing their title to the property in question. The Grigsbys were charged as being debtors to Ward, which indebtedness was secured by the trust deed sought to be foreclosed. The plaintiffs in error answering claimed that the indebtedness to the plaintiff was a pretense without foundation in fact; that it had once existed, but had been paid in full, which payment had liquidated any right of action to foreclose the trust deed; and that, thereafter, by reason of the judgment in 1,524 and sale of the property pursuant thereto, they, the plaintiffs in error, were the owners in fee of the property. This issue, presented by the plaintiffs in error, the Grigsbys assailed in their cross-petition, charging that the plaintiff in error acquired no title under and by virtue of the judgment and proceedings in case No. 1,524; it being void as we have heretofore stated, for want of jurisdiction of the parties to it, both plaintiff and defendant, and ask to have such judgment vacated and held for naught. This we hold was not a collateral attack, and cannot be held to be such. It was a direct attack, and intended as such upon the validity of that judgment, and might be made in this action under the circumstances of this case. A multiplicity of suits is discouraged by the law, and where, as in this case, the rights of the parties depend upon the validity or invalidity of some other judgment of the court, which is charged to be void for want of jurisdiction of the subject-matter or the parties, and the necessary parties are before the court to enable it to determine the validity or invalidity of such other judgment for such cause, such determination may be had, where it is necessary to a conclusion of the rights of the parties to the litigation.

In this case the plaintiff in error brought forward the judgment and proceedings thereunder in 1,524, as the basis of their right

to resist the foreclosure of the trust deed executed by the defendants Grigsby, who, in turn, say that such judgment was void for want of jurisdiction of both the parties and the subject-matter, and set forth the reason why their allegation is true. The court heard the evidence, and found the issues thus framed in favor of the allegation of want of jurisdiction in the court rendering judgment in case No. 1,524, and entered its decree, holding such judgment void. In this we see no error, nor any legal ground of complaint on the part of the plaintiff in error. It would be otherwise if it had been alleged that the judgment was voidable merely, for in such case the court would have been called upon to act in an appellate capacity; and this we understand to have been the decision of the Supreme Court of the United States in *Elliott v. Peirsol*, 28 U. S. 340, 7 L. Ed. 164, where the court say: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct, or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers. This distinction runs through all the cases on the subject; and it proves that the jurisdiction of any court exercising authority over a subject, may be inquired into in every court, when the proceedings of the former are relied on and brought before the latter, by the party claiming the benefit of such proceedings." This determination was reviewed and confirmed by the Supreme Court in *Hickey v. Stewart*, 44 U. S. 750, 11 L. Ed. 814. And in *Williamson v. Berry*, 49 U. S. 541, 12 L. Ed. 1170, the court say: "The principle that a record cannot be impeached by pleadings is not applicable where there is a want of jurisdiction. The want of it makes a record utterly void and unavailable for any purpose. The want of jurisdiction is a matter that may always be set up against a judgment when it is to be enforced, or when any benefit is claimed under it." Here a benefit was claimed by the defendants Temple et al., under the judgment in case No. 1,524, which was disputed by the defendants and cross-petitioners, the Grigsbys, and it thus becomes apparent that, under the law as above expressed by the Supreme Court of the United States, the judgment and proceedings in case No. 1,524 was before the trial court in such way as to authorize that court to pass upon its validity. This the trial court did, and determined the judgment and all proceedings thereunder to be utterly void for want of jurisdiction over the parties plaintiff or defendant, or of the

subject-matter of the action. This judgment, in No. 1,524, being thus open to the court's inspection in this case, the first inquiry of the court was necessarily directed to the proceedings by which it was claimed that court had obtained jurisdiction over the parties litigant and the subject of the action.

To a complete understanding of case No. 1,524 let it be remembered that the American Exchange Bank of St. Louis had brought suit in Dallas, Tex., against the Union Lumber Mills Company, a partnership composed of the Grigsbys and Temple, and the Southern Pine Lumber Company, a partnership composed of T. L. L. Temple and Ben Whitaker, and T. L. L. Temple personally, in which action the said bank plaintiff recovered judgment against the defendants named, and upon which judgment execution was issued, and which execution was satisfied in the hands of the sheriff by payment thereof by T. L. L. Temple. Thereafter, suit No. 1,524 was brought in the district court of Logan county, Okl., in the name of the American Exchange Bank upon the Dallas judgment, and against the defendants, T. L. L. Temple and Ben Whitaker, partners of the Southern Pine Lumber Company, the Southern Pine Lumber Company, a corporation of Arkansas, D. J. Grigsby, G. M. D. Grigsby, and T. L. L. Temple, partners, under the firm name of Union Lumber Mills Company, to recover in that court upon the Dallas judgment as a first cause of action; and a second cause of action therein stated upon an account alleged to have been owing by the Union Lumber Mills Company to the Southern Pine Lumber Company, and by said company assigned to the Southern Pine Lumber Company, a corporation, and by said corporation assigned to the plaintiff. An attachment was issued in said cause out of the district court of Logan county, Okl., and levied upon the property now in question in this suit. Service of summons by publication was had upon the defendants named, and, upon default by them, judgment was entered for the amount sued for, and the attached property ordered sold, plaintiffs in error becoming the owners under and by virtue of a sale had pursuant to such order. The title of plaintiffs in error to the property in controversy by reason of such judgment and sale, is the bone of contention in this suit. The trial court held the judgment and all proceedings thereunder void, and this holding, we think, must be affirmed.

While it is true that the American Exchange Bank of St. Louis, plaintiff in cause No. 1,524, was not made a party to this case, it is also true, we think, that said bank never was a party to the proceedings had in said cause No. 1,524. Its president was a witness in this case, and testified that he did not know anything about the case No. 1,524; that McCormick & Spence, attorneys at Dallas, Tex., were the bank's attorneys, and the only people who had authority to bring that action, or any action in that behalf; that

he, as president of the bank, did not know of the suit until he was written to about it by Mr. Prendergast, attorney for the defendants in error; that he knew nothing about the \$294 account sued on in that action; and that he would have known of it, if the same had ever been transferred to the bank. And the record further shows that McCormick & Spence knew nothing of the bringing of the action, and did not authorize it to be brought. By the testimony of the plaintiff in error T. L. L. Temple, it appears that he caused the action No. 1,524 to be brought without consultation with the American Exchange Bank. The record further shows that the Dallas judgment was collected upon execution in February, 1892, from T. L. L. Temple, and the amount so collected was by the sheriff paid to McCormick & Spence, attorneys for the American Exchange Bank. This testimony is undisputed upon the record, and justifies the finding of the court below, that said action No. 1,524, was never brought or authorized by the American Exchange Bank, the plaintiff named therein. It had in fact no cause of action. The Dallas, Tex., judgment having been paid on execution, the same was thereby liquidated, and could not rightfully be made the basis of another action, by the bank or any one in its behalf; and it could not become the owner of the \$294 account sued on, except by some agreement or undertaking whereby it became entitled to maintain an action thereon. It therefore appears from the record that the district court of Logan county did not, at the time of the rendition of the judgment in said cause, have jurisdiction of the plaintiff in that action, of the subject-matter, or to render any judgment in that case in the plaintiff's name.

Jurisdiction of the parties and of the subject-matter is essential to the rendition of a valid judgment; and without it, a judgment is void, and no right can be acquired thereunder. It is equally as essential that the court should have jurisdiction of the plaintiff as of the defendant. Such jurisdiction is ordinarily acquired by the plaintiff coming voluntarily into court and by appropriate pleadings invoking the exercise of the court's jurisdiction, thereby submitting himself and his cause of action to the ultimate determination of the court. If it is shown that this is not done or authorized to be done, the court acquires no jurisdiction of the subject-matter, and if, as in this case, the action is instigated and directed by a person not authorized, it is immaterial what the motive may have been; it is fraud upon the court as well as the parties, and all transactions thereunder are void ab initio. Fraud of such character vitiates and avoids all rights attempted to be acquired thereby; and if a record, void for such reason, is brought forward and relied upon by a party to pending litigation, and its validity is challenged, as in this case, and a determination of its validity or invalidity is necessary to complete determination of the pending

cause, such validity or invalidity may be determined. It is immaterial whether or not the parties plaintiff to the challenged record are brought in; he is sufficiently represented by the party claiming under him who pleads or relies upon the right acquired thereunder and thereby, for in such case there was no party plaintiff; the whole proceeding was fictitious and void, and when clearly and satisfactorily shown, should be so declared. The trial court in considering the validity of the judgment in No. 1,524 found the services by publication void for want of sufficient allegations in the affidavit therefor; and the order of attachment also void, for want of a sufficient affidavit to warrant the issuance of the same.

We find it unnecessary to determine these questions; having already determined that the judgment in said cause No. 1,524, and all proceedings thereunder, were void for want of jurisdiction in the court rendering the same, such conclusions determined the rights of the plaintiff in error in this case adversely to them. With the rights of the plaintiff in error eliminated from this case, for the reason hereinbefore stated, the cause stands as an action by the defendant in error Ward for foreclosure of a trust deed against the defendants Grigsby. The lower court found the legal title to the property in question to be in the defendants G. M. D. and D. J. Grigsby, who executed the trust deed sued upon and quieted the title in them, subject to the rights of the plaintiff under such trust deed, and entered judgment foreclosing the same; which judgment we think was correct, and must be affirmed.

Judgment affirmed, all the Justices concurring, except BURFORD, C. J., who presided in the court below.

#### WEST v. BANK OF LAHOMA.

(Supreme Court of Oklahoma, Sept. 8, 1905.  
Rehearing Denied Jan. 10, 1906.)

##### 1. BANKRUPTCY—TRANSFER OF PROPERTY.

As contemplated by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], money is property, and a payment of money constitutes a transfer of property.

##### 2. BANKS AND BANKING—DEPOSIT IN BANK—APPLICATION TO NOTE.

Where an insolvent person has money on deposit in a bank subject to check, and also owes the bank upon a promissory note, upon such insolvent person being adjudged a bankrupt, the bank is entitled to have the amount of the bankrupt's deposit set off against the sum due on the promissory note, and to prove its claim against the bankrupt for the balance.

##### 3. BANKRUPTCY—PREFERENTIAL TRANSFER.

Where an insolvent person borrows money from a bank, and executes his note therefor, and deposits the money in said bank subject to his check, said transaction does not constitute a preferential transfer under the bankruptcy act, and the bank may, before the depositor is declared a bankrupt, credit the amount of his deposit upon his debt due the bank, and such transaction will not entitle the trustee in

bankruptcy to recover the amount of such deposit as a preference.

##### 4. SAME—ACTION TO RECOVER—PETITION.

A petition by a trustee in bankruptcy against a creditor of the bankrupt to recover money alleged to constitute a preferential transfer, must, among other averments, show that, if the transfer is permitted to stand, the creditor will receive a greater percentage of its debt than other creditors of the same class, and, failing to show such state of facts, it is not error to sustain a demurrer to such petition.

(Syllabus by the Court.)

Error from District Court, Garfield County; before Justice C. F. Irwin.

Action by Langdon C. West, trustee of Kasper Streich, bankrupt, against the Bank of Lahoma. Judgment for defendant, and plaintiff brings error. Affirmed.

Stanley, Vermillion & Evans and Charles West, for plaintiff in error. Horace Speed and H. J. Sturgis, for defendant in error.

BURFORD, J. The plaintiff in error, Langdon C. West, as trustee of the estate of Kasper Streich, a bankrupt, filed his petition in the district court of Garfield county to recover \$1,300 from the Bank of Lahoma, which it is claimed belongs to the estate. It is alleged in the petition substantially that an involuntary petition in bankruptcy was filed against Streich on the 16th day of May, 1902, and that on July 8th following he was adjudicated a bankrupt. It is further alleged that on May 9th he borrowed from the Bank of Lahoma \$1,800 and executed his note to the bank therefor, payable May 12, 1902; that Streich deposited said sum of \$1,800 in the bank and was given credit therefor; that said note was secured by a chattel mortgage upon a stock of merchandise, furniture, and fixtures, situated in the storeroom of Streich, in Woods county, Okl.; that on May 13, 1903, the bank, without releasing or waiving its mortgage, with the intent to receive a preference over the other creditors of Streich, and while he was insolvent, and the bank knowing he was insolvent, applied \$1,300 of said deposit toward the payment of the debt due the bank upon said promissory note, and gave Streich credit on said note for said sum. The trustee in bankruptcy demanded a return of said money, and, the bank refusing to surrender the same, he demands judgment against the bank for the said sum, with interest and costs. The Bank of Lahoma demurred to the petition on the ground that the facts alleged do not constitute a cause of action in favor of the trustee in bankruptcy. The court sustained the demurrer and rendered judgment for the defendant. The plaintiff appealed.

The only question presented is whether or not, under the facts stated in the petition, the trustee is entitled to recover the money which it is alleged the bank received as a preference. It is clear from the allegations that Streich, while insolvent, borrowed from the bank \$1,800, and received credit in the

bank as a depositor for that amount. The relation of debtor and creditor was thereby created as to this deposit. Streich owed the bank \$1,800 for which the bank held his note, payable May 13th. On that day the bank gave him credit on his note for the balance of the deposit, \$1,300, and charged him with that sum on his deposit account. At that time Streich was insolvent, and three days afterward his creditors began proceedings against him to have him declared a bankrupt. It cannot be questioned but that the effect of this transfer or payment to the bank had the effect to prefer the bank to the amount of the deposit of \$1,300; but is it a preference prohibited by the bankruptcy law, and is the trustee entitled to recover the same? The questions presented by the record have been before the Supreme Court, Court of Appeals, or District Courts of the United States, and we shall content ourselves by following these decisions.

In the case of *Pirie v. Chicago Title & Trust Company*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, the Supreme Court of the United States had under consideration the various provisions of the bankruptcy act relating to preferential transfers. In that case the bankrupts were merchants, the creditors had sold them goods and merchandise, and within four months prior to the adjudication in bankruptcy the bankrupts paid to the creditor certain sums on account. The debtors were insolvent. The creditor did not know of the insolvency, and had no reason to believe that the debtors were insolvent. It was claimed by the trustee that the payment constituted a preferential transfer, and the cause finally reached the highest court in the land for interpretation of the provisions of the national bankruptcy law. The court said: "The solution of the question depends primarily upon the interpretation of subdivisions 'a' and 'b,' § 60, of the law of July 1, 1898 (30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3445]), and certain related sections. Subdivision 'a' of section 60 is as follows: 'Preferred Creditors.—(a) A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.' It will be observed that payments in money are not expressly mentioned. Transfers of property are, and one of the contentions of appellants is that by 'transfers of property' payments in money are not intended. The contention is easily disposed of. It is answered by the definitions contained in section 1. It is there provided that "'transfer' shall include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolute or con-

ditional, as a payment, pledge, mortgage, gift or security.' It seems necessarily to mean that a transfer of property includes the giving or conveying anything of value—anything which has debt-paying or debt-securing power. We are not unaware that a distinction between money and other property is sometimes made, but it would be anomalous in the extreme that, in a statute which is concerned with the obligations of debtors and the prevention of preferences to creditors, the readiest and most potent instrumentality to give a preference should have been omitted. Money is certainly property, whether we regard any of its forms or any of its theories. It may be composed of a precious metal, and hence valuable of itself, gaining little or no addition of value from the attributes which give it its ready exchangeability and currency. And its other forms are immediately convertible into the same precious metal, and even without such conversion have, at times, even greater commercial efficacy than it. It would be very strange indeed if such forms of property, with all their sanctions and powers, should be excluded from the statute, and the representatives of private debts which we denominate by the general term 'securities' should be included. We certainly cannot so declare upon one meaning of the word 'transfer.' If the word itself permitted such declaration, which we do not admit, the definition in the statute forbids it. 'Transfer' is defined to be not only the sale of property, but 'every other mode of disposing or parting with property.' All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished—a preference enabling a creditor 'to obtain a greater percentage of his debt than any other creditors of the same class.'" It is here settled that money is "property" within the meaning of the bankruptcy law, and that a payment of money is a "transfer."

In *Jaquith v. Alden*, 180 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 620, the same court put its own construction upon the holding in *Pirie v. Chicago Title & Trust Co.* After reciting the facts in that case the court said: "The judgment below was affirmed by this court, and it was held that a payment of money was a transfer of property, and, when made on an antecedent debt by an insolvent, was a preference, within section 60a, although the creditor was ignorant of the insolvency and had no reasonable cause to believe that a preference was intended. The estate of the insolvent as it existed at date of the insolvency was diminished by the payment, and the creditor who received it was enabled to obtain a greater percentage of his debt than any other of the creditors of the same class." This principle is applicable to the case under

consideration. The Bank of Lahoma, by the transfer of the \$1,300 deposit and application of said sum to the payment of the debt due from the bankrupt to the bank, was, under the rule announced above, a preference within section 60a, if the bank had reasonable grounds to believe that Strelch was insolvent at the time of the transfer, and the effect of such transfer will be to enable the bank to obtain a greater percentage of its debt than any other creditors of the same class.

In *Swartz v. Fourth National Bank*, 117 Fed. 1, 54 C. C. A. 587, the Circuit Court of Appeals, speaking by Justice Sanborn, said: "The plain intention of Congress and the legal effect of the paragraph were to make every transfer of any of the insolvent's property by means of which a larger percentage would be paid out of his estate to any creditor or any claim than every other creditor and every other claim of the same class, would receive a preference, to be surrendered or avoided under the other provisions of the statute. The meaning and effect of section 60a are the same as though it declared every transfer of his property by an insolvent to be a preference which has the effect to enable any one of his creditors to obtain a greater percentage of his debt out of the property of the insolvent 'than any other of such creditors of the same class.' The test of a preference under the act is the payment out of the bankrupt's property of a larger percentage of the creditors' claim than other creditors of the same class receive, and not the benefit or injury to the creditor preferred."

When the result of the transactions has been to decrease the indebtedness of the insolvent to one creditor at the expense of his estate, it is a preference. In *Re Colton Export & Import Co.*, 121 Fed. 663, 57 C. C. A. 417; *In re Lyon* (D. C.) 114 Fed. 326; *Livingston v. Heineman*, 120 Fed. 786, 57 C. C. A. 154; *In re Christensen* (D. C.) 101 Fed. 802. These cases seem to settle the doctrine that a payment of money constitutes a transfer, and that, if the effect is to diminish the assets of the bankrupt and to enable the creditor who receives the transfer to obtain a greater per cent. of his claim than other creditors of the same class, then such transaction is a preferential transfer. The primary test, then, is, have the creditors of the same class been deprived of anything by the transfer? If they have not, it must follow as a necessary result that the transaction is not within the denunciation of the statute.

Section 68a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]) is as follows: "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid." Under this section it was held by Mr. Justice Baker, in *Re Myers* (D. C.) 99 Fed. 691, that money on

deposit in a bank to the credit of a bankrupt may be set off against the indebtedness of the bankrupt to the bank upon promissory notes, and in the case of *In re Little* (D. C.) 110 Fed. 621, Mr. Justice Shiras enunciated the same doctrine. The Supreme Court of the United States, in *New York County National Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, in construing this provision of the bankruptcy act, held that insolvents, by depositing money in a bank upon an open account subject to check, do not thereby make a transfer of property amounting to a preference which will deprive the bank of its right under section 68a to set off the amount of such deposit remaining to the depositor's credit on the date of the adjudication in bankruptcy, and to prove its claim against the bankrupt estate for the balance.

It must be conceded that these decisions embrace the law of this case. The Bank of Lahoma, as shown by the averments in the petition, loaned to Strelch the sum of \$1,800, and Strelch executed his promissory note to the bank for said amount. The bank gave him credit on deposit account for the proceeds of the loan. The bank then became his debtor to the amount of the deposit. He became the debtor to the bank in the amount of the note. The deposit was subject to check, and the transcript of account from the bank's books, which accompanies the petition as an exhibit, shows that the bank paid out on his check \$500 of the deposit before the note matured. On the date the note fell due Strelch had on deposit of the original sum borrowed \$1,300, and the bank applied this sum on his note, and gave him credit for payment of that sum, and charged the same to him on the account. The deposit in the first instance did not create a preference in favor of the bank, for the reason that the bank became his debtor for the full amount of the deposit. His available assets were not diminished by the deposit in the bank, and his other creditors of the same class were in as good a position as they were before. These mutual transactions brought about the exact condition mentioned in section 68a, a case of mutual debts and mutual credits between the estate of the bankrupt and the creditor, and after the adjudication the bank would have been entitled to have had set off the amount of Strelch's deposit against the amount due on his note to the bank, and the right to have the balance allowed against the estate. Then, if this was the right of the bank in case Strelch was adjudicated a bankrupt, has it put itself in any worse position by making the transfer of the deposit to the payment of its debt before the adjudication in bankruptcy? Will any creditor of the estate receive a less percentage of his claim under present conditions than he would have received had the credit or set-off been allowed by the trustee in bankruptcy? If the effect of this transfer by the bank has not been to enable it as a creditor to obtain a greater per-

centage of its debt than any other creditors of the same class, then such transaction does not constitute a preference. We are unable to see how, by doing itself that which the law requires the trustee in bankruptcy to do, the bank should be required to lose the credit the law permits it to have. No advantage has been acquired by the bank, and no detriment has resulted to the other creditors.

In order for the petition to be sufficient to withstand a general demurrer, it was required to show that, if the transfer of the credit by the bank is permitted to stand, the bank will receive a greater percentage of its debt than other creditors of the same class. *Schreyer v. Citizens' National Bank* (Sup.) 77 N. Y. Supp. 494.

We think the court committed no error in sustaining the demurrer to the petition. The judgment of the district court is affirmed, at the costs of the plaintiff in error. All the Justices concur, except IRWIN, J., who presided below, not sitting.

MORRISON et al. v. ATKINSON et al.

(Supreme Court of Oklahoma. Feb. 15, 1906.)

APPEAL—THEORY OF CASE—ESTOPPEL TO CHANGE.

Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Hence, where a party assumes a position and asserts a legal right in the district court, and there asks the benefit of that position, he is estopped from denying the legality of that position on appeal to the Supreme Court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3591-3616.]

(Syllabus by the Court.)

Error from District Court, Oklahoma County; before Justice B. F. Burwell.

Action by C. E. Atkinson and others against A. Morrison and J. E. Bailey. Judgment for plaintiffs, and defendants bring error. Affirmed.

This was an action originally brought in the probate court of Oklahoma county, from which an appeal was taken by the plaintiff in error to the district court of Oklahoma county. In the district court, the plaintiff in error moved the court for judgment in favor of the plaintiff in error, defendant in that court, and against the plaintiff, for the reason that the plaintiff has not complied with rule 19 of that court. Rule 19 is as follows: "In appeal cases, which under the statute stand for trial at a term of court, the appellant shall be required to deposit with the clerk the sum of \$10.00 and the appellee the sum of \$5.00 on the first day of such term to apply on costs accruing in the district court. For failure to comply with this rule, the court may enter either a default, or an order dis-

missing the appeal or cause." This motion coming on to be heard by the court, it was found by the court that the appellant had not made the deposit required by rule 19, and for this reason the appeal was dismissed, to which the defendant excepted, motion to set aside the judgment of dismissal was made, overruled, and exceptions saved, and the case is brought here for review.

Hays, Thorp & Thorp, for plaintiffs in error. Shartel, Keaton & Wells, for defendants in error.

IRWIN, J. (after stating the facts). But one reason is assigned as grounds for reversing the order of the court below, to wit: That said order and the rule of said court, requiring that in appeal cases appellant shall deposit with the clerk \$10 to apply on costs, and authorizing the court to dismiss the appeal upon the failure of appellant to make such deposit, are illegal and void. The record in this case shows that in the district court this matter came up for hearing upon the motion of the plaintiff in error, who was the defendant in that court. He asks the enforcement of this rule, and alleges that a violation of this rule by the plaintiff in the court below, defendant in error here, is a sufficient legal cause for judgment in his favor. Now we take the rule to be that where a party assumes a position in the district court, and asks for relief on certain legal grounds, that when he has succeeded in bringing the matter before the court upon the theory adopted by him, and upon his demand for legal relief, that he is estopped from denying that such position is correct, or that he is entitled to such legal relief, on appeal. In this case, as shown on page 24 of the record, the plaintiffs in error filed in the court below on October 25, 1904, their written motion, asking that the court below dismiss the cause of defendant in error, because he had failed to make the deposit required by rule 19. They thus expressly asked the court to enforce that rule, and to hold that the defendant in error had not complied with it. After they had invoked the benefit of this rule, and had had a hearing thereon, and it was found that they were in default for non-compliance with this rule, and their cause was defeated by the very rule they themselves had enforced, they now desire to be heard in this court to say that while they asked the enforcement of the rule, they now deny the right of the court to make such a rule. We take the true rule to be, that parties are restricted on appeal to the theory on which the case was tried in the court below. 2 Cent. Dig. col. 1580, § 1053. "Where parties consent to try their cause below on a particular theory of what the law of the case is, though it be erroneous, they cannot complain if the result be correct according to that theory." *Davis v. Jacoby*, 54 Minn. 144, 55 N. W. 908.

Now, when they asked the court to enforce that rule, they in effect said that the rule was a valid rule, and that they desired the benefit of it. The matter was tried in the court below on the theory that rule 19 should be enforced. The only question for the court to determine was, who was in default according to the terms of that rule. The determination of the court was unquestionably correct if the rule was a valid one; and according to the doctrine laid down by the Minnesota Supreme Court in the case of *Davis v. Jacoby*, they cannot be heard to complain that the rule invoked was erroneous, if the result be correct according to the theory they adopted. In other words, counsel for defendant below, in their motion for judgment, alleged that said rule 19 was legal, and pleaded that they had complied therewith, and that plaintiff below had failed to comply with the requirements thereof, and for that reason they asked that judgment be entered in said cause in favor of said defendant. Hence it is evident that the position now taken by counsel for said defendant is inconsistent with the position which they occupied when they filed and urged said motion for judgment for noncompliance with said rule 19. In the case of *Wills v. Kane*, 2 Grant, Cas. 60, the Pennsylvania Supreme Court say: "Where a man alleges a fact in a court of justice for his advantage, he shall not be allowed to contradict it afterwards." In the case of *Fowler v. Stevens*, 29 La. Ann. 353, the Louisiana Supreme Court say: "One who has represented himself in his own pleading, in a former suit, as a partner in a certain firm, is estopped from afterwards denying it." In *Davis v. Wakelee*, 156 U. S. 681, in the opinion, at page 689, 15 Sup. Ct. 555, at page 558 (39 L. Ed. 578) Mr. Justice Brown, in speaking for the court, says: "It may be laid down as a general proposition, that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." And, in the case of *Philadelphia, etc., Railroad v. Howard*, 13 How. 307, 14 L. Ed. 157, in the body of the opinion, the court says: "We are clearly of opinion that the defendant cannot be heard to say, that what was asserted on a former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it." In the case of *Railroad Company v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693, it appears that defendant proved on the trial in the court below that it was impossible to forward certain cattle on Sunday, for want of cars, and it was held to be fairly pre-

sumed that no other reason was given for the refusal at that time; and that the railway company could not in this court, set up the illegality of such a shipment on the Sabbath, under the Sunday law of West Virginia. In delivering the opinion of the court, Mr. Justice Swayne says: "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold." To the same effect are *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. Ed. 61; *Daniels v. Tearney*, 102 U. S. 415, 421, 26 L. Ed. 187; *Everett v. Saltus*, 15 Wend. (N. Y.) 474; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; *Winter v. Coit*, 7 N. Y. 288, 57 Am. Dec. 522. In the case of *Abbot v. Wilbur*, 22 La. Ann. 368, the court says: "It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment, claim that it was rendered without personal service upon him. Davis may possibly have been mistaken in his conclusion that the judgment was valid, but he is conclusively presumed to know the law, and cannot thus speculate upon his possible ignorance of it. He obtained an order which he could only have obtained upon the theory that the judgment was valid \* \* \* his statement that it was in force was equivalent to a waiver of service, a consent that the judgment should be treated as binding for the purposes of the motion, and he is now estopped to take a different position." Hence, in this case, it is unnecessary for us to go into an extended discussion as to the inherent right of the court to make the necessary rules and regulations to facilitate a proper discharge of the business coming before the court, because, for the reasons herein expressed, we think the plaintiff in error is estopped from asserting the invalidity of the rule, after having invoked its aid in the court below.

The decision of the district court is therefore affirmed, at the costs of the plaintiff in error. All the Justices concurring, excepting *BURWELL, J.*, who, having tried the case below, took no part in this decision.

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TERRITORY ex rel. HUBBELL v. DAME.  
(Supreme Court of New Mexico. March 2, 1906.)

1. APPEAL.—DISMISSAL.

When, pending an appeal, an event occurs without fault of appellee which renders it impossible for the court, should its decision be favorable to appellant, to grant him any effectual relief whatever, the court, upon that fact being brought to its knowledge, will not

proceed to formal judgment, but will dismiss the appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4456-4461.]

## 2. QUO WARRANTO—POSSESSION OF OFFICE.

By instituting proceedings in the nature of quo warranto the claimant of an office conclusively admits that such office is in the possession of the party proceeded against.

## 3. APPEAL—DISMISSAL.

Where a litigant, claiming to be the de facto officer, brings an action purely in aid of or for the protection of his possession of such office, and, pending an appeal from an adverse decision in such action, surrenders the possession of such office and institutes proceedings in the nature of quo warranto, the court will not proceed to the decision of such appeal, but will dismiss the same.

(Syllabus by the Court.)

Appeal from District Court, Bernalillo County; before Justice Ira A. Abbott.

Application by the territory, on the relation of Thomas S. Hubbell, for a writ of mandamus to William E. Dame, clerk of the district court. Judgment for defendant, and relator appeals. Dismissed.

This is a mandamus proceeding brought September 6, 1905, on the relation of Thomas S. Hubbell, against William E. Dame, as clerk of the district court of the second judicial district of New Mexico. The information sets forth that relator was duly elected sheriff of Bernalillo county at the regular 1904 election; that he duly qualified as such and entered into possession of his office and upon the discharge of the duties thereof on January 1, 1905, and was at the time of the filing of this information still in possession of the office, together with its books, papers, property, insignia, and rooms in the county courthouse, and also in the care and custody of the county jail and the prisoners therein, and was otherwise in the discharge of, and ready, willing, and offering to discharge, the duties of the office of sheriff. Relator further avers that he has never resigned from or abandoned the said office; that he is still alive, and still claiming the right to said office, and is still discharging the duties thereof; and that there has been no vacancy in said office since his qualifying therein on the date above named. The information further alleges that certain charges of official misconduct were filed against relator with the Governor of New Mexico, after the hearing of which an order was made by the Governor removing him from said office of sheriff, and a further order was made appointing one Perfecto Armijo to fill the alleged vacancy thus created; that said order of removal was void and conferred no color of right on said Armijo; that the said Armijo has taken all the formal steps required by law to qualify as sheriff, including the giving of bond, and is assuming to discharge, and claiming the right to exercise and discharge, the duties and receive the emoluments of

the said office under the pretended commission above mentioned. The relator further alleges that it is the duty of the said Dame as clerk to issue and deliver to him as sheriff the jury venires for the September, 1905, term and succeeding terms of court, and to deliver, also, all other process of the court, and that it is the duty of relator to serve the same and his privilege to receive all fees therefor. It is further alleged that the same clerk, claiming to act under the instructions and directions of the presiding judge of said court, has refused and still refuses to deliver to relator the venires for said September, 1905, term, and gives out that he will likewise refuse to deliver future process to relator as such sheriff, and will refuse to recognize him as de facto sheriff, but will deliver the same to the said Perfecto Armijo, claiming to act as sheriff under said pretended executive appointment. Proceeding upon these allegations, relator prayed an alternative writ of mandamus commanding said Dame "forthwith to deliver the said jury venire for the summoning of grand and petit jurors for the ensuing September term of the said court to this relator, and also commanding him to deliver all other process issued out of the said court, requiring service by the sheriff of the said county, to this relator to be served by him, and to recognize said relator as sheriff de facto." The alternative writ was allowed, and the respondent filed what is entitled an "answer," and which sets up by way of defense, first, that upon the allegations above outlined no issue could be formed properly triable in an action of mandamus; second, that the alternative writ indirectly seeks to try the question of title to office; third, that relator has a plain, speedy, and adequate remedy in the ordinary course of law, and the facts alleged do not entitle relator to the relief prayed. No evidence was taken, but, the court taking judicial notice that the said Perfecto Armijo had presented to the court the commission alleged in the complaint, signed by the Governor of New Mexico, appointing him as sheriff, and being informed by the pleadings that Armijo had duly qualified under said commission, made findings of fact to the effect, first, that Armijo was the prima facie sheriff of said county, in possession of the office, and entitled to discharge the duties thereof, and to the custody and possession of all public property, until his right to said office should be successfully assailed in quo warranto, or other appropriate proceeding; second, that the defendant clerk derives his authority from the court alone, and therefore the plaintiff was not entitled to a peremptory writ of mandamus. The alternative writ was accordingly ordered quashed, and the cause dismissed, from which decision relator prosecutes an appeal to this court.

William B. Childers, A. B. McMillen, and E. W. Dobson, for appellant. Neill B. Field and Frank W. Clancy, for appellee.

POPE, J. (after stating the case). Upon the state of facts above outlined, a number of questions are argued at the bar and in the briefs of counsel. Among these are whether the court below had the power upon the pleadings, and aided only by judicial notice, to make the findings of fact contained in the record, or, indeed, any findings at all; whether the Governor of New Mexico had the power to remove the relator and to appoint Armijo in his stead; whether the clerk, being an arm of the court, is subject to mandamus; and whether a court will, pending a dispute as to an office, issue mandamus to enforce recognition of the de facto officer. We find it unnecessary to decide any of these questions, for the reason that, even were they to be decided as contended for by appellants, and the cause reversed, the status of the case has been so changed, pending this appeal, that it would be impossible upon a new hearing to grant appellants an effectual relief. No rule of practice is better settled than that when, pending an appeal, an event occurs, without fault of appellee, which renders it impossible for the court, should its decision be favorable to the appellant, to grant him any effectual relief whatever, the court, upon that fact being brought to its knowledge, will not proceed to formal judgment, but will dismiss the appeal. *Jones v. Montague*, 194 U. S. 147, 24 Sup. Ct. 611, 48 L. Ed. 913; *Mills v. Green*, 159 U. S. 653, 16 Sup. Ct. 132, 40 L. Ed. 293; *Kimball v. Kimball*, 174 U. S. 163, 19 Sup. Ct. 639, 43 L. Ed. 932; *Tennessee v. Condon*, 189 U. S. 69, 23 Sup. Ct. 579, 47 L. Ed. 709. It appears from the records of this court in cause 1,133 and the arguments and briefs in this case that the appellant, Hubbell, has since the decision below instituted proceedings in the nature of quo warranto to test the title of Armijo to the office in question. The underlying theory of such a suit is that the office contended for is in the adverse possession of the party proceeded against, or, in other words, that while the relator, moving in such suit, considers himself the de jure officer, his adversary is the de facto officer. Such a suit admits the relator therein to be out of office. This was distinctly held by this court in *Conklin v. Cunningham*, 7 N. M. 445, 38 Pac. 170, where the fact that Conklin had instituted quo warranto against Cunningham was held to be a conclusive admission that Cunningham was the de facto officer and entitled to all of the rights flowing from such occupancy. With the law as thus declared in *Conklin v. Cunningham*, we have no dispute, nor apparently has appellant; for in his petition in the prohibition case (No. 1,112, 85 Pac. 476) he distinctly avers that "he cannot institute proceedings in quo warranto without abandoning his said office and waiving his rights as de

facto sheriff." We deem it sufficient, therefore, to point out that by instituting quo warranto appellant has abandoned the possession of the office, and has surrendered any point of vantage he might have as de facto sheriff. Were the cause reversed, there could be no effectual relief granted him. Certainly the clerk could not be ordered to deliver to him the venires for the September, 1906, term of court, for the time for the service of these has long since expired. Neither could the clerk be ordered to deliver to him future process requiring service by the sheriff's office, for the reason that he is confessedly no longer in possession of that office, or its books or paraphernalia. How, for example, could commitments for prisoners be attended to by relator, when the jail to which they are to be committed is in the hands of another? Indeed, the whole theory upon which this suit is predicated is that the relator, Hubbell, as de facto officer, is entitled to be maintained in the possession of the office by mandamus. The gist of the contention is, not that he is entitled to prosecute these proceedings as the de jure officer, for that question is confessedly one for quo warranto, but that he is the de facto officer in full possession of the office. When, therefore, as admitted by his filing quo warranto, relator surrendered the office and ceased to be the officer de facto, the whole basis of his several contentions slipped away from him and, even upon his own argument, left no foundation upon which the court, upon a reversal of the case, could grant him any relief. His election to abandon the possession of the office and to proceed by quo warranto was, to again quote his own language, a waiver of "his rights as de facto sheriff." Feeling, therefore, that a reversal of this case could result in no substantial relief to relator, for the reason that the changed status of the matter has left the case where a determination of the questions involved would be a mere moot decision by this court, we are of opinion that the appeal should be dismissed.

By this direction given the matter we do not desire to be understood as receding from the views expressed in *Albright v. Territory* (N. M.) 79 Pac. 719, wherein we declined to dismiss an appeal, where the term of office had expired pending such appeal, upon the ground that in quo warranto the proceeding was one involving more than the mere right to hold the office. In the present case we do not conceive that either the findings of the court of which complaint is made, or the judgment quashing the writ, will be of the slightest relevancy upon any proceeding directly involving the title to the office in controversy. The present disposition of the matter, therefore, does not leave the appellant burdened with any adjudication that will affect the quo warranto proceeding to which he has taken recourse.

The appeal is accordingly dismissed

MILLS, C. J., and McFIE, and MANN, JJ., concur. ABBOTT, J., having tried the case below, did not participate in this decision.

HUBBELL v. ABBOTT, District Judge.  
(Supreme Court of New Mexico. March 2, 1906.)

Application by Thomas S. Hubbell for writ of prohibition to Ira A. Abbott, Judge of the Second judicial district. Writ denied.

William B. Childers and A. B. McMillen (E. W. Dobson, on the brief), for relator. Nell B. Field (F. W. Clancy, on the brief), for respondent.

MILLS, C. J. This is a proceeding in which the relator obtained from Hon. Edward A. Mann, Associate Justice of the Supreme Court of the territory of New Mexico, and judge of the Sixth judicial district thereof, a preliminary writ of prohibition returnable on the first day of the present term of this court, to wit, January 3, 1906, against Hon. Ira A. Abbott, individually and as judge of the Second judicial district and of the district court of the county of Bernalillo, territory of New Mexico. The facts of the case are stated concisely in the brief filed by the attorneys of the respondent, and we adopt their statement as that of the court. It reads: "The writ was based upon two affidavits of the relator, in which were set forth certain orders, made and entered by the respondent in his official capacity, which were alleged to be in excess of the jurisdiction of the court over which the respondent presides, as well as the reasons upon which relator relied to establish the illegality of the acts of respondent. While these affidavits, together with the exhibits attached to them, are quite voluminous, it is only necessary, for the purpose of this brief, to say that they charge that the relator had been removed from office by the Governor of the territory and that one Perfecto Armijo had been appointed and commissioned by the Governor in his place and stead; that the relator denied the power of the Governor to remove him and to appoint said Armijo, and denied that the commission of the Governor and Armijo's qualification thereunder were effectual, and claimed that Armijo could not be recognized as sheriff of the county of Bernalillo until such time as he should by a proceeding in quo warranto establish the validity of his appointment and commission. Relator affirmed that the respondent was proceeding to determine the question of title to the office of sheriff of Bernalillo county and to adjudge that Armijo was, and the relator was not, invested with a valid title thereto at a time when there was no proceeding pending before the court over which respondent presides. It will be observed that the two affidavits narrate as facts no more than the

proceedings before the Governor, the action of Armijo thereunder, and the orders of the district court thereon, and that all else contained in the affidavits are mere statements of conclusions of law. It does appear, however, that at the time of the granting of the writ the relator was in jail, and that no other proceedings were contemplated, except to continue him in jail until he complied with the order of the court." The preliminary writ was duly served upon the respondent on the 7th day of October, 1905.

The respondent filed a motion to quash the writ, the motion containing nine grounds, as follows: "(1) It appears from the record that the orders in the writ of prohibition contained refer only to matters or acts already performed at the time the writ was allowed. (2) It appears from the record that, at the time said writ was allowed, the said district court had disposed of the matters referred to in said writ, so that nothing remained to be done, and therefore there was nothing upon which the writ of prohibition could operate. (3) It appears from the record that, at the time the writ was allowed, no act was threatened or contemplated in the direction of passing upon or determining the rights of said Perfecto Armijo to the office of sheriff of Bernalillo county. (4) It appears from the record that, at the time the writ was allowed, no further act was threatened or contemplated in the direction of ordering, or enforcing any order, that the said Thomas S. Hubbell should deliver to the said Perfecto Armijo possession of the county jail, or of the prisoners therein confined, or of a room in the courthouse of Bernalillo county, or of the records and paraphernalia of the office of sheriff; everything necessary to that end having already been performed. (5) The writ seeks to prohibit a court of general jurisdiction from punishing disobedience to its orders as a contempt. (6) It appears from the record that, at the time the said writ was allowed, the said Thomas S. Hubbell was confined in the jail of Bernalillo county for contempt of the authority of said district court in having disobeyed the order of said court sought to be prohibited, and his remedy to obtain release from such imprisonment, if unlawful, was by writ of habeas corpus, and not by writ of prohibition. (7) It is impossible for this court to grant said Hubbell any effectual relief in this case. (8) It appears from the records of this court in the case of Thomas S. Hubbell, appellant, against Perfecto Armijo, that said Hubbell, by the institution of a proceeding in the nature of a quo warranto, admitted that he had been deprived of the possession of the office of sheriff of Bernalillo county, and that it was in said Perfecto Armijo. (9) The writ was allowed ex parte, without notice to respondent or opportunity for any hearing on the application." Upon this motion to quash, the hearing was had by this court on January 23, 1906.

For the reasons indicated in the opinion of the court in *Hubbell v. Dame*, Clerk (this day decided) 85 Pac. 473, we are of opinion that the writ of prohibition should be quashed, upon the ground that, even if made absolute, it would afford no effectual relief to the relator, Hubbell. The proceedings disclose that the writ was applied for because of two supposed emergencies: First, that the judge of the Second judicial district was proceeding, notwithstanding the alleged fact that Hubbell was in full possession of the office of sheriff as at least the de facto incumbent thereof, to require the clerk to deliver and to continue to deliver all process for service to one Perfecto Armijo, a rival claimant to the office; and, second, that said judge had, ex parte and without notice or proceedings filed to that end, made an order requiring the relator to yield up the possession of the office of sheriff, its books, paraphernalia, and jail, to Armijo, and upon relator's failure to comply therewith had committed him for contempt. As pointed out in the case first above mentioned, however, the status of the case has entirely changed pending this proceeding. Hubbell is no longer in possession of the office. He has, we are informed by the argument at the bar, complied with the order of the court as to the possession of the office and its accessories, and has delivered it up to Armijo. He has, we are likewise informed by the argument at bar, been released from the imprisonment imposed for contempt. We can, therefore, see no utility in the perpetuation of a writ whose only objects are to secure writs for service which, if delivered to him could no longer be served; to restrain the enforcement of an order which he has already obeyed; to avoid an imprisonment from which he has already been released.

The preliminary writ of prohibition heretofore allowed is accordingly quashed.

McFIE, PARKER, and POPE, JJ., concur. MANN and ABBOTT, JJ., took no part in this decision.

#### HUBBELL v. ARMIJO.

(Supreme Court of New Mexico. March 2, 1906.)

Appeal from District Court, Bernalillo County; before Justice Ira A. Abbott.

Bill by Thomas S. Hubbell against Perfecto Armijo. Demurrer to the complaint sustained, and plaintiff appeals. Dismissed.

W. B. Childers, A. B. McMillen, and E. W. Dobson, for appellant. Neill B. Field, for appellee.

PARKER, J. Appellant brought a bill for injunction against appellee to restrain him from interfering with appellant in the discharge of his duties as sheriff of Bernalillo county. Appellee answered, setting up his commission from the Governor, his qualifi-

cation, and claimed to be in possession of the office. A demurrer was interposed to the answer, overruled as to that, but carried back to the complaint and sustained as to the latter. Appellant electing to stand upon his bill of complaint, the same was dismissed for want of jurisdiction. Subsequently, as appears from the briefs of counsel, appellant abandoned his possession of the office and brought quo warranto proceedings to try the title thereto. This brings the case within the doctrine stated in *Hubbell v. Dame* (decided at this term) 85 Pac. 473, and it will be disposed of in the same way as that case and for the same reasons. While that was a mandamus proceeding, and this is a proceeding for injunction, the principle involved is the same in each case, and this court is not in position to award appellant any effectual relief.

The appeal is dismissed.

MILLS, C. J., and POPE, McFIE, and MANN, JJ., concur. ABBOTT, J., having tried the case below, did not participate in this decision.

#### SCRIBNER v. MEADE.

(Supreme Court of Arizona. March 30, 1906.)

TRUSTS — CONSTRUCTIVE TRUSTS — BREACH OF AGREEMENT AS TO PURCHASE.

In an action to have defendant declared a trustee for plaintiff of certain real estate, it appeared that the parties had agreed to purchase the real estate, each to have a half interest. That plaintiff had on deposit with defendant a sum of money, and told defendant that payment for plaintiff's share could be made from such funds, but it did not appear that defendant ever agreed to so use the money. Defendant purchased, taking title in his own name, and paying the full purchase price from his own funds. Subsequently, the defendant offered to deed plaintiff a half interest, but plaintiff did not accept the deed. Thereafter plaintiff sent defendant a check sufficient to make the sum in defendant's hands equal half what had been paid for the land, and demanded a deed. *Held*, that the facts did not show defendant a constructive trustee.

Appeal from District Court, Cochise County; Thomas Armstrong, Jr., Judge pro tem.

Action by William K. Meade against M. D. Scribner. From a judgment in favor of plaintiff, defendant appeals. Reversed.

William K. Meade brought this action, seeking to have the defendant, M. D. Scribner, declared to be a trustee for the plaintiff of an undivided one-half interest in certain real estate. The complaint alleged that the title to the property in question, being in one Bently W. Warren, as trustee, the said Warren sold the property for the sum of \$1,500 to the plaintiff and the defendant, and by deed conveyed the same to the defendant in fee; that the plaintiff and defendant paid for the property in equal shares, to wit: \$750 each; that the title was for convenience taken in the name of the defendant upon the express understanding and express agreement

of the defendant that he would on demand convey one equal undivided half thereof to the plaintiff, and that the defendant, though often requested, has refused and still refuses, to perform his said agreement. The plaintiff prayed that the defendant be decreed to be such trustee, and be required to execute and deliver to the plaintiff a deed for one-half of the premises. The answer was a general denial of all the facts alleged in the complaint. The court found that prior to April 1, 1902, Warren was trustee of the property; that prior and subsequent to such date the defendant was in possession of a considerable sum of money belonging to the plaintiff, and acted as the plaintiff's agent in the disbursement of the same; that prior to such date the plaintiff asked the defendant, as agent of the plaintiff, to purchase an undivided half interest in the property for the plaintiff, and to pay therefor out of the money of plaintiff then in defendant's hands as agent of the plaintiff, there being there sufficient money for such purpose, and to take the title in defendant's name, and that at that time the plaintiff directed the defendant to make the said purchase; that pursuant to such direction of the plaintiff, and acting as plaintiff's agent as to half of such property, the defendant purchased the property and took the title in his own name, one-half thereof in his own behalf, and one-half on behalf of the plaintiff, as his agent, and that the plaintiff directed the defendant to use for the purchase price of his half of the property money of the plaintiff in the defendant's hands as agent; that on an accounting had between the parties on September 5, 1903, of the money held by defendant as agent of the plaintiff, defendant informed the plaintiff that he had not applied the money of the plaintiff in payment of the half interest in the property as directed; that it further appearing upon such accounting that the sum then in defendant's hands as agent of the plaintiff was not sufficient to pay for the plaintiff's one-half interest in the property, but that there was a balance due the defendant, the plaintiff offered then to make good such balance, and sent defendant a check therefor, which defendant returned to plaintiff; that prior to the commencement of the action, plaintiff, at a time when he had in defendant's hands applicable thereto sufficient funds to pay the full agreed purchase price therefor, duly demanded of the defendant that defendant execute to him a deed for an undivided half interest in the property.

The court found, as conclusions of law, that the defendant purchased a half interest in the property for and on behalf of the plaintiff, and acting as his agent, and that the defendant is now estopped from denying that he made payment therefor out of the plaintiff's money and thus defeat plaintiff's right thereto; that the defendant took title to half of the property as agent of the plaintiff,

and holds the same in trust for the plaintiff, and that as there is not now sufficient funds of the plaintiff in defendant's hands to fully reimburse defendant for plaintiff's share of the purchase price, plaintiff ought, in equity and good conscience, to pay to the defendant the balance sufficient to complete such purchase price, to wit, \$386.54; and that upon deposit thereof with the clerk, the defendant be required to execute a deed to the plaintiff for an undivided half of the premises. The judgment followed the conclusions reached by the court. From such judgment, and the denial of a motion for a new trial, the defendant has appealed.

W. P. Miller and Eugene S. Ives, for appellant. Flannigan & Flannigan, Thos. F. Wilson, and Kingan & Wright, for appellee.

KENT, C. J. (after making the foregoing statement). The complaint in the action alleged a payment by the plaintiff of his half of the purchase price of the property, and an express agreement on the part of the defendant to convey to the plaintiff a half interest therein. Neither the evidence taken in the case, nor the findings of the court support the allegations of the complaint in this regard; nor do facts appear in the record or in the findings of the court which show such representations, acts, or conduct in regard to the premises as would justify the application of the doctrine of equitable estoppel. The trial court seems to have applied either the doctrine of equitable estoppel, or to have concluded that, by the action of the parties and the premises the defendant, as the agent of the plaintiff, was impressed with a constructive trust in favor of the plaintiff, his principal. This latter theory is the one on which the appellee seeks to uphold the judgment in this court.

There is no substantial conflict in the evidence. Stating it as favorably as possible for the plaintiff, it appears that Meade and Scribner were old friends living together in the same house, and had had various business transactions together. Meade had on deposit with Scribner some \$5,000, against which Meade drew from time to time, Scribner acting as Meade's banker in this regard. The property in question belonged to Meade's wife, being held in trust by Warren. Scribner, who was the lessee of the property, had held an option to purchase the property. The property was offered to Scribner by Warren, the trustee, for \$1,500. Scribner and Meade had several conversations about a prospective purchase of the property and its value, and it was agreed between them that the property should be purchased for \$1,500. Each to have a half interest. At that time Meade had on deposit with Scribner, about \$4,000, and Meade told Scribner that he could pay for his (Meade's) half interest out of the funds in his hands. There

is no evidence that Scribner ever agreed so to use Meade's money. Scribner purchased the property for \$1,500, taking the title in his own name, but paying the full purchase price himself, and not any part thereof with Meade's money. Scribner took the deed in his own name, and after its receipt told Meade thereof, and offered to deed Meade a half interest. Meade asked, however, to have the matter remain in abeyance, and did not accept the deed, and no deed was ever given him. At this time Meade and Scribner were friendly, and it is apparent that up to this time Scribner intended, in making the purchase, to allow Meade a half interest therein. Matters were allowed to remain in this state for a year and a half, Scribner being in possession of the property and expending money thereon. Differences having then arisen between them a settlement of Meade's money account in Scribner's hands was had, when Meade learned, as he claims for the first time, that Scribner had not used any of Meade's money in the purchase of the property. On such settlement it appeared, however, that Meade had checked against the fund in Scribner's hands until it was reduced below the sum of \$750, which was half of the purchase price. Meade thereupon sent Scribner a check for the balance, sufficient to make the sum in Scribner's hands equal the amount of \$750, and demanded a deed to a half interest in the property. Scribner returned the check and gave no deed. Meade then brought this action. Upon such a state of facts, was the district court right in its conclusion, that Scribner in his purchase of the property acted as Meade's agent as to the purchase of one-half thereof, and that as to such half Meade was entitled to a conveyance thereof upon his payment into court for Scribner's benefit a sum sufficient to cover half of the purchase price?

It is apparent that there is a wide variance between the pleadings and the proof. The complaint alleges a payment by Meade of half of the purchase price, and an express agreement on Scribner's part to take the title in his own name and to convey to Meade a half interest. The proof shows, looking at it in the most favorable light to Meade, that there was an agreement between Meade and Scribner that each should have a half interest, and that Scribner should deed such half to Meade, but that Meade paid no part of the purchase price. It is clear from the evidence and the findings of the court, that there can be no recovery upon the theory of an express trust. It is also clear that there can be no recovery upon the theory of a resulting trust; for in order for such a trust to arise upon a purchase, it is indispensable that the payment should have been made by the beneficiary, or that an absolute obligation to pay should have been incurred by him as a part of the original transaction of purchase, at or

before the time of the conveyance. 2 Pomeroy's Eq. Juris. par. 1037; *In re Stanger*, (D. C.) 35 Fed. 239; *Woodside v. Hewel* (Cal.) 42 Pac. 152. The appellee claims, however, that a constructive trust has been imposed; his contention being that where it appears that an agent employed by his principal to negotiate for the purchase of land purchases in his own name and with his own money; the transaction, on account of the circumstances, will be held to be impressed with reasons of equity and justice with a constructive trust in favor of the principal.

If we could ignore the fact that the pleadings raise no such issue, and that upon the evidence the relation of Scribner was rather that of a bailee holding his funds subject to Meade's orders, than that of an agent to purchase or negotiate a purchase for Meade, we still do not think that a constructive trust could be held to be impressed. As said by Mr. Pomeroy, such trusts "include all those instances where a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express implied written or verbal declaration of the trust. \* \* \* They are often termed trusts in invitum, and this phrase furnishes a criterion generally accurate and sufficient for determining what trusts are truly 'constructive.' An exhaustive analysis would show, I think, that all instances of constructive trusts, properly so called, may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source." 2 Pomeroy's Eq. Juris. § 1044. One form of such constructive trust *ex maleficio* is where a person obtains the title to land by means of an intentional false verbal promise to convey to a third person, and having thus fraudulently obtained the property retains it. Equity regards such person as holding it charged with a constructive trust. The trust in such a case arises wholly from the fraud, and is in most jurisdictions expressly excluded from the operation of the statute of frauds. 2 Pomeroy's Eq. Juris. § 1055.

In all such cases, however, as pointed out, fraud actual or constructive must be found. Not only is the complaint here lacking in any allegation sufficient to cover such claim, but there is no finding of the trial court of actual fraud, or of such facts as would show constructive fraud, and the evidence does not support such claim. At best, the facts disclose a mere verbal promise to purchase and convey, and a subsequent refusal. This is not sufficient to impose such trust. Furthermore, such a promise, not being in writing, is not enforceable under our statute

of frauds. *Spencer v. Lawton*, 14 R. I. 404. To quote again from Mr. Pomeroy: "The foregoing cases should be carefully distinguished from those in which there is a mere verbal promise to purchase and convey land. In order that the doctrine of trusts *ex maleficio* with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal, otherwise the statute of frauds would be virtually abrogated: there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. Equity does not pretend to enforce verbal promises in the face of the statute; it endeavors to prevent and punish fraud by taking from the wrongdoer the fruits of his deceit, and it accomplishes this object by its beneficial and far-reaching doctrine of constructive trusts."

The case of *Dunphy v. Ryan*, 116 U. S. 491, 3 Sup. Ct. 486, 29 L. Ed. 703, is a case almost identical with the case the appellee seeks to make upon the evidence, and the findings of the trial court. There, however, under a similar agreement as is contended is in the case before us, the defendant by cross-complaint sought to compel the plaintiff to take a deed to the property he had purchased, the converse of the case at bar, where the plaintiff seeks to obtain such deed. The court there held that the general denial of the making of the contract alleged was sufficient to let in the defense of the statute of frauds; that such a contract was clearly within the statute, it being simply a verbal agreement to convey land for a certain consideration; that a contract so void by the statute could not be enforced directly or collaterally; that the fact that the purchaser was acting as the agent of the plaintiff, as well as for himself, did not avail to take the case out from the operation of the statute the suit being based upon, and brought to enforce, the void contract; that the contract being void under the statute, there was no obligation upon the plaintiff to accept the deed tendered to him, or to pay any part of the purchase money; that the case, neither in the averments nor in the prayer, was one for equitable relief, and that the mere breach of a verbal promise for the purchase of the lands would not justify the interference of a court of equity, there being no fraud in such refusal. The case fully meets the contentions of the appellee, and is conclusive of this appeal.

We think that the trial court in the findings made by it went outside of the issues raised by the pleadings, and furthermore, that upon the findings as made by it, and upon the evidence, the trial court was in error in its conclusions that the defendant held a half interest in the property in trust for the plaintiff, which he was obligated to convey to him.

The judgment of the district court is reversed, and the case remanded for a new trial.

SLOAN, CAMPBELL, and NAVE, JJ  
concur.

#### IVES v. SANGUINETTI.

(Supreme Court of Arizona. March 30, 1906.)

##### 1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—TRUSTS—CONTRACTS—PAYMENT OF DEBTS.

Defendant agreed to sell to plaintiff a hay crop harvested on certain ranches belonging to defendant's wife, the proceeds to be applied to certain debts of defendant and his wife; plaintiff agreeing to account to defendant for the balance. *Held*, that such agreement created a mere trust of such proceeds, in which the creditors had no vested interest, and that it was not an assignment for the benefit of creditors.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments for Benefit of Creditors, §§ 5, 6.]

##### 2. TRUSTS—ALTERATION—AGREEMENT OF PARTIES.

Such agreement was subject to alteration or abrogation by the parties to the extent of eliminating from its provisions the payment of any money to any of the creditors named therein at any time.

##### 3. ASSIGNMENTS—EFFECT.

Where creditors acquired no vested rights under a trust of the proceeds of certain hay sold by their debtor to which such creditors were not parties, an assignment of whatever rights they had under such agreement to the debtor did not confer on him a right of action against the buyer.

##### 4. HUSBAND AND WIFE—WIFE'S PROPERTY—SALE—ACTIONS.

Where a husband sold hay cut from land belonging to his wife under an agreement with the buyer to pay a portion of the proceeds to the creditors of both husband and wife, the buyer's failure to conform to such agreement gave rise to a cause of action to compel him to account, maintainable by the husband and wife jointly, and not by the husband alone.

##### 5. SET-OFF AND COUNTERCLAIM—JOINT DEBT.

A joint debt cannot be pleaded as a set-off or counterclaim by one of two joint creditors in a suit brought by the debtor against such joint creditor alone on his individual debt.

Appeal from District Court, Yuma County; before Justice Campbell.

Action by E. F. Sanguinetti against Eugene S. Ives. From a judgment sustaining a demurrer to the counterclaim, defendant appeals. Affirmed.

Marcus A. Smith and W. E. Parker, for appellant. Peter T. Robertson and Thomas Armstrong, Jr., for appellee.

SLOAN, J. The appellee, E. F. Sanguinetti, brought suit in the district court of Yuma county against appellant, Eugene S. Ives, to recover upon two several checks aggregating \$125, one being in the sum of \$100, and the other in the sum of \$25. The appellant in his answer admitted the indebtedness sued upon, but pleaded a counterclaim wherein he alleged that on or about the 1st day of April, 1899, he and his wife, Annie W.

Ives, entered into a certain contract with the appellee in which they agreed to sell to appellee the hay crop to be grown during the year 1890 on certain farms, belonging to said Annie W. Ives, upon the terms that appellee was to pay to the appellant and his said wife \$5.50 per ton for all the hay delivered under the contract, and the balance that might be realized from the sale of said hay to be disbursed by said appellee as follows: First, the sum of \$750 was to be paid to one J. W. Dorrington upon a promissory note held by him against appellant and his said wife; second, the sum of \$3,958, with interest, was to be paid on a promissory note given by Ives and his wife to Gandolfo and Sanguinetti, and the sum of \$550.50 to be paid to one F. L. Ewing, and credited upon another promissory note of appellant and his said wife; third, after the payment of the aforesaid claims appellee was to pay the sum of \$372.50 to said J. W. Dorrington, with interest; fourth, any residue remaining in the hands of appellee after all the said claims were paid was to be paid to appellant and his said wife. The counterclaim further alleged that under said agreement 510 tons of hay were delivered to appellee which were sold by appellee for a sum not less than \$5,000; that appellee failed to pay to appellant or to Ewing or Gandolfo any sum whatever on account of the notes mentioned in the agreement: that prior to the commencement of the action Ewing assigned his interest in said agreement to appellant, and that Gandolfo also assigned his interest and claim against Sanguinetti under said agreement to appellant; that the notes mentioned in the agreement had become due and payable long prior to the commencement of this action; that Gandolfo and Sanguinetti, mentioned in the agreement, prior to the assignment of Gandolfo's interest therein to appellant, had dissolved partnership; this interest it is alleged, upon information and belief, to have been two-thirds of any interest which the firm of Gandolfo and Sanguinetti were entitled to in the proceeds of the sale of the hay under said agreement. It is further alleged in the counterclaim that appellee had received from the proceeds of the sale of the hay a sum more than \$925 in excess of the amount agreed by him to be paid to the said appellant and his wife in and by the terms of said agreement; and that appellee became, under the agreement, indebted to Dorrington in the amount of \$783.50; that after deducting from the said \$5,000, received by appellee from the proceeds of the sale of the hay, \$2,805, said sum being \$5.50 for each ton of hay delivered to and sold by appellee, and deducting the further sum of \$783.50, due Dorrington under the agreement, there remained the sum of \$1,411.50; that, of the latter sum, by reason of the assignments made to appellant by Ewing and Gandolfo of their interests in the proceeds of the sale of the hay under the agreement, appellant became entitled to the

sum of \$998.50, being, as alleged, the proportionate amount which would, under the agreement, have been due to Ewing and Gandolfo had no assignment been made by them of their interests. The counterclaim prayed for judgment against appellee for said sum of \$998.50, less the amount sued for by appellant. To this counterclaim appellee demurred upon the grounds: First, that there was a defect of parties; second, that it failed to state facts sufficient to constitute a counterclaim; third, that it failed to constitute facts sufficient to constitute a defense, and cause of action against appellee. The demurrer was sustained by the court, and judgment rendered for the appellee for the amount sued for. From the order sustaining the demurrer, and from the judgment, this appeal is taken.

In considering the ruling of the court in sustaining the demurrer to the counterclaim the first inquiry must be to ascertain the exact nature of the agreement between Ives and his wife and Sanguinetti. Upon its face, primarily it was an agreement to sell the hay crop to be grown and harvested on certain ranches belonging to the wife of the appellant; secondarily it was an agreement between the parties regarding the disposition of the proceeds to be derived from such sale. A trust arose by virtue of the agreement that Sanguinetti should devote a part of the proceeds to the payment of certain debts owed by Ives and his wife evidenced in part by their promissory notes. In no sense can the agreement, either at common law or under the statute, be construed as an assignment for the benefit of creditors. The parties to the agreement could, at any time, have abrogated it or changed its terms to the extent of eliminating from its provisions the payment of any money to any of the creditors named. The trust was not such an one as conferred any vested right upon any of the creditors named in the agreement who were not parties thereto. In so far as the agreement read, the provisions thereof having reference to the payment of certain debts were for the convenience merely of appellant and his wife. Certainly, nothing appears in the agreement, nor is any fact alleged in the counterclaim, from which it can be inferred that the creditors named had any vested interest in the trust funds held by Sanguinetti. The beneficiaries under the trust were Ives and his wife. None of the creditors, therefore, had a right of action against Sanguinetti upon the agreement, and no assignment of any assumed interest therein carried with it such a right of action. Appellant, therefore, by taking an assignment from Ewing and Gandolfo of their assumed interests in the agreement, did not acquire thereby any right of action which he could enforce against Sanguinetti, either in this suit or in one which he might bring against the latter. Whatever may be Sanguinetti's liability upon an accounting, that liability continues, notwithstanding the

assignment, one enforceable by appellant and his wife jointly, and not by appellant individually. By the terms of the agreement it appears that the hay sold was the separate property of Mrs. Ives. She had rights, therefore, under the agreement, which could not be litigated in this action. A joint indebtedness cannot be pleaded as a set-off or counterclaim by one of two joint creditors in a suit brought by the debtor against the former alone upon his individual debt. It does not appear that Mrs. Ives has assigned her interest in the proceeds of the hay to appellant. For the reasons given the appellant cannot, in this action, require an accounting by Sangulnetti or recover judgment against him for any amount which may be due appellant and his wife jointly under the contract.

We hold, therefore, that the demurrer was properly sustained, and the judgment of the court will therefore be affirmed.

DOAN and NAVE, JJ., concur.

#### YOUNG v. TERRITORY.

(Supreme Court of Arizona. March 30, 1906.)

##### 1. ASSAULT AND BATTERY—PUNISHMENT.

Under Pen. Code, § 208, prescribing the punishment for assault as either a fine in any sum not exceeding \$300, or imprisonment for a term not exceeding three months, a judgment imposing both a fine and an imprisonment is irregular.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, § 170.]

##### 2. SAME.

Under Pen. Code, § 208, prescribing as punishment for the crime of assault, either a fine in any sum not exceeding \$300, or imprisonment for a term not exceeding three months; and section 1013, providing that a judgment imposing a fine may direct that defendant be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for each dollar of the fine, a judgment on conviction for assault, sentencing defendant to pay a fine of \$300, and, in case of nonpayment of the fine immediately after judgment, to be imprisoned for 300 days, failed to impose the imprisonment as the method of satisfying the fine under the provisions of said section 1013, and was irregular as imposing both a fine and an imprisonment.

##### 3. SAME—EXCESSIVE TERM.

The judgment was also irregular under said Pen. Code, § 208, as imposing a term of imprisonment exceeding three months.

Appeal from District Court, Graham County; before Justice Eugene A. Tucker.

George Young was convicted of assault, and appeals. Judgment modified.

W. K. Dial, for appellant. E. S. Clark, Atty. Gen., for the Territory

SLOAN, J. The appellant, in the district court of Graham county, was convicted of the crime of assault. He was sentenced by the court to pay a fine of \$300, and in case the defendant should not pay the fine immediately after judgment to be imprisoned

in the county jail for 300 days. The appeal is from this judgment.

The punishment prescribed for the crime of assault is either a fine in any sum not exceeding \$300 or imprisonment in jail for a term not exceeding three months. Section 208, Pen. Code. The judgment is irregular, in that it imposes both a fine and an imprisonment, and for the further reason that the term of imprisonment imposed exceeds three months. A judgment imposing a fine may direct that the defendant be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for each dollar of the fine. Section 1013, Id. If the intent of the court was to impose the imprisonment as a method of satisfying the fine under the provisions of the latter section of the Penal Code, such intent is not expressed in the judgment and cannot, therefore, be given effect.

The judgment is modified by eliminating all reference to the imprisonment which leaves in full force and effect the fine of \$300.

KENT, C. J., and DOAN, CAMPBELL, and NAVE, JJ., concur.

#### EPPERSON v. CROZIER.

(Supreme Court of Arizona. March 30, 1906.)

##### SALES — BILL OF SALE — ACKNOWLEDGMENT — NECESSITY.

Under Acts 1897, p. 28, No. 6, § 57, declaring that upon the sale of horses or cattle the delivery shall be accompanied by a written bill of sale signed and acknowledged by the seller, and that upon the trial of any person charged with theft of any such animal the possession of the animal by the accused without his having such a bill of sale shall be prima facie evidence that the possession is illegal, and section 55, declaring that no person shall, in originally branding animals make use of more than one brand, provided that any person may own or possess animals in many marks and brands, the same having been acquired by purchase and that bills of sale in writing properly acknowledged by the previous owner, shall be sufficient evidence of such purchase, etc., a bill of sale of cattle is not by reason of being unacknowledged, inadmissible in evidence in action for conversion of the cattle.

Appeal from District Court, Mohave County; before Justice Sloan.

Action by William Epperson against John W. Crozier to recover damages for the conversion of mares and colts. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

E. M. Sanford, for appellant. Herndon & Norris, for appellee.

NAVE, J. The appellant, William Epperson, brought suit in the district court of Mohave county to recover \$2,500 alleged to be the value of mares and colts purchased by plaintiff from defendant on April 2, 1901,

and "unlawfully converted and disposed of, to his own use, by defendant" in April, 1903, while still in defendant's possession.

The first assignment of error is that the court erred in rejecting a paper offered in evidence by plaintiff, purporting to be a bill of sale dated April 2, 1901, signed by defendant, whereby defendant sold to plaintiff "all mares branded 'DR' on left hip and all sucking colts for the sum of \$200," purchaser "agreeing to take them all off the range within six months from date." This instrument was not acknowledged; and was objected to by defendant upon that ground alone. The objection was sustained. Act No. 6, p. 9, of the Legislature of 1897, was in effect at the time of the execution of this bill of sale. Section 57 (page 28) thereof provides as follows: "Upon the sale, alienation, or transfer of any horses, mules, asses, or neat cattle by any person in this territory, the actual delivery of such animals shall be accompanied by a written bill of sale from the vendor or the party selling to the party purchasing, giving the number, kind, marks and brand of each animal sold and delivered, which bill of sale shall be signed by the party giving the same, and shall be acknowledged by him as his act and deed before some officer authorized under the laws of the territory to take acknowledgment of deed of conveyance; and upon the trial of any person charged with the theft, unlawful possession, handling, driving or killing of any such animal as is mentioned in this section, the possession of such animal by the accused without his having a duly written and acknowledged bill of sale therefor, such as is required by the provisions of this section, shall be prima facie evidence against the accused that such possession was illegal; \* \* \* " Section 55 (page 27) of the same act is as follows: "No person owning or claiming shall in originally marking or branding horses, mules, asses, or neat cattle, make use of or keep up more than one mark or brand; provided, that any person may own or possess such animals in many marks and brands, the same having been by him acquired by purchase or any other lawful manner, and bills of sale in writing, properly acknowledged by the previous owner or owners of the animal or animals having such brands, or from the heirs, executors, administrators, or legal representatives of such owner or owners, shall be sufficient evidence of such purchase. \* \* \* " The penalty of being prima facie a thief is attached to one who purchases and takes possession of animals enumerated in the act without having a bill of sale complying in all respects with the requirements of the act; and a bill of sale complying with the act carries with it proof of its execution, and is made "sufficient evidence" of such sale; but that a bill of sale of such animals must be acknowledged, and otherwise must comply with the provisions of section 57

supra, in order that it may be admissible as evidence of a sale, is not expressly prescribed. Such a rule of evidence should not be based upon implication. The objection to the introduction in evidence of this paper went only to its failure to comply with the section of the statute in question. This objection should have been overruled, and the instrument received.

It is unnecessary to consider the other assignments of error.

The judgment is reversed, and the case is remanded to the district court for new trial.

KENT, C. J., and DOAN and CAMPBELL, JJ., concur.

(10 Ariz. 110)

### HUTTON v. CRAMER.

(Supreme Court of Arizona. March 30, 1906.)

#### 1. DEEDS—DELIVERY—EVIDENCE.

Intestate proposed to deed to defendant a mining claim in controversy if the latter would agree to take care of him during the balance of his life. Defendant agreed, and thereafter met intestate, who stated that he had some papers made out which he would like to deposit in defendant's box in the bank. They went to the bank, procured the box, into which intestate placed an envelope with defendant's name written thereon, remarking, "This contains what I am going to give you after I am dead; keep that here until I am dead." The box was returned to the cashier of the bank, and was not opened until after intestate's death. Before leaving the bank, defendant requested the cashier to add intestate's name to that of defendant on the box, and to give intestate access to it as he desired. The envelope contained a deed to the mining claim, together with a notice that intestate had conveyed all his property to defendant, and asked that the instruments be recorded immediately after intestate's death. Held sufficient to show a valid delivery of the deed to transfer title.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Deeds, §§ 140, 141.]

#### 2. ESCROWS—DEEDS—CONDITIONAL DELIVERY.

The placing of the deed in the bank box, though construed as an escrow, and hence a conditional delivery, constituted a sufficient delivery to vest title in the grantee on the grantor's death.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Escrows, §§ 9-14.]

Nave, J., dissenting.

Appeal from District Court, Gila County; before Justice Eugene A. Tucker.

Action by Peter L. Hutton, as administrator of the estate of A. T. Epley, deceased, against John J. Cramer. From a judgment for defendant on his cross-complaint, plaintiff appeals. Affirmed.

George R. Hill and G. W. Shute, for appellant. A. C. Baker, for appellee.

SLOAN, J. Appellant, Peter L. Hutton, as administrator of the estate of A. T. Epley, deceased, brought suit in the district court of Gila county against John J. Cramer, appellee, to quiet the title to the Gem mining claim situate in the Globe mining district of said county. The case was heard by the court

without a jury, and a judgment entered for the appellee quieting the latter's title to said mine in accordance with the prayer of his cross-complaint. From this judgment the appeal is taken.

The facts, as disclosed by the record, are these: In 1903 A. T. Epley was the owner of the Gem mining claim. Being a man of advanced years and somewhat feeble, he proposed to Cramer if the latter would agree to take care of him during his lifetime to so arrange his affairs that Cramer should have the Gem mine and his other property upon his death. This Cramer agreed to do. In November, 1903, Epley met Cramer in the town of Globe, and said to him: "Mr. Cramer, I have the papers made out, and I would like to go and deposit these papers in your box in the First National Bank." Cramer then accompanied Epley to the bank and introduced him to the cashier, and asked the latter to hand him his private bank box. Upon receiving the box Cramer and Epley withdrew to a private room, whereupon Epley placed in the box an envelope with Cramer's name written thereon, and remarked at the time to Cramer: "This contains what I am going to give you after I am dead; keep that here until I am dead." The box was then closed and returned to the cashier. Before leaving the bank Cramer requested the cashier to put Epley's name on the box with his own name and to give Epley access to it at any time he might desire. The box was not thereafter opened until after Epley's death which occurred in 1904. After this transaction at the bank Cramer assumed control of the property with the knowledge of Epley, and did or caused to be done the assessment work on the claim. After Epley's death Cramer opened the box at the bank and took out the envelope, placed therein by Epley, and found therein a deed made out to him by Epley of the Gem mining claim which he at once placed of record. He also found with the deed, inclosed in the envelope, a paper which read as follows: "Notice. To all whom it may concern: I, A. T. Epley, of the Town of Globe, County of Gila, Territory of Arizona, on this 7th day of November, A. D. 1903, have made two deeds of conveyance of all my real estate, of which I am possessed, as also a bill of sale of all my personal property of which I am possessed, to John J. Cramer of Globe, Gila County, Territory of Arizona, and have placed the said instruments so made into my private box in First National Bank, Globe, Arizona, to be had and held there by seal for delivery to said John J. Cramer, immediately upon my death, with the understanding that the valuable consideration by said John J. Cramer, so as aforesaid therefor is: (1) That he will cause upon my said death a respectful and honorable burial; (2) that said John J. Cramer has for times past extended every possible kindness to me; (3) that the said John J. Cramer has for many years been and is an old time friend;

that, for the aforesaid considerations, I have thus conveyed to him, said John J. Cramer, all my real and personal property; and ask that the same be placed on record in the recorder's office, Gila county, Territory of Arizona, as evidence of title from myself to him, said John J. Cramer, immediately after decease and this to be the authority therefor. A. T. Epley." The trial court found that there was an actual delivery of the deed by Epley to Cramer during the lifetime of the former, and that the title to the Gem mine thereupon vested in the latter upon the death of the former. The correctness of this finding, as a matter of law, is the sole question raised by the appellant and discussed in the briefs.

It is evident from the facts above stated that Epley intended, by depositing the deed in Cramer's bank box, to part with its possession, and it is likewise evident from his declarations and subsequent conduct that he had no intention of reserving the power of recalling the deed. It is true that the circumstances show that he could have regained possession of the deed had he so chosen. The arrangement made with the cashier of the bank granting Epley permission to have access at any time to the box and the papers therein was made by Cramer, and was not made through any suggestion or request coming from Epley. Nothing in his acts or in his written notice accompanying the deed negatives the view taken by the trial court in its findings that Epley intended irrevocably to place the deed in the bank box to be there kept until his death. Such an act with such an intent constitutes in law a delivery and a transfer of title under the deed. It is a generally accepted rule of law that where a deed to real estate is handed to a third party to be kept until the death of the grantor, and then immediately to be delivered to the grantee, upon the death of the grantor title vests in the grantee as of the time when the deed was thus placed in escrow; and the law regards the legal effect of such a conditional delivery to be the same, after the death of the grantor, as if there had been an absolute delivery of the deed during the life of the grantor, and an immediate transfer of the title to the grantee, with a reservation of a life estate by the grantor. *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; *Cook v. Brown*, 34 N. H. 460; *Prutsmann v. Baker*, 30 Wis. 650, 11 Am. Rep. 592; *Thatcher v. St. Andrew's Church*, 37 Mich. 264. Under this rule of law, if the placing of the deed by Epley in the bank box be construed to have been in effect an escrow, and hence a conditional delivery, then, upon the death of Epley, title to the mine vested in Cramer. If the transaction cannot be construed as a conditional delivery, then, under the finding of the court, which the evidence sustains, that Epley parted with the possession of the deed without intending to reserve any right of recall, it must be

construed as an absolute delivery, the legal effect of which was to vest title in Cramer subject to the life interest retained by Epley. *Hathaway v. Payne*, 34 N. Y. 92; *Foster v. Mansfield*, 3 Metc. (Mass.) 412, 37 Am. Dec. 154.

Whichever view be taken, therefore, the trial court was right in its conclusion of law that the title to the mine in question vested in appellee, and the judgment must therefore be affirmed.

KENT, C. J., and DOAN and CAMPBELL, JJ., concur.

NAVE, J., dissents.

(12 Idaho, 33)

#### HALL et al. v. NIEUKIRK et al.

(Supreme Court of Idaho. Feb. 10, 1906. On Rehearing, March 9, 1906.)

#### 1. CORPORATIONS—ACTIONS—RECEIVERS—APPOINTMENT PENDENTE LITE.

Upon a proper showing a receiver will be appointed for a corporation pendente lite.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2015, 2016.]

#### 2. SAME—WHEN APPOINTED.

Under the provisions of subdivisions 5 and 6, § 4320, Rev. St. 1887, a receiver will be appointed where it is shown that the corporation is insolvent or in imminent danger of insolvency, and in all cases where receivers have heretofore been appointed by the usages of the courts of equity.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2201-2216.]

#### 3. SAME—COMPLAINT—SUFFICIENCY.

Under the allegations of the complaint, *held*, that the court erred in refusing to appoint a receiver.

#### 4. SAME—APPOINTMENT OF RECEIVER PENDENTE LITE.

Under our statute an appointment of a receiver does not necessarily cause a dissolution of the corporation. Unless the court so directs, the receiver may be appointed simply to manage the affairs of the company during the pendency of the litigation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2015, 2016, 2243.]

#### 5. RECEIVERS—CAUSE FOR APPOINTMENT—MISMANAGEMENT OF CORPORATION.

Upon the application of a stockholder, where it is shown that the directors and officers of the corporation are mismanaging its affairs for their own personal advantage and gain, and where it is shown that the profits of the business of the corporation is being absorbed by such mismanagement in paying the salaries of favorite employes, whose services are not necessary to the proper conduct of the business of the corporation, and where gross mismanagement is shown which, if continued, would necessarily result in insolvency of the corporation, a receiver should be appointed.

(Syllabus by the Court.)

Appeal from District Court, Elmore County; Littleton Price, Judge.

Suit by Adin M. Hall and others against J. W. Nieukirk and others, in which application was made for the appointment of a receiver for the Charles R. Kelsey Company, Limited. From an order denying the application, plaintiffs appeal. Reversed.

E. M. Wolfe and E. J. Dockery, for appellants. W. C. Howie, for respondents.

SULLIVAN, J. This is an appeal from an order of the judge of the Fourth judicial district court denying the application of the appellants for the appointment of a receiver for the Charles R. Kelsey Company, Limited, a corporation organized under the laws of the state of Idaho, and doing a general merchandising business in Elmore county. The application was based on the amended complaint in the action. All of the allegations of that complaint were admitted by the respondents, as they did not, by answer or otherwise, deny any of them at the time said application for a receiver was presented and passed upon by the judge. Among many of the allegations of the complaint we find the following: That Charles R. Kelsey, on or about February 1, 1901, owned and operated a general merchandise store in Mountainhome, said county, and that on or about said day was organized the defendant corporation; that the appellants were inexperienced in the merchandising business and that said Kelsey represented to them that his merchandising house was doing a prosperous business and that the new corporation would make large profits, and guaranteed to the plaintiffs or to the appellants, and to all owners of preferred stock, an annual dividend of 10 per cent., and to that end he caused the stock of said corporation to be issued in preferred and common, \$25,000 of each. All of the preferred stock he sold to plaintiffs and others, who paid cash therefor; that plaintiffs were led to believe that said preferred stock would receive a 10 per cent. dividend which would be paid semiannually, but as a matter of fact said articles of incorporation guaranteed said dividends only out of the profits of the business before the common stock should share in any part thereof; that only three semi-annual dividends had been paid and that no dividends whatever had been paid on said preferred stock since August, 1902; that in fixing the value of the store and general assets of said Kelsey which went to make up the property transferred to said corporation, there was considered and valued a large number and amount of open accounts to said Kelsey, and he guaranteed said accounts should be paid within one year after the incorporation of the said company, and as security for such guaranty it was agreed that \$15,000 of the common stock should remain and be the property of the corporation and should not be delivered to said Kelsey or to any other person until all of said open accounts should be paid to said corporation; that thereafter a considerable part of said accounts were paid, and by proper resolution of the board of directors of said corporation, the president and secretary were directed to issue to said Kelsey \$10,000 worth of the common stock and to retain as the property of the company the remaining \$5,000 worth of common stock: that at that time said Kelsey was president

of the company, and instead of issuing \$10,000 as directed, he caused to be issued \$5,000 additional of the said common stock, thus defrauding the plaintiffs out of said common stock; that there is yet due and unpaid a large amount upon said open accounts so guaranteed by Kelsey; that thereafter said Kelsey transferred said \$5,000 worth of common stock so fraudulently issued to him to his wife, Altha B., who took the same with full knowledge that said stock was fraudulently issued; that on or about the 24th day of June, 1904, said Kelsey died, and that on or about the 9th day of July, 1904, the defendant J. W. Nieu Kirk was elected president of the said company to succeed the deceased; that he was elected in opposition to the votes of the plaintiffs, who were members of the board of directors; that said Nieu Kirk is a practicing physician and is wholly unacquainted with the mercantile business; that he was a particular friend of the said Kelsey, deceased, and his wife, and was their family physician, and that he always sustained them at the meetings of the stockholders and of the directors of said corporation; that among the duties of the secretary and treasurer is that of preparing every month, for the regular monthly meeting of the board of directors, a statement in writing showing the present financial condition of the company, the business transacted during the preceding month, the cash taken in and paid out, and the amount due and owing to the company; that said Nieu Kirk has refused to allow the secretary and treasurer to prepare and present to said board the said monthly reports, although the same has often been requested by the board of directors; that on the 17th day of November, 1904, the directors, believing that it was for the best interest of the company and stockholders, ordered and directed an inventory of the property of said company to be taken so that they might know how the company stood financially, and for that purpose they employed one Wilterding, an experienced merchant, whereupon defendant Nieu Kirk then and there refused to allow him or any person to make an appraisalment of the company's property; that said Nieu Kirk, Altha B. and Altha R. Kelsey and George C. Nichols have conspired together for the purpose of defrauding said corporation and the plaintiffs herein and other stockholders, and in furtherance of said conspiracy and fraud said Nieu Kirk has refused to preside over the regular monthly meetings of the board of directors, although personally present; that he failed to entertain motions made for the purpose of adjourning such meetings; that he has left meetings of the board for the purpose of reducing the number so that there would be no quorum present, thereby forcing an adjournment; that at various meetings of said board he has become very offensive, abusive, and insulting to the members of the board; that

he is at enmity with every member of the board, except the two Kelseys and Nichols; that on the 17th day of December, 1904, while the board of directors was in session in the company's store building, they requested their counsel to appear before them, for the purpose of counseling and advising them, whereupon said Nieu Kirk refused to allow said counsel to enter the building, declaring that he would put him out by force violence if he attempted to enter; that he refused to abide by their instructions or to carry out their orders; that he manages and operates the business of the said company in the interest of himself and of the said Kelsey's family, to the exclusion of the other stockholders; that he draws from the funds of said company the sum of \$150 per month for his said services, which, instead of being a benefit, are an injury to the company because of his inexperience and misconduct; that he employs the Kelsey family in said store; that the office help alone consists of four persons at a monthly cost of \$500; that in the sales department he employs four persons at a monthly salary of \$450; that in the delivery department he employs a man and a boy at a monthly cost of \$100; that the work of the office, including the superintending of the buying, can be done by two persons at a cost not to exceed \$175 monthly, and that for the five months next preceding the election of said Nieu Kirk as president, the office force consisted of two persons for three months at a salary of \$150, and for two months at a salary of \$185; that the total cost of help for said company should not exceed \$550; that the board of directors have often directed that the purchases of the company should be made on a cash basis.

Notwithstanding the repeated orders of the board to that effect, at the close of the year ending January 31, 1904, the said Kelsey, deceased, had so managed the company's business that it was indebted to wholesale houses and firms in the sum of \$16,000, all of which was overdue; that said Kelsey and Nieu Kirk urged the board of directors to consolidate the indebtedness of the company and place it with one bank or person and that the time for payment thereof be extended; that in so doing the finances of the company would be in such condition that all purchases thereafter could be made for cash and all bills discounted, thereby making a great saving to the company. Relying upon such representations the appellants joined with the defendants in an order directing said Kelsey to secure a loan of \$16,000; that thereafter said Kelsey became ill and unable to attend to said matter, and that said Nieu Kirk and others negotiated a loan of \$16,000, which loan was secured by mortgage on the company's property; that said loan was to be paid monthly in payments of \$1,000; that four of said monthly payments only had been made; that all other of said monthly payments are

now past due and remain unpaid; that said Nieukirk, instead of conducting said business upon a cash basis in the purchase of goods, has so managed and conducted the business that said company now owes \$11,000 for goods purchased, which amount is overdue; that said Nieukirk and Altha B. Kelsey, in furtherance of the conspiracy, transferred to Altha R. Kelsey, daughter of Altha B., without consideration, a number of the shares of the capital stock of said company, and so transferred to the said George Nichols five shares of the capital stock thereof; that said transfers were made for the sole and only purpose of enabling said Kelsey and Nichols to become directors of said company that they might assist Nieukirk and Altha B. Kelsey in said conspiracy; that at the annual meeting of the stockholders on the 16th of January, 1905, the plaintiffs and Altha B. Kelsey were elected directors of said company, but that said Nieukirk, Altha B. and Altha R. Kelsey and Nichols, in furtherance of said conspiracy and after said election and without further ballots being taken, during a recess of said meeting and in pursuance of said conspiracy, did fraudulently and unlawfully remove four of the ballots which had been cast prior to said recess, and in their place substituted other ballots, and that said ballots were counted by said defendant on the accumulated plan; that by reason of said fraudulent change of said ballots the defendants Nieukirk, Kelseys, and Nichols were declared elected as directors of said company in fraud of said company and of the rights of plaintiffs. That after said fraudulent election the four persons mentioned elected said Nieukirk president, Altha B. Kelsey vice president, and George C. Nichols secretary and treasurer of said corporation; that no meeting of the board of directors has been held since the annual meeting of January, 1905; that no monthly statement of the financial condition of the company has been rendered since said annual meeting, and none was made at that time; and that said defendants had refused to make such report, in violation of the by-laws of the company. That Nieukirk had taken from said company the sum of \$1,800 for one year's service as president of the company; that said fraudulently elected officers have conspired together to defraud the appellants and other stockholders of any and all profits of said business, and have fraudulently denied the plaintiffs and other stockholders from all knowledge or participation in the conduct of such business; that in furtherance of such conspiracy said defendants have paid to themselves and their favorites salaries way beyond the value of the services rendered by them to the said company, in order to consume the profits and substance of the said company; that while the business of the said company now and for several months last past is less

than one-third of the business done by said company before the incompetent management of Nienkirk and the other defendants, they have continued to employ an unnecessary force to conduct the business of said company, and have increased the salaries of the said Kelseys and Nichols, and that the affairs of the company have been so recklessly, fraudulently, and incompetently managed that the salary expense thereof ranges from \$722 to \$950 per month, and that the total expense of conducting the business is from \$1,100 to \$1,400 per month, and that the average monthly sales do not exceed \$5,000 per month; that to give the impression of doing a large business, credit is indiscriminately extended to people of little or no financial responsibility, and accounts of long standing are left uncollected so that about two-thirds of the total outstanding bills of said company, aggregating upward of \$20,000, are uncollectible, and that said misconduct, mismanagement, and extravagance in the affairs of said company are deliberately and intentionally made on the part of said Nieukirk, and in furtherance of a purpose and conspiracy to divert the funds and apply the assets to their own benefit, whereby plaintiffs are defrauded, and the said company is in imminent danger of becoming insolvent if it is not, in fact, already so; that said \$5,000 of common stock was to become the property of the stockholders in the event Kelsey failed to collect or pay outstanding accounts, aggregating over \$2,300, and that said stock was fraudulently issued by said Kelsey and assigned to the defendant Altha B. Kelsey, and that said accounts have not been collected and have been fraudulently charged to the account of said C. R. Kelsey months after his death, and that the same were uncollectible from his estate, and that said accounts were so charged for the purpose of consummating the conspiracy to defraud plaintiffs and said stockholders of the \$5,000 worth of common stock; that on October 31, 1904, said Altha B. Kelsey owed said company the sum of \$758.14 on account, and had the same transferred to the account of C. R. Kelsey, deceased; that said transfer was caused to be made by the said Nienkirk, Kelseys, and Nichols with the full knowledge that said C. R. Kelsey was dead and had left no estate, and that said account was utterly worthless as an account against his said estate; that said transfer was made expressly for defrauding plaintiffs and other stockholders out of said sum of \$758.14; that said Altha B. Kelsey now disclaims said debt and obligation and refuses to pay the same; that no redress can be obtained by plaintiffs in an action in the name of the corporation, as its officers and directors are parties to and direct beneficiaries of the fraud practiced upon plaintiffs, and they neglect and refuse to require said Altha B. Kelsey to pay said sum or

any part thereof or to require her to assign and transfer to the company said \$5,000 worth of common stock so fraudulently acquired by her; that prior to the organization of the said corporation, as an inducement and protection to the owners and holders of the said preferred stock, it was understood and agreed by and between them and all owners of stock that the holders of preferred stock should have the privilege, power and authority to elect the secretary and treasurer and to fix his salary, and to that end a by-law was adopted as follows: "The office of secretary and the office of treasurer may be held by the same person both offices to be filled and the salary fixed by a majority vote of the preferred stockholders at the time of the stockholders' annual meeting. He or they shall hold the office for one year. In case of a vacancy by resignation, disqualification or removal, the vacancy is to be filled in the same manner as the election." That at the annual meeting of the stockholders in January, 1905, Niekirk, Kelseys, and Nichols, representing all the common stock and a very small minority of the preferred stock, against the will and without the authority or consent of the holders of the majority of the preferred stock, in furtherance of said conspiracy and in fraud of plaintiffs, so amended said by-law as to deprive the holders of preferred stock from so selecting the secretary and treasurer and that under such amended by-law and in pursuance of the fraudulent purpose aforesaid, voted for and elected or pretended to elect said Nichols secretary and treasurer, and thereafter employed him as a bookkeeper at a salary of \$100 per month; that on account of the unfriendly feeling existing between Niekirk and the board of directors caused by the mismanagement and misconduct of the said Niekirk, Kelseys, and Nichols, and because of the inexperience of said Niekirk and his extravagant management in the conduct of the said business, the capital stock of said company is becoming impaired and endangered, and that said corporation is in imminent danger of insolvency, and unless protected by order of the court will become entirely valueless; that plaintiff has no plain, speedy, and adequate remedy at law.

The foregoing is the substance of the allegations of the complaint, none of which are denied by the respondents. That being true, we think the allegations amply sufficient to warrant the court in appointing a receiver. The utter incompetency of Niekirk is shown. A conspiracy is shown to exist between him and other of the directors to loot said corporation of all its profits in the mercantile business and of the profits of the company. Under his management large debts have accrued against the company and contrary to the order of the board of directors. Salaries of the officers and of the employes have been increased,

and employes not required by the business retained on the pay roll. The business of the company has decreased from \$15,000 a month to about \$5,000. Credit has been indiscriminately given to the amount of about \$20,000, much of which is absolutely worthless. Stock that belonged to said company has been fraudulently issued to the Kelsey family. A good account of \$758.14 against Altha B. Kelsey has been transferred against a deceased man who left no estate in fraud of the rights of the stockholders. It appears that money was paid for the preferred stock, and a by-law was adopted giving the stockholders holding the preferred stock the right to elect the secretary and treasurer. This was fraudulently amended by said Niekirk and his co-conspirators so as to permit the secretary and treasurer to be elected by themselves and against the interests of the stockholders who held the preferred stock, and it is admitted that if said corporation is not already insolvent, that insolvency stares it in the face. Notwithstanding all of those undenied allegations, it is contended by counsel for respondents that sufficient is not alleged to warrant a court of equity in granting a receiver, and that the appellants have a plain, speedy, and adequate remedy at law. If the complaint does not contain allegations sufficient to warrant the appointment of a receiver, it would be most difficult to make allegations sufficient for that purpose. Under the provisions of subdivisions 5 and 6 of section 4329, Rev. St. 1887, the appointment of a receiver is authorized where a corporation is insolvent or in imminent danger of insolvency, and also in all other cases where receivers have heretofore been appointed by the usages of courts of equity. The allegations are amply sufficient to show that said corporation is grossly mismanaged and is in imminent danger of insolvency.

In *Gibbs v. Morgan*, 72 Pac. 732, section 4329, Rev. St. 1887, this court held that upon proper application a receiver would be appointed for a corporation pendente lite. The court said in that case: "As far as possible courts of equity should adapt their practice to the existing conditions of the business world and apply their jurisdiction to the changed conditions and cases arising thereunder, and should not too strictly adhere to forms and rules established under different circumstances and decline to administer justice and enforce rights for which there is no other remedy." The Supreme Court of Montana, in *State v. Second Judicial Court*, 39 Pac. 316, 48 Am. St. Rep. 682, 20 L. R. A. 392, under a statute identical with section 4329, held that the court had jurisdiction to appoint a receiver; and that court, referring to the *French Bank Case*, 53 Cal. 550, says: "In the California case an important element in the decision as it appears was that the appointment of a receiver acted as a dissolution of the corporation," and says further: "The receiver is not to wind up the corporation

under his appointment; he is simply to manage the affairs of the same while charges of the most outrageous frauds of the managers and officers are being investigated in the trial of the action." So, in the case at bar, the appointment of a receiver does not act as a dissolution of the corporation. The receiver would only manage the affairs of the corporation during the investigation of the charges of the conspiracy, incompetency, and fraud. In *Smith on Receiverships*, § 225, it is stated: "Where, upon application of a stockholder, it is shown that the directors and officers of the corporation are mismanaging its affairs as for their own personal advantage and gain," a receiver will be appointed and: "Where the majority stockholders are clearly violating the chartered rights of the minority and putting their interests in imminent danger," a receiver will be appointed. In section 228 it is said: "Where, however, the conduct of the officers of a corporation is satisfactorily established as fraudulent, it is not only proper, but it is the duty of the court to wrest from such officers the management of the company and place the company in the charge of a receiver." In *Gloert v. Reynolds*, 51 Ill. 516, it is held that if possession of the defendants is obtained by fraud, or that the income is in danger of loss from neglect, waste, or misconduct, a receiver will be appointed upon proper application; and in *Re Lewis*, 52 Kan. 660, 35 Pac. 287, that the mismanagement, diverting of funds, applying assets to the benefit of officers, are grounds for a receiver. See *Sidney Stevens et al. v. South Ogden Land, Bldg. & Imp. Co.*, 14 Utah, 232, 47 Pac. 81. In *Ponca Mill Co. v. Mikesell*, 55 Neb. 98, 73 N. W. 46, it was held that a receiver would not be appointed merely because of difference of opinion between officers or holders of the majority of the stock as to proper policy of managing the corporate affairs, but that one would be appointed when it was shown that the officers and the holders of a majority of the stock are fraudulently managing the corporate business, converting the property to their individual use, and abusing their powers to the injury of the other stockholders. *Miner v. Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412, was a case something like the one at bar, and furnishes an instance of a gross abuse of the trust. It is there held that the law requires of the manager the utmost good faith in the control and management of the corporation as to the minority. The court said: "It is the essence of the trust that it shall be so managed as to produce for each stockholder the best possible returns for his investment. The trustee has so far absorbed all returns." So, in the case at bar, it is shown that Nieukirk and his favorites have not only absorbed all of the returns, but are about to wreck the company. See *Clark & Marshall on Corporations*, § 556. In *Haywood v. Lincoln Lumber Co.*, 64 Wis. 239, 26 N. W. 184, the court holds that a

receiver may be appointed when the affairs of a corporation are being mismanaged and its assets be in danger of being lost to the stockholders. The rights of a majority of the board of directors or a majority of the stockholders to loot and mismanage the business of the corporation is not protected by our law simply because it is a corporation. Such rights are no more protected to a corporation than they are to a partner of a partnership. In this age of trusts and corporations, the managers thereof must be held to as strict an accountability for the fair and honest conduct of the business as a partner conducting the business of a partnership.

The allegations of the complaint require the appointment of a receiver, and the judge erred in not appointing one. His action in refusing to appoint a receiver is reversed, and the cause remanded, with directions to appoint one. Costs of this appeal are awarded to appellants.

STOCKSLAGER, C. J., concurs. AILSHIE, J., expresses no opinion.

#### On Rehearing.

STOCKSLAGER, C. J. Respondents in this case filed their petition for what is termed a limited rehearing, "with a view to the correction of what we think is an error in the order of the court directing that a receiver be appointed, and ask that said order be modified to permit respondents to answer the complaint in said cause and deny the allegations of said complaint, to the end that complete justice may be done." So says the petitioner. Again it is said: "Respondents now stand ready, and at all times have stood ready, to show the falsity of all the allegations of the complaint upon which a receiver is asked to be appointed, except the liability to insolvency, and to show that said liability is caused by the wrongful acts of the appellant." As shown by the complaint in this action, the substance of which is embodied in the opinion, a number of reasons were enumerated why a receiver should be appointed to take charge of the property of this corporation and preserve it from waste, and whether a direct charge of insolvency was alleged or not, the allegations were sufficient to show that the ultimate result of the management would be insolvency. These allegations were met by a demurrer, which was sustained by the learned trial judge; but this court was of the opinion that the showing was sufficient to warrant the appointment of a receiver under the provisions of subdivision 5 of section 4320, Rev. St. 1887. It says a receiver may be appointed "when a corporation has been dissolved, is insolvent, or in imminent danger of insolvency or has forfeited its corporation rights."

Learned counsel for respondents says that his time was too limited to prepare an answer and meet the issue at the time the application was set for hearing. Beyond doubt an

application for an extension of time in which to prepare his answer would have been granted by the lower court, and the allegations of insufficiency, incompetency, with other more serious and far-reaching charges, were of a nature that should have been met by a positive denial other than by demurrer, which, in effect, admits the truth of the allegation, but denies that the plaintiff is entitled to the relief demanded. As to respondents' right to answer in the lower court now, this court has nothing to say; that right is governed by statute.

We find no merit in the petition, and it is denied.

SULLIVAN, J., concurs.

#### WOOD v. BRODERSON.

(Supreme Court of Idaho. March 12, 1906.)

##### 1. TRIAL—FINDINGS—FAILURE TO FIND.

Where the court fails to find on all the material issues made by the pleadings, the judgment will be reversed, unless a finding upon such issues would not affect the judgment entered.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 940-945.]

##### 2. SAME—SUFFICIENCY OF FINDING.

The following finding held insufficient to support a judgment, to wit: "That all the issues of fact raised by the pleadings in this case are hereby found and decided in favor of the defendant and against plaintiff."

##### 3. SAME—NECESSITY FOR FINDING.

The issues made by the pleadings held sufficient to require a finding upon the rate of commission to be paid.

##### 4. BROKERS—RIGHT TO COMMISSION.

Where a party employs a real estate broker to sell a piece of real property at a stipulated price, and the broker procures a purchaser who purchases the property at that price, the broker is entitled to his commission therefor.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 85-89.]

##### 5. SAME—ACTION FOR COMMISSIONS—EVIDENCE.

Held, in this case, that there is not a substantial conflict in the evidence, such as to bring it within the rule that where there is a substantial conflict in the evidence, the findings of the court will not be disturbed.

(Syllabus by the Court.)

Appeal from District Court, Canyon County; Frank J. Smith, Judge.

Action by A. E. Wood against Claus F. Brodereson. Judgment for defendant, and plaintiff appeals. Reversed.

Richards & Haga, for appellant. T. D. Cahalan, for respondent.

SULLIVAN, J. This action was brought to recover a commission of \$700 for services rendered in selling for the plaintiff 40 acres of land, situated near the town of Payette, Canyon county, for the sum of \$14,000. The complaint sets out two causes of action; one on contract, and the other on quantum meruit. It is alleged, among other things, in the first cause of action, that the plaintiff was a real

estate agent, and on or about the 1st of January, 1903, defendant employed him to sell a certain 40-acre tract of land situated near the town of Payette, and promised to pay the plaintiff for services rendered in securing a buyer for the same a commission of 5 per cent. on the purchase price thereof; that plaintiff after being so employed expended a considerable sum of money in advertising said real estate, and in taking persons out to view the same, and that through such services and efforts a sale of said premises was made on or about the 5th of October, 1903; that thereupon defendant became indebted to the plaintiff in the sum of \$700. And as a second cause of action the plaintiff alleges that while engaged as a real estate agent and broker, the plaintiff performed services for the defendant at defendant's instance and request in effecting a sale for defendant of a certain 40-acre tract of land belonging to the defendant, and situated near the town of Payette; that plaintiff expended considerable sums of money in advertising said land for sale, and taking persons out to inspect the same, and that through his services and efforts a sale of said premises was made on the 5th day of October, 1903, for the sum of \$14,000; that plaintiff's services were reasonably worth \$700, which at the time of the sale defendant undertook and promised to pay, but no part thereof has been paid, although payment of the same has been demanded by the plaintiff. The prayer is for \$700 damages, with interest and costs. The defendant by his answer specifically denies the allegations of the complaint, and in his second defense sets up a contract entered into on or about the 10th day of April, whereby plaintiff was to receive 2½ per cent. commission for the sale of the lands in question and adjoining land at \$250 per acre, and avers that no sale was made thereunder. Defendant then sets up a second contract entered into about the 15th of September, 1903, whereby the plaintiff was to sell the 40-acre tract that was subsequently sold for \$14,000 at a commission of 2½ per cent., but alleges that the defendant withdrew the land from sale on the 29th of September, informing the plaintiff at that time that the land was no longer for sale. Both of said contracts were oral. Judgment was entered for the defendant and a motion for a new trial was overruled. This appeal is from the judgment and said order.

The failure of the court to find upon all the issues raised in the pleadings is assigned as error, as well as the insufficiency of the evidence to justify the findings and decision of the court. As to the first assigned error: It is clear that the court failed to find upon all of the material issues raised by the pleadings. The issue of the employment of appellant to sell the real estate described in the complaint is found in favor of appellant, but fails to find the amount or per cent. of commission to be paid for such services. It is

alleged in the first cause of action that respondent agreed to pay 5 per cent. on the purchase price of said land as commission. while respondent averred in his answer, and testified on the trial, that it was 2½ per cent., and the court failed to find upon that issue. It was alleged in the complaint that the appellant expended considerable money in advertising said real estate for sale, and in taking persons out to view it for the purpose of buying. Those allegations were denied by the answer, and the court failed to make a finding thereon. The respondent averred in his answer that the first contract with appellant was to terminate on July 1, 1903, and the court failed to find on that issue. As an affirmative defense the respondent averred a contract entered into with appellant on the 15th of September, 1903, for the sale of said land, and avers that said contract was to continue for one week only. This defense is significant, and, as I view it, has an important bearing on this case, as it is averred that said land was listed with appellant for sale at \$14,000, the very price that respondent sold the land for on the 5th of October, 1903, to a purchaser introduced to him by appellant. But it is contended by counsel for respondent that appellant did not "introduce" the purchaser to respondent. In such transactions as this the formal introduction required in polite society is not absolutely necessary. It is sufficient if the appellant procured the purchaser. The court failed to find on this affirmative defense, although it was a clear cut issue and considerable testimony received thereon. As late as September 29th, only seven days before the sale, respondent avers in his answer that he asked appellant if he had yet found a purchaser for said land, when, according to the averment in his answer, the contract, which was to continue for a week only, had expired on September 22d. Why ask that question on that date, if the contract had been terminated seven days before? An issue was made as to the amount of commission to be paid in case of a sale, and also as to whether the respondent withdrew from sale the land in question on September 29th, and terminated the contract between them, and the court failed to make findings thereon.

The fourth finding is apparently a very sweeping one, and is as follows: "That the plaintiff, under said employment, never sold defendant's said land, nor any part thereof, to any person, nor did the plaintiff ever notify the defendant, or his agent, that he had sold said property, or any part of the same, for any sum at all, or that he had found a purchaser for said land, or any part thereof, at any price or sum, nor did plaintiff ever present a purchaser to the defendant." When analyzed, this finding does not meet the issues. While it is there found appellant "never sold defendant's land," nor "notify the defendant or his agent that he had sold said property, \* \* \* or that he had found a

purchaser for said land, \* \* \* nor did plaintiff ever present a purchaser to the defendant," as under the issues appellant to earn his commission was not required to "sell said land" nor formally "notify" the defendant that he had sold the same or that he had found a purchaser or "presented" a purchaser to respondent. It was sufficient if the appellant found a purchaser, showed him the land and explained its desirability as a purchase, and was instrumental in making the sale. No formal introduction of the purchaser to the owner was necessary, and no formal notification was required, but the evidence clearly shows that appellant gave respondent the name of the purchaser, and he testified that a Mr. Wells in the employ of appellant introduced him to respondent. Said finding is equivocal, evasive, and does not squarely meet the issues. The rule is well established in this state that when the court fails to find on all of the material issues, the judgment will be reversed, unless a finding thereon either for or against the successful party would not affect the judgment entered. *Tage v. Alberts*, 2 Idaho (Hash.) 271, 13 Pac. 19; *Standley v. Flint* (Idaho) 79 Pac. 815; *Carson v. Thews*, 2 Idaho (Hash.) 176, 9 Pac. 605; *Bowman v. Ayers*, 2 Idaho (Hash.) 305, 13 Pac. 346; *Haight v. Tryon*, 112 Cal. 4, 44 Pac. 318. This rule applies to all material issues even though made by affirmative defenses. In 2 *Spelling on Appellate Practice*, § 591, the author says: "It is immaterial whether the issue arises upon allegations in the complaint, and denials in the answer, or upon affirmative defenses pleaded in the answer and treated as denied by the plaintiff."

Reliance is placed upon the sixth finding by counsel for respondent, which finding is as follows: "That all the issues of fact raised by the pleadings in this case are hereby found and decided in favor of defendant and against the plaintiff." That finding at once suggests an inquiry as to what issues are raised by the pleadings, and that in many cases is of no little difficulty to determine. Take the case at bar. The court below may have concluded that the affirmative defense set up in the answer did not present an issue, while this court has concluded that it did do so. Said finding is indefinite, and not a sufficient finding. *Johnson v. Squires*, 53 Cal. 37. It is difficult to determine from the finding of facts the exact position of the trial court. But from the record we infer the court took the view that said land was not sold under the first agreement between the parties, and as stated by the judge, "the plaintiff has failed to establish by a preponderance of the evidence that he ever notified defendant that he had a purchaser for said land under said agreement." The rule does not require a formal notification in such a matter. It is sufficient if plaintiff procured the purchaser. And the judge said: "The evidence discloses a subsequent agreement made in September, 1903, but does not show the rate of compensation or any

agreement in regard to the amount of compensation plaintiff was to receive for his services in selling said property. The evidence shows clearly that the plaintiff performed certain services for defendant, but there is an absolute failure of proof as to the reasonable value of said services." This statement would indicate that the court found for respondent because of an absolute failure to prove the value of the services, which the court conceded the appellant had performed. On the question of compensation respondent avers in his answer that he stipulated to pay 2½ per cent. commission in case of a sale, and on that admission the appellant was entitled to judgment in case he procured the purchaser. Witness Brainard testified that one selling a farm like the one described in the complaint, a reasonable commission would be 5 per cent. This I think sufficient to fix the commission to be paid, if appellant procured the purchaser. The answer of respondent admits that the land was listed with appellant for sale in April, 1903, but the parties do not agree as to the time the contract was to continue and the commission to be paid in case of a sale. The respondent contends that the contract was to expire on July 1, 1903, while the appellant contends that, in case the orchard tract was not sold until after July 1st, respondent should retain that year's crop, and, if sold before that date, the crop was to go with the land.

It also appears that after the 1st day of July, the respondent called on appellant, and urged him to sell said land, and that he continued to advertise the same and show it to prospective purchasers. While the respondent testified that said contract was to terminate on July 1st, the circumstance of his calling on the appellant repeatedly after that date and urging him to sell said land, and when a purchaser procured by appellant went to respondent in September he did not protest that the land was not for sale, but assisted the appellant in showing the land to the best advantage by furnishing returns from the sale of fruit and arranged for the purchaser to go through and examine the house on the premises. If the place was not for sale after the 1st of July, it is a little remarkable that when the purchaser called on him on the 15th of September, and talked with him in regard to the purchase of the property, that he did not then and there inform him that the property was not for sale. It further appears from the record that the appellant found a purchaser for said land at \$300 per acre, and when he informed the respondent that he had found a purchaser, respondent asked at what price, and the appellant informed him that it was at the price of \$300 per acre. He replied that he could not take that for it then, and the appellant replied that "It was a pretty late time then to put up the price." The appellant there informed the respondent that

he feared the raise in the price would block the sale; that it would bar the sale. It was at that time respondent informed the appellant that he would take \$14,000 or \$350 per acre for said land, and, after appellant had persuaded the purchaser to give that amount, and the purchaser informed the respondent that he would take it at that price, the respondent testified as follows in regard to that transaction: "It kind of surprised me. He told me he would take it, \$14,000 cash, so I told him that I had better see my wife about it. It kind of frightened me. It scared me." It seems from the evidence that the respondent was vacillating and scared and frightened whenever he was offered the price that said land was listed for. The further fact that the respondent testified that the second listing of the property for sale was to continue only for a week from the 15th of September, and thereafter testified that on the 29th of September he told the appellant that "it is all off," and that in seven days thereafter he sold the land to the purchaser procured by the appellant for \$14,000 on very favorable terms as to deferred payments, would at least go to indicate that he was attempting to evade the payment of a commission to the one who had procured him the purchaser. It is clear from the evidence that the appellant not only furnished a purchaser who was ready, willing, and able to buy, but did buy the land at the listed price. At the time of the sale respondent for some reason requested the purchaser not to inform the appellant of the sale, apparently desiring to keep it a secret, and keep appellant in ignorance of the sale. Considering all the facts of the case, and the statement of the respondent that the power to sell was revoked on the 29th of September, yet in the face of that statement, seven days thereafter he proceeds to sell the property to the very person whom the evidence clearly shows was procured by the appellant, is at least very significant. *Smith v. Anderson*, 2 Idaho (Hash.) 537, 21 Pac. 412, was a case somewhat similar to the case at bar; the court said, after reciting the facts: "Considering these facts, and considering the fact that the defendants stated in their letter of revocation that they did not desire to sell the ranch, yet, in the very teeth of that statement, proceeded to sell, and to the very person to whom the plaintiff had introduced them, it is a fair inference from the testimony that the object of the letter of revocation was an attempt to deprive the plaintiff of his commission." While there is a conflict in the oral testimony on some points in the case, the circumstances and physical facts surrounding the transaction clearly support the contention of the appellant, and that in connection with the failure of the court to find upon the material issues, requires a reversal of the judgment, and the granting of a new trial in order that justice may be done. There is not such a conflict

in the evidence as would bring this case within the well-established rule on the question of substantial conflict therein.

The judgment is reversed, a new trial granted, and the cause remanded, with costs in favor of appellant.

STOCKSLAGER, C. J., concurs in conclusion reached. AILSHIE, J., concurs.

### STATE v. WRIGHT.

(Supreme Court of Idaho. March 16, 1906.)

#### 1. CRIMINAL LAW—APPEAL—MOTION FOR NEW TRIAL.

Under the provisions of section 7953 of the Revised Statutes of 1887, where a defendant serves and files his notice of intention to move for new trial, and states therein the grounds upon which his application is based, and the trial court or judge and respective counsel treat such notice as an application for a new trial, this court will so treat it, and not dismiss the appeal on the ground that a formal application was not made.

#### 2. LARCENY—EVIDENCE—SUFFICIENCY.

Evidence examined, and held sufficient to sustain verdict.

#### 3. CRIMINAL LAW — INSTRUCTIONS — ASSUMPTION OF FACTS.

An instruction that leaves the questions of fact to be found by the jury, and only suggests the law applicable in case they find certain facts to exist, is not objectionable on the ground that it assumes that certain facts do exist.

#### 4. SAME—BINDING INSTRUCTIONS—POWER OF COURT.

Under the provisions of section 7877 of the Revised Statutes of 1887, it is not error for the court to refuse to instruct the jury to find the defendant not guilty; but the court may advise the jury to acquit the defendant, but the jury is not bound by such advice.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1727.]

(Syllabus by the Court.)

Appeal from District Court, Washington County; Frank J. Smith, Judge.

John Wright was convicted of larceny, and appeals. Affirmed.

Frank Harris, for appellant. J. J. Guheen, Atty. Gen., and Edwin Snow, for the State.

STOCKSLAGER, C. J. Appellant was charged with the crime of grand larceny in the district court of Washington county, to wit: "That the said John Wright, on or about the 15th day of May, 1905, in the county of Washington, state of Idaho, then and there one bay horse, the same being the personal property of W. M. Pearson, did unlawfully and feloniously steal, take, lead, and drive away, contrary to the form, force, and effect of the statute in such cases made and provided, and against the power, force, and dignity of the state of Idaho." To this information defendant pleaded not guilty. A trial was subsequently had, which resulted in a verdict of guilty. Defendant moved for a new trial, which was overruled. The appeal is from the order overruling the motion

for a new trial and from the judgment. Learned counsel for appellant assigned two errors, to wit: (1) "That the court misdirected the jury in matters of law, and erred in the matter of decisions of questions of law arising in the trial of the cause." (2) "That the verdict is contrary to law and the evidence."

Counsel for respondent moved to dismiss the appeal from the order of the court denying a new trial, and also to strike the bill of exceptions from the record, for the reason that appellant did not comply with section 7953, Rev. St. 1887, by making his application for a new trial within 10 days after verdict. This section provides: "The application for a new trial may be made before or after judgment, and must be made within ten days after verdict, unless the court or judge extends the time." The verdict was rendered on November 1st, and on November 3d the defendant served and filed what is designated "Notice of Motion for New Trial," wherein he stated all the grounds upon which he thereafter moved the court for a new trial, and addressed the notice to the district judge and the prosecuting attorney in and for Washington county. On the same date the prosecuting attorney entered into a stipulation with defendant's counsel for an extension of time for a period of 60 days in which to prepare and present a bill of exceptions, and on the same date the trial judge made and entered an order to the same effect. It is clear and undisputable, we think, that the prosecuting attorney, district judge, and all parties to this action understood the so-called "notice of motion for new trial" as amounting to an "application for a new trial," within the meaning of section 7953, Revised Statutes. Had they not so understood it, there would have been no use or object in granting an extension of time for the settlement of "a bill of exceptions and statement of the case on motion for a new trial," as was done by the trial court. The foregoing views are also reinforced by the fact that the prosecuting attorney made no objection whatever to the consideration of defendant's motion for a new trial, when the same was formally made, on the ground that the same had not been made within the statutory time. The contention which is here made by the Attorney General for the first time in this court was never presented to the trial judge nor urged in any manner until the case was called for hearing in this court. We are admonished by section 8070, Rev. St. 1887, that in the hearing of criminal cases on appeal "the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." This section has been time and time again invoked by this court against defendants who were relying on mere technical objections, and we can see no reason why the same statute is not as clearly applicable

to and enforceable against the state, when it urges a mere technical variance from the statutory requirements which appears neither to have misled nor prejudiced the rights of the people in any respect whatever. It is clear to my mind that the appeal from the order denying defendant's motion for a new trial should not be dismissed. Section 8056, Rev. St. 1887, provides that "if the appeal is irregular in any substantial particular, but not otherwise, the appellate court may, on any day and term, on motion of the respondent upon five days' notice, accompanied with copies of the papers upon which the motion is founded, order it to be dismissed." The objection urged here does not amount to a substantial irregularity. It makes no difference what a party litigant calls a paper or document he files in legal proceedings. The court will look to the purpose, effect, and object of the document. The notice given by defendant in this case advised the state beyond all peradventure that he would formally move for a new trial as soon as he could get his bill of exceptions and statement prepared and settled; and in pursuance of this notice he prepared, served, and presented his statement, procured the settlement of the same, and thereupon made his formal motion for a new trial. The rule announced in *State v. Smith*, 5 Idaho, 201, 48 Pac. 1060, will be so modified as to hold that where a notice of intention to move for a new trial is made within the statutory time, and contains the grounds of the application, and is treated by the trial court and respective counsel as an application for new trial, it will be so treated on appeal.

The insufficiency of the evidence to sustain the verdict is assigned as error. On an examination of the evidence, we conclude that there was sufficient to support the verdict.

The giving of instructions 11 and 12 is assigned as error. Instruction 11 is as follows: "Possession of property recently stolen is not evidence sufficient of itself to warrant a conviction. It is merely a circumstance to show guilt, which, taken in connection with other evidence, is to determine the question of guilt. If, however, the jury believe, beyond a reasonable doubt, that the property described in the information was stolen, and was seen in the possession of the defendant shortly after being stolen, the failure of the defendant to account for such possession or to show that such possession was honestly obtained, is a circumstance tending to show his guilt; and the defendant is called upon to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such." The twelfth instruction reads: "The court instructs you that in order to find that the property described in the information was in the posses-

sion of the defendant, for the reason that it was found in the possession of Zibe Morse and Thomas Jackson, if you find that it was in their possession, then you must find that the said Zibe Morse and Thomas Jackson were authorized and directed by the defendant to take possession of said property described in the information for and on behalf of said defendant, and as the property of the said defendant." We think that those instructions correctly state the law, and there was no error in giving them. They should not, however, be used as a model, as they are not as clear as they might be drawn and might tend to confuse. The court does not assume by either instruction that the evidence shows any particular fact. Both are conditional, and leave the question of fact in each instance for the jury to determine, and suggest the law to be applied in case they find certain facts to exist.

Counsel for appellant also submitted a peremptory instruction for the consideration of the court to be given to the jury, which was in effect to return a verdict of not guilty, and urges that the court erred in not giving this instruction. There are two reasons why the court did not err in refusing to give that instruction: (1) In criminal cases the court is not authorized to direct the jury to return a verdict of not guilty, but may so advise, which advice the jury may decline to follow. Section 7877, Rev. St. 1887; *Territory v. Neilson*, 2 Idaho (Hasb.) 614, 23 Pac. 537. (2) The evidence was sufficient to sustain the verdict.

The judgment is affirmed.

AILSHIE and SULLIVAN, JJ., concur.

#### LATER et al. v. HAYWOOD.

(Supreme Court of Idaho, Feb. 21, 1906. On Rehearing, March 16, 1906.)

#### 1. WITNESSES—PRIVILEGED COMMUNICATIONS—CONVEYANCE AND PARTY TO CONVEYANCE—ATTORNEY AND CLIENT.

Communications which pass between one who is merely acting as a conveyancer or friendly advisor and the grantor or grantee are not privileged communications under the provisions of subdivision 2, § 5958, Rev. St. 1887, which protects communications which pass between attorney and client in the course of professional employment.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 749, 752.]

#### 2. TRIAL—MOTION FOR NONSUIT—EFFECT OF EVIDENCE.

On a motion by the defendant for nonsuit after the plaintiff has introduced his evidence and rested his case, the defendant must be deemed to have admitted all the facts of which there is any evidence and all the facts which the evidence tends to prove.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 372, 374.]

#### 3. SAME—WHEN GRANTED.

A case should not be withdrawn from the jury on motion for nonsuit after the plaintiff has introduced his evidence, unless the conclusion from the evidence necessarily follows, as

a matter of law, that no recovery could be had upon any view, which could reasonably be drawn from the facts which the evidence tends to establish. [Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 359, 360.]

Stockslager, C. J., dissenting.  
(Syllabus by the Court.)

Appeal from District Court, Fremont County; J. M. Stevens, Judge.

Action by Peter Later and others against Martha Haywood. From a judgment for defendant, plaintiffs appeal. Reversed.

The plaintiffs, who are appellants in this court, commenced their action in the district court in and for Fremont county on the 11th day of January, 1905, praying that a certain deed made by George E. Hill, Sr., to Martha Haywood, though absolute in form, be declared to be a mortgage on the ground that such deed was given only for the purpose of securing the payment of a loan from the defendant Haywood, to Frederick R. Hays. The plaintiffs also prayed that they be adjudged and decreed the successors in interest of George E. Hill, Sr., and Frederick R. Hays, and that it be decreed that they are the legal owners of the property described in the deed, and that the defendant be required to convey the legal title to the plaintiffs upon their paying the amount of the loan with interest. It appears that the plaintiffs, Peter Later, Richard Later, and Samuel S. Later, had been for a number of years prior to the commencement of the action, copartners doing business under the firm name and style of Later Bros., and that prior to the commencement of the action the firm had been dissolved and the business and accounts of the firm had been turned over to the Rigby Hardware, Lumber & Manufacturing Company, a corporation which had been organized by the Later Bros., to succeed to the rights and interest of the copartnership. It was also agreed and understood that any debts or accounts that could not be collected by the corporation should be turned back to the Later Bros. About the 15th day of July, 1902, the plaintiffs made a contract with George E. Hill, Sr., to build a house for him on his ranch, and, in the course of the business dealings, agreed to take in payment for their services and materials furnished, certain real property consisting of some town lots and the buildings thereon in the town of Rigby, at a consideration of \$675. The plaintiffs in the meantime had a conversation with one of their employes, Frederick R. Hays, whereby they agreed to secure for Hays the property involved in this action, either by purchasing the same or by assisting him in raising the purchase price. In the course of plaintiffs' business dealings with Hays, a loan was secured through them from the defendant Martha Haywood, in the sum of \$400 for the use and benefit of Hays, the defendant making the loan on the agreement and understanding that she should re-

ceive an absolute deed to the property as security for the loan. This appears to have been agreed to by all parties interested, and a deed was made and executed by George E. Hill, Sr., in favor of the defendant Haywood, and was delivered by Hill's son to the Later Bros. and the \$400 cash was paid by the defendant to Later Bros. for the use and benefit of Hays, whereupon the deed was delivered by them to the defendant. At the time of the payment of the loan, and the receipt of the deed of conveyance, a contract was entered into whereby the defendant agreed to reconvey the property to Frederick R. Hays upon the payment of the amount of the loan, together with the interest thereon. At the time of this transaction there was due to Hays from the Later Bros., the sum of about \$100 for labor. The amount of the loan and the \$100 was paid to Hill on the purchase price for the property and the Later Bros. paid Hill the difference. About two weeks thereafter, Hays executed and delivered to the Rigby Hardware, Lumber & Manufacturing Company his promissory note for the sum of \$184, being the difference between the purchase price for the property, together with the amount of money which the Later Bros. had to his credit, and the purchase price paid to Hill for the property. Some months after the purchase had been made and the loan secured, Hays executed and delivered a quitclaim deed in favor of the plaintiffs, the Later Bros., for the property in dispute. The plaintiffs introduced their evidence tending to establish the allegations of their complaint, and, after they had rested their case, the defendant moved for a nonsuit, which motion was granted. The plaintiffs appealed from the judgment of nonsuit made and entered against them. Reversed, and new trial ordered.

Caleb Jones, for plaintiffs. Holden, Holden, Holden & Holden, for respondent.

AILSHIE, J. (after stating the facts). The first four assignments of error go to rulings of the court in settling the issues in the case. These were matters addressed to the discretion of the trial court, and we find no abuse of that discretion in this case. The fifth and sixth assignments are predicated on the denial of motions by plaintiffs to have default entered against defendant. While the defendant, was as a matter of fact, in default, in the strict sense, it was within the power and discretion of the court to extend and enlarge the time for answering, and no injury appears to have resulted from such action.

The seventh assignment is that the court erred in sustaining defendant's objection to the admission of the evidence of J. F. Bonham. The witness was called, and, after being sworn, testified that he had resided at Rigby and was acquainted with Later Bros., and also with the defendant; that he had

talked with Mrs. Haywood in relation to the matter at issue about one year prior to the trial of the case. It was shown by the witness that he had never been admitted as an attorney in any court, and that he did not hold himself out as such, but that, on the other hand, he was a conveyancer and kind of general counselor and advisor of the people in the village of Rigby. He advised his neighbors and friends concerning business and legal transactions which arose among them. It does not appear that he had ever been employed by defendant as a legal advisor in this matter. It is sufficient to say that, so far as the record discloses, the witness was not disqualified under subdivision 2, § 5958, Rev. St. 1887.

The last assignment is made against the action of the court in granting a nonsuit. This action was taken under subdivision 5, § 4354, Rev. St. 1887. A careful perusal of the record convinces us that the evidence produced by the plaintiffs was sufficient to put the defendant to her proof. The evidence, at least, tended to prove all the material allegations of the complaint. The rule requiring the evidence in such cases as the one at bar to be clear and convincing applies only to the determination of the case on the evidence after both sides have submitted their proofs and has no application to a case where the defendant, resting on plaintiffs' proof alone, moves for nonsuit. By such a motion the defendant admits the existence of every fact which the evidence tends to prove, or which can be gathered from any reasonable view of the evidence. *Great Northern R. R. Co. v. McLaughlin*, 17 C. C. A. 330, 70 Fed. 673; *Cain v. Gold Mountain Min. Co. (Mont.)* 71 Pac. 1004; *Railroad Co. v. Everett*, 152 U. S. 107, 14 Sup. Ct. 474, 38 L. Ed. 373; *Cravens v. Dewey*, 13 Cal. 40; *McKee v. Greene*, 31 Cal. 418; *Felton v. Millard*, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750; *Lewis v. Lewis*, 3 Idaho (Hiasb.) 645, 33 Pac. 38; *Edmisson v. Drumer-Flato Commission Co. (Okla.)* 73 Pac. 958; 6 Ency. P. & P. 441. It is also contended that there was a fatal variance between the allegations of the complaint and the proof submitted. Respondent argues that the evidence shows that whatever claim or cause of action has been disclosed belongs to the Rigby Hardware, Lumber & Manufacturing Co., a corporation, and not to the plaintiffs. This contention rests on the fact that the Later Bros. were the incorporators of the new company, and that the corporation appears to have succeeded to all the property and rights of the Later Bros. It also appears that the copartnership known as Later Bros. was dissolved sometime prior to the commencement of this action. It was shown, however, that the accounts were turned over to the corporation only conditionally, and that such as might not be collected within a given time should be turned back.

So far as disclosed by the record, the right of action rests in the plaintiffs and a recovery by them will be a bar to a recovery on the same cause of action by the Rigby Hardware, Lumber & Manufacturing Co. If any assignment of the subject-matter of the cause of action has ever been made—which fact does not appear—it is not shown that the defendant has ever had any notice thereof either actual or constructive. The dissolution of the partnership does not preclude the maintenance of an action for the collection of debts and liabilities due, nor from recovering property that belonged to the firm.

The judgment must be reversed, and it is so ordered, and the cause is remanded for a new trial. Costs awarded to appellants.

SULLIVAN, J., concurs.

STOCKSLAGER, C. J. (dissenting). I cannot concur in the conclusion reached by my associates for the reason that I do not believe that the plaintiffs are entitled to any relief. Before a plaintiff can recover in a civil action of this character he must show he is the real party in interest. In this case Later Bros. plead they are entitled to the relief prayed for, and if they prove any one is entitled to an equity in the property in controversy, it is the Rigby Hardware, Lumber & Manufacturing Company. The proof shows that Later Bros. and others organized a corporation called the Rigby Hardware, Lumber & Manufacturing Company; that a corporation took over all the assets of Later Bros. Later Bros. ceased to exist as a copartnership after the incorporation of the Rigby Hardware, Lumber & Manufacturing Company, and the equity, if any, in the property in controversy, passed to the Rigby Hardware, Lumber & Manufacturing Company as one of the assets of Later Bros.; the corporation is still in existence. We find a letter in the record that throws much light on the question before us: "Rigby, Idaho, June 21, 1904. Mrs. Martha Haywood, Rigby, Idaho—Dear Madam: Your proposition made to us through Richard Later to pay us \$140.00 in full for our claim against the property you hold as security for loan, being lots 5 and 6, block 2, town of Rigby, has been considered by the directors of our company and refused. We feel that this company has been as generous with you in this matter as any sane person could wish. We wish to avoid trouble and foreclosure proceedings, but in this matter you certainly cannot object to the ultimate result of such procedure. The members of our company insist on immediate action being brought to recover the amount due us, with interest, and have instructed the undersigned to notify you that unless you pay to this company before the morning train leaves for St. Anthony, Friday, the 23d inst. the sum of \$150.00 (being the proposi-

tion made to you on the 18th inst.) the said proposition will be off, and we shall go to the county seat and institute foreclosure proceedings. This proposition is final and do not expect further overtures from us, for none will be made. Most respectfully yours, The Rigby Hardware, Lumber & Manufacturing Company, per George E. Hill, Jr., secretary and treasurer." This letter would indicate that the business officer of this corporation believed the Rigby Hardware, Lumber & Manufacturing Company had some kind of a claim against respondent. There is no dispute about the claim referred to being the same one upon which this action is predicated. The record fails to disclose any transfer of this claim from the Rigby Hardware, Lumber & Manufacturing Company to Later Bros., after the time this letter was written and the commencement of this action. The motion for nonsuit was sustained on the ground of fatal variance between the pleadings and proofs and other grounds.

I do not think there was any error in the ruling of the court in sustaining this motion, at least on the ground above indicated, and the judgment should be affirmed.

#### On Petition for Rehearing.

**SULLIVAN, J.** This is a petition for rehearing. The petitioner suggests that the majority of the court have treated the petitioner's motion for nonsuit as made solely upon the ground of failure of proof and not as a motion made upon the ground of fatal variance between the allegations and the proof. In that, counsel for petitioner is mistaken. It is admitted by counsel that the motion for nonsuit involved two questions: (1) Whether the defendant had been actually misled to her prejudice in maintaining her defense upon the merits because of the variance between the allegations and the proof; and (2) were the appellants the real parties in interest? While the first point is only inferentially decided by the opinion, the court considered that matter and concluded that the variance between the allegations and proof did not mislead the appellant. Section 4225, Rev. St. 1887, provides that whenever it appears that the party has been so misled, the court may order the pleadings to be amended upon such terms as may be just; but it is clear to us that the variance complained of did not mislead the adverse party, and for that reason the court followed the provisions of section 4231, Rev. St. 1887, which provides that the court must in every stage of an action disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.

A rehearing is denied.

**AILSHIE, J.,** concurs.  
85 P.—32

#### BANK OF COMMERCE, Limited, v. BALDWIN et al.

(Supreme Court of Idaho. March 6, 1906.)

##### 1. HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—POWER TO CONTRACT.

Under the act of March 9, 1903 (Sess. Laws 1903, p. 345), a married woman is given the absolute control of her separate property and estate, and has the unqualified right of contracting with reference to such property, and may sell and dispose of the same without the consent or approval of her husband.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 716-718.]

##### 2. SAME—CONSTRUCTION OF STATUTE.

The act of March 9, 1903 (Sess. Laws 1903, p. 345), has reference only to the separate property of the wife and the management and control thereof, and the carrying on of business therewith, and the sale or disposal thereof, and contracts in reference thereto, or for the benefit thereof.

##### 3. SAME—AGREEMENT TO PAY DEBT.

A married woman cannot bind herself personally for the payment of a debt that was not contracted for her own use, or for the use or benefit of her separate estate, or in connection with the control and management thereof, or in carrying on or conducting business therewith.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 317-326.]

(Syllabus by the Court.)

Appeal from District Court, Ada County; Frank J. Smith, Judge.

Action on a promissory note by the Bank of Commerce, Limited, against Geo. E. Baldwin and another. Judgment by default against defendant Baldwin, and judgment of nonsuit in favor of defendant Bowers. Plaintiff appealed. Reversed.

George M. Parsons and Karl Davis, for appellant. Thomas Cahalan, for respondent.

**AILSHIE, J.** This action was commenced by the Bank of Commerce against Geo. E. Baldwin and Sarah A. Bowers to recover a balance of \$5,697.05 due on a promissory note executed by Baldwin and Mrs. Bowers on the 4th day of November, 1903. Baldwin defaulted, and Mrs. Bowers answered, admitting the execution of the note and the amount due, but denying her liability for the reason that the same was executed by her simply as a surety for Baldwin and that the contract did not in any way affect her separate property and was not made for her use and benefit or in reference to her separate estate. The case came on regularly for trial and the plaintiff introduced its evidence. The defendant moved for a nonsuit, on the ground that the evidence of the plaintiff failed to show that the contract was executed for the benefit of or concerning the separate property or estate of Mrs. Bowers, or for her individual or separate use and benefit. This motion was sustained by the court and the plaintiff moved for a new trial, which was denied, and thereupon appealed from the judgment and order denying the motion. The principle and leading question to which

the respective counsel have directed their attention on this appeal is the effect of the act of the Legislature approved March 9, 1903 (Sess. Laws 1903, p. 345), and entitled: "An act giving to married women the management, control, and power of disposition of their separate property, amending section 2495, chapter 3, title 2, Revised Statutes 1887, of Idaho, and repealing sections 2498 and 2499 thereof and all other acts in conflict herewith." Sections 1 and 2 of that act are as follows:

"Section 1. That section 2495, of chapter 3, title 2, of the Revised Statutes of Idaho, 1887, be amended to read as follows: 'Sec. 2495. All property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest or descent, or that she shall acquire with the proceeds of her separate property, shall remain her sole and separate property, to the same extent and with the same effect as the property of a husband similarly acquired.'

"Sec. 2. During the continuance of the marriage the wife has the management, control and absolute power of disposition of her separate property, and may bargain, sell and convey her real and personal property, and may enter into any contract with reference to the same in the same manner and to the same extent and with like effect as a married man may in relation to his real and personal property. Provided, that, the husband shall be bound by such contracts to no greater extent or effect than his wife under similar circumstances would be bound by his contracts."

The act closes with section 5 which specifically repeals sections 2498 and 2499 of the Revised Statutes of 1887.

It is contended by counsel for respondent that under the decision in this state as announced prior to the adoption of the act of March 9, 1903, the plaintiff is not entitled to recover. *Dernham & Kaufman v. Rowley*, 4 Idaho, 753, 44 Pac. 643; *Jaeckel v. Pease*, 6 Idaho, 131, 53 Pac. 399; *Strode v. Miller*, 7 Idaho, 16, 50 Pac. 898; *Holt v. Gridley*, 7 Idaho, 416, 63 Pac. 188. Appellant contends, however, that the foregoing legislation so extended and enlarged the powers and corresponding liabilities of a married woman, as to make respondent liable on the contract in question. This can best be determined by first ascertaining the purpose and extent of this latter legislation. First, it gives the wife the absolute control and management of her separate property and repeals section 2498, which had formerly given the management and control of her property to the husband. Second, it gives to the wife the sole and absolute power to sell and dispose of her separate property and carry on business therewith and make contracts in reference thereto and for the benefit thereof and repeals section 2499 which provided for her becoming a sole trader. In this respect *McDonald v. Rozen*, 8 Idaho, 352, 60 Pac. 123, is no longer the rule of law in this state. It

is safe to say that a most careful examination and consideration of the act of March 9, 1903, will disclose no legislation nor legislative intent therein to, in any respect, change the wife's legal status with reference to any subject or matter other than her separate property. Prior to the amendment the husband was entitled to the custody, control, and management of his wife's separate property, but now she is entitled to its custody and control and may sell and dispose of it without consulting him. She may also make any contracts she pleases with reference thereto. In all other respects the law of this state remains the same with reference to her contracts as it was when the above cited cases were decided by this court. It should be borne in mind that all our legislation with reference to the contracts, powers, and liabilities of married women must be viewed and construed as grants, instead of restriction of power and authority to contract. In *Dernham & Kauffman v. Rowley*, supra, the question arose as to the power of the wife to bind herself to pay a debt contracted by the husband for his use and benefit, and this court, speaking through Chief Justice Morgan, said: "From this exposition it will clearly appear that in order to charge the separate property of the wife, or render it liable to levy and sale, it must be alleged in the complaint, and proven, that the debt was incurred for the use and benefit of her separate property, or was contracted by her for her own use and benefit." In *Jaeckel v. Pease*, supra, the question arose as to the power of the wife to bind herself on a debt contracted for the benefit of the community property, and this court, speaking through Justice Quarles, said: "A married woman cannot bind herself personally for the debt of her husband, or for a community debt, and it is error to render judgment jointly against the husband and wife on a note signed by both in the absence of a showing that the debt was created for the separate use and benefit of the wife, or for the use and benefit of her separate estate." In *Strode v. Miller*, supra, the same principle was enunciated, and *Jaeckel v. Pease* was cited with approval. In *Holt v. Gridley*, supra, a similar question was involved, and this court, speaking through Justice Sullivan, said: "It also appears that the defendants are husband and wife, and there is nothing in the record to show that her separate property is liable for the indebtedness sued on herein. Where it is sought to make the separate property of a married woman liable for debt, it must be alleged and proved that the debt is her own, or made on behalf of her separate property. The wife is not personally liable for the debts of her husband, and neither is her separate property."

It follows, from what we have already said, that in order to bind Mrs. Bowers in this case it will be necessary for the plaintiff to show that the debt was contracted for the use or benefit of her separate property, or for her

own use or benefit, or in reference to the management, control, or business transactions touching such property. There can no longer be any question in this state as to the power of a married woman to bind her separate property and estate for the payment of a debt. The nature of the argument advanced in this case, however, makes it necessary for us to observe that the mere representation by a feme covert that she owns a certain amount, class, and character of property in her own name and right does not create a liability against her estate for a debt not contracted for her use or benefit, or the benefit of such estate. In order to create a charge against her estate for such a debt, it must be made a charge in rem by a mortgage or pledge of the property or in some manner known to or recognized by the law as constituting a lien upon or charge against the specific property. It is not sufficient to furnish a list of property and say: "This is my separate property and I own it in my own name and right." It has been repeatedly held that a married woman who signs a promissory note with her husband for the payment of his debt, and executes a mortgage on her property to secure the payment of the same, creates a liability only in rem and not in personam. The property encumbered is liable for the payment of the debt, but when exhausted the obligation, as against the wife, is extinguished, and no personal liability attaches. *Jaeckel v. Pease* and *Strode v. Miller*, supra. It is different, however, where the liability was originally the wife's debt or contracted with reference to her separate property and estate; or in the management and control thereof; or in the carrying on and transacting business therewith or in reference thereto. In the case at bar the obligation, if an obligation at all, is only in personam, as no property appears to have been mortgaged or encumbered or pledged for the payment of the debt.

We have examined the evidence introduced on behalf of the plaintiff in this case very carefully, and, while it is rather meager and slight, we think it is sufficient to bring the case within the rule announced at the present term in *Later v. Haywood*, 85 Pac. 494, where the court said: "On a motion by the defendant for nonsuit after the plaintiff has introduced his evidence and rested his case, the defendant must be deemed to have admitted all the facts of which there is any evidence, and all the facts which the evidence tends to prove." See, also, *Simpson v. Remington*, 6 Idaho, 681, 59 Pac. 300; *Kannsteiner v. Clyne*, 5 Idaho, 59, 46 Pac. 1019; *Lewis v. Lewis*, 3 Idaho (Hasb.) 645, 33 Pac. 38; *York v. P. & N. Ry. Co.*, 8 Idaho, 574, 60 Pac. 1042. The debt sued on in this case might have been incurred for the use and benefit of the respondent, or for the benefit of her separate estate, and still she might not have actually received and disbursed the money. It may, on the other hand, have been

incurred entirely and solely for the use and benefit of her codefendant, Baldwin. The plaintiff, we think, introduced sufficient evidence to put the defendant to her proofs, and we shall therefore order a new trial. If the respondent can establish a defense that will bring her within the purview of the law, as herein announced, she will defeat plaintiff's right of recovery; otherwise she will fail. The parties should have a full hearing on the merits of this case.

Judgment reversed, and a new trial granted. Costs awarded to appellant.

STOCKSLAGER, C. J., concurs.

SULLIVAN, J. (concurring). I concur in the conclusion reached, to the extent that a new trial should be granted, but am unable to concur in the conclusion that under the laws of this state a married woman cannot bind herself personally for the payment of a debt that was not contracted for her own use, or for the use or benefit of her separate estate.

#### STATE v. DRISKELL.

(Supreme Court of Idaho. April 14, 1906.)

#### CRIMINAL LAW—NEW TRIAL—REVIEW ON APPEAL.

Where respondent was convicted of the statutory crime of rape, and it is shown that the evidence was conflicting on material questions involved in the trial, and the trial judge sustained a motion for a new trial, without stating whether his order was based upon the insufficiency of the evidence or errors of law occurring at the trial, this court will not reverse such order, unless error is manifest from the record.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3067-3071.]

(Syllabus by the Court.)

Appeal from District Court, Latah County; Edgar C. Steel, Judge.

Ernest Driskell was convicted of crime. From an order granting a new trial, the state appeals. Affirmed.

William E. Stillinger and John J. Guheer, Atty. Gen., for the State. Wm. M. Morgan and Albert L. Morgan, for respondent.

STOCKSLAGER, C. J. The prosecuting attorney of Latah county filed an information against respondent, charging him with the crime of statutory rape on the person of one Grace Clark. A trial was had and a verdict returned by the jury finding him guilty as charged in the information. Within the time agreed upon by the prosecuting attorney and counsel for respondent, a bill of exceptions was settled and allowed by the court, and thereafter a motion in arrest of judgment was filed, to wit: "Comes now the above-named defendant and moves the court to arrest the judgment in the above-entitled cause, and that no judgment be pronounced against the defendant on the

verdict hereinbefore rendered, for the reason that the information in said cause does not state facts sufficient to constitute a crime against the laws of the state of Idaho." This motion was filed on the 22d day of January, 1906, overruled by the court, and defendant sentenced to five years' imprisonment in the State Penitentiary. On the same day counsel for respondent there moved for a new trial on the following alleged errors: "(1) That the court misdirected the jury in matters of law arising during the course of the trial. (2) That the verdict is contrary to both the law and the evidence." On the 29th day of January, 1906, the court made the following order: "This cause coming on to be heard before me this 29th day of January, 1906, the defendant having heretofore in open court regularly made his application and motion for a new trial, within the time heretofore allowed by the court for that purpose, the time for the presentation of that motion and application being agreed to by the respective counsel for the state and the defendant, and the court having heard the arguments of the respective counsel for and against said application and motion, and having examined all the records and papers appertaining, and being fully advised in the premises both as to the law and the facts, it is hereby ordered that the said application and motion of the defendant for a new trial be, and the same is, hereby granted and allowed." It is from this order that the state appeals.

We are not informed by the order of the learned trial judge on which ground or whether on both set out in respondent's motion he granted the new trial. It is conceded by the Attorney General, also the county attorney of Latah county, who took the appeal and made the only oral argument in the case, that orders granting new trials are largely within the discretion of the trial court. The rule is so well settled that it needs neither discussion nor citation of authorities. It is apparent from the record that, in the opinion of the court, the information was sufficient to charge the crime of rape, as a demurrer alleging various reasons why it was insufficient had been overruled by the court. It would hardly seem reasonable that the motion was sustained on account of the insufficiency of the evidence to support the verdict, as this question had been passed upon by the jury; hence we conclude that the court was convinced that an error prejudicial to the rights of the defendant in the instructions given to the jury or refusal to give the requests of counsel for defendant, the admission of evidence on behalf of the prosecution or rejection of evidence offered by defendant, or some one or more of these reasons, prompted the court in granting a new trial. If it was apparent to the judge before whom this case was tried, after an

examination of the record and proceedings of the trial, that some error had been committed that may have misled the jury in the conclusion reached that the defendant was guilty, then it was the duty of the court below to make the order granting respondent another hearing. It matters not, so far as this court is concerned from the record before us, whether the order was based on the insufficiency of the evidence to support the verdict, or whether, in the opinion of the court, errors in the admission of evidence offered by the state or rejection of evidence offered by respondent prompted the court in making the order. He says he made it after familiarizing himself with both the law and the facts, and, as has been so often said by this court, where there are disputed facts, the trial court and jury are in better position to pass upon them than this court. Without discussing what the record shows as to the facts in the case, it is sufficient to say that there are many contradictions shown, especially as to the confession of the respondent, and the facts and circumstances that led up to such confession. In 1 Greenleaf on Evidence (15th Ed.) § 219, discussing confessions and when they may be used against the accused, the author says: "Before any confession can be received in evidence in a criminal case it must be shown that it was voluntary. The cause of practice is to inquire of the witness whether the prisoner had been told that it would be better for him to confess, or worse for him if he did not confess, or whether language to that effect had been addressed to him. \* \* \* " This rule stands uncontradicted by any author or text-writer, and from the record in this case we find much evidence and many contradictory statements as to just what was said by Mr. Clark, the father of Grace Clark, and respondent, prior to the meeting in the office of the prosecuting attorney as well as in the office of such officer. If the theory of the prosecution is correct as to what was said in consultation between Mr. Clark and respondent, then the court erred in granting a new trial. If, on the other hand, the evidence offered by respondent, some of which was admitted and some rejected, shall be accepted as true and should have gone to the jury for their consideration, then there was no error in the order granting a new trial. As heretofore stated, the lower court was more familiar with the record and facts in this case than it is possible to bring here on paper, and we do not feel inclined to disturb his order granting a new trial.

The order granting a new trial is sustained.

SULLIVAN, J., concurs.

AILSHEE, J. (concurring). I have examined the record in this case very minutely

and in detail, have been unable to find any reason why the trial court granted a new trial. It is clear to my mind that the evidence of extrajudicial statements made by the defendant was admissible and that those statements were made under such circumstances as to clearly justify their admission. I am also satisfied that the court did not err in refusing to give the instructions requested by the defendant. The court had already given an instruction to the jury covering the same subject in even a more favorable light to the defendant than this request, and, indeed, one of which he could in no way complain. It is also true that there would have been no error in giving this requested instruction. It is as follows: "The guilt of the defendant cannot be proven alone by the confessions or statements of the defendant without other evidence or circumstances tending to show the commission of the crime, and, unless there is other evidence, it is your duty to acquit the prisoner." I have been unable to find any error committed by the court on the admission or rejection of evidence. The letters written by defendant's sister to him while in jail and after the commission of the alleged offense were clearly inadmissible, and the court properly rejected them. This leaves only one other possible ground upon which the court could have granted a new trial, and that is insufficiency of the evidence. It is true there is a conflict in the evidence, and it was perhaps not an abuse of the discretion vested in the trial court in such cases to grant a new trial if he believed that material evidence introduced on the part of the state was false, or that an injustice had been done the defendant by reason of false statements made by witnesses or misapprehension of facts by the jury.

Since the trial court has assigned no specific reason why he granted a new trial, it is as fair to presume that he granted it for this latter reason as for any other. On that ground alone I concur in an affirmance of the order granting a new trial.

(48 Or. 135)

#### PAXTON v. LIVELY.\*

(Supreme Court of Oregon. May 22, 1906.)

#### APPEAL — SURETIES — COMPETENCY — OFFICERS OF COURT—UNITED STATES COURT COMMISSIONER.

Under Act Cong. May 28, 1896, c. 252, § 19, 29 Stat. 184 [U. S. Comp. St. 1901, p. 499], providing that the United States District Courts shall appoint United States commissioners having the same powers and duties as were performed by commissioners of the Circuit Courts, a United States district commissioner is an "officer of court," within B. & C. Comp. § 1507, providing that no officer of any court is qualified to be bail, so that such

officer is disqualified to act as surety on appeal bond under B. & C. Comp. § 549, subd. 2, providing that qualifications of sureties on appeal shall be the same as in bail.

Appeal from Circuit Court, Wallowa County; Robert Eakin, Judge.

Action by O. F. Paxton against L. D. Lively. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

The plaintiff recovered judgment against the defendant who appealed to this court and filed his transcript on appeal herein, whereupon plaintiff filed a motion to dismiss the appeal for the reason that the defendant had failed to file a proper undertaking on appeal, in that the surety thereon was not qualified as by law required. The record discloses that the plaintiff excepted in the lower court to the sufficiency of the surety on the undertaking and required him to justify before the county clerk, where he testified that he then was, and for several months had been, a United States commissioner appointed by the United States District Court for the district of Oregon, and made no other showings as to his qualifications as surety.

J. A. Burleigh, for appellant. D. W. Sheahan and D. W. Bailey, for respondent.

HAILEY, J. (after stating the facts). The sole question raised by this motion is whether or not a United States commissioner is qualified to act as surety on an undertaking on appeal under our law. Subdivision 3, § 549, B. & C. Comp., provides that "the qualifications of sureties in the undertaking on appeal shall be the same as in bail on arrest, and, if excepted to, they shall justify in like manner." Section 1507, B. & C. Comp., defining the qualifications of bail on arrest, provides: "No counselor or attorney, sheriff, clerk of any court, or other officer of any court, is qualified to be bail." In *Todd v. United States*, 158 U. S. 278—282, 15 Sup. Ct. 880, 39 L. Ed. 982, Mr. Justice Brewer, in speaking of a commissioner of the United States Circuit Court, said: "He is simply an officer of the Circuit Court, appointed and removable by that court." Congress in 1896 abolished all commissioners of Circuit Courts and provided that the United States District Courts for each judicial district should appoint United States commissioners, who "shall have the same powers and perform the same duties as are now imposed upon commissioners of the Circuit Courts." Act May 28, 1896, c. 252, § 19, 29 Stat. 184 [U. S. Comp. St. 1901, p. 499]. The surety in the undertaking on appeal herein, being a United States commissioner, was an officer of a court, and therefore not qualified as surety.

The motion will be allowed, and the appeal dismissed.

\*Rehearing denied July 17, 1906.

**MILLER v. BEAVER HILL COAL CO.**

(Supreme Court of Oregon. May 22, 1906.)  
**MASTER AND SERVANT—SURGICAL ATTENDANCE—MASTER'S LIABILITY.**

Where defendant company collected from plaintiff and other employes a certain amount per month for the maintenance of a hospital for the use of employes, but made no contract to furnish employes medical or surgical attendance at such hospital, defendant's only duty was to use ordinary care in the expenditure of the money collected, and in the employment of physicians and surgeons in charge of the hospital, and it was not therefore liable for fees of a surgeon employed by plaintiff to perform an operation during the absence of the surgeon in charge.

Appeal from Circuit Court, Coos County;  
 L. T. Harris, Judge.

Action by Victor Miller against the Beaver Hill Coal Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is an action to recover for the breach of an alleged contract by which the defendant agreed to provide the plaintiff with necessary medical and surgical attention, at a hospital maintained by it, in case of his injury while in its employ. The facts, as disclosed by the testimony, are these: The defendant company is engaged in coal mining at Beaver hill, in Coos county. It has a hospital at its mine in charge of a physician at which its employes, and those of subcontractors paid through its office, are entitled to be cared for free in case of sickness or injury while in its service. For the support and maintenance of the hospital \$1.50 a month is deducted from the wages of each employe by their consent, or at least without objection from them. In August, 1904, the plaintiff, while at work for a subcontractor, was seriously injured by an iron splinter penetrating the abdominal wall. He was taken to the company's hospital and the wound examined by Doctor Chambers, who was temporarily in charge during the absence of the regular physician. The doctor found the wound to be of such a character as to require a surgical operation which could not be performed by him alone or with the facilities at his command. He telephoned to Coquille, the nearest town, for assistance, but was unable to obtain a surgeon from that place and thereupon at plaintiff's request telephoned to Marchfield to Doctor Mingus, who came out to the mine and performed the necessary operation. Mingus charged the plaintiff \$250 for his services, and, defendant refusing to reimburse him therefor, he brought this action to recover the amount. At the close of the plaintiff's testimony the defendant moved for a nonsuit, which motion was overruled and a verdict rendered in favor of plaintiff. From the judgment entered on the verdict, the defendant appeals.

J. L. Coke, for appellant. J. M. Upton, for respondent.

BEAN, C. J. (after stating the facts). This action is founded on contract, and before the plaintiff can recover he must show that defendant agreed to furnish him with necessary medical and surgical attendance in case of injury, and that it neglected to comply with its contract. The only evidence on this question was the testimony of the plaintiff and the witnesses Bjorquist, Anderson, and Carlson. The plaintiff testified that for sometime prior to his injury he had been assisting in getting out mine timbers for the defendant and that it retained \$1.50 each month from his wages "for the hospital." Bjorquist said the defendant had a hospital at the mine where sick and injured employes were cared for free, and that \$1.50 a month was regularly deducted from the wages of each employe by the company for its support, but that he did not know who employed the physician in charge. Anderson and Carlson testified to substantially the same state of facts. Doctor Swennson, an admittedly competent physician and surgeon, was in charge of the hospital, and testified that he was employed by the defendant; that he was in Portland at the time of the accident to the plaintiff and left the hospital in charge of Doctor Chambers, who was a proper person for that purpose.

This is all the testimony that was given on the trial on the question now under consideration, and we are of the opinion it falls short of proving a contract by the defendant to provide the plaintiff with necessary medical and surgical attendance in case of injury. It merely shows that a certain sum each month was contributed by the plaintiff and his fellow employes, or exacted by the company, for the support and maintenance of a hospital for the use of the employees. There is no evidence that any statement or promise was made by the defendant to the plaintiff, or any of its employes, as to the object and purpose of the contribution or the benefit they would receive therefrom, other than it was for hospital purposes. The transaction, therefore, under the testimony, constituted in law nothing more than a subscription by the plaintiff and the other employes for the charitable purpose of maintaining a hospital, where they could obtain such medical attendance and hospital accommodations as the fund thus subscribed would afford. And the only liability assumed by the defendant in collecting the fund was to expend it for the purpose for which it was subscribed, and no other. The mere fact that it received or exacted the contribution did not impose upon it the absolute duty to furnish each contributor all the medical or surgical attendance he might need or require, whether the fund provided was sufficient or not. A sick or injured employe was entitled to the use and benefit of the hospital and the medical services there provided, to the extent of the money contributed for that purpose, but he was not obliged to go to the

hospital or to accept the accommodations. He could, if he chose, go elsewhere and employ physicians and attendants other than those provided by the company, and, if he did so, the company would not be liable to reimburse him therefor. The only duty of the company was to use ordinary care in the expenditure of the money and in the employment of physicians and surgeons in charge of the hospital, and it is not responsible for the negligence of the surgeon so employed in going away and leaving the hospital in charge of another. *Union Pacific Ry. Co., v. Artlist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581; *South Florida Ry. Co., v. Price*, 32 Fla. 46, 13 South, 638; *Elghmy v. Union Pacific Ry. Co.*, 93 Iowa, 538, 61 N. W. 1056, 27 L. R. A. 206; *Atchison, Topeka & Santa Fé R. Co. v. Zeller*, 54 Kan. 340, 38 Pac. 282; *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, 39 Pac. 95. This action is not based upon a misapplication or misappropriation of the hospital fund by the defendant, or the employment of an unskillful surgeon by it, but upon an alleged contract to furnish plaintiff with necessary medical and surgical attendance—an averment entirely unsupported by the testimony.

The judgment is therefore reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

#### MACRAE v. SMALL.

(Supreme Court of Oregon. May 22, 1906.)

#### 1. WATERS AND WATER COURSES—APPROPRIATION OF WATER FOR IRRIGATION PURPOSES—RIGHTS ACQUIRED.

A settler on land owned by another took possession of a ditch constructed by a third person for the irrigation of land on which he settled and subsequently acquired as a homestead. The settler diverted the water to the land occupied by him. No consent to divert the water was obtained. *Held*, that a grantee of the land under a quitclaim deed of the settler and a deed from the owner did not acquire any right by appropriation to the use of the water.

#### 2. SAME—RELINQUISHMENT OF RIGHT.

Evidence examined, and *held* to show that grantees of land under conveyances expressly conveying a right of appropriation of water for irrigation purposes did not relinquish the right of appropriation.

#### 3. SAME—PRESCRIPTIVE RIGHT—EVIDENCE—SUFFICIENCY.

Evidence examined, and *held* not to show that one entitled to the prior right of appropriation of water for irrigation purposes was deprived of a part thereof by adverse user for the statutory period.

#### 4. SAME.

One entitled to the prior right of appropriation of all the waters of a creek for irrigation purposes can only be deprived thereof by adverse user established by clear and conclusive evidence.

Appeal from Circuit Court, Grant County; Morton D. Clifford, Judge.

Suit by Kenneth F. MacRae against James Small. From a decree for defendant, plaintiff appeals. *Affirmed*.

Errett Hicks, for appellant. Morton D. Clifford and John L. Rand, for respondent.

MOORE, J. This is a suit by Kenneth F. MacRae against James Small to enjoin interference with the flow of water in a ditch to plaintiff's premises, and to recover damages for intermeddling therewith, his right being based on an alleged appropriation, and also on a prescriptive use. The answer denies the material allegations of the complaint, and avers that the defendant's predecessor in interest made a prior appropriation of all the water in question in 1870, which quantity had ever since been used in irrigating the lands now owned by the defendant. The reply admits that defendant's predecessor constructed a small ditch from a stream to his premises, appropriating about six inches of water and, on December 10, 1881, conveyed the lands to defendant's grantor, who immediately abandoned such use, and alleges that no right to the water was thereafter asserted until June 1, 1902. The cause was tried resulting in a decree for the defendant, awarding him the use of all the water in controversy, and plaintiff appeals.

The transcript shows that about 1870, one Marcus D. Reeves settled on unsurveyed public land through which a perennial stream flows that was subsequently called Reeves' Creek. This brook rises in a spur of the Blue Mountains in Grant county, flows southerly and empties into the John Day river, affording in the dry season about 20 inches of water, miners' measurement. Reeves in 1872, constructed a flume from the creek with which he connected a ditch, whereby water was diverted, and used to irrigate crops grown on the arid land on which he had settled. The township in which such land is situated was surveyed in 1873, by authority of the general government, whereupon Reeves filed a homestead claim on the premises containing his improvements, described as follows: The S. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$ , the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , and the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 12, in township 13 S., of range 27 E. of the Willamette meridian, and April 20, 1882, a patent from the United States was issued to him therefor. Reeves built a good house on this land, fenced most of it, cultivated several acres thereof, and raised good crops thereon by use of the water which he had diverted. He also irrigated with water from his ditch a meadow of about 10 acres on land subsequently patented to Louisa Aldrich, which is described as follows: The S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , the W.  $\frac{1}{2}$ , and the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of that section. Reeves and his wife had some difficulty in consequence of which he left her, after making final proof in support of his entry, and made his home with one Robert B. Hay to whom, on December 10, 1881, he executed a deed of his land, but she did not join in the con-

veyance. Hay also obtained a deed of the Aldrich land, and on October 4, 1889, conveyed it and the Reeves tract to the defendant. Reeves left Grant county soon after executing his deed, and having never since been heard from, it is generally believed that he is dead. Mrs. Reeves subsequently married M. E. Gage who in 1884, settled on the N.  $\frac{1}{2}$  of the N.  $\frac{1}{2}$  of section 11 in that township and range, which land was then owned by the Eastern Oregon Land Company, a corporation, the title thereto having been secured, with other lands, by mesne conveyances from the United States, pursuant to an Act of Congress Act Feb. 25, 1867, 14 U. S. Stat. 409, c. 77), granting lands to the state of Oregon to aid in the construction of a military wagon road, and also conformable to an act of the legislative assembly of this state (Laws Or. 1868, p. 3), designating the Dallas Military Road Company as the artificial being entitled to the benefits of such grant. Gage, in the spring of 1886, took possession of Reeves' flume, which he repaired, and of his ditch, which he cleaned out from its head to a point near the termination thereof from which he constructed a ditch to land on which he had settled, and used the water of Reeves' creek to irrigate crops. He executed a quitclaim deed, December 31, 1888, to plaintiff of all his interest in such land, but no mention was made therein of any ditch or water right. The Eastern Oregon Land Company, on November 1, 1890, gave a deed of such land to the plaintiff, who, ever since securing possession of the premises from Gage, has caused water so diverted to be used in irrigating crops grown thereon until June 1, 1902, when his ditch was cut by defendant's tenant, thereby causing an embroilment which resulted in this suit.

The first question to be considered is whether the testimony shows that the use of water from Reeves' Creek was abandoned by Hay, and not thereafter resumed by the defendant until the ditch referred to was cut, and whether MacRae and his predecessor in interest for more than 10 years prior to bringing this suit have, under a claim of right, openly, notoriously, and continuously, applied such water, each season, to the irrigation of crops grown on his land, thus securing by prescription a preferred right thereto? Neither Hay nor the defendant ever lived on the land now owned by the latter, but as they were severally engaged in raising sheep, their flocks were occasionally kept thereon during winters, and in the summers they were driven to and herded on distant ranges. After Reeves conveyed his homestead, the fences which he had built were allowed to decay and sage brush was permitted again to grow on all the land that he had cultivated, except about an acre thereof on which, by the use of water from the ditch, garden vegetables were occasion-

ally raised by persons who temporarily occupied the house on the premises. Some placer mining was attempted on the Aldrich place by using water from the ditch, but as this work was not done in the irrigating season the extent of such use is not deemed material. In the 10 years from the spring of 1886, when Gage first applied the water to the irrigation of crops grown on the land now owned by plaintiff, gardens were cultivated and vegetables raised on the Reeves' homestead by persons and in area as follows: H. Munjar, Jr., in 1893, not an acre, and J. E. Noble in 1894 and the following year about an acre. This is the extent of the use of such water for irrigating the defendant's tillable land during the entire period of the statute of limitation. J. Helmadore, as defendant's witness, testified that in October, 1899, he took a band of sheep to the Reeves' land and kept them there for Small until the following spring, and that while on the place he put some rocks in the head of the ditch and turned water on defendant's land to irrigate grass growing on a meadow. The defendant, as a witness in his own behalf, testified that when he purchased the Reeves' and the Aldrich lands the fences once standing thereon were nearly all destroyed, and that cattle and horses could come and go at will over the entire premises, but that by the use of water from the Reeves' ditch, grass could be kept alive without inclosing the meadow on which it grew; that every year after securing the deed to these lands he had sent men thereto from his home ranch, about four miles distant, to irrigate the premises, frequently going there himself for that purpose, always using the water when necessary and sometimes taking the entire flow of the ditch, thereby keeping the timothy growing on a meadow and also irrigating a lower bench of cultivated land, containing in all about 10 or 12 acres which were partly covered with sage brush; and that he never gave Gage or MacRae any authority to use the water, though as a neighborly act he had permitted the surplus after supplying his needs to flow in the ditch to plaintiff's land, until he learned that a right thereto by adverse user was claimed. The plaintiff's witnesses, who lived in the vicinity of the Reeves' land, severally testified that they never saw the defendant or his employees using water from the ditch. It further appears that plaintiff's occupation is raising sheep, which business Gage was formerly conducting, and as the latter was grazing more land than the parties hereto thought he was entitled to occupy, the plaintiff, at the defendant's suggestion, purchased Gage's interest in the lands on which he had settled and MacRae, referring thereto, testified that defendant then made no claim to the use of the water thereon from Reeves' creek. When Gage's deed was executed an agree-

ment was consummated whereby plaintiff was to keep his sheep west of Reeves' creek, and the defendant would pasture his flocks east of that stream, the terms of which contract the parties have ever since observed. The defendant further testified that he advised plaintiff to purchase Gage's interest in the lands on which he had settled, but he did not then know that any water from Reeves' creek had been used on the premises. The plaintiff does not live on the Gage place, but his tenants have cultivated about 35 acres thereof which, without the use of water from Reeves' creek, must become nearly valueless. Gage testified that when he applied the water of such creek to the irrigation of crops grown on the land now owned by plaintiff he knew that the premises were within the limits of the grant to the state of Oregon, but that he thought, because a part of the section had been settled upon prior to the act of Congress, that the land which he selected would not pass under the terms of the grant, and that he could procure a title thereto directly from the United States, but that having applied therefor at the local land office he was unable to make an entry thereon.

The foregoing is the substance of the testimony given at the trial from a consideration of which the plaintiff's right to use the water of Reeves' creek, if it exist, must be determined. Gage was evidently a trespasser on the land on which he settled, but as the use of water thereon was undoubtedly a benefit to the Eastern Oregon Land Company, the owner of the premises, and as such advantage regularly passed to the plaintiff, it will be assumed, without deciding the question, that Gage was authorized to make a valid appropriation of water, and to apply the same to such land. Such appropriation could legally have been made by taking water from the Reeves' ditch, if the consent of the owner thereof had been secured. *Water Supply & Storage Co. v. Larimer & Weld Irrigation Co.*, 24 Colo. 322, 51 Pac. 491, 46 L. R. A. 322; *North Point Consolidated Irrigation Co. v. Utah & Salt Lake Canal Co.*, 16 Utah, 246, 52 Pac. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607. In *McPhail v. Forney*, 4 Wyo. 556, 35 Pac. 773, Mr. Justice Conway, speaking for the court in discussing this question, says: "Plaintiff in error also forgets that it is just as necessary to the creation and preservation of a water-right, to provide means for the continual diversion of the water from its natural channel and for conducting it to the place where it is applied to some beneficial purpose, as it is to apply it to the beneficial purpose. And he cannot arbitrarily seize and use another's ditch, or interest in a ditch, for that purpose." No consent to divert the water from the ditch was ever secured, but Gage arbitrarily seized and used the conduit constructed across patented land, and hence

plaintiff, as his successor in interest, never acquired any right by appropriation to the use of water from Reeves' creek. A careful examination of the testimony convinces us that neither Hay nor Small intended voluntarily to relinquish the valuable right of appropriation which was initiated by Reeves, and conveyed by express stipulation contained in his deed. It is contended by plaintiff's counsel, however, that from the spring of 1886 to the corresponding season of 1896, the 10 years prescribed by the statute of limitation, during which Gage and the plaintiff used the water in question, no part of the lands so owned by the defendant was irrigated, except a small garden, requiring not to exceed an inch of water which is the greatest measure of his right, and that the plaintiff and his predecessor in interest, in the interim, acquired by prescription, a right to the remainder of the water flowing in Reeves' creek, all of which is necessary to his use in the irrigating season. If the testimony of the defendant is to be believed, that each year after securing Hay's deeds of the premises she used such quantities of water as he needed to irrigate his meadow and other land, sometimes taking the entire flow of the stream, there was therefore such an interference with plaintiff's alleged continuous user as to defeat his prescriptive right.

It is argued by plaintiff's counsel that as the defendant's testimony, in relation to the very existence of the alleged meadow is uncorroborated except possibly by that of Helmadore, and denied by all other witnesses, the improbability of such declaration under oath is self-evident when it is considered that an unfenced meadow would be entirely destroyed by cattle, horses, and sheep grazing thereon. If the grass was utterly uprooted as intimated, its complete destruction in the manner suggested would not necessarily disprove the defendant's statement that the water was applied to his meadow and cultivated land, for the right to the entire use of the stream being primarily vested in him, as Reeves' successor in interest, he might have wasted the entire volume of water on the land which had once produced grass and crops and thereby interrupted plaintiff's adverse user. That no person living in the vicinity of the Reeves' or Aldrich lands saw the defendant or his employes using water on his meadows does not disprove his testimony, for it does not appear from the transcript that a view of the meadow could, at all times, have been obtained by plaintiff's witnesses. That the defendant did not call any of his employes, except Helmadore, to corroborate his statement, to the effect that he frequently sent them to these lands to irrigate grass growing thereon, or offer any proof of their death, absence, or inability to attend the trial, is a circumstance tending to discredit him. So, too, the plaintiff's testimony that if the defendant ever

interfered with the ditch he was never aware of any diminution of the water which continuously flowed therein to his premises where it was used for irrigation, directly controverts the defendant's statement under oath. It is impossible to say with certainty that the defendant's testimony, in the particular mentioned, is true, but as he is entitled to the prior right of appropriation of all the water of the creek, and could only be deprived thereof by an adverse user, the evidence of such prescriptive right ought always to be clear and conclusive, in order to defeat a vested estate in or an appurtenant to land. 1 Am. & Eng. Enc. Law (2d Ed.) 887; 1 Cyc. 1151. The agreement entered into whereby the flocks of sheep of the defendant and of the plaintiff were respectively kept on separate sides of Reeves' Creek, tends to show the friendly relation formerly existing between the parties to this suit and probably accounts for the flow of the surplus water in the ditch to plaintiff's premises. The testimony, in our opinion, fails to show that plaintiff has made out a case with that degree of proof which the rules of law require in such cases, but rather that the weight of evidence discloses that defendant's irrigation of his meadow and other land, by means of the flume and ditch from Reeves' creek broke the continuity of plaintiff's enjoyment of the water, thereby depriving him of a prescriptive right thereto.

These conclusions necessitate an affirmation of the decree, which is ordered.

(48 Or. 191)

#### KABAT v. MOORE.\*

(Supreme Court of Oregon. May 29, 1906.)

#### 1. PLEADING—COMPLAINT—MOTION TO MAKE MORE CERTAIN—FRAUD.

In an action for deceit, because of defendant, who had been employed by plaintiff to locate plaintiff on homestead land, having pointed out, as the land embraced in plaintiff's description, land not subject to entry, it was proper to deny a motion to make the complaint more definite and certain by inserting the names of the parties who assisted defendant in running out the lines of the property shown to plaintiff.

#### 2. SAME—REQUISITES OF REPLY.

Laws 1903, p. 205, amending section 77, B. & C. Comp., provides that when an answer contains new matter constituting a defense or counterclaim, plaintiff may reply thereto, denying generally or specifically each allegation thereof controverted by him. In an action for deceit, the complaint alleged that plaintiff employed defendant to locate plaintiff on homestead land, that defendant pointed out certain land which he stated to be a part of section numbered 34, and that plaintiff filed thereon, but subsequently discovered that the land pointed out was in another section. The answer alleged that defendant was employed to locate plaintiff, and that defendant showed plaintiff a portion of section 34 and truthfully pointed out the corners and lines thereof, and that plaintiff, being satisfied, entered such description. *Held*, that such averments of the answer constituted merely a denial, and hence a motion to make a reply, merely denying the material

allegations of the answer, more definite and certain, was properly overruled.

#### 3. FRAUD—ACTION—QUESTION FOR JURY.

In an action for deceit, because of defendant, who had been employed by plaintiff to locate plaintiff on homestead land, having pointed out certain land as the description on which plaintiff filed, when in fact the land shown was not subject to entry, *held* a question for the jury whether plaintiff relied upon the statements of defendant.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 70.]

#### 4. EVIDENCE—ADMISSIONS AGAINST INTEREST—EFFECT.

In an action for deceit, because of defendant, who was employed by plaintiff to locate plaintiff on homestead land, having pointed out, as the description on which plaintiff filed, certain land not subject to entry, upon which plaintiff made improvements before discovering the fraud, a letter written by plaintiff's attorney to defendant, in an attempt to adjust the matter, to the effect that plaintiff had had his land surveyed and found that his house was not upon the land shown him, if susceptible of the construction that plaintiff did not build his house on the land shown him, was a mere admission against interest, the value of which was for the jury.

#### 5. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Though an allegation of the complaint in reference to defendant's being engaged in the business of locating persons on vacant government land was stricken out, such fact appearing from the evidence, an instruction that, as it was alleged in the complaint that defendant was engaged in locating settlers, he was supposed to know the corners and boundaries, and to understand the business, was not reversible error.

#### 6. FRAUD—ACTION—INSTRUCTIONS.

In an action for deceit, because of defendant, who was employed by plaintiff to locate plaintiff on homestead land, having pointed out to plaintiff, as the description on which he filed, land which was in fact not subject to entry, it was proper to refuse a requested instruction that when one or more witnesses affirm the existence of fraud, and an equal number deny its existence, and there is nothing to show that one is more credible than the other, the fraud is not established, as the question was to be determined from all the testimony and circumstances.

Appeal from Circuit Court, Douglas County; William Galloway, Judge.

Action by Leonard Kabat against Maurice Moore. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action for deceit. The complaint alleges that at all the times therein mentioned defendant was engaged in the business of locating settlers upon vacant government land for a consideration; that on May 18, 1902, he represented to the plaintiff that he knew of a suitable tract of vacant land subject to entry under the homestead laws of the United States, and plaintiff employed him to point it out and run the lines and boundaries thereof, and agreed if the land was as represented by the defendant that he would enter the same and pay defendant \$85 for his services; that under and in pursuance of such agreement defendant took him to a certain tract of land which he represented to be the N. E.  $\frac{1}{4}$  of section 34, township 30 S., of range 8 W. of

\*Rehearing denied June 26, 1906.

the W. M., and unoccupied public land, subject to entry under the homestead laws, and then and there showed plaintiff a certain tree with markings thereon, which he represented to be a witness tree to the northeast corner of such quarter section, and by the assistance of other persons pretended to run out and locate the lines of such land; that the land thus shown to the plaintiff was a valuable tract, contained several acres of level land, and was suitable for a homestead; that plaintiff was wholly without knowledge of the public surveys or the location of the land or the manner of tracing and locating the lines thereof, but relied upon the representations of the defendant concerning the same, and, so relying, entered the N. E.  $\frac{1}{4}$  of section 34 as a homestead, paying \$22 as fees therefor; that he afterwards built a house and made other valuable improvements upon the land shown him by the defendant and spent considerable time and money in going to and returning from such land, amounting in the aggregate to \$400, with the intention of improving the same with a view to obtaining title thereto from the United States; that after plaintiff had built his house, made his improvements, and spent the time and money as aforesaid, he was advised that such improvements were not on the land entered by him, and he thereupon employed the county surveyor of Douglas county, at an expense of \$17.50, to survey out such land, and it was thereupon ascertained that his improvements were upon the northeast quarter of section 35, and not the northeast quarter of section 34 as represented; that at the time the defendant showed him the land and pointed out the boundaries he well knew that it was not land of the United States, but belonged to the Oregon & California Railroad Company, and that such representations and statements were made for the purpose and with the intention of wronging, cheating, and defrauding the plaintiff out of the location fee; that the land upon which the plaintiff was induced to locate by the false and fraudulent representations of the defendant is a steep mountainside, not suitable for agricultural purposes, and plaintiff could not reside upon or cultivate the same so as to secure title thereto; that by reason of the false and fraudulent representations of the defendant, plaintiff has lost the money paid as the location fee, the amount paid the land office, the value of his improvements, and the money and time expended in going to and from the land, aggregating \$524.50. Defendant moved to strike out certain portions of the complaint as sham, frivolous, and irrelevant, and to make it more definite and certain by setting out the names of the persons who assisted the defendant in running the lines of the land shown by him to the plaintiff. The motion to strike out was sustained, and that to make more definite and certain overruled. The defendant then answered,

denying all the allegations of the complaint, except as thereafter alleged. For an affirmative defense he averred that about the 1st day of May, 1902, he was employed by the plaintiff to show him 160 acres of vacant land which he could take under the stone and timber act, and another 160 acres which he could enter under the homestead laws, for which he was to pay the defendant \$85 for each claim; that in pursuance of such employment the defendant did find and show plaintiff two tracts of land, one suitable for entry under the stone and timber act, and the other under the homestead laws; that each of such tracts was satisfactory to the plaintiff, but when they returned to the land office at Roseburg, that selected for a homestead was found to have been filed upon, and thereupon plaintiff solicited the defendant to show him another tract for a homestead; that defendant then said to plaintiff that he knew of only one vacant quarter section, and that if, after examination, it was satisfactory to him, he could have it upon the payment of \$85; that thereafter, and in pursuance of such arrangement, defendant showed plaintiff the northeast quarter of section 34 and pointed out the corners and lines thereof; that plaintiff examined such land and the timber growing thereon until he became fully satisfied, accepted the same, and thereafter filed thereon under the homestead law. The reply is a denial of "each and every material allegation" of the answer. The defendant moved to make the reply more definite and certain, which motion was overruled, and a trial had before the court and a jury. At the close of plaintiff's testimony the defendant moved for a nonsuit, on the ground that plaintiff had not proven a case sufficient to be submitted to the jury, and also for a verdict in his favor, for the reason that the affirmative matter alleged in the answer was not denied by the reply. These motions were both overruled, and a verdict and judgment rendered in favor of the plaintiff, from which defendant appeals, assigning as error the overruling of his motion to make the complaint more definite and certain, his motion for nonsuit and for a directed verdict, and the giving and refusal of certain instructions.

John T. Long, for appellant. J. C. Fullerton and A. N. Orcutt, for respondent.

BEAN, C. J. (after stating the facts). There was no error in overruling the motion to make the complaint more definite and certain. The names of the parties, if any, who assisted the defendant in running out the lines of the property shown to the plaintiff, were immaterial to the cause of action, and it was not necessary that they should be stated in the complaint.

The motion to make the reply more definite and certain and for a directed verdict, because it did not raise an issue on the aver-

ments of new matter in the answer, was likewise properly overruled. The statute (section 77, B. & C. Comp.), as amended in 1903, provides that when an answer contains new matter constituting a defense or counterclaim, the plaintiff may reply to such new matter, denying generally or specifically each allegation thereof controverted by him. Laws 1903, p. 205. It may be doubted whether, under this statute, a reply merely denying each and every "material" allegation of the answer is a good denial, for a plaintiff ought not to assume to himself to determine what facts are material and thus render a conviction for perjury for a false verification difficult or impossible. 1 Enc. Pl. & Pr. 782; *Montour v. Purdy*, 11 Minn. 384 (Gil. 278), 83 Am. Dec. 88; *Lewis v. Coulter*, 10 Ohio St. 452. The question, however, is not important here, because the new matter pleaded in the answer merely negatives the averments of the complaint, and could have been shown under the denials. It does not admit the cause of action as alleged and seek to avoid its force and effect, nor set up a defense or a counterclaim thereto. All the facts alleged were embraced in the judicial inquiry as to the truth of the matter stated in the complaint, and went directly to disprove such facts. The substance of the affirmative matter is that defendant was employed by plaintiff to locate him on a homestead claim; that in pursuance of such employment he showed plaintiff the northeast quarter of section 34 and truthfully pointed out to him the corners and lines thereof; that defendant made an examination of the premises, and, being satisfied therewith, entered the same under the homestead laws, with full knowledge that he was filing upon the land included within the description. These averments constitute merely a denial of the fraud charged in the complaint, and no reply was required. Bliss, Code Pl. (3d. Ed.) § 330.

It is also contended that the court erred in overruling defendant's motion for a nonsuit on the ground that plaintiff had not proven a case sufficient to be submitted to the jury. The argument is that the evidence does not show that plaintiff relied upon the statements and representations of the defendant as to the location of the land and the boundaries thereof, or that he was deceived thereby. There is no positive and direct evidence that plaintiff relied upon the statements and representations of the defendant, but such is the only reasonable inference that can be drawn from the testimony. Plaintiff was a cigar manufacturer at Roseburg, and unfamiliar with public lands. Desiring to enter 160 acres as a homestead, he applied to defendant, who was in the business of locating settlers upon government land, to ascertain and point out to him a vacant tract subject to entry under the homestead laws, for which service he agreed to pay the defendant \$85. The defendant, in pursuance of this employment,

took him out in the mountains some distance from Roseburg, showed him a tract of land which he represented to be the northeast quarter of section 34, from 15 to 18 acres of which was level and suitable for agricultural purposes; that defendant pointed out to the plaintiff what he represented to be the northeast corner of the tract and then stated that he would run out the east line, but, as the country was rough and the plaintiff was not very well, advised him to go by another route to the supposed southeast corner and there await his arrival; and that defendant pretended to run the east line, and, after a time, came to where the plaintiff was waiting for him, and said that the corner must be near that point. He was unable to find it, but said to the plaintiff that "We'll make a corner," and then proceeded to mark a laurel tree at the point where he said the corner was to be and to run out what he claimed to be the south line of the tract. The plaintiff, without making any further examination or inquiry as to the true lines, and relying upon the defendant's statements in reference thereto, filed on the land, and thereafter proceeded to build a house and make other improvements thereon. He subsequently caused the land to be surveyed, and found that the true east line was 31 rods west of the line shown him by the defendant, and that his house and improvements were off the land filed on some 16 rods, and that none of the level land was on the claim. It is clear, from this testimony, if true—and for the purposes of this motion it must be so taken—that the plaintiff, in filing upon the claim and making his improvements, relied upon the statements of the defendant as to the location of the land and the boundaries thereof, and was thereby deceived and misled to his injury.

Considerable prominence is given in this connection to a statement in a letter written by one of plaintiff's counsel to the defendant long after the facts constituting this cause of action had arisen, and in an attempt to adjust the matter, to the effect that plaintiff had had his land surveyed and found that "his house and improvements are not upon the land shown him, but upon a railroad section." The intention of the writer of this letter is perfectly apparent, and his language can hardly be distorted into an admission that plaintiff did not, in fact, build his house or make his improvements upon the land shown him by the defendant, but upon other and different land. But, if it be so construed, counsel who wrote the letter had no authority to bind his client by any such a statement, and at most it could amount to nothing more than an admission against interest, and its value was for the jury.

It is also claimed that the court erred in instructing the jury that, as it was alleged in the complaint that defendant was engaged in locating settlers upon vacant government land for hire, he was supposed to know the

corners and boundaries of the land he solicited persons to locate upon and to understand his business "just as much as a physician should his profession if he takes pay therefor." The allegation of the complaint in reference to defendant's being engaged in the business of locating persons on vacant government land for hire was stricken out and therefore, technically, the court was in error in saying that the complaint so stated. The fact, however, appeared from the evidence. He assumed to locate the plaintiff upon a tract of vacant land for which he was to receive and was paid \$85, and he must, therefore, be presumed to understand his business and be responsible for the manner in which he discharged his obligation. There was no reversible error in the instruction as given, as applied to the facts of this case, although some parts of it may be open to criticism as the statement of a general rule.

The defendant requested the court to instruct the jury that: "When one or more witnesses affirm the existence of fraud, and an equal number denies its existence and there is nothing to show that one is more creditable than the other, the fraud is not established, and if you find that state of facts from the evidence that has been adduced before you, plaintiff has failed to make out the better case, and your verdict should be for the defendant." As an academic statement of the law this instruction may be correct under some circumstances, but it is not pertinent in this case. The existence of fraud here is not to be determined from the number of witnesses, but from the entire testimony and the surrounding circumstances. Where fraud is an issue, it is generally to be ascertained from all the testimony and such inferences as may be legitimately drawn from it. *Williamson v. North Pacific Lumber Co.*, 42 Or. 153, 70 Pac. 387, 532. It is seldom that it can be established by the direct and positive testimony of witnesses. It is a question for the jury, who are the judges of the credibility of the witnesses, the weight of their testimony, and the inferences to be drawn from the circumstances attending the particular transaction.

The judgment is affirmed.

#### LIVESLEY et al. v. HEISE et al.

(Supreme Court of Oregon. May 29, 1906.)

#### 1. FRAUDULENT CONVEYANCES — CONDUCTING BUSINESS IN NAME OF ANOTHER — BREACH OF CONTRACT — LIABILITY OF PERSONS PARTICIPATING IN FRAUDULENT SCHEME.

A lessee of hopyards for a term of years contracted to sell to a third person a specified number of pounds of hops annually during the term. The lessee relinquished his rights under the lease before the expiration of the term, and his wife and son procured a lease for the residue of the term. *Held*, that the third person, in an action for breach of contract, could recover only from the lessee unless the wife and son partici-

pated in a scheme to defraud him, though the wife and son knew of the contract.

#### 2. SAME — BURDEN OF PROOF.

The burden of proving good faith on the part of the wife and son in procuring the lease rested on them.

#### 3. PARENT AND CHILD — SERVICES AND EARNINGS OF CHILD — EMANCIPATION — RIGHT OF CREDITOR OF PARENT.

A lessee of hopyards for a term of years surrendered the premises before the expiration of the term. His wife and minor son subsequently operated the yards under a new lease to them. There was no question as to whether the minor son had been emancipated. *Held*, that the minority of the son did not render the labor he performed or the hops he helped to produce liable to the claims of the creditors of the lessee.

#### 4. FRAUDULENT CONVEYANCES — CONSIDERATION OF TRANSFER — SURRENDER OF LEASE.

The release by a lessee of his rights under the lease, made in consideration of the lessor agreeing to forego his right to collect rent, is supported by a sufficient consideration.

#### 5. SAME.

A lessee of hopyards for a term of years surrendered the premises before the expiration of the term. The owner executed a new lease to the lessee's son and wife for the remainder of the term, in consideration of their agreement to give one-fifth of the hops annually to be grown on the premises. *Held*, that the agreement of the son and wife to pay a part of the annual crop was a sufficient consideration for the lease to them.

#### 6. SAME — CONDUCTING BUSINESS IN NAME OF ANOTHER — BREACH OF CONTRACT — LIABILITY OF THIRD PERSONS.

A lessee of hopyards for a term of years contracted to sell to a third person a specified number of pounds of hops per year during the term. He surrendered the lease before the expiration of the term. His wife and son then leased the yards and operated it for the remainder of the term. A third person sued the lessee and wife and son for breach of contract. Evidence examined, and *held* to warrant a finding that the son and wife in good faith leased the yards for their own use and benefit and not in trust for the lessee, and they were not liable to the third person.

Appeal from Circuit Court, Polk County; William Galloway, Judge.

Suit by T. A. Livesley and another, partners as T. A. Livesley & Co., against A. Heise and others. From a decree granting insufficient relief, plaintiffs appeal. Modified.

This is a suit by T. A. Livesley and John J. Roberts, partners as T. A. Livesley & Co., against A. Heise, Rachel E. Heise, his wife, and W. C. Heise, their son, originally to enjoin the disposal of certain hops, grown in 1903, and to compel the specific performance of a contract to sell and deliver the crop to plaintiffs. The complaint sets out the facts constituting their right to the hops, and alleges a conspiracy on the part of the defendants to defraud plaintiffs. A demurrer to the complaint was sustained, the temporary injunction was dissolved, the suit dismissed, and plaintiffs took an appeal, on the trial of which the decree was reversed, the demurrer overruled, and the cause remanded for further proceedings. *Livesley v. Heise*, 45 Or. 148, 76 Pac. 952. While that appeal was pending the hops were sold and

shipped out of the state. When the mandate was sent down plaintiffs filed a supplemental complaint, stating the changed condition of the hops and praying a recovery against the defendants of the value of the crop as damages for the breach of the contract. The defendant Heise separately, and his wife and son jointly, answered, denying the material allegations of the original and the supplemental complaints, and averring that in 1901 and the year following, Heise cultivated hop-yards leased to him, and delivered the crops grown thereon to plaintiffs, but that in consequence of his financial embarrassment he was compelled to relinquish his rights under the leases and to surrender the possession of the demised premises to the owners thereof, and that Mrs. Heise and her son leased the same yards and raised hops thereon in 1903, in which crop Heise had no interest. The allegations of new matter in the answers having been denied in the replies, a trial was had, and plaintiffs were awarded a recovery against Heise in the sum of \$2,764.80, as the damages sustained by reason of his failure to perform the terms of his contract, but Mrs. Heise and her son were decreed to be the owners of the hops in question and entitled to their costs and disbursements, and the plaintiffs again appeal.

W. T. Slater and Wirt Minor, for appellants. Geo. G. Bingham and P. H. D'Arcy, for respondents.

MOORE, J. (after stating the facts). The transcript shows that about January 26, 1900, the defendant A Heise leased two hop-yards in Polk county, containing 25 and 20 acres, from his mother-in-law, Mrs. N. W. Harris, and brother-in-law, E. L. Harris, respectively, for the term of five years; the consideration being one-fifth of the hops to be raised annually thereon. About the same time he entered into an agreement with plaintiffs to cultivate, sell, and deliver to them 30,000 pounds of merchantable hops on or before the 15th of October of each year during the term of his leases, at 10 cents a pound, the plaintiffs to make certain advances to enable him to cultivate the yards and to harvest the hops. Heise complied with his contract during the first two years, except that in 1902 he attempted secretly to dispose of about 35 bales of hops, but was prevented from doing so by plaintiffs. When he settled with plaintiffs for the year 1902, he had received such advances on account of his crop that there remained only \$288.50 due him for the season's work. The plaintiffs charged him \$69.49 for examining his hops, and also assessed to him premiums for insurance on his crop taken out in their names in pursuance of the terms of the contract but the policies for which they refused to exhibit to him. The controversy arising in relation to these matters culminated in a notice given by Heise to plaintiffs that he

would not longer be bound by the terms of his contract, and that he should surrender his interest in the leases to the owners of the demised premises. The plaintiffs thereupon offered to operate the yards in fulfillment of the terms of the contract, but Heise refused to assign to them any part of his term. Of the sum of money so received he paid his brother-in-law \$180, and being still in debt, an action was instituted against him in a justice's court, so that at that time he owed several hundred dollars and had no money or property with which to make payment. After the crops of 1902 were harvested, Mrs. Heise, leaving her husband in Polk county, came to Salem, where she sent her two sons and two daughters to school, paying their tuition in advance with money she had earned by picking hops and selling turkeys she had raised. Needing more money to support herself and family, she reluctantly conveyed to her brother, E. L. Harris, on December 3, 1902, an undivided interest in certain real property that she inherited from her father, receiving therefor \$665. On the same day Heise executed to the owners of the hopyards releases of all his interests therein for the remainder of the terms, which relinquishments were accepted. E. L. Harris, December 4, 1902, and his mother, February 2, 1903, severally leased to the defendants Mrs. Heise and W. C. Heise, the hopyards so surrendered, for terms to expire October 1, 1905, in consideration of the lessees' agreement to give one-fifth of the hops annually to be grown on the premises. About February 1, 1903, Mrs. Heise removed to Polk county, and with the money remaining from the sale of her patrimony supported her family and raised hops that year in the yards so leased to her and her son; her husband and children aiding her in the enterprise. The plaintiffs, April 4, 1903, mailed to Heise their check for \$150, inclosed in a letter which stated that the money evidenced thereby was an advance on his hop contract with them, but he refused to accept it and returned the draft, writing them that he had no use for it. Mrs. Heise's mother and brother, during the season of 1903, furnished her and her son sustenance for their teams, supplied them tools and farming implements to enable them to cultivate the yards, and also loaned them the sum of \$2,500; to pay the expenses of harvesting, taking as security therefor a chattel mortgage on the crop, pursuant to the terms of which they took immediate possession of the hops as soon as they were baled, and, after the injunction was dissolved, sold the same, retaining the sums due them and paying the remainder to Mrs. Heise and her son.

Though Heise assisted in cultivating and harvesting the hops, for which service it does not appear that he received any compensation, his wife and eldest son, who was then a minor, employed, discharged, and paid the persons who labored in the yards and about

the dry houses. E. Selwert, who was employed in the hopyard in 1903 by W. C. Heise and paid for his services by a check drawn on the bank by the latter, as defendants' witness, testified on cross-examination as follows. "Q. Are you acquainted with A. Heise? A. Yes, sir. Q. Did you see him at that time? A. Yes, sir. Q. What was he doing? A. Nothing; just joshing the boys; having a good deal of fun once in a while. Q. Did you see him there all the time? A. No, sir." E. L. Harris, as defendants' witness, testified that in October, 1902, Heise told him he did not have sufficient money with which to operate the hopyards, and for that reason he was not going to rent them any longer; that the witness did not then begin to look for another tenant or think much about the matter until he obtained releases of the demised premises; that he negotiated with Mrs. Heise about two days before he secured her deed of the real property which she inherited from her father; and that after securing such releases and deed, he then advised his sister and her son to rent the hopyards, which proposal having been accepted, leases thereof were executed to them. Mrs. Heise, as a witness for herself, testified that, knowing her husband did not intend to raise hops in 1903, she sold her interest in the real property, to obtain money with which to educate her children; that from the sum so received she paid an old grocery bill of about \$100, which her husband was unable to liquidate; that after he had executed releases of all his interests in the demised premises and subsequent to the making of her deed, her brother told her that as she then had the necessary means, it would be advisable for her and her son to rent the hopyards, and that at his suggestion she consented to the proposal in pursuance of which the leases were made out to them.

From the foregoing testimony, plaintiffs' counsel insist that, as the contract which their clients consummated with Heise related to real property then leased to him and to the crops annually to be raised thereon, when the possession of such premises voluntarily passed to his wife and son, with knowledge thereof, they took the leases subject to the conditions imposed, and, though equity might not compel them to perform the labor necessary to produce a crop, when they did so, and the hops came into existence, plaintiffs were entitled thereto, but the crop having been sold by them they are liable to plaintiffs for the value thereof, which is the measure of the damages sustained, in refusing to give which an error was committed. Mrs. Heise and her son unquestionably knew of the contract, but notwithstanding such knowledge, if they were innocent of any attempt to defraud plaintiffs, they should not be punished because the husband of one of the defendants and the father of the other failed in business, whereby he was

unable to perform the terms of his agreement. If Heise's financial embarrassment necessitated a relinquishment of his interests in the demised premises, or, if his anger enkindled by being compelled to account for hops which he tried to secrete, or his resentment at what he considered to be exorbitant charges, prompted him to surrender his rights under the leases, plaintiffs' remedy was limited to an action against him for a breach of his agreement, and they cannot recover against his codefendants unless they participated in a scheme to defraud plaintiffs. The relation existing between the defendants imposes upon Mrs. Heise and her son the burden of proving the bona fides of the part undertaken by them immediately preceding and during the time they had charge of the hopyards. *Jolly v. Kyle*, 27 Or. 95, 39 Pac. 999; *Feldman v. Nicolai*, 28 Or. 34, 40 Pac. 1010; *Schwartz v. Gerhardt*, 44 Or. 425, 75 Pac. 698. After Heise settled with plaintiffs and received the money due him for the hops which he raised in 1902, he found it impossible to pay the debts which he then owed. It is fair, also, to infer that he was angry with plaintiffs and determined, if possible, to prevent them from securing any further advantages under their contract with him. His wife, having the duty of supporting and educating her children thus unexpectedly thrust upon her, seems to have undertaken the task with characteristic fortitude, but her very limited means were evidently soon exhausted, and, after about two days of negotiations, she reluctantly acceded to her brother's earnest solicitation to convey to him her interest in the real property which she inherited from her father. Fraternal duty probably prompted E. L. Harris to desire that Mrs. Heise should make good use of the money which she had received, and having also obtained from her husband a relinquishment of all his interest in and rights to the demised premises, he recommended her and her son to take leases thereof and raise hops thereon. We believe that Mrs. Heise's testimony is true, to the effect that the first intimation she received concerning the possibility of the hopyards being again rented came from her brother, after he had secured her husband's relinquishments of all his rights in the premises, and after she had executed her deed.

Though Heise's resentment towards plaintiffs may have afforded a motive for his desire to renounce his rights under the leases, his lack of sufficient means to continue raising hops was evidently the controlling cause that induced such action, but, whatever the reason may have been that brought about such result, we think the testimony clearly shows that neither his wife nor his son was a party to any scheme, if such existed, to defraud the plaintiffs. Heise performed some labor in cultivating and harvesting hops. He was not a diligent worker, however, if the testimony of Selwert, hereinbefore quoted,

is to be believed. His wife surpassed him in the management of the hopyard, thereby demonstrating that she possessed the greater interest therein, which is a circumstance tending to corroborate her testimony respecting the bona fides of the transaction. If Heise had labored faithfully at the business, such work would not necessarily establish the fact that he was the beneficiary of a secret trust or render his wife's money that she had invested in good faith subject to the payment of his debts. In *McCormack Harvesting Machine Co. v. Ponder*, 123 Iowa, 17, 98 N. W. 303, Mr. Justice McClain, speaking for the court, in discussing the legal principle arising under similar facts respecting labor performed by a married man, says: "But if, in fact, he saw fit to do just what he did for the purpose of assisting his wife and son in carrying on the farm and realizing profits therefrom, this would not render such profits subject to any extent to the payment of his debts. That a husband can render his services to his wife in the management of property belonging to her without rendering such property subject to the claims of his creditors is well settled in this state." To the same effect is, also, the decision of this court. *King v. Voos*, 14 Or. 91, 12 Pac. 281. This suit was evidently instituted on the assumption that the defendant W. C. Heise had attained his majority. The testimony evinces, however, that he was not quite 21 years old. No question was raised at the trial as to whether or not he had been emancipated, and, as he was permitted to become a party to the leases, we shall assume that his father had given him his time before his grandmother and uncle executed to him and his mother such leases. His minority, under the circumstances supposed, did not render the labor he performed or the hops he helped to produce liable to the claims of his father's creditors. *Flynn v. Baisley*, 35 Or. 268, 57 Pac. 908, 45 L. R. A. 645, 76 Am. St. Rep. 495; *Clemens v. Brillhart*, 17 Neb. 335, 22 N. W. 779.

The releases given by Heise to his mother-in-law and to his brother-in-law were not voluntary, for their agreement to forego his obligation to pay them rent was a sufficient consideration for his relinquishments. *Whitman v. Watry*, 31 Wis. 639. So, too, the covenant of Mrs. Heise and her son to pay for the use of the hopyards was an adequate consideration for the execution of the leases to them. We think the testimony clearly shows that Mrs. Heise and her son honestly entered into the contract for the leasing of the yards for their own use and benefit and not in trust for Heise or any other person, and that it would be inequitable to permit advantage to be taken of the money which she expended and of the labor which she and her children performed, in cultivating and harvesting the hops, to award against her or such son a recovery of any sum whatever as damages by reason of Heise's failure

or refusal to keep and perform his part of the contract with plaintiffs. The testimony, which is uncontradicted, shows that the market value of the hops which Heise agreed to sell to plaintiffs was 24 cents a pound at the time they should have been delivered; that there were raised on the yards originally leased to him 23,040 pounds of hops, for which he was to have received 10 cents a pound, whereby plaintiffs sustained damages to the extent of 14 cents a pound. The court found, however, that the value of such hops at that time was only 22 cents a pound, making the loss sustained by plaintiffs \$2,764.80.

The decree will therefore be modified so as to award plaintiffs a recovery against the defendant A. Heise of the sum of \$3,225.60, but in all other respects affirmed; the defendants Rachel E. Heise and W. C. Heise to recover their costs and disbursements on this appeal.

#### JACKSON v. BAKER.

(Supreme Court of Oregon. May 29, 1906.)

##### 1. PUBLIC LANDS—HOMESTEAD—CONTRACT TO CONVEY—VALIDITY.

A contract whereby defendant agreed, for a consideration paid by plaintiff and another, to convey to a third party the legal title to defendant's homestead after he had obtained title thereto from the United States, was illegal and void, and unenforceable at the demand of either party thereto.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 373.]

##### 2. DISMISSAL—ACTION ON CONTRACT—ILLEGALITY APPEARING FROM COMPLAINT.

Where the illegality of a contract sued on appears from the complaint, or the plaintiff's case, the court will, at any stage of the proceedings, dismiss the action, though such illegality is not pleaded as a defense or insisted upon by the parties, and may have been expressly waived by them; it being an objection which the court itself is bound to raise in the due administration of justice, regardless of the wishes of the parties.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dismissal and Nonsuit, § 160.]

##### 3. CONTRACTS — ILLEGALITY — ACTIONS ON—PARTIES IN PARI DELICTO.

Where defendant agreed for a consideration paid by plaintiff and another to convey to a third party the legal title to defendant's homestead after obtaining title thereto from the United States, the parties to the contract, void because against the policy of the homestead law, were in pari delicto, and plaintiff was not entitled to recover the consideration paid.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 686-688.]

Appeal from Circuit Court, Josephine County; H. K. Hanna, Judge.

Action by H. W. Jackson against G. W. Baker. Judgment for plaintiff, and defendant appeals. Reversed.

This is an action to recover \$1,000 paid by the plaintiff and his assignor to the defendant in consideration of an agreement by the latter to sell, and convey land entered by him as a

homestead upon obtaining title thereto. The complaint alleges that in September, 1903, the plaintiff and defendant and one Hamilton were the owners as tenants in common of certain mining property, and that the defendant was in possession of 160 acres of adjoining land, which he had entered under the homestead laws; that at the date mentioned the parties referred to contracted and agreed with one Draper to sell and convey to him the mine and homestead for \$25,000, and that it was agreed between the plaintiff and Hamilton and the defendant that if the entire sum should be paid for the property the former would pay to the latter out of their part of the proceeds \$1,000 in consideration of his transferring to Draper the "legal title" to the land covered by the homestead, but that if he failed, or neglected to make such transfer he would return the money so paid; that thereafter Draper paid the \$25,000 for the property, and plaintiff and Hamilton paid the defendant \$1,000; that defendant never obtained title to the homestead because his entry was subsequently canceled for the reason that the land was mineral in character, and not subject to entry under the homestead laws, and defendant did not and cannot transfer the legal title thereto to Draper; that plaintiff has succeeded to all the rights of Hamilton in and to the money paid by them to the defendant and prior to the commencement of this action defendant promised and agreed to repay the same to him but has failed and neglected to do so. A demurrer to the complaint because it did not state facts sufficient to constitute a cause of action was overruled, and the defendant answered denying the material allegations, and affirmatively alleging that he only agreed to surrender and relinquish to Draper his homestead entry, and that the consideration for the \$1,000 paid him by Hamilton was such surrender, and certain assessment and development work which he had done on the mining property. A reply put in issue the new matter pleaded in the answer, and a trial was had before the court, and a jury. At the close of plaintiff's case the defendant moved the court to direct a verdict in his favor, but this motion was overruled, and the cause submitted to the jury who returned a verdict in favor of the plaintiff. From the judgment entered thereon this appeal is taken.

A. S. Hammond, for appellant. A. C. Hough, for respondent.

BEAN, C. J. (after stating the facts). There is no bill of exceptions. The only question made on the appeal is that the contract between the plaintiff and Hamilton, and the defendant as alleged and set out in the complaint is illegal and void as against public policy, and ought not to be enforced by the courts. The substance of the complaint is that the defendant agreed for a considera-

tion paid by plaintiff and Hamilton to convey to Draper the legal title to his homestead after he should obtain title thereto from the United States. Such a contract is illegal and void because against the spirit and policy of the homestead law, and will not be enforced by the courts at the demand of either party thereto. *Kine v. Turner*, 27 Or. 356, 41 Pac. 664; *Oaks v. Heaton*, 44 Iowa, 116; *McCrillis v. Copp*, 31 Fla. 100, 12 South. 643; *Dawson v. Merrill*, 2 Neb. 119; *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97; *Anderson v. Carkins*, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272.

If the illegality appears from the complaint or the plaintiff's case, the court will, at any stage of the proceedings, dismiss the action, although such illegality is not pleaded as a defense, or insisted upon by the parties, and may have been expressly waived by them. It is an objection which the court itself is bound to raise in the due administration of justice, regardless of the wishes of the parties. *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Buchtel v. Evans*, 21 Or. 309, 28 Pac. 67; *Ah Doon v. Smith*, 25 Or. 89, 34 Pac. 1093; *Bradtfeldt v. Cooke*, 27 Or. 194, 40 Pac. 1, 50 Am. St. Rep. 701; *Miller v. Hirschberg*, 27 Or. 522, 40 Pac. 506; *Pacific Livestock Co. v. Gentry*, 38 Or. 275, 61 Pac. 422, 65 Pac. 597; *Cullison v. Downing*, 42 Or. 377, 71 Pac. 70; *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735.

The plaintiff's counsel seems to think that the parties to this litigation were not in pari delicto; but, as said by Mr. Justice Brewer in a similar case (*Anderson v. Carkins*, supra): "We are unable to see any distinction in moral status between the man who contracts for the perjury of another, and the one who contracts to commit such perjury."

The judgment is reversed, and the cause remanded, with directions to dismiss the complaint.

#### SUMMERS v. GEER et al.

(Supreme Court of Oregon. May 29, 1906.)

#### 1. APPEAL—NOTICE—SUFFICIENCY—DESCRIPTION OF JUDGMENT—SURPLUSAGE.

A reference in a notice of appeal from a judgment to the entry of the judgment, in the "judgment docket," while B. & C. Comp. § 190, requires the recording of judgments in the journal, which is, by section 583, a book in which the clerk must enter the proceedings of the court in term time, is a misdescription of the record intended, and may be disregarded as surplusage in determining the sufficiency of the notice.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 2145, 2149.]

#### 2. SAME — DESCRIPTION OF PARTY—SUFFICIENCY.

A defect in a notice of appeal, arising from the failure to state that the person named in the notice as appealing is the defeated party in the action, is not fatal, identity of the person being established under B. & C. Comp. § 788, subd. 25, from the identity of name.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2142.]

### 3. SAME—REQUISITES OF NOTICE.

A notice of appeal from a judgment containing the name of the court and the parties, and reciting that the defeated party appeals from a judgment rendered and "entered of record in the above-entitled court, \* \* \* wherein and whereby it was ordered and adjudged substantially as follows," followed by the judgment appealed from, is sufficient under B. & C. Comp. § 549, providing that a notice of appeal shall be sufficient if it contains the title of the cause, the name of the parties, and notifies the adverse party that an appeal is taken from the judgment, though the omission from the notice of the words "and cause" after the phrase "in the above-entitled court," creates a doubt as to whether the judgment complained of was rendered in the case at bar, and though the word "substantially" qualifying the words "ordered and adjudged" makes uncertain what purports to be the judgment attempted to be reviewed.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 2140, 2142, 2145, 2149.]

Appeal from Circuit Court, Marion County; George H. Burnett, Judge.

Action by George Summers against T. T. Geer and others. From a judgment for defendants, plaintiff appeals. On motion to dismiss appeal. Denied.

George G. Bingham and John W. Reynolds, for the motion. M. E. Pogue, opposed.

**PER CURIAM.** This is a motion to dismiss an appeal. The notice of appeal, by referring to the first page of the transcript for the title and names of the parties, is as follows: "In the Circuit Court of the state of Oregon for the County of Marion. Department No. 1. George Summers, Plaintiff, v. T. T. Geer, L. B. Geer, and W. H. Odell, Defendants. To T. T. Geer and to George G. Bingham, Your Attorney of Record, and to L. B. Geer and to George G. Bingham, Your Attorney, and to W. H. Odell and to A. O. Condit and John W. Reynolds, Your Attorneys of Record, in the Above-Entitled Action: You and each of you are hereby notified, and you will hereby please take notice that the plaintiff, George Summers, hereby appeals to the Supreme Court of the state of Oregon, from that certain judgment made, rendered, and entered of record in the above-entitled court on the 10th day of July, 1905, at page 405, of Book 24, Judgment Docket for Marion county, Or., wherein and whereby it was ordered and adjudged substantially as follows: 'Now on this 10th day of July, 1905, this cause coming on to be heard, plaintiff appearing by M. E. Pogue, his attorney, and the defendant T. T. Geer appearing by George G. Bingham, his attorney, and the defendant L. B. Geer appearing by George G. Bingham, his attorney, and the defendant W. H. Odell appearing by A. O. Condit and John W. Reynolds, his attorneys, and now at this time the plaintiff, by M. E. Pogue,

his attorney, announcing to the court that he did not desire to file a second amended complaint, and that he was satisfied with and could stand on his first amended complaint, and the defendants by their attorneys now move the court for a judgment of dismissal for the failure on the part of plaintiff to file a second amended complaint, and it appearing to the court that the defendants' motion should be allowed, it is therefore ordered and adjudged that plaintiff's action be, and the same is, hereby dismissed, and that the defendants each recover of and from the plaintiff their costs and disbursements herein expended and taxed and allowed at \$46.00—and from the whole and every part of said judgment. M. E. Pogue, Attorney for Plaintiff." When the notice of appeal is not given in open court, its adequacy is tested by the following rule: "Such notice shall be sufficient if it contains the title of the cause, the names of the parties, and notifies the adverse party or his attorney that an appeal is taken to the Supreme or circuit court, as the case may be, from the judgment, order, or decree, or some specified part thereof." B. & C. Comp. § 549. As all judgments of the circuit court are required to be recorded in the journal (Id. § 196), which is a book in which the clerk must enter the proceedings of the court in term time (Id. § 583), the reference in the notice of appeal to the entry of the judgment in the "Judgment Docket" is probably a misdescription of the record intended and all allusion to it may be disregarded as surplusage. It is not stated that the George Summers mentioned in the notice of appeal is the plaintiff in this action. This defect is not fatal for certainty to a common intent in general (5 Am. & Eng. Enc. Law, [2d Ed.] 799) is the degree of indubitableness required which permits invoking the presumption, that the identity of a person may be established from the identity of name. B. & C. Comp. § 788, subd. 25.

The omission from the notice of the words "and cause" after the phrase "in the above-entitled court" creates a doubt as to whether the judgment complained of was rendered in the case at bar. So, too, the word "substantially," used to qualify the verbs "ordered" and "adjudged," makes uncertain what purports to be the judgment attempted to be reviewed, although the language employed is designated by quotation marks. "The punctuation of an instrument," says Mr. Tiffany (17 Am. & Eng. Enc. Law [2d Ed.] 20, "may be considered when the meaning is doubtful." By rejecting the repugnant words mentioned and applying the rules of construction specified, the notice of appeal assailed comes within the very liberal provisions of the statute regulating its sufficiency.

The motion should therefore be denied, and it is so ordered.

(48 Or. 158)

## CATLIN et al. v. JONES.\*

(Supreme Court of Oregon. May 29, 1906.)

## 1. SALES—CONSTRUCTION OF CONTRACT—DEPENDENT STIPULATIONS.

Where a contract requires one party to sell the other certain property at a specified price, the payment of the price and delivery are concurrent acts, which are to be performed at the same time.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 180, 230.]

## 2. SAME—DELIVERY—EXCUSES FOR DEFAULT—DEFAULT OF BUYER.

Where, by a contract of sale, payment and delivery are concurrent acts, the purchaser cannot recover damages for a failure to deliver, unless he was ready and willing to perform, by accepting and paying at the time and place appointed.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1156, 1157.]

## 3. SAME—PAYMENT OF PRICE—TENDER.

Where the purchaser, in a contract of sale whereby payment and delivery were concurrent acts, was ready to perform at the appointed time and place, but the seller did not deliver, the purchaser's right of action for the breach was complete without tender or demand.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1156, 1157.]

## 4. PLEADING—DEFECTS—CURE BY SUBSEQUENT PLEADINGS.

In an action by the purchaser, in a contract of sale whereby payment and delivery are concurrent acts, for damages because of defendant's failure to deliver, though the complaint failed to allege plaintiff's readiness and willingness to perform, defendant having by his answer set up nonperformance by plaintiff, and plaintiff having taken issue upon the averment, the defect in the complaint was cured.

## 5. SALES—DELIVERY—TIME.

Where a contract for the sale of hops required delivery to be made on a certain day, it was incumbent on the seller to make delivery seasonably during that day, so that the purchaser might have an opportunity to inspect the hops by daylight.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 403, 404.]

## 6. SAME—SUFFICIENCY OF DELIVERY.

Where a contract for the sale of hops required them to be delivered on a certain day at a certain place, the mere transportation of the hops to that place was not a sufficient delivery, without the presence of the seller or his agent to make delivery and receive the purchase price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 371-380.]

Appeal from Circuit Court, Marion County; George H. Burnett, Judge.

Action by Russell Catlin and another against S. W. Jones. From a judgment in favor of defendant, plaintiffs appeal. Reversed, and new trial ordered.

This is an action to recover damages for the breach of a contract to sell and deliver hops. The complaint alleges that on July 15, 1904, the parties to this action entered into a written contract, by the terms of which the defendant agreed to sell for 14½ cents a pound and deliver to the plaintiffs at Brooks station, on board cars free of all expense, from 13,000 to 15,000 pounds of hops, to be

grown during that season in certain specified yards, and to be of the first average quality for the year and section, and to be put up in new baling cloth, delivery, and acceptance to be made between the 1st and 10th of October, 1904; that the defendant had of the hops mentioned in the contract 15,000 pounds or thereabouts, produced upon the premises described and of the kind and quality mentioned; that on the 10th of October, 1904, the plaintiffs sent their agent to defendant to ascertain whether he was ready to deliver the hops, but they were not all then baled or in a deliverable condition, and on the 17th of October, the hops being baled and ready for delivery, the plaintiffs tendered the purchase price thereof, and demanded a delivery, but defendant refused to accept the money or deliver the hops to the plaintiffs' damage in the sum of \$2,025. The answer admits the contract as alleged, avers that the hops therein stipulated to be sold by the defendant amounted to 14,086 pounds, and for an affirmative defense alleges that prior to October 1, 1904, the plaintiffs sold, assigned, and transferred all their interest in the contract in question to T. Rosenwald & Co., who have ever since been the owners and holders thereof; that on October 10, 1904, the defendant had at Brooks station the hops mentioned in the complaint, ready for delivery, but that neither Rosenwald nor any one on his behalf was there ready and willing to accept or pay for them; that on the day named defendant was ready and willing to deliver the hops as called for by the contract to the legal owner and holder of such contract, but that there was no one at Brooks to receive the hops or pay for the same on the part of any person whatsoever. The reply denies the material allegations of the answer and affirmatively alleges that during the year 1904, Rosenwald was a customer of the plaintiffs and they had agreed to sell and deliver to him in October of that year a large quantity of hops; that for the purpose of fulfilling their contract with him, they entered into the agreement with the defendant set out in the complaint and attempted to assign the same to Rosenwald, but when he learned that defendant refused to deliver the hops he declined to accept the assignment and insisted that plaintiffs comply with their agreement, which they were compelled to and did do at great loss and damage to them. Upon the issues thus joined the case was tried to a jury. It was admitted that the hops in question amounted to 69 bales and weighed 14,086 pounds. The evidence for the plaintiffs tended to show that on October 10, 1904, they sent their agent, Earl Race, to defendant's residence near Brooks to ascertain if the hops were then in a deliverable condition, and to receive them if defendant was ready to deliver; that Race arrived at defendant's place some time after noon and told the defendant that plaintiffs were anxious to receive the hops, and inquired when he would be ready to de-

\*Rehearing denied June 26, 1906.

liver and he replied "at most any time"; that defendant gave Race a written order permitting him to take samples from the bales of hops which were then in the warehouse at the station at Brooks; that Race went from defendant's residence to Brooks, took samples from the hops then in the warehouse, and remained there until about 4:30 o'clock in the afternoon or thereabouts; that at that time there were only 40-odd bales in the warehouse. The defendant, as a witness in his own behalf, testified that he told Race that he was then ready to deliver the hops to the plaintiffs; that 40-odd bales were in the warehouse at Brooks station on the morning of the 10th of October, and had been for some time previous; that afterward and on that day he caused 29 or 30 bales more to be hauled by his workmen to the warehouse, and placed with the other hops; that he himself was at the warehouse in the forenoon but did not return again that day, and the bill of exceptions recites that there was no evidence "tending to show that defendant or any person authorized by him was at the place when the hops were stored for the purpose of delivering the same to plaintiffs." There was testimony tending to show that all the hops were baled, and in deliverable condition on October 17th and were worth from 30 to 31 cents a pound; and that on that day the plaintiffs demanded the delivery thereof, and tendered to the defendant the purchase price, but that defendant refused to accept the money or make the delivery. The plaintiffs requested the court to instruct the jury that, "if the defendant did not have the hops at Brooks in time for the plaintiffs to inspect and receive them by daylight, but that he got them there so late that plaintiffs would have had to inspect and receive them after dark or at a time so late in the day that it was not possible to carefully inspect and receive them by the aid of daylight, then the defendant did not comply with that part of the contract which required him to have the hops at Brooks by the 10th day of October, 1904, and his defense on that issue cannot avail him." This instruction was refused, and the cause was thereupon submitted. After the jury had been out for a time they returned into court and inquired whether it was necessary for the defendant to be at the warehouse on October 10th, after the last load of hops had been hauled in order to make a complete delivery. To this inquiry the court replied: "I will say to you that the question presented is not within the pleadings. The plaintiffs have charged in their complaint that the hops were not in a deliverable condition, and that is the only ground that they allege as excusing them from paying or offering to pay the money on the 10th and they must recover on that ground or not at all. The question which you propound has nothing to do with the case under the evidence that they have offered." The verdict was for the defendant, and plaintiffs appeal.

A. M. Cannon, for appellants. Geo. G. Bingham and M. L. Pipes, for respondent.

BEAN, C. J. (after stating the facts). By the terms of the contract upon which plaintiffs seek to recover, the payment of the purchase price, and the delivery of the hops were made concurrent acts, to be performed at the same time. The defendant was not bound to deliver the hops until they were paid for, nor were plaintiffs bound to pay for them until delivered. Payment and delivery were to be performed simultaneously. *Beauchamp v. Archer*, 58 Cal. 431, 41 Am. Rep. 266; *Meeker v. Johnson*, 5 Wash. 718, 32 Pac. 772, 34 Pac. 148. But, before the plaintiff can recover damages for a breach of the contract, he must show more than the mere default of the defendant. He must show that he was ready and willing to perform his part of the contract by accepting and paying for the hops at the time and place appointed. The hops were to be delivered at a particular place, and if the plaintiffs were ready at the appointed time and place to perform their part of the contract, and the defendant did not have the hops there ready for delivery, the right of action for a breach of the contract was complete without a tender of the purchase price or a demand for the hops. *Coonley v. Anderson*, 1 Hill (N. Y.) 519; *Neis v. Yocum* (C. C.) 16 Fed. 168. But if the defendant, as he alleges, had the hops ready for delivery at the time and place specified in the contract, the plaintiffs must show an offer then to receive and pay for them before they can maintain an action for nondelivery.

Now, it is not directly averred in the complaint that plaintiffs were ready and willing at the time and place specified to perform the contract on their part, but this omission is cured by the allegation of the answer that defendant had the hops at Brooks station ready for delivery at a time stipulated, but that there was no one present to receive and pay for them. This averment of the answer is denied by the reply, and an issue thus made on the plaintiffs' readiness and willingness to perform the contract on their part. Consequently the defect in the complaint is cured by the answer. *Turner v. Corbett*, 9 Or. 79; *Chesapeake & Ohio R. Co. v. Thiemann*, 96 Ky. 507, 29 S. W. 357; *Schenck v. Hartford Fire Ins. Co.*, 71 Cal. 28, 11 Pac. 807; *Beckmann v. Phoenix Ins. Co.*, 49 Mo. App. 604. In an action of this kind, readiness and willingness to perform by the plaintiff, must be alleged in the complaint, or else it will be had on demurrer, but where such allegation is omitted and the defendant in his answer by way of defense sets up nonperformance by the plaintiff of the terms of the contract, and the plaintiff takes issue upon such averment, the defect in the complaint is helped out or aided by the subsequent pleading. This rule is well illustrated in *Beckmann*

v. Phoenix Ins. Co., *supra*. That was an action on a policy of fire insurance, and the complaint failed to allege that the plaintiff complied with certain conditions precedent to his right of action. The court said the complaint would have been vulnerable to a demurrer, but that the defendant having by way of defense set up the nonperformance of the conditions precedent on the part of the plaintiff, and plaintiff having taken issue by reply, the defect was cured. The same principle is applied in other cases cited.

The questions for determination, therefore, under the pleadings, were (1) whether the plaintiffs were ready and willing at the time and place stipulated to perform the contract on their part by accepting and paying for the hops, and if so (2) whether the defendant was ready and able at that time to comply with the contract by making the delivery. Upon this latter point the instruction requested by the plaintiffs was, in our opinion, correct and should have been given and the inquiry of the jury should have been answered in the affirmative. Where, under the terms of an executory contract of sale, the delivery of bulky articles, such as hops, which require inspection and examination, is to be made at a particular place, tender must be seasonably made so that the vendee, who is bound to attend for the purpose of receiving the property, may have an opportunity to examine and inspect it by daylight to ascertain whether it complies with the contract. 2 *Mechem, Sales*, § 1137; *Croninger v. Crocker*, 62 N. Y. 151; *Startup v. MacDonald*, 46 E. C. L. 591. The rule upon this subject is thus admirably stated by Baron Parke, in *Startup v. MacDonald*, *supra*, "A party who is, by contract, to pay money, or to do a thing transitory, to another, anywhere, on a certain day, has the whole of the day, and if on one of several days, the whole of the days, for the performance of his part of the contract; and until the whole day, or the whole of the last day, has expired, no action will lie against him for the breach of such contract. In such a case the party bound must find the other, at his peril, and within the time limited, if the other be within the four seas; and he must do all that, without the concurrence of the other, he can do, to make the payment, or perform the act, and that, at a convenient time before midnight, such time varying according to the quantum of the payment, or nature of the act to be done. \* \* \* But where the thing to be done is to be performed at a certain place, on or before a certain day, to another party to a contract, there the tender must be to the other party at that place; and as the attendance of the other is necessary at that place to complete the act, there the law, though it requires that other to be present, is not so unreasonable as to require him to be present for the whole day where the

thing is to be done on one day, or for the whole series of days where it is to be done on or before a day certain; and, therefore, it fixes a particular part of the day for his presence; and it is enough if he be at the place at such a convenient time before sunset on the last day as that the act may be completed by daylight; and if the party bound tender to the party there, if present, or, if absent, be ready at the place to perform the act within a convenient time before sunset for its completion, it is sufficient." If, therefore, the defendant did not have the hops at Brooks in time for the plaintiffs to inspect them by daylight on the day stipulated for the delivery, he did not comply with his contract and his act is no defense in this case, if in fact the plaintiffs have themselves complied with the contract so as to entitle them to sue the defendant for nondelivery. Nor would the mere transportation of the hops to Brooks station be a defense if the plaintiffs were there ready and willing to accept them, unless the defendant or some one representing him was present to make the delivery and to receive the purchase price. If both parties had been present at the time and place agreed upon and able to perform their respective undertakings, neither could have put the other in default without offering to perform on his part. *Davis v. Adams*, 18 Ala. 264. It was, therefore, incumbent on the plaintiffs, if they were ready and willing to perform the contract and the defendant was likewise ready, to offer to perform before they could maintain an action for a breach, but they were not bound, as Judge Deady says in *Nels v. Yocum*, *supra*, "to go out into the highways and elsewhere to find the seller" to make such offer. It was the duty of the defendant, if he desired to perform his contract, to be present at the time, and place of performance either in person or by agent so that he could have delivered the hops, and received the pay therefor.

Judgment reversed, and new trial ordered.

#### HENRY JENNING & SONS v. MILLER.

(Supreme Court of Oregon. May 29, 1906.)

#### SPECIFIC PERFORMANCE — CONTRACTS FOR LEASE—PART PERFORMANCE.

Where plaintiff, who had been occupying a building as tenant, presumed that on the termination of his lease he would be compelled to vacate, and hence secured an option on another building, and subsequently he contracted orally with the landlord of the building which he occupied for a lease for a greater term than one year, he could not maintain a suit for specific performance on the ground that part performance had taken the lease out of the statute of frauds, as plaintiff's possession was a mere uninterrupted continuation of a former possession, and the abandonment of plaintiff's option was not in pursuance of any contract with the landlord.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 129.]

Appeal from Circuit Court, Multnomah County; Alfred F. Sears, Jr., Judge.

Action by Henry Jennings & Sons, a corporation, against Ernest Miller. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This is a suit to enjoin an action of forcible entry and detainer and for the specific performance of a parol contract for the leasing of real property. The plaintiff is a corporation engaged in the furniture and carpet business in the city of Portland with an investment of about \$75,000. Its furniture and carpet departments are separate, but under the same general management, and it is therefore important that they should be as accessible to one another as possible. For some time prior to February, 1904, the plaintiff occupied two stores at the northeast corner of First and Yamhill streets, known as Nos. 174 and 172. The former was used for the furniture department, and the latter for the carpet department, and there was an opening or passageway between them. The plaintiff had a lease for three years on No. 174, but was a tenant from month to month of No. 172, paying therefor a rental of \$80 a month. In January, 1904, it learned that No. 172 was about to be sold, and that it would probably have to vacate and move its carpet business elsewhere. Its officers thereupon began looking about for a suitable building near and convenient to its furniture department into which it could move its carpets and curtains. The most desirable vacant building for that purpose was across the street, and they entered into negotiations with the agent or owner for a lease thereof, and had practically agreed upon its terms, although no definite or binding contract had been entered into, when the defendant became the purchaser of No. 172. Negotiations were thereupon had between the plaintiff and the defendant for the leasing by the plaintiff of the premises purchased by the defendant, and such negotiations resulted in some sort of an agreement by which the plaintiff continued to occupy the premises, and gave up and surrendered, with the defendant's knowledge, its option on, or contract for, the other building. The parties disagree as to the terms of the leasing. The plaintiff alleges and gives testimony tending to show that it was understood and agreed that the lease should be for three years at the same rental it had been paying the former owner, and that, relying upon such contract and agreement, it continued to occupy the building and abandoned its efforts to secure another location, and gave up its option or contract on the room across the street. The defendant, however, denies the contract as set up by the plaintiff and says that the understanding was that the lease should only extend to such time as he should need the premises, and that there was no agreement as to the amount of the rent. The

plaintiff continued in possession paying \$80 a month rent, which was accepted by the defendant, until December 31, 1904, when the defendant commenced an action of forcible entry and detainer, whereupon plaintiff commenced this suit to enjoin the prosecution of such action, and for the specific performance of the oral contract of leasing, alleging that it was then impossible for it to secure a suitable building near its furniture department for its carpets and curtains, and that if it was compelled to vacate No. 172 it would be greatly damaged. Upon the trial the suit was dismissed, and plaintiff appeals.

Thomas G. Greene, for appellant. John F. Logan, for respondent.

BEAN, C. J. (after stating the facts). That the contract sought to be enforced in this suit, assuming it to be as plaintiff has alleged, was void under the statute of frauds because not in writing is unquestioned. *B. & C. Cop.*, § 797; *Pulse v. Hamer*, 8 Or. 251; *White v. Holland*, 17 Or. 4, 3 Pac. 573; *Rosenblatt v. Perkins*, 18 Or. 156, 22 Pac. 598, 6 L. R. A. 257. But the plaintiff contends that there has been such a part performance as will take it out of the statute. The acts relied upon for this purpose are the possession of the leased premises by the plaintiff and the abandonment by it of the attempt to secure another storeroom, and especially its surrender or release of its right or option on the room across the street, and its inability to secure another. But these are not sufficient to avoid the effect of the statute.

The possession by the plaintiff was a mere uninterrupted continuation of its former possession without any change whatever, and under all the authorities this is not enough. The rule on this question is thus enunciated by Mr. Pomeroy, who, after pointing out that if the possession can naturally and reasonably be accounted for upon some supposition other than that of the contract it will not be a part performance, says: "This rule has its most frequent application to cases in which the possession is not a new fact, but is the uninterrupted continuation of a former condition. It results as a necessary corollary from the rule itself that such a possession—one, that is, which merely prolongs a pre-existing situation of the party in reference to the land—cannot alone be a part performance of an intervening contract, since it will be accounted for by the prior condition as naturally as by the new agreement. If, therefore, a verbal agreement is made by a lessor with his tenant, either during the tenancy or after its termination, to grant another lease in place of the existing one, or to renew the lease after the expiration of the prior one, or to sell and convey the land itself, the possession of the tenant continued as under the former holding cannot of itself be a part performance of the agreement. If the original tenancy has not

expired, the possession must, of course, be referred to that; if it has expired, the possession will more naturally be accounted for by the tenant's holding over than by a new contract. As has already been shown, such possession does not raise a presumption as to the intent of the possessor, as is the case where he is an entire stranger to the estate; it must be accompanied by some further act on the part of the tenant in order to stamp its character and connect it with the contract." *Pomeroy, Sp. Perf. Contracts* (2d Ed.) § 124. The same doctrine is laid down by the text-writers and the adjudged cases generally. *Waterman, Sp. Perf.*, § 274; *Brown, Stat. Frauds*, (5th Ed.) § 476; *Wood v. Thornly*, 58 Ill. 470; *Koch v. National Union Building Ass'n*, 137 Ill. 497, 27 N. E. 530; *Swales v. Jackson*, 126 Ind. 282, 26 N. E. 62; *Mahana v. Blunt*, 20 Iowa, 142; *Rosenthal v. Freeburger*, 26 Md. 80; *Spalding v. Conzelman*, 30 Mo. 177; *Emmel v. Hayes*, 102 Mo. 186, 14 S. W. 209, 11 L. R. A. 323, 22 Am. St. Rep. 769; *Bigler v. Baker*, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255; *Johnston v. Glancy*, 4 Blackf. (Ind.) 93, 28 Am. Dec. 45.

The abandonment and giving up by the plaintiff of its option or right to the storeroom across the street and its ceasing its efforts to secure another building were not in pursuance of, or in execution of, any contract with the defendant, although it may have been in reliance thereon. It was no part of the alleged contract of leasing that the plaintiff should surrender or give up its option on the other storeroom and the defendant made no contract or agreement in reference thereto. An act of part performance to take a case out of the statute of frauds must be done in pursuance of, or in execution of, the contract alleged, or must obviously be related to or connected therewith, and must be referable solely to such contract. A mere collateral act, disconnected with the agreement, although done in reliance thereon and although prejudicial to the plaintiff, known to the defendant, and incapable of adequate compensation in damages, will not suffice. *Brown, Stat. Frauds* (5th Ed.) § 457. "If," says Mr. Pomeroy, "a plaintiff should, relying upon a verbal agreement, and with the defendant's knowledge, do something prejudicial to himself in a manner and to an extent not susceptible of compensation in damages, but unconnected with that agreement and not in execution of its provisions, this would fall far short of being the part performance required by the rule, in order to admit the remedial jurisdiction of equity." *Pomeroy, Sp. Perf. Contracts* (2d Ed.) § 109. This principle is illustrated by the case of *Graves v. Goldthwait*, 153 Mass. 268, 26 N. E. 860, 10 L. R. A. 763. The plaintiff and her sisters were tenants in common of real estate. The plaintiff made an oral agreement with them by which she was to pay each a certain sum, and they

were to convey to her their right and title to the premises. Five of the sisters, relying upon each and all of these agreements, released their respective interests in the land to the plaintiff, and the stipulated sums were paid. The defendant, however, refused to carry out her contract. In a suit against her for specific performance it was contended by the plaintiff that she had so changed her position by relying upon the defendant's promise that she could not be restored to her original situation and that the injury which would result to her if the defendant failed to carry out her contract was such a fraud as enabled her to invoke the remedial jurisdiction of equity. The court, however, refused to specifically perform the contract on the ground that the purchase of the rights of the other sisters even in reliance on defendant's promise was not in part performance of the contract with the defendant but was purely a collateral matter.

So, in the case under consideration, the giving up by the plaintiff of its right or option on the other storeroom was not in performance of, or in pursuance of, any contract with the defendant, but was entirely a collateral matter, and, therefore, not sufficient to take the case out of the statute of frauds.

The decree is affirmed.

#### AUSTIN v. VANDERBILT.

(Supreme Court of Oregon. May 29, 1906.)

##### 1. TROVER AND CONVERSION—COMPLAINT.

The complaint in an action for conversion of articles alleging that plaintiff, being the owner thereof, delivered them to defendant, and thereafter demanded of him the possession thereof, and that he refused to comply with the demand, and converted the property to his own use, is sufficient, without setting out the contract with respect to the delivery and averring wherein it was violated.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trover and Conversion, §§ 197, 198.]

##### 2. SAME—CONVERSION OF PLEDGE—TENDER OF DEBT SECURED.

Where a pledge is sold and converted by the pledgee so that he cannot return it, the pledgor need not, before bringing action for the conversion, tender the amount of the debt secured by the pledge.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, §§ 115-117; vol. 46, Cent. Dig. Trover and Conversion, § 149.]

##### 3. DAMAGES—VALUE OF PROPERTY CONVERTED—EVIDENCE.

Though the value of property at the time of its conversion is the measure of damages, evidence of its worth a reasonable time before and after its conversion is admissible to show such value.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 462; vol. 47, Cent. Dig. Trover and Conversion, § 231.]

##### 4. APPEAL—BILL OF EXCEPTIONS.

Admission of evidence, in an action for the conversion of diamonds, of the value of "flawless" diamonds, cannot be held error, the bill of exceptions not showing that the converted diamonds were not of that quality.

Appeal from Circuit Court, Multnomah County; M. C. George, Judge.

Action by Aimee Austin against Oscar Vanderbilt. Judgment for plaintiff. Defendant appeals. Affirmed.

This is an action by Aimee Austin against Oscar Vanderbilt to recover damages for an alleged conversion of personal property. The complaint states that, October 30, 1902, at Los Angeles, Cal., the plaintiff was the owner and possessed of one pair of 6-carat solitaire earrings, pure white, of the value of \$900, and also of one horseshoe pin, set with 11 diamonds, of the value of \$285, which she then and there delivered to the defendant; that she thereafter demanded of him possession of such property, but he refused to comply therewith, and converted it to his own use, to her damage in the sum of \$1,185. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, having been overruled, an answer was filed denying the material allegations of the complaint, and averring that the diamonds were delivered to the defendant as security for a loan of \$200; that, plaintiff having failed to pay any part of that sum, he gave her a written notice, July 30, 1903, that in 30 days he would sell such property to the highest bidder; that pursuant to such notice he sold the diamonds mentioned for \$255, which was the full value thereof, to A. McPhail of Chicago, Ill.; that defendant, retaining the amount of his debt, tendered to plaintiff in writing \$55, which she refused to accept, whereupon he deposited that sum in court for her. The reply denied the allegations of new matter in the answer, and, the cause being tried, the jury found for the plaintiff, assessing her damage at \$726, less \$200 loaned to her by the defendant, and, judgment having been rendered on the verdict for \$526, the defendant appeals.

A. King Wilson, for appellant. A. C. Emmons, for respondent.

MOORE, J. (after stating the facts). It is contended that the complaint should have alleged the substance of the contract, respecting the delivery of the diamonds, and averred wherein it had been violated by the defendant, but not having done so, the pleading assailed failed to state facts sufficient to constitute a cause of action, which defect was not waived by answering over. In *Miller v. Hirschberg*, 27 Or. 522, 40 Pac. 506, it was held that an allegation of the facts now insisted upon was unnecessary in an action of trover; Mr. Chief Justice Bean saying: "The material averments in an action of this character are ownership and right to the possession in plaintiff, and that the defendant wrongfully took and converted the property in question to his own use, or that, being lawfully in possession thereof, he so converted it." The conclusion thus reached is amply supported by the adjudged cases (21 Ency. Pl. & Pr. 1053), which hold that it is sufficient, in an action

of trover, to allege in the complaint the conversion, as a fact, without stating the particular acts constituting the unauthorized assumption and exercise of the right of ownership over the plaintiff's goods and personal chattels to the exclusion of his dominion over them. *Id.* 1077. Whether it is necessary to the maintenance of an action of this character to allege a tender of the sum loaned, to secure the payment of which the property was pledged, will be considered in connection with the contention that the court erred in denying a motion for a nonsuit and also in refusing to instruct the jury to find for the defendant. An examination of plaintiff's pleadings would seem to show that her theory was that the delivery of the diamonds was a mere naked bailment; but, as the jury found that she owed the defendant \$200, we shall adopt his hypothesis, that the delivery of the jewels to him was a pledge to secure the payment of that sum.

The bill of exceptions contains the following statement: "There was no evidence introduced at the trial of any demand to repay any loan, or of any tender of any money by plaintiff to defendant." So that a consideration of the questions of averments and of proof of tender become important. In *Halliday v. Holgate*, L. R. 3 Ex. 299, one Bentley borrowed of the defendant a sum of money, to secure the payment of which he deposited scrip certificates for certain shares of stock in a mining company. Bentley became a bankrupt and absconded, whereupon the defendant, without demand or notice, sold a part of the certificates. The plaintiff, as the bankrupt's assignee, not having tendered any of the debt, brought an action of trover against the defendant, to recover the value of the shares disposed of, and it was held, affirming the decision in *Donald v. Suckling*, L. R. 1 Q. B. 585, that, assuming the sale to be wrongful, as the immediate right to the possession of the shares of stock was not by the sale revested in the plaintiff, he could not maintain trover, either for the whole value of the shares or for nominal damages, thereby substantially overruling the decision in *Johnson v. Stear*, 15 C. B. (N. S.) 330. In *Halliday v. Holgate*, supra, Mr. Justice Willes, speaking for the Court of Exchequer Chamber, in discussing the question, says: "It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest. If he deals with it in a manner other than is allowed by law for the payment of his debt, then, in so far as by disposing of the reversionary interest of the pledgor he causes to the pledgor any difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor. But it is a contradiction in fact, and would be to call a

thing that which it is not, to say that the pledgee consents by his act to revest in the pledgor the immediate interest or right in the pledge, which by the bargain is out of the pledgor and in the pledgee. Therefore for any such wrong an action of trover or of detinue, each of which assumes an immediate right to possession in the plaintiff, is not maintainable, for the right clearly is not in the plaintiff."

The doctrine thus announced in England prevails in some of the states of the Union. In *Cortelyou v. Lansing*, 2 Caines, Cas. (N. Y.) 200, however, a different rule was adopted where it was held that, if a pledgee sells the pledge before application is made to redeem it, he is answerable in damages for the value of the property converted, and that it is not necessary in such case to make an actual tender of the sum due, to secure the payment of which the property was delivered to the pledgee. In deciding that case Mr. Justice Kent, assigning a reason for the conclusion thus reached, observes: "But when one party has incapacitated himself to perform his part of the contract, there is no need of the other coming forward at the time to make a tender, or to show himself in a capacity to pay, because it would be a nugatory act which the law will never require. If the one party discharges the other from a performance, by saying he will not perform on his part (and voluntarily and notoriously rendering himself unable to perform his part is equivalent to such discharge), it is well understood that it is not necessary for the other party to go forward." The rule established in that pioneer case is tersely stated by Mr. Milburn as follows: "If the property has been converted by the pledgee, no tender of the debt secured need be made by the pledgor before bringing an action against the pledgee." 22 Am. & Eng. Enc. Law, (2d Ed.) 874. Judge Story, in his work on Bailments (8th Ed., § 349), in speaking of the recovery of compensation for injury sustained by reason of the conversion of a pledge, remarks: "But, if an action is brought, the pledgee may recoup his debt in the damages." In addition to the cases cited by Mr. Milburn, as supporting the text quoted, see the following: *Hallack L. & M. Co. v. Gray*, 19 Colo. 149, 34 Pac. 1000; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307; *Rush v. First Nat. Bank*, 71 Fed. 102, 17 C. C. A. 627; *Waring v. Gaskill*, 95 Ga. 731, 22 S. E. 639; *Glidden v. Mechanic's Nat. Bank* (Ohio) 42 N. E. 905, 43 L. R. A. 737; *Felge v. Burt*, 118 Mich. 243, 77 N. W. 928, 74 Am. St. Rep. 390; *Work v. Bennett*, 70 Pa. 484. The pledgee impliedly agrees faithfully to hold the pledge until the conditions have been performed upon the faith of which the choses in action, goods, or personal chattels have been delivered to him. If, in violation of his trust, he sells or disposes of the pledge, thereby putting it out of his power to return the property, it would be useless to impose upon the pled-

gor the burden of tendering to the pledgee the payment of the debt, or the performance of the duty before he could maintain an action against the pledgee for the damages sustained by reason of the conversion, when it would be impossible for the latter to discharge the obligation which he had undertaken. When a pledgee, by his overt act, violates the terms of his agreement, so that it cannot be specifically enforced, he necessarily severs the fiduciary relations he assumed towards the pledgor, whose remedy against him in this form of an action for the injury sustained, though treated as one for conversion, is in reality founded on the breach of the contract. *Glidden v. Mechanic's Nat. Bank*, supra. The statement that the rules of law, which are founded in reason, do not require the performance of vain things, has been so often repeated as to become almost a general maxim, invoking which we think there was no necessity to allege in the complaint, or to prove at the trial a tender of any sum by the plaintiff to the defendant as a condition precedent to this right to maintain this action.

A. Feldenheimer, as plaintiff's witness, testified that he had bought and sold diamonds for several years and knew the value thereof, was permitted, over objection and exception, to state the highest market value from October 30, 1902, to the time of trial, of two pure white flawless diamonds, one weighing a trifle less and the other a little more than three carats, and also to specify the rate of increase in the value of such jewels in the interim, and it is contended by defendant's counsel that an error was committed thereby. The value of property at the time of its conversion is generally the measure of damages in an action of trover. To ascertain that value, however, evidence of its worth a reasonable time prior and subsequent to the conversion is admissible. *Douglass v. Kraft*, 9 Cal. 562; *Hamer v. Hathaway*, 33 Cal. 117; *Denton v. Smith*, 61 Mich. 431, 28 N. W. 160; *Kendrick v. Beard*, 90 Mich. 589, 51 N. W. 645; *Gauche v. Milbrath*, 94 Wis. 674, 69 N. W. 909. We think no error was committed as alleged, nor in permitting the witness to testify concerning the value of "flawless" diamonds; for the bill of exceptions does not disclose that the jewels which plaintiff delivered to the defendant were not of that quality.

These considerations necessitate an affirmation of the judgment, which is ordered.

(34 Mont. 31)

#### STATE v. LU SING.

(Supreme Court of Montana. March 19, 1906.)

#### 1. INFORMATION — FORM — MISSPELLING OF WORDS.

Pen. Code, § 1842, declares that no information is insufficient by reason of any defect or imperfection in matter of form not prejudicial to a substantial right of the defendant on its merits; and section 2600 provides that neither a departure from the form or mod-

prescribed by the Code in respect to any pleading, nor any error or mistake therein, renders it invalid in the absence of prejudice. *Held*, that an information charging murder in the first degree, alleging that defendant feloniously, willfully, and of his (defendant's) "deliberately" premeditated malice aforethought committed the act in question, was not fatally defective because of the mistake in spelling the word "deliberately."

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 209-214.]

## 2. SAME.

Allegations sufficient for a common-law indictment are sufficient to sustain an information for murder in the first degree.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 209.]

## 3. WITNESSES — COMPETENCY — ABILITY TO TELL THE NATURE OF AN OATH.

Under Code Civ. Proc. § 3161, declaring that all persons, without exception, otherwise than as specified in the succeeding two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses, a Chinaman was not disqualified to testify because of his inability to tell the nature of the oath administered to witnesses.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 77, 95, 104.]

## 4. CRIMINAL LAW—ADMISSIONS—ENTIRE CONVERSATION.

Defendant, after being arrested, attempted to conduct a conversation with a policeman, who had him in charge, while being taken to the city jail. The policeman testified that defendant spoke English very poorly, and that witness was unable to understand all that he said, but did understand his statement: "If I kill him, me good man. If I no kill him, no good"—and again: "If me no kill him, me no good man; and if Tom Sing dead, me die happy." *Held*, that such statement was not objectionable because of the witness' inability to detail all of the conversation.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 863, 895, 905.]

## 5. SAME—OBJECTIONS TO EVIDENCE—FORM.

An objection to questions asked accused on cross-examination that the evidence sought was "incompetent, irrelevant, immaterial, and not cross-examination" was too general.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1633-1637.]

## 6. SAME—MOTIVE—REASONABLE DOUBT.

In a prosecution for homicide, accused requested an instruction that, if the evidence failed to show any motive on the part of accused to commit the crime, that was a circumstance in favor of his innocence, which the jury ought to consider with other facts and circumstances in making up their verdict, and the absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, affords a strong presumption of innocence. *Held*, that the instruction was properly refused; the second clause being erroneous, as misleading and as invading the province of the jury.

## 7. SAME—VERDICT—SENTENCE—TIME.

Pen. Code, § 2210, declares that after a plea or verdict of guilty, if the judgment be not arrested or a new trial granted, the court must appoint a time for pronouncing judgment, which, in cases of felony, must be at least two days after the verdict, if the court intends to remain in session so long; otherwise, at as remote a time as can be reasonably allowed. *Held*, that defendant is entitled to two days after verdict before judgment is pronounced, provided the term of court lasts that long; other-

wise, the time of pronouncing judgment must be postponed to a date as remote as can reasonably be fixed within the current term of court.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2492.]

## 8. SAME—APPEAL—PRESUMPTION.

Where two days did not intervene between the verdict and judgment, it will be presumed on appeal, in the absence of anything in the record to the contrary, that the court did not remain in session after the date on which the judgment was pronounced.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

Lu Sing was convicted of murder, and he appeals. Affirmed.

J. L. Staats, for appellant. Albert J. Galen, Atty. Gen., and E. M. Hall, Asst. Atty. Gen., for the State.

**HOLLOWAY, J.** Lu Sing was convicted of murder of the first degree, and appeals from the judgment and from an order denying him a new trial.

1. It is contended by appellant that the information does not charge any higher offense than murder of the second degree, and therefore does not support the judgment. The information charges that the acts by which the homicide were committed were done "feloniously, willfully, and of his [defendant's] deliberately premeditated malice aforethought." The word "deliberately" is used repeatedly instead of "deliberate," as employed in the Code. Pen. Code, § 352. It is urged that the word "deliberately" is wholly meaningless, and without some appropriate word importing deliberation the information does not charge murder of the first degree, and that this question may be raised in the Supreme Court for the first time. So far as the question of procedure is concerned, we think appellant is correct. *Territory v. Young*, 5 Mont. 242, 5 Pac. 248; *Territory v. Duncan*, 5 Mont. 478, 6 Pac. 353. But we are not satisfied that by reason of the poor spelling—the mere insertion of the letter "d" between the letter "e" and the letters "ly" of what was evidently intended to be the word "deliberately"—the information is rendered fatally defective as one charging murder of the first degree; for, even assuming that it is necessary to allege the facts which distinguish murder of the first degree from murder of the second degree, in order to sustain a conviction of murder of the first degree, still we think that no one could have been misled as to the meaning of this information. The authorities are practically unanimous in holding that an error of this character will not vitiate the information. *Lefler v. State*, 122 Ind. 206, 23 N. E. 154; *Terrell v. State*, 41 Tex. 463; *State v. Williamson*, 43 Tex. 500; *State v. Smith*, 63 N. C. 234; *State v. Myers*, 85 Tenn. 203, 5 S. W. 377; 12 Cyc. 761. Furthermore, sections 1842 and 2600 of the Penal Code provide:

"Sec. 1842. No information or indictment

is insufficient, nor can the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits."

"Sec. 2600. Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

If the word "deliberately" had been used, the information would not have been couched in the most elegant English, but the objection now made could not have been urged seriously; and, while the evident purpose of the pleader was to use the word "deliberately," we think the mere misspelling of it does not render the information defective. "When the context and subject-matter are taken into consideration, the word intended to be used cannot be misunderstood." *State v. Williamson*, above. Under a statute similar to the one now in force it has been held by this court that it is not necessary to allege that the acts done were done deliberately in order that the information may be sufficient to sustain a conviction of murder of the first degree. It is still held that allegations sufficient for a common-law indictment will be sufficient for an information. *Territory v. Stears*, 2 Mont. 324, approved in *Territory v. McAndrews*, 3 Mont. 158, and in *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182. The same rule is also announced in *People v. De La Cour Soto*, 63 Cal. 165.

2. One Mar Quong, a Chinaman, was called as a witness on behalf of the state, but before testifying was tested as to his competency as a witness by defendant's counsel. It is now contended that upon the showing made, defendant's objection to the witness testifying should have been sustained. The examination of the witness related principally to his religious belief. He testified in the first instance that he knew the nature of the oath he had taken, but, after being cross-examined at some length, said that he did not. He said he could tell what he knew, and that what he would say would be true. He testified that he believed in the Christian religion and knew that the Christian God is a supreme being. He also stated that he did not know what kind of an oath is administered in the courts in China. Section 3161 of the Code of Civil Procedure provides: "All persons, without exception, otherwise than as specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibil-

ity of the witness may be drawn in question, as provided in section 3123." The witness does not come within any of the exceptions noted in section 3162 as amended, or in section 3163, and was apparently competent under section 3161. We do not find any authority for applying the test sought to be applied in this case, namely, the ability of the person offered as a witness, to "tell the nature" of the oath administered to witnesses in the courts of this state. So far as this record discloses, there was not any attempt to show that the witness did not understand the obligation of his oath or the penalty for perjury.

3. E. H. Williams, a policeman in the city of Bozeman, who arrested the defendant soon after the homicide was committed, testified for the state, over the objection of the defendant, to a part of a conversation which took place between himself and the defendant on their way to and at the city jail. The witness testified that the defendant spoke English very poorly, and that he could not understand all that defendant said, but did understand the defendant's statement: "If I kill him, me good man. If I no kill him, no good." And again: "If me no kill him, me no good man; and if Tom Sing dead, me die happy." Defendant moved to strike out the testimony of the witness, on the ground that he had not understood all that the defendant said to him and ought not to be permitted to testify to a portion only. The motion was denied, and error is predicated on this ruling. In support of his contention counsel for appellant cites *People v. Gelabert*, 39 Cal. 663, decided in 1870, and *State v. Buster*, 23 Nev. 346, 47 Pac. 194, decided in 1896. The opinion in *People v. Gelabert* is very brief and cites no authorities in support of the conclusion reached. The reason given for the conclusion goes to the weight, rather than to the competency, of the evidence. 1 *Greenleaf on Evidence*, § 214, is cited, not, however, in support of the conclusion reached by the court, but in support of the oft-repeated declaration of courts and text-writers that evidence of extra judicial confessions should be received with great caution, because of the danger of mistake of the witness arising from his misapprehending what the defendant said, his unintentional misuse of a particular word; or, if the witness does not remember the exact words used by the defendant, his failure to express in his own language the meaning intended to be conveyed by the defendant; and, finally, because of the infirmity of memory. But all of this is directed to the weight, rather than the competency, of the evidence, and it is well for the trial court to warn the jury as to the caution to be exercised respecting this character of evidence (*Code Civ. Proc.* § 3390, subd. 4) as indicated above, as was fully done by the trial court in this case. The case of *State v. Buster* is of no weight

as a precedent, for the reason that, while the Supreme Court of Nevada holds that the evidence given by the witness Cozzens, who could not understand all the defendant said, was incompetent, the error in receiving it was, nevertheless, cured by the fact that other witnesses, who did fully understand what the defendant said, corroborated the testimony of Cozzens, apparently overlooking the fact that the jury might have believed the witness Cozzens, and refused absolutely to believe the other witness who corroborated him, with the result, if the court's conclusion was right in the first instance, that the defendant was convicted upon evidence held to be wholly incompetent.

No fault is found with the authorities which hold that where the state offers only a part of the conversation embodying a confession, the defendant has a right to have the whole of the conversation before the jury; but the great weight of authority and reason hold that merely because a witness did not hear all of the conversation, or did not understand it all, does not render incompetent what he did hear or understand. The evidence goes to the jury for what it is worth. Its value may be greatly impaired by the fact that the witness heard or understood only a part of what was said. But where the jury is cautioned, as was done in this case, there can be no error in the reception of the evidence, merely because the witness can give only a portion of what was said. *Westmoreland v. State*, 45 Ga. 225; *Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814; *State v. Elliott*, 15 Iowa, 72; *State v. Moelchen*, 53 Iowa, 310, 5 N. W. 186; *State v. Madison*, 47 La. Ann. 30, 16 South. 566; *State v. Vallery*, 47 La. Ann. 182, 16 South. 745, 49 Am. St. Rep. 363; *State v. Daniels*, 49 La. Ann. 954, 22 South. 415; *Commonwealth v. Pitsinger*, 110 Mass. 101; 3 Wigmore on Evidence, § 2100; Wharton's Criminal Evidence, § 688. Long after the decision in *People v. Gelabert* was rendered, the Supreme Court of California held to this same doctrine announced by the courts above. *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Dice*, 120 Cal. 189, 52 Pac. 477. There cannot be any reason advanced for the admission of the testimony of witnesses who heard only a part of a conversation which will not apply equally to the testimony of a witness who heard it all but only understood or remembered a portion of it. We think the evidence was properly admitted.

The same objection is made to the testimony of the witness John Robertson; but the record does not support the contention. So far as disclosed, the witness Robertson understood the defendant and detailed all the conversation which he had with him.

4. Objections were made to certain questions asked the defendant on cross-examination, and errors are predicated upon the refusal of the court to sustain them. We

are not prepared to say that the court's rulings were erroneous, even had the objections been more specific; but the fact is that the objection in every instance was that the evidence sought was "incompetent, irrelevant, immaterial and not cross-examination." The evidence was certainly material. The objections were too general and were properly overruled. *State v. Black*, 15 Mont. 143, 38 Pac. 674.

5. The defendant offered an instruction, numbered 2, as follows: "If the evidence fails to show any motive on the part of the accused to commit the crime charged in the information, this is a circumstance in favor of his innocence which the jury ought to consider, together with all the other facts and circumstances, in making up their verdict. The absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, affords a strong presumption of innocence." It was refused. The first sentence of the instruction correctly states the law, but the second sentence renders the whole instruction erroneous: (a) In that it would necessarily confuse the jury by leading them to infer that after they had come to a conclusion that there was a reasonable doubt as to who committed the murder, they must still pursue their investigation of the case further; (b) in that it would have been highly improper for the trial court to have said that certain evidence "affords a strong presumption of innocence." Whether the presumption is strong or otherwise is for the jury to determine, and any comment upon the weight of the evidence by the court is an unwarranted invasion of the province of the jury. *State v. Sullivan*, 9 Mont. 177, 22 Pac. 1088; *State v. Gleim*, 17 Mont. 29, 41 Pac. 998, 31 L. R. A. 294, 52 Am. St. Rep. 655.

6. The verdict was returned on November 10, 1905, and judgment was pronounced on November 11, 1905, over objection of the defendant that he was entitled to two full days after the rendition of the verdict, before sentence. Section 2210 of the Penal Code provides: "After a plea or verdict of guilty, or after a verdict against the defendant on the plea of a former conviction or acquittal, if the judgment be not arrested or a new trial granted, the court must appoint a time for pronouncing judgment, which in cases of felony, must be at least two days after the verdict, if the court intend to remain in session so long; but if not, then at as remote a time as can be reasonably allowed." Counsel for appellant construes this section to mean that in any event the defendant is entitled to two full days after the verdict is rendered before judgment is pronounced, and, if the court is not to remain in session for that length of time, then judgment must be pronounced at a subsequent general or special term. Of course, if appellant's construction of this section is correct, this judgment was

pronounced prematurely. But we do not agree with counsel in his construction of the section. The section means that the defendant is entitled to two days after the verdict is returned before judgment is pronounced, provided the term of court lasts that long. But, if the term is not to continue for two days after the verdict is returned, then the time for pronouncing judgment shall be postponed to a date as remote as can reasonably be fixed within the then current term of court. Whether this was done in this instance does not appear from the record. The burden of showing error rests upon the appellant, and, in the absence of anything in the record indicating that the court was to remain or did remain in session after November 11th, this court must presume that the district court did its duty; at least, the presumption will not be indulged that a substantial right of the defendant was invaded or denied. The minutes of the court should have shown that, when the court fixed the time for pronouncing judgment, it also announced that court would not remain in session longer than the time so fixed, if that was done. This court takes judicial notice of the fact that there are two counties in the Ninth judicial district, and that the court has fixed terms, which, of necessity, must expire at certain periods, and that the court is not open for the transaction of business at all times, as in a district having but a single county.

The judgment and order are affirmed.  
Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

**STATE ex rel. PEW v. DISTRICT COURT OF FIRST JUDICIAL DISTRICT FOR LEWIS AND CLARK COUNTY et al.**

(Supreme Court of Montana. May 14, 1906.)  
INJUNCTION — JURISDICTION — SUMMARY PROCEEDING.

Where by the final decree in an action the rights of the parties to the use of the waters of a creek were determined, and all the parties, their heirs, assigns, tenants, etc., were enjoined from interfering with the rights of the other parties, the court is without jurisdiction in a summary proceeding, on less than 24 hours' notice, to enjoin a person not a party to the action, whether he be a trespasser or claim an independent right, from using the waters of the creek for any purpose whatever.

Certiorari by the state, on relation of George H. Pew, against the district court of the First judicial district in and for the county of Lewis and Clark and Henry C. Smith, judge of department 1 thereof, to review an order enjoining relator from using the waters of a creek for irrigation purposes or otherwise. Order annulled.

C. B. Nolan and Chas. E. Pew, for appellant. Galen & Mettler, for respondents.

BRANTLY, C. J. Certiorari. In May, 1903, in a cause entitled William Allen Butler and Wilhelmus Mynderse v. Thomas Cassidy et al., the district court of Lewis and Clark county made and entered a final decree settling and adjudicating the rights of all the parties to the use of the waters of Silver creek, in that county, and declaring their relative priorities. Among the other rights so adjudicated is one owned jointly by the plaintiffs and S. S. Johnson, one of the defendants, consisting of 50 inches, statutory measurement. The relator was not a party to the action, but being the tenant of plaintiffs, interested himself therein as their representative, and was active in their behalf. The decree contains this provision: "(2) And it is further ordered that each and every one of the parties to this action, his, her, or their heirs, assigns, lessees, tenants, subtenants, claimants, or occupiers of said several rights, their agents, servants, employes, legal or other representatives, be, and they are, hereby perpetually enjoined from in anywise invading, encroaching, or infringing upon or interfering with the rights of any and all of the other of said parties as the same are quieted and settled by this decree." On April 16, 1906, Johnson filed in that cause in the district court the following affidavit: "S. S. Johnson, being duly sworn, says: That he is the owner of a joint water right with plaintiff of 50 inches of waters of Silver creek involved in the decree in this action; that ever since the opening of the season of 1906, one George H. Pew has persistently taken all of said water right, including the waters of this affiant, and when this affiant has gone to the head of the ditch to get his share of the water, the said Pew would always take the whole of the same immediately upon the return of this affiant to his home." The court thereupon issued and had served an order requiring the relator to show cause at 4 o'clock that day why an order should not be made providing for the use of said joint water right by the owners thereof at different periods, respectively, so as not to interfere with each other, and why such further order should not be made in the premises as to the court might seem proper. After a hearing the following order was entered: "This matter came on regularly for hearing before the court on the affidavit of S. S. Johnson, and the order to show cause heretofore issued. George H. Pew appeared in open court personally and by counsel: Whereupon S. S. Johnson, George S. Fryatt, and W. H. Barnes appeared and gave testimony for the affiant, and the said George H. Pew testified in his own behalf, whereupon the court makes the following findings of fact: 1. That while the said George H. Pew disclaims any further interest or present interest in the plaintiffs' water right, he has for the last 30 days, un-

der some absolutely unfounded claim taken all of the waters of the said joint right of the plaintiffs and the said defendant S. S. Johnson, and in addition thereto a great volume of other water belonging to other water users on said creek from Silver creek, to none of which the said Pew has any title or any right thereto. And it further appearing that the said plaintiffs and their lessees have passively allowed the said Pew to use all of said joint water right without protest and that the said S. S. Johnson has been deprived of his share of the same for the last 30 days: It is ordered that the said Johnson be, and he is hereby, given the right to use the whole of said joint right of 50 inches heretofore decreed to himself and the plaintiffs, continuously up to and including the morning of May 16, 1906, and that thereafter the plaintiffs may use the same until the 23d day of May, 1906, at 8 o'clock a. m. exclusively, and that thereafter the defendant, S. S. Johnson, and the plaintiffs shall use the said joint right respectively, alternately, week in and week out commencing as aforesaid, until the further order of this court. And it is further ordered that the said George H. Pew be, and he is hereby, restrained and prohibited from directly or indirectly, personally, or through his servants or employes, or in any other manner using any of the waters of Silver creek, for irrigation purposes or otherwise." Thereupon this proceeding was brought in this court to have the order annulled.

The proceedings resulting in the order made by the court were anomalous. The decree in the case of *Butler et al. v. Cassidy et al.* does not provide in terms how the right in controversy shall be used. It merely adjudges that the plaintiffs are entitled to a one-half interest and that Johnson is entitled to the other half interest. Though all the parties to the action, including their heirs, assigns, lessees, tenants, etc., are perpetually enjoined from in any manner invading or interfering with the rights of any of the other parties, there is no specific provision regulating the rights of the plaintiffs and the defendant Johnson, as between themselves, in the use of their joint right. But whatever may be the rights of these parties under the decree, and whatever may be its provisions adjusting their rights as between themselves, it is clear that the order complained of is in excess of jurisdiction. If the relator had such connection with the litigation by which the rights of the parties were adjusted, as to make the decree binding upon him, the proper way for the court to enforce it was by contempt proceedings. The affidavit does not charge a contempt. It appears from the order made, that the relator disclaims any further interest in the plaintiffs' water right by virtue of a tenancy or any other relation. The court evidently

proceeded upon the theory that he was a trespasser interfering with the rights of the parties as they had been settled and determined by the decree, and that the making of the order would restrain Pew from interfering in any way any further. However this may be, the order amounts to an independent injunction issued in the case, restraining Pew from interfering with any of the waters of Silver creek, no matter whether by a claim of some independent right not adjudicated in the decree, or as a mere trespasser without claim of any right. At the close of the hearing the relator found himself enjoined from interfering with or using in any way any of the waters of the creek. In other words, the court adjudged that he was engaged in committing a trespass, and enjoined him in a summary proceeding, in a cause to which he was not a party, or, upon the theory that he claimed an independent right, finally and absolutely adjudicated that he had no such right, and that, too, upon summary notice of less than 24 hours. From either point of view the court had no jurisdiction. If the relator was a trespasser, he could be enjoined only after a hearing in a regular action, brought in the usual way. So, if he claimed an independent right, he was entitled to a regular hearing in an action brought for the purpose of adjudging his right. As it is, his rights were adjudged without due process of law.

There being no appeal from the order, nor any other adequate remedy than by certiorari, relator is entitled to a judgment annulling the order complained of. The order is accordingly annulled.

Order annulled.

HOLLOWAY, J., concurs. MILBURN, J., not having heard the argument, takes no part in the foregoing decision.

STATE ex rel. HUNGATE v. TIBBITS et al. (Supreme Court of Kansas, April 7, 1906.)

STATUTES—VALIDITY—MULTIFARIOUSNESS.

Chapter 334, p. 550, of the Session Laws of 1905, amending section 4700 of the General Statutes of 1901 (one of the sections of article 12 of the Code relating to injunctions), is not multifarious because it deals with injunctions in respect to such diverse matters as taxation, improvident public contracts, and nuisances.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 121, 122.]

(Syllabus by the Court.)

Error from District Court, Shawnee County; A. W. Dana, Judge.

Action by the state, on the relation of Otis E. Hungate, county attorney, against W. M. Tibbits and others. Judgment for defendants, and relator brings error. Reversed.

C. C. Coleman, Atty. Gen., and Otis E. Hungate (R. B. Welch, of counsel), for plain-

tiff in error. Hazen & Gaw, for defendants in error.

BURCH, J. This proceeding in error was commenced to procure a review of an order of the district court vacating a temporary injunction. The injunction was granted under the authority of chapter 334, p. 550, of the Session Laws of 1905, the material portion of which reads as follows: "That section 4700 of the general statutes of 1901 be amended so as to read as follows: Section 4700. An injunction may be granted to enjoin the illegal levy of any tax, charge, or assessment, or the collection of any illegal tax, charge, or assessment, or any proceeding to enforce the same, or to enjoin any public officer, board, or body from entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge or assessment; and any number of persons whose property is or may be affected by a tax or assessment so levied, or whose burdens as taxpayers may be increased by the threatened unauthorized contract or act, may unite in the petition filed to obtain such injunction. An injunction may be granted in the name of the state to enjoin and suppress the keeping and maintaining of a common nuisance. The petition therefor shall be verified by the county attorney of the proper county, or by the Attorney General, upon information and belief, and no bond shall be required."

This act the court held to be unconstitutional in that it contains more than one subject. The purpose of the act was to amend section 253 of the Code. That section is a part of the chapter of the Code which treats of injunctions. The entire chapter relates to the single subject of injunctions. Before the amendment section 253 enumerated certain classes of cases in which injunctions may be granted. The amendment merely added to the list. The subject of the chapter is now, the same as before the amendment, the subject of each section it contains. If the defendant's view were correct it might be argued that section 238 embraced in the same chapter is multifarious because it enumerates some three or four occasions upon which a temporary injunction may be granted. Clearly, however, the Legislature does not there deal with waste, fraudulent transfers, and the like, but with temporary injunctions. So the burden of section 253 is not taxation, improvident public contracts, and nuisances, but the right to invade those fields with an injunction. If the principle of interpretation here applied were not the true one, section 5 of the act relating to corporations (section 1249, Gen. St. 1901) would contain 40 different subjects instead of one, and it would be impossible to pass a valid law of comprehensive scope. By the terms of the act relating to injunctions a temporary injunction is a provisional remedy. Hence an order vacating a temporary

injunction is reviewable under the second subdivision of section 542 of the Code.

The judgment of the district court is reversed, and the cause remanded. All the Justices concurring.

(78 Kan. 780)

BURLEY v. BROWN.

(Supreme Court of Kansas, April 7, 1906.)

1. PARTNERSHIP—DISSOLUTION—ACTION BETWEEN PARTNERS—PETITION.

A complaint alleging that plaintiff and defendant dissolved their partnership and settled the "business," but that defendant failed to pay the amount due plaintiff, was not objectionable on the ground that it did not allege a settlement of the partnership affairs.

2. SAME—SETTLEMENT ON DISSOLUTION—PAYMENT OF DEBTS.

In an action to recover a sum found due to plaintiff on a partnership settlement between the parties, it was not necessary to show that the firm debts were paid.

Error from District Court, Cherokee County; W. B. Glasse, Judge.

Action by W. R. Brown against J. M. Burley. Judgment in favor of plaintiff, and defendant brings error. Affirmed.

E. J. White and S. C. Westcott, for plaintiff in error. Sapp & Brown, for defendant in error.

PER CURIAM. Brown sued Burley, alleging in his petition that a partnership existed between them, which was dissolved by mutual consent January 1, 1904; that in July, 1904, there had been a full and final accounting and settlement of the business, and in the settlement there was found to be due to Brown from Burley the sum of \$852.38. It was alleged that the debts of the partnership had all been paid; that Burley refused to pay the amount agreed upon in the settlement. The answer was a general denial. Upon a trial before a jury, plaintiff recovered a verdict for the full amount, and had judgment, from which defendant below appeals.

It is urged that the court should have sustained an objection to the introduction of any testimony under the petition for the reason that the petition does not allege a settlement of the partnership affairs. This objection is trivial, and depends upon whether the word "business" means "affairs." The petition states that they had a full and final accounting and settlement of their said business up to said date. Plaintiff in error cites *Palm v. Poponoe*, 60 Kan. 297, 56 Pac. 480, which, however, upholds the theory upon which the petition was drawn. That case distinctly recognizes the well-settled rule that, before an action can be maintained by one partner against another to recover as for a balance due upon an accounting, there must have been an accounting or settlement and the amount due determined, which is just what the petition here alleges was done.

The claim that the court should have sus-

tained a demurrer to the evidence rests upon the contention that it was necessary for plaintiff to prove that there were no debts of the partnership outstanding. Plaintiff's evidence was silent as to this, although the petition alleged that the debts had been paid. As the action here was based upon a settlement and agreement to pay, it was not necessary to establish the fact that the firm's debts were paid. It was not an action for an accounting, or a settlement of a partnership, but simply upon a contract to pay an amount agreed upon in a final settlement. The general denial raised no issues of fraud or mistake in the settlement, but merely denied the settlement.

We have examined the other errors complained of, but find nothing substantial or prejudicial. The evidence clearly shows that these parties met day after day for months in a lawyer's office for the express purpose of arriving at a settlement of their affairs; that they had their papers and accounts with them, and frequently adjourned to meet and continue the attempt at a settlement; and there is the testimony of plaintiff below, corroborated by other witnesses and circumstances that a final settlement was agreed upon, and that defendant below agreed to pay plaintiff the amount found to be due from him.

There was evidence sufficient to warrant the verdict and judgment. The judgment will be affirmed.

#### ROBERTSON v. LOMBARD LIQUIDATION CO. et al.

(Supreme Court of Kansas. April 7, 1906.)

##### 1. PLEADING—AMENDMENT—ANSWER.

Under the express provisions of Code Civ. Proc. § 139, an answer may be amended where the amendment does not substantially change the defense.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 761-807.]

##### 2. TAXATION—TAX DEEDS—DESCRIPTION—SUFFICIENCY.

Where a tax deed accurately described the land taxed, and in describing the land sold stated "the whole of the above-described property," and in the granting clause stated "the real property last hereinbefore described," it was sufficient as to the description of the land sold.

Error from District Court, Jewell County; R. M. Pickler, Judge.

Action between Fred Robertson and the Lombard Liquidation Company and another. The former brings error to review the judgment. Affirmed.

R. W. Turner and Fred Robertson, for plaintiff in error. E. P. Hotchkiss and Peters, Bowersock & Hall, for defendants in error.

PER CURIAM. This was an action in ejectment. Two errors are assigned: (1) In allowing an amended answer to be filed;

(2) in holding the tax deed of the defendant valid. The defenses set up in the amended answer did "not change substantially . . . the defense" which could have been made under the original answer. Hence there was no abuse of discretion in the allowance of the amendment. Code Civ. Proc. § 139.

The tax deed had been of record more than five years before the commencement of this action. It described accurately the land taxed, and in describing the land sold says "the whole of the above-described property," and in the granting clause says "the real property last hereinbefore described." There is only one tract of land described. Its description is admitted to be accurate, and the references thereto are so direct and certain that there can be no mistake as to the land sold or to the land conveyed. This is sufficient. *Cartwright v. Korman*, 45 Kan. 515, 26 Pac. 48. The deed shows that the land was sold on the first Tuesday in September, 1891, for the taxes of 1890, for \$10.83, and that the holder of the tax-sale certificate paid the taxes of 1891, \$5.77, and that on July 22, 1895, the county clerk conveyed the land to such holder for \$32.05, being "the taxes, costs, and interest due on said land for the years 1890 and 1891." Chapter 110, p. 193, Laws 1893, changed the rate of interest from 24 per cent. to 15 per cent. Of course, this would not effect the rate of interest in this case. Assuming that the taxes for 1891 were paid by the holder of the certificate as soon as the same became delinquent, and computing interest at 24 per cent. on the two amounts to July 22, 1905, leaves less than 50 cents of the amount for which the conveyance was made to be accounted for in costs.

The judgment of the district court is affirmed.

#### MISSOURI, K. & T. RY. CO. v. TAYLOR.

(Supreme Court of Kansas. April 7, 1906.)

##### 1. RAILROADS—INJURY TO LICENSEE.

A person while upon premises occupied and controlled by an elevator company, with its consent and for the purpose of transacting business with it, is not a trespasser as to a railroad company which owns the land upon which the elevator building stands.

##### 2. SAME—CONTRIBUTORY NEGLIGENCE.

When a railway company negligently inflicts injuries upon a person situated as above stated, while such person is exercising ordinary care, it cannot avoid liability therefor on the plea of contributory negligence.

(Syllabus by the Court.)

Error from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Action by Florella Taylor against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John Madden and W. W. Brown, for plaintiff in error. Osborn & Osborn, for defendant in error.

GRAVES, J. The Missouri, Kansas & Texas Railway Company, while placing a car of grain on its switch track at an elevator in Coffeyville, Kan., knocked a grain chute down, which fell upon James W. Taylor, and injured him so that he died. His widow sued the company for damages, and recovered a judgment in the district court of Montgomery county for \$3,000. The defendant brings the case here for review. A demurrer to the evidence was overruled, and, the defendant having no testimony, the case went to the jury on the evidence of the plaintiff alone. The plaintiff in error has assigned several errors, but its argument is confined almost entirely to a failure of proof and contributory negligence.

The facts necessary to an understanding of the case are in substance as follows: The Rea-Patterson Milling Company own the elevator, and the railway company is the owner of a switch track upon which cars loaded with grain may be taken to the elevator to be unloaded. When a loaded car is run up to the elevator, it is the duty of the Milling Company, to see that it is unloaded. It does not appear from the evidence, whether the elevator building occupies ground belonging to the railway company or not, but it may be inferred from the averments of the petition, which should perhaps be considered as admissions of the plaintiff, equivalent to proof, that it stands upon the defendant's right of way, the elevator company having permission to use all the ground necessary for the purposes of its business. The elevator building stands upon a foundation wall which is strengthened with brick piers, about three feet across at the ground, and 18 inches at the top and extend from 18 inches to two feet out from the wall of the building. The deceased, prior to his death had been for about two months in the habit of coming to the elevator and assisting the men engaged in unloading wheat by sweeping out the cars, for which he received whatever grain he might find which amounted in quantities, ranging from a bucket full to a half bushel to the car. At the time of the injury, he was engaged with an employé of the elevator company in unloading a car; while so employed it became necessary to move the car to permit the placing of another. While this was being done, the deceased was requested to get off of the car, which he did. After getting out he stood against the elevator, between it and the switch track, and west of and near one of the brick piers to the foundation wall. While so situated he would be about three feet from a car passing on the switch track. The loaded car which was being pushed in on the switch track, had a heavy iron step hanging under it, which was bent out of proper position so that it extended several inches beyond the car. The car was run down to the elevator at a speed of about 10 miles an hour, and as it passed the elevator this step struck the chute and knocked it over

against and upon the deceased, whereby he was killed.

It is contended that the deceased was a trespasser upon the defendant's premises, and, as the injury was not inflicted wantonly, there can be no recovery. It appears that he was standing at the time of the injury, within the line of the foundation walls of the elevator, and on ground which the elevator company occupied and controlled. He was there by permission of the managers of this company, for the purpose of performing duties in which both were interested, the company was interested in having the car cleaned and the deceased in securing the grain therefor. Under ordinary circumstances he was in a place of perfect security. He had no reason to suspect danger. He was rightfully there. The jury returned special findings of fact, among which was the following: "Q. Was James W. Taylor at the time of the injury a trespasser on the grounds that he was occupying at the time he was injured? A. No. Q. From whom did he obtain a right to occupy the ground? A. Rea-Patterson Milling Company's foreman." Under the facts shown we do not think the deceased can fairly be held to have been a trespasser, but if we had any doubt upon the subject, these findings of the jury would place it at rest.

It is also contended that the deceased was guilty of contributory negligence. This claim is based largely upon the idea that he was a trespasser. Aside from this, it is urged that the deceased, by the exercise of proper diligence, could have seen the projecting step and moved to a place of safety. We do not understand it to be the duty of a person, when rightfully in a place which under ordinary circumstances is safe, to anticipate danger which arises from the negligence of another. Ordinary care to avoid ordinary or known danger is the extent of vigilance required. Upon this subject the jury returned the following special findings: "Q. Could Taylor, by the exercise of ordinary prudence, have seen that there was danger in placing himself between the cars and the wall of the elevator? A. No. Q. Could Taylor at the time he saw the train approaching him have gone to the west side of the elevator and have been safe from danger? A. No." Ordinary care did not require the deceased to anticipate that the defendant would run a car upon this switch track at a high rate of speed, past the chute, between which and the car there was known to be a space of only a very few inches, without first examining to see if any obstacles existed. He was not bound to act upon a supposition that the chute near which he was standing was about to be negligently torn to pieces, and thrown upon him. We think this claim of contributory negligence is not tenable.

The other errors complained of relate to the instructions of the court, but the foregoing conclusions practically dispose of these

questions also. We have examined each of these instructions, and are unable to find that either is erroneous.

The judgment of the district court is affirmed. All the Justices concurring.

# WHITNEY et al. v. BOARD OF COUNTY COM'RS OF MORTON COUNTY.

(Supreme Court of Kansas. April 7, 1906.)

## 1. TAXATION—DELINQUENT TAXES—CONSOLIDATION OF ACTIONS.

Under chapter 392, p. 705, Laws 1901, relating to the collection of delinquent taxes on real estate and providing a remedy by sale under decree of court, separate suits against individual tracts are permissible. In many instances there ought to be a joinder. In all cases the board of county commissioners ought to exercise care when ordering suits to be commenced not to multiply costs; and if by a consolidation of actions the district court can aid in keeping costs at a minimum, it should make an order to that end, on request, unless some paramount consideration should control to the contrary.

## 2. SAME—COSTS.

If the action of the board of county commissioners in ordering separate suits should result in oppression and palpable wrong, the district court may tax any unjust increase in costs so made to the plaintiff.

## 3. SAME—FRAUDULENT VALUATION.

In an action brought under the provisions of the statute referred to the district court is required to investigate and decide what taxes shall have been legally assessed and charged upon the land in controversy. An increment to taxes occasioned by a fraudulent valuation is illegal, and should be eliminated from the amount of the plaintiff's lien.

## 4. LIMITATION OF ACTIONS—TAXATION—DELINQUENT TAXES—COLLECTION—ACTIONS.

The statute requiring actions to enforce a liability created by statute to be commenced within three years has no application to suits brought to enforce tax liens.

(Syllabus by the Court.)

Error from District Court, Morton County; Wm. Easton Hutchison, Judge.

Action by the board of county commissioners of the county of Morton against Florence D. Whitney and Charles S. Hinchman, trustee. Judgment for plaintiff, and defendants bring error. Reversed.

Allen & Allen, for plaintiffs in error. Geo. Getty, Mathew J. Allen, and G. Porter Craddock, for defendant in error.

BURCH, J. This proceeding in error grows out of an action brought to enforce tax liens under chapter 392, p. 705, Laws 1901, providing a remedy by sale under decree of court. Under an order of the board of county commissioners the county attorney brought a large number of actions to foreclose tax liens, devoting a single suit to each unredeemed tract. A large number of defendants moved for a consolidation, and the refusal of the court to comply with their applications is assigned as error.

The statute relates to "cases" in which real estate remains unredeemed, and the commissioners are given authority to order

suits against so much of the unredeemed real estate of the county as they may direct. Separate suits, therefore, are permissible, although not required. In many instances no doubt, a single action for the foreclosure of the lien upon a single tract is the only proper method of procedure. In many other cases there should be a joinder, and the board of county commissioners always ought to exercise great care when ordering suits not to multiply costs. Likewise, when the matter of consolidating suits already commenced is presented to the district court, it should manage the litigation in such a way as to keep costs at a minimum. One individual may be the owner of a large number of tracts all affected by the same tax proceedings. In such a case it would be unjust for the board of county commissioners to require separate suits, and it would be an abuse of discretion in the district court not to consolidate such suits after they had been started unless some exceptionally important fact should control to the contrary. Other clear cases might be suggested. No very large amount of arbitrary power has been distributed among officers and tribunals of this state vested with authority in public affairs, and if the action of the board of county commissioners in ordering separate suits should result in oppression and palpable wrong the district court should remedy the injury by apportioning costs at the time of the decree. The board of county commissioners has a discretion only as to the time and manner in which it will act. When proceedings have commenced it is merely a party, and the district court has jurisdiction to protect the rights of all concerned. The proceeding is equitable, for the enforcement of a lien, and the lienholder may be required to bear whatever unconscionable increase it may make in the costs. In this case the only reason given for the motions to consolidate is that the actions might have been joined. It cannot be said, therefore, that the district court abused its discretion.

The answers pleaded facts showing a fraudulent valuation whereby the defendant's taxes were greatly increased, but the defendants were not permitted to introduce evidence in support of this claim. The plaintiff contends that the remedy lay in an application to the board of equalization. The statute requires the court "to investigate and decide what taxes shall have been legally assessed and charged on such land, lot, or piece of ground, and to render judgment therefor with the interest and penalty thereon as provided by law." This does not mean that mere errors of judgment, mistakes, or simple irregularities on the part of any of the officials may be corrected in the foreclosure suit. But an increment to taxes occasioned by fraud in the valuation of the property affected is so far illegal as to be within the contemplation of the stat-

ute. Without the statute the courts have exercised jurisdiction to restrain the collection of taxes which were the result of conduct quite similar to that described in the answers in this case (*C. B. & Q. Railroad Co. v. Com'rs of Atchison Co.*, 54 Kan. 781, 39 Pac. 1039) and the Legislature evidently intended to give the court authority to eliminate the products of fraud, corruption and gross injustice from the amount of the claimed lien before entering a decree for the sale of the land.

The defendants claim that the liability of their land to sale for taxes under a decree of court is one created by statute and hence that suit for that purpose must be brought within three years. Under the provisions of section 5 the board of county commissioners acts in a representative capacity. The suit is brought for the benefit of the state of Kansas and all of its municipal subdivisions interested in the taxes to be recovered. The proceeds of the foreclosure sale are distributed among the beneficiaries, including the state, ratably in proportion to their several interests. Under the well-known rule statutes of limitation do not apply to the state except by specific reference. The state is certain to be interested in almost every suit brought under the act. No discrimination having been made between those cases and others it is plain the Legislature did not intend that action should be barred in any instance by lapse of time. Other considerations lead to the same interpretation, but it is not necessary to elaborate them.

For the error committed in rejecting evidence under the answers, the judgment of the district court is reversed, and a new trial awarded. All the Justices concurring.

#### McCREADY v. DENNIS et al.

(Supreme Court of Kansas. April 7, 1906.)

##### PLEADING—JUDGMENT ON PLEADINGS.

In ejectment, plaintiff claimed to be the owner and entitled to possession. Defendants, in their cross-petition, denied plaintiff's ownership and alleged that a third person was the owner and that she had executed an oil and gas lease to defendants under which they were in possession. Plaintiff filed a general denial to the cross-petition and reaffirmed his ownership. *Held*, that the court could not enter judgment for defendants on the pleadings; it being necessary to determine the issue of ownership in order to decide the rights of the parties.

Error from District Court, Chautauqua County; G. P. Alkman, Judge.

Action by Abba Clair McCready against W. H. Dennis and others. Judgment for defendants, and plaintiff brings error. Reversed.

J. B. Ziegler and Keplinger & Trickett, for plaintiff in error. W. S. Fitzpatrick and Sproul & Van Tuijl, for defendant in error.

PER CURIAM. This was the second trial of an action in ejectment. On motion therefor the court rendered judgment for the defendants on the pleadings. This is assigned as error. The plaintiff in the action claimed to be the owner of the property in controversy, and entitled to its possession. The defendants denied plaintiff's ownership, and in their cross-petition for affirmative relief alleged that one Amanda Miller was the owner of the property, and that she had executed to them an oil and gas lease under which they were in possession, and they asked that the plaintiff's claim of ownership be canceled. To this cross-petition the plaintiff filed a general denial, and reaffirmed her ownership of the land. These pleadings put in issue the ownership of the land as one of the material facts to be determined before the court could decide the ultimate rights of the parties. It was therefore error for the court, while this issue was undetermined to render a judgment on the pleadings.

The motion to dismiss this proceeding is overruled, the judgment reversed, and the cause remanded for further proceedings.

ROSS OIL & GAS CO. v. EASTHAM et al.  
(Supreme Court of Kansas. April 7, 1906.)

##### 1. CORPORATIONS—AUTHORITY OF SECRETARY—CONTRACTS.

A secretary of a corporation cannot ordinarily, without special authority, make contracts which will bind the company.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1613.]

##### 2. APPEAL—PRESUMPTIONS.

Where a district court, in a trial to it without a jury, enters a general judgment, and the record in the case presents two theories upon which the court might have based its conclusions, one proper and the other erroneous, but does not show which theory was followed, this court will presume that the judgment was entered upon the theory which makes it valid.

(Syllabus by the Court.)

Error from District Court, Allen County; Oscar Foust, Judge.

Action by F. N. Eastham and others against the Ross Oil & Gas Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Ewing, Gard & Gard, for plaintiff in error. Campbell & Goshorn, for defendant in error.

GRAVES, J. This action was brought to recover for extra work done on a gas well. The plaintiff in error, a corporation, had a contract with the defendant in error to put down six wells at Humboldt, Kan. Five of the wells were completed. When the sixth well was at the depth where oil sand was expected, a stratum thereof was found, but the quantity and quality were not satisfactory. Under the direction of the secretary of the plaintiff in error the extra work was done which is involved in this case. It does

not appear that the secretary was specially authorized to act for the company in this matter, and for this reason, the company denies liability. On a trial to the court without a jury in the district court of Allen county, the defendant in error recovered judgment against the company for the extra work done, and it brings the case here for review.

No special findings of fact were filed by the court and the record does not show upon what theory the judgment was based. It is insisted that the secretary of a corporation cannot bind the company by contracts made for it, unless thereto specially authorized. In this contention, we fully agree with the plaintiff in error. It is alleged in the petition, however, that the secretary was also manager and agent of the corporation, so far as this well was concerned, and there is evidence in the case tending to sustain this averment. It the evidence in the case satisfied the court that the secretary acted for the company in this matter, with its knowledge and consent, and under circumstances which justified the defendants in error, in recognizing him as the authorized representative of the company; or that he was expressly authorized to manage and superintend the well in question, the judgment was proper. The general presumption which always obtains in support of the judgments of courts having general jurisdiction, requires us to assume that the court so found, and placed its judgment upon such finding. There is evidence to support such finding, and as the case comes to us we are unable to say that the evidence is insufficient.

The judgment of the district court is affirmed. All the Justices concurring.

(73 Kan. 364)

#### CROAN v. BADEN.

(Supreme Court of Kansas. April 7, 1906.)

##### 1. TRIAL—FINDING—CONSTRUCTION.

Whether the answer "Do not know," to a special finding of fact returned by a jury, is equivalent to "Yes," or "No," depends upon the form of the question answered. Generally, such an answer shows that the party whose duty it was to establish the fact involved in the question, failed in his proof. In a case where it was the duty of the defendant to prove that Emma M. Carey did not sign a certain promissory note, and the jury returned the following finding and answer: "Did Emma M. Carey sign the note in question? Do not know." Such answer is equivalent to "Yes."

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 853.]

##### 2. LIMITATION OF ACTIONS—PLEADING.

The statute of limitations, to be available as a defense, must be affirmatively pleaded or otherwise asserted, and a failure to do so, constitutes a waiver of such defense.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 678.]

##### 3. SAME—ACTION BETWEEN NONRESIDENTS.

The laws of the state of Kansas relating to the limitation of actions apply exclusively in this state, except when the requirements of the statute permitting the law of another state

or territory to be applied has been complied with.

(Syllabus by the Court.)

Error from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Action by Henry Baden against R. B. Croan. Judgment for plaintiff. Defendant brings error. Affirmed.

Ayres & Welch, for plaintiff in error. J. H. Keith, for defendant in error

GRAVES, J. This action was commenced in the court of Coffeyville, Montgomery county, Kan., on the 29th day of August, 1900, by Henry Baden, a resident of said county, against R. B. Croan, a resident of the Indian Territory. The plaintiff recovered judgment May 11, 1901. The defendant took the case to the district court by petition in error, where the judgment was affirmed, and he now brings the case here for review.

The suit was brought to recover on a promissory note. The petition was in ordinary form with a copy of the note attached as an exhibit, which reads: "\$735.00. Nowata, I. T., June 7th, 1895. Sixty days after date we promise to pay to the order of Henry Baden at Independence, Kansas, seven hundred & thirty-five and no-100 dollars with interest at the rate of 10 per cent. per annum from date until paid value received. Interest payable annually. Emma M. Carey. Wm. V. Carey. R. B. Croan." Apparently for the purpose of avoiding the statute of limitations, it was averred "that the said defendants and each of them have for more than one year since said note became due and payable resided in the Indian Territory, and out of the state of Kansas, and beyond the jurisdiction of this court." The defendant was summoned in Montgomery county. He filed a verified answer containing: (1) A general denial. (2) That he had for more than eight years been a resident of the Indian Territory, and never had been a resident of Kansas. That the note was made, executed, and delivered in the Indian Territory, and was barred by the laws of that place long before this action was commenced. (3) A failure of consideration. The plaintiff for reply filed a general denial. The issues thus presented were tried to a jury of six men in the court of Coffeyville.

One of the material facts involved in the defendant's third defense was whether or not Emma M. Carey signed the note in question. The defendant claimed that he signed the note as surety in consideration of the promise that she would also sign it, and her name had been forged thereto. Special findings of fact were submitted to, and returned by the jury, which are in part as follows: "Q. State what the consideration of the note was? A. The amount of the note. Q. What was the agreed consideration of the note? A. \$735. Q. Did Emma M. Carey sign the note in question? A. Do not know." It is

claimed that the answer "Do not know," is equivalent to "No," and the case of *Kallna v. Railroad*, 69 Kan. 172, 76 Pac. 438, is cited as authority for this contention. The decision, however, does not so hold. The rule established by that and other cases, is that such an answer indicates that the party whose duty it was to establish the fact involved in the question, failed in his proof. Tested by this rule the answer means, "Yes." The defendant alleged and undertook to prove that Emma M. Carey did not sign the note. The jury, after hearing all the evidence on the subject, are unable to say that she did not sign it, and therefore, the presumption that she did, is not overthrown. The execution of the note by the defendant is not controverted by the evidence. This disposes of all the questions presented in favor of the plaintiff, Henry Baden, except the statute of limitations.

It is argued by the plaintiff in error that, when it appears from the face of the petition that the cause of action is barred by the statute of limitation, the plaintiff cannot recover unless he affirmatively removes the bar by his testimony. It is further claimed that this duty of the plaintiff does not depend upon any act or plea on the part of the defendant. We think otherwise. The mere fact that a promissory note is barred by the statute of limitations does not imply that the debt evidenced thereby is extinguished, nor that the defendant is not morally obligated to pay it. This statute was not designed to prevent the payment of such obligations. It only furnishes a defense thereto which the defendant may use or not at his option. The right to use this defense is regarded as a privilege which may be waived, and the failure to affirmatively assert it will constitute a waiver thereof. In this case the defendant did not either demur to the petition, object to the introduction of evidence, plead the statute of limitations in his answer, or otherwise claim the protection of this Kansas statute. It seems that the defendant did not rely upon the Kansas statute of limitations, at the trial, but sought protection under the statutes of the Indian Territory, which were fully pleaded in his answer, and established by the proof. He insists that a good defense was made out under section 4450 of the General Statutes of Kansas of 1901, which, so far as necessary, reads: "Where the cause of action has arisen in another state or country, between nonresidents of this state, and by the laws of the state or country where the cause of action arose an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in this state." The defense as pleaded, however, omits the essential averment that the cause of action "arose between nonresidents of this state." This omission makes the plea insufficient. It is shown by the evidence that the plaintiff, Henry Baden, payee of the note, was at all

times a resident of the state of Kansas. This fact is not disputed. It seems, therefore, that this defense, both in plea and proof, falls outside of the provisions of the statute relied upon. We conclude that the verdict and findings of the jury were fully justified, both by the law and the evidence.

The judgment is affirmed. All the Justices concurring.

#### MISSOURI PAC. RY. CO. v. DORR.

(Supreme Court of Kansas. April 7, 1906.)

##### 1. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES.

Before an employé of a railroad company can recover from the company for injuries resulting from a defective appliance on a locomotive, of which defect the railroad company had no actual knowledge, he must show that it had existed for such length of time that the company should have discovered and remedied it.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 248, 250.]

##### 2. SAME—TRIAL—SPECIAL FINDINGS—DEFINITENESS.

There was a finding by the jury that the injury in question would not have occurred but for the defect, and that the company had no actual knowledge of its existence. It also found, in response to a question as to the duration of the defect, that it had existed "for some time previous to accident." Held, that the latter finding is too indefinite to support a recovery.

##### 3. TRIAL—CORRECTION—OBJECTIONS.

At the instance of the defendant the jury was required to make a more definite answer to the question, but the second answer was no more specific than the first, and, as the second effort to obtain a specific answer had failed, it is not to be presumed that a better result would have been obtained by still other efforts, nor did the defendant waive its right to object to the finding by failing to request the court to have the effort repeated.

##### 4. SAME.

A finding of a jury upon a specific and controlling question must be deemed to be as full and definite an answer as the testimony in the case will warrant.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by Richard N. Dorr against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

J. H. Richards and C. E. Benton (Smyth & Helm, of counsel), for plaintiff in error. Houston & Brooks, for defendant in error.

JOHNSTON, C. J. Richard N. Dorr was the head brakeman on a freight train of the Missouri Pacific Railway Company, and on his fourth trip over the line he fell from the steps of the locomotive, the wheels passed over and crushed his legs, making it necessary to amputate one of them above, and one below the knee. He brought this action, alleging that the injury was due to the negligence of the railway company. In his testimony he related the circumstances of the unfortunate occurrence, saying substantially

that he was riding on the engine, and as he approached the station of Freeport it was suggested to him that he make ready to get off, which he proceeded to do; that he grasped the handhold of the tender and reached for the handhold of the cab at the opposite side of the passage-way, and, it being considerably lower than the other handhold, he leaned over and just as he was about to catch it there was a jar of the engine which threw him off his balance. He then placed his foot on the lower step which, being defective, tilted him off, his handhold broke loose, he fell to the ground, and rolled under the wheels, receiving the injuries mentioned. In his petition the negligence imputed to the railway company was the sudden checking of the train, the improper position of the handholds, the defective step and the condition of the ground upon which he fell, causing him to roll towards the track. The railway company alleged and offered testimony tending to show that the step was not defective, and its condition was the main point in dispute between the parties. It was insisted by the company that in any event Dorr knew of the existing conditions and that his own negligence contributed to the injury. The trial resulted in a verdict for Dorr and the jury awarded him damages in the sum of \$35,000. There was no claim that the injury was malicious, willful, or wanton, and hence no part of this exceptionally large award was exemplary damages.

It is earnestly contended that the evidence does not prove the alleged negligence of the railway company, and it is also argued that it affirmatively shows that the injury was due to a want of care on the part of Dorr. Of this branch of the case it may be said that in some respects the testimony is not satisfactory, but it cannot be held that the finding that the company was negligent is without support, nor would the court be justified in saying, as a matter of law, that a recovery by Dorr was barred by his own negligence. The railway company insists that it is entitled to judgment on the findings, claiming that they in effect acquit it of the charge of negligence. It appears from the evidence and the findings that the liability of the railway company is based principally upon its negligence in maintaining a defective step. To question No. 18, "If you find that said step was out of repair, state in answer to this whether you find plaintiff would have been injured if said step had not been out of repair?" the jury answered, "No." To hold the company for injuries to an employé because of defective machinery or appliances it is necessary that the company should have had knowledge of the defect, or that it ought to have had such knowledge by the use of ordinary care. There was a finding by the jury that the step on the engine was out of repair at the time of the injury, and in answer to another question as to the nature of the defect, the jury an-

swered, "The stirrup was bent up in the center at the bottom—bolt was loose and flanges broken." To the special question, "What person or persons in the employ of the defendant are shown by the evidence to have had notice prior to the accident in question that said step was out of repair?" the jury answered, "No one." The special interrogatory, "If you answer question No. 13 in the affirmative, state for how long a time said step had been out of repair," was answered by the jury, "For some time." The railway company moved the court to require the jury to answer the question more definitely, and the judge stated, "I presume they are entitled to a more definite answer to that; as to how many days or weeks," and sustained the motion. Later the jury returned with the enlarged answer, "For some time previous to accident." These findings do not warrant a recovery. Whether the defect existed for such a length of time as to charge the railway company with notice of the defect was an important consideration. Notice or knowledge cannot be presumed unless the duration and character of the defect were such as should have been discovered by the railway company by the exercise of ordinary care and diligence. In *Harter v. Railroad Co.*, 55 Kan. 250, 38 Pac. 778, it appeared that an injury to an employé was caused by a defect in a railway track. The court remarked: "This, however, is not enough to warrant a recovery against the defendant. There must be evidence fairly tending to show either that the defendant knew of the existence of the defect, or that, in the exercise of reasonable and ordinary care and diligence, the defect could have been discovered before the accident." See, also, *Railroad Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204; *Railroad Co. v. Ledbetter*, 34 Kan. 326, 8 Pac. 411; *Carruthers v. Railway Co.*, 55 Kan. 600, 40 Pac. 915; *Railroad Co. v. Tindall*, 57 Kan. 719, 48 Pac. 12; *Railroad Co. v. Swartz*, 58 Kan. 235, 48 Pac. 953.

It has been found that Dorr would not have been hurt but for the defective step: that none of the employés of the railroad company knew of the defect, and that the step had been out of repair "for some time previous to accident." Was it out of repair long enough to charge the railroad company with constructive notice of the defect? How long a period is "some time"? In the *Century Dictionary* the word "some" is defined as "a certain indefinite or indeterminate quantity or part of; more or less; often so used as to denote a small quantity or a deficiency." The definition given in *Webster's International Dictionary* is: "Consisting of a greater or less portion or sum; composed of a quantity or number which is not stated; used to express an indefinite quantity or number;" and also, "not much; a little." In *Lewis v. Jones*, 17 Pa. 262, 55 Am. Dec. 550, a witness had testified about the purchase of "some hay" and "some

grain" to feed stock, and the court was asked to base an instruction thereon, which was refused. In reviewing the case it was said that "'some' is a term too uncertain in its signification to sustain a verdict for any definite amount. It may mean a single ounce, or 10,000 tons; a single quart, or 20,000 bushels." In the same connection it was said that "nothing can more justly impair confidence in the administration of justice than the practice of encouraging, or even permitting, a jury to find facts of which there is no evidence." In *Railroad Co. v. Spear*, 44 Mich. 170, 6 N. W. 203 (38 Am. Rep. 242), the court, in speaking of a promise to repair an engine "some time," said that "the promise was wholly indefinite." In *City of Lincoln v. Calvert*, 39 Neb. 305, 58 N. W. 115, there was an instruction given in a personal injury case to the effect, that if the city permitted a defect in the street to continue for a "considerable length of time" which rendered it unsafe and dangerous, a liability would arise, and it was held that a "considerable length of time" was so indefinite as to form no proper test for the guidance of the jury. In *St. Louis Paper Box Co. v. Hubinger Bros.*, 100 Fed. 595, 40 C. C. A. 577, the court had before it a contract for the sale of a large number of articles, and there was a provision in it that if the vendee should receive "some" that were not up to sample he should return them to the vendor who would replace them, and the court interpreted the word "some," as used in the contract, to mean "a small or inconsiderable number." To the same effect is *Chase v. City of Cleveland*, 44 Ohio St. 505, 9 N. E. 225, 58 Am. Rep. 843. In *Railroad Co. v. Swarts*, 58 Kan. 235, 48 Pac. 953, where the question was whether a certain hole had existed such a length of time that the railway company should have known of it Chief Justice Doster discussed the matter of time. Among other things, he said: "What is meant by a 'considerable time,' as related to the duration of a defect in railroad tracks which will charge the company with knowledge? Suppose the jury had found in plain terms: 'The hole did not exist for a considerable time.' Who would have been the wiser as to whether it had existed long enough to enable the company's responsible agents to discover and repair it? Such a finding would have been too indefinite to aid in the determination of the disputed question." "Some time" is equally indefinite as a "considerable time," and certainly it is not a longer time. It is evident that the jury were unable to find from the evidence what length of time the defect did exist, and upon what basis could they have found that it did exist such a length of time that it should have been discovered and remedied by the railroad company? The finding is the equivalent of an answer that "the step was out of repair before the accident, but the length of time we do not know." The jury were

pressed for a specific answer to the question, but their second attempt added words but not definiteness to the answer. After the second effort to obtain a definite answer to the question had failed there was no good reason to expect anything more explicit from the jury on the testimony submitted, and therefore no reason why the court should have been asked to send the jury back for a better answer.

It is argued that the necessary facts are presumably found in the general verdict. The general verdict had no other or better support than the special finding. The question was specific; it was controlling; a definite answer was required, and it must be presumed that the jury made as full and as definite an answer as the testimony would warrant. How, then, can it be said that the general verdict helps out the special finding? The general rule is that the general verdict yields to the special findings. The purpose, in part, of special findings is to explain and test the correctness of the general verdict. Applying this test it appears that the jury must have misunderstood or misapplied the law as to constructive notice of the defective step. The court, in effect, instructed that the company was not chargeable with constructive notice "unless the defects were of such a nature, and had existed for such a length of time, that they should have been discovered and remedied by the defendant." The jury's answer as to the length of time was no more than a conjecture. If they could not approximate the duration of the defect, they could not intelligently find that it had existed so long that it should have been discovered and remedied by the railroad company. As was said in *Railroad Co. v. Tindall*, *supra*: "A finding of negligence cannot rest on mere conjecture."

On account of this finding, the verdict must be set aside, the judgment reversed, and the cause remanded for a new trial. All the Justices concurring.

#### HONCE et al. v. SCHRAM et al.

(Supreme Court of Kansas. April 7, 1906.)

#### 1. EXECUTION—SUPPLEMENTARY PROCEEDING—PROBATE COURT—REVIEW.

In a proceeding in aid of execution the probate judge acts as a subordinate officer of the district court from which the execution is issued, and in the supervision of the probate judge's action the court exercises original, rather than appellate, jurisdiction.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 1097.]

#### 2. APPEAL—HARMLESS ERROR.

Where such supervision was invoked by what was termed a "petition in error," and the court gave such consideration to the proceedings of the probate judge as would have been given on a formal application, it cannot be held that its action was void or that any one was prejudiced by the informality.

#### 3. EXECUTION—SUPPLEMENTARY PROCEEDINGS.

An abstract of a judgment of a justice of the peace, duly filed in the district court, is

a sufficient basis for a proceeding in aid of execution.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 1093.]

#### 4. PRINCIPAL AND SURETY—SUBROGATION—CONTRIBUTION.

Under section 480 of the Civil Code a surety who has paid a judgment may have the benefit of such judgment, not only to compel repayment from the principal, but also to enforce contribution against other sureties jointly liable with him on the judgment.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, §§ 524, 605.]

#### 5. JUDGMENT—SATISFACTION—ASSIGNMENT OF JUDGMENT.

The payment of such judgment by one of the sureties against whom it was rendered, and the taking of an assignment of the judgment to himself, did not operate as a satisfaction of the judgment against the other judgment debtors.

#### 6. EXECUTION—SUPPLEMENTARY PROCEEDINGS.

While the rights of third parties as to the ownership of assets sought to be subjected to the payment of a judgment cannot be finally determined in this summary proceeding, the mere fact that property is in the hands of others than the judgment debtor, or that a colorable dispute as to the ownership arises, does not deprive the judge of power to proceed.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 1149.]

#### 7. SAME—ORDER—RES JUDICATA.

A third person, subpoenaed as a witness and who gives testimony in such a proceeding, but who is not made a party to it, and who did not intervene to claim the property, is not bound by the order of the judge, and may thereafter in an appropriate action litigate his rights to such property.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 1157.]

#### 8. SAME—SUPPLEMENTARY PROCEEDINGS.

The failure of the judgment debtor to appear and give testimony in the proceeding does not preclude the examination of other witnesses, nor prevent the judge from making such order as the testimony produced will warrant.

(Syllabus by the Court.)

Error from District Court, Butler County; G. P. Alkman, Judge.

Proceedings by Charles Schram and others against S. A. Honce and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

N. A. Yeager, for plaintiffs in error. T. A. Kramer, for defendants in error.

JOHNSTON, C. J. This was a proceeding in aid of execution. Joseph S. Bogle gave a promissory note for borrowed money and procured his brother, John P. Bogle, and also Charles Schram and E. H. Hutchins, to sign the note as sureties. Default was made in the payment of the note, and on May 16, 1891, judgment was obtained before a justice of the peace against the principal and the sureties. For his own protection, the surety Schram paid the judgment and took an assignment of it. An abstract of the judgment was filed in the district court and several executions were issued without substantial results. On October 13, 1903, Schram in-

stituted this proceeding, and an order was issued by the probate judge requiring both of the Boggles to appear and answer concerning property of theirs which might be subject to the payment of the judgment. In that connection a subpoena duces tecum was issued, directed to S. A. Honce, a daughter of John P. Bogle, and to Chris Wirth, under which S. A. Honce produced a note for \$300, executed by Wirth. On the part of Schram it was claimed that this note was the property of John P. Bogle, while Mrs. Honce stated that it had been given to her by her father for services rendered. After a hearing, the probate judge found that the note and indebtedness was the property of John P. Bogle, and to cover it up, and to prevent Schram from collecting a share of the judgment from him, he had attempted to transfer the note and indebtedness to his daughter, Mrs. Honce, and that the transfer was without consideration and fraudulent. An order was made by the judge appointing a receiver and directing him to take charge of and collect the note and apply the proceeds upon the Bogle judgment. The probate judge, who had obtained possession of the note under the subpoena duces tecum, delivered it to the receiver. Exceptions were taken to the rulings of the probate judge, a transcript of the proceedings made, and the matter was taken before the district court upon what is designated as a "petition in error." Schram moved to dismiss the proceeding for lack of jurisdiction in the district court, on the theory that a proceeding in error is not warranted in such cases. The district court denied the motion, reviewed the proceedings before the probate judge, and sustained his rulings. John P. Bogle died after the proceeding was begun, and the administrator of his estate, as well as his daughter, S. A. Honce, complain of the rulings of the district court. In a cross-petition in error, Schram also complains of the refusal of the district court to dismiss the proceeding.

In a proceeding in aid of execution, the jurisdiction of the district court to review and revise the action of the probate judge is original rather than appellate. "While the proceedings were had before the probate judge, they were not an exercise of probate jurisdiction, nor was a record of them required to be kept in the probate court. The judge was exercising judicial functions in a case in the district court, and was in fact acting as a subordinate officer of that court, and under its supervisory control." *Bowersock v. Adams*, 55 Kan. 685, 41 Pac. 971; *Young v. Ledrick*, 14 Kan. 92; *The White Sewing Machine Co. v. Wait*, 24 Kan. 136; Civ. Code, § 499. The proceeding, being in the district court, is of course subject to its supervision. Although irregularly brought to its attention the court had jurisdiction to examine, and, if necessary, to correct the proceedings of its subordinate officer. That jurisdiction was invoked, and a hearing had upon a full tran-

script of the proceedings. The consideration of the court was substantially what it would have been if it had been invoked by an ordinary application, and, that being true, the name of the paper by which its jurisdiction was invoked is not very material. The transcript presented the doings of the probate judge more fully than if the requirements of the Code had been strictly followed. It provides that "the judge shall reduce all his orders to writing which, together with a minute of his proceedings, signed by himself, shall be filed with the clerk of the court," etc. Civ. Code, § 499. Since the court supervised the proceedings of the probate judge substantially as if there had been a formal presentation it cannot well be said that its action is void, nor that anyone suffered prejudice by reason of the informality.

On the other side it is insisted that as a full transcript of the judgment of the justice of the peace was not filed in the district court there was no basis for the proceeding. An abstract of the judgment is sufficient. When an abstract, such as is prescribed in section 119 of the Justice Code, is filed in the district court, the judgment is subject to the same rules, and has the same force within the county, as though originally rendered in the district court. *Treptow v. Buse*, 10 Kan. 170; *Rahm v. Soper*, 28 Kan. 529. Where a judgment is to be transferred from one county to another a different rule applies and the transcript of the journal entry of judgment is required. The distinction between such a transfer and the filing of an abstract within the county is pointed out and the reasons given therefor in *Hubbard v. Jones*, 61 Kan. 722, 60 Pac. 743.

The contention that Schram was not entitled to the benefit of the judgment to enforce contribution from his co-surety cannot be sustained. Under section 480 of the Civil Code, a surety who has paid a judgment may have the benefit of such judgment, not only to compel repayment from the principal, but also to enforce contribution against any one jointly liable with him on the judgment. In such a case a new proceeding would be wholly superfluous. The assignment of the judgment, when it was paid by Schram, was entered on the docket and embraced in the abstract of the judgment which was filed in the district court. The assignment did not operate as a satisfaction of the judgment as against the other judgment debtors, and under it, and the notice which the entry afforded, Schram was entitled to enforce contribution against his co-surety, *Bogle*. *Harris v. Frank*, 29 Kan. 200; *Williams v. Riehl*, 127 Cal. 365, 59 Pac. 762, 78 Am. St. Rep. 60; 17 Cyc. 410.

There is a contention that the judgment had not been kept alive, and was therefore not enforceable. This is based on the discredited theory that no execution was issued on May 11, 1896. The entry on the judgment docket was that on the date named a præcipe

for execution was filed and an execution issued. That execution appears to have been lost; but there is ample testimony that it was in fact issued, placed in the hands of the sheriff, and that he returned the writ unsatisfied. The oral proof of this fact is supplemented by an entry on the docket of June 2, 1896, that the execution was returned, entered, and filed, and that it was unsatisfied.

It is next contended that the judge had no power over S. A. Honce, who was only a witness, and that his order can have no binding effect upon her, or upon Wirth, who owned the impounded debt. The judge did have power to inquire whether the debt was an asset of John P. Bogle, and, that being found, to order the application of it to the payment of the judgment. The note had been placed in the custody of the judge, and, so far as appears, it was surrendered without objection. If she had refused to yield possession, or had intervened as a party and claimed ownership of the note, the judge would probably have declined to proceed further until the dispute as to ownership had been settled. It is true, as contended, that an ultimate determination of a disputed ownership of property or of indebtedness cannot be made in this summary proceeding, and especially in a case where the claimant is not a party to the proceeding. However, the mere fact that an asset is in the hands of another than the judgment debtor does not preclude the application of it to the payment of the judgment. The statute provides that the judge may order the application of any property of the judgment debtor not exempt by law which is in the hands of any other person or corporation, or which may be due to the judgment debtor, upon the judgment and may enforce the order by contempt proceedings. Civ. Code, § 490. We have no statute, as do some of the states, providing that a dispute as to title or ownership ends the inquiry; and the statute would not be very effective if every dispute, colorable or otherwise, terminated the proceeding. The statute is intended, however, to include only property of the judgment debtor, and is not operative upon the property of third persons, and a proceeding under it can never conclude the rights of third parties where there is a substantial dispute as to title or ownership by such parties. A refusal to surrender the note might have made necessary an action by the receiver of the court to obtain possession of and collect the note, but there was no refusal nor any intervention by Mrs. Honce. She was not a party to the proceeding, and her right to the note is not concluded by the action of the judge. She was a witness and was brought into court by the compelling force of a subpoena, but this did not make her a party nor give her a day in court. The judge in this case has found, upon what appears to be sufficient evidence, that the indebtedness of Wirth was due to Bogle, and therefore the order of application is not without support.

The order, however, is not binding upon a third party like Mrs. Honce, and if there is a real dispute as to the ownership of the asset she is entitled to a trial in accordance with the regular forms of law.

The fact that John P. Bogle did not give testimony before the judge does not invalidate the order. The statute contemplates that other witnesses may be examined and that the order of the judge shall be based upon the whole testimony submitted in the proceeding. The absence of the judgment debtor, which in this case it is said was due to his illness, does not defeat the proceeding. *State v. Downing*, 40 Or. 309, 58 Pac. 863, 66 Pac. 917. We think the probate judge had judicial authority to make the inquiry and order of application, that there is evidence to support his order, and that he correctly measured the liability of John P. Bogle as co-surety.

The judgment will be affirmed. All the Justices concurring.

#### DINEEN v. OLSON.

(Supreme Court of Kansas. April 7, 1906.)

##### 1. JUSTICES OF THE PEACE—JURISDICTION—FORCIBLE DETAINER—EVIDENCE.

A justice of the peace in an action of forcible detainer may receive evidence of title, legal or equitable, whom such evidence is necessary to determine the question of possession.

##### 2. SAME.

It was provided in a written contract that the grantor therein would convey to the grantee certain real estate upon payment by him of the purchase price as stipulated. On the part of the grantee it was agreed that he would make such payments, or, in case of failure so to do, would return the possession of the premises to the grantor immediately. Afterwards the grantee made such default as, under the conditions of the contract, terminated his right of possession. The grantor then commenced an action of forcible detainer, before a justice of the peace, to recover possession of the property. In such action, it appeared by the stipulations of the parties thereto that such default had occurred. The defendant did not claim, and it did not appear that he had any legal or equitable right in the premises. *Held*, that the justice of the peace had jurisdiction to hear and determine such action.

(Syllabus by the Court.)

Error from District Court, Saline County; R. R. Rees, Judge.

Action by John Olson against John J. Dineen. Judgment for plaintiff before a justice was affirmed in the district court, and defendant brings error. Affirmed.

This is an action of forcible detainer. It was commenced before a justice of the peace, and the plaintiff recovered judgment. The defendant appealed to the district court, where the plaintiff again recovered judgment, and the defendant brings the case here for review. The case was tried each time upon an agreed statement of facts as follows: "(1) That John J. Dineen went into posses-

sion of the S. E.  $\frac{1}{4}$  of section 5, township 16, range 5, Saline county, Kansas, April 14, 1900, under contract with the Union Pacific Land Company, the owner of said land. A copy of said contract it attached to this agreed statement, marked 'Exhibit A,' and made a part hereof. (2) That at the time said Dineen went into possession he made a payment of \$168, as shown by the contract above referred to, and that on April 19, 1901, he made the interest payment of \$90.72, which was due on April 14, 1901; that after April 19, 1901, Dineen made no further payment of either principal or interest. (3) That demand was made of Dineen by the Union Pacific Land Company for the payments which fell due April 14, 1902, and April 14, 1903, but the same were never made nor tendered, nor did the Union Pacific Land Company waive any of the conditions of the contract regarding payment. (4) That on January 21, 1904, forfeiture notice was duly served on Dineen. A copy of said notice with copy of the affidavit of service is attached to this agreed statement, marked 'Exhibit B,' and made a part hereof. (5) March 14, 1904, John Olson bought this land, under contract with the Union Pacific Land Company, for \$2,000, paying \$200 down. A copy of said contract is attached to this agreed statement of facts, marked 'Exhibit C,' and made a part hereof. (6) Dineen refuses to deliver possession of said land to Olson, and has put in a crop on said land since the sale of the land to Olson and demand by Olson of Dineen for possession of the same. (7) On May 2, 1904, Olson duly served on Dineen the notice required by statute, before commencing the action of forcible detention. (8) May 16, 1904, this action was commenced. (9) The amount involved is over \$100, exclusive of costs. (10) Additional evidence not inconsistent with the foregoing agreed statement may be introduced by either party upon the trial of the case."

The contract (Exhibit A) so far as necessary is as follows:

"This agreement, made this 14th day of April, A. D., 1900, between the Union Pacific Land Company, as party of the first part, and J. J. Dineen, of the county of Douglass in the state of Nebraska, the party of the second part, witnesseth: That the Union Pacific Land Company, for and in consideration of the payment to it of the sum of one hundred sixty-eight (\$168.00) dollars on the delivery thereof, the receipt whereof, is hereby acknowledged and in consideration of the covenants and agreements of the party of the second part, hereinafter written, subject however to the exceptions, reservations and conditions hereinafter written, has agreed to sell to said party of the second part, for the sum of sixteen hundred eighty (\$1,680.00) dollars and upon the strict, exact and punctual performance, by the said party

of the second part, of each, every and all of the covenants and agreements on his part herein written and by him to be kept and performed and subject also to the exceptions, reservations and conditions below written, to make and deliver at the office of its land department at Omaha, Nebraska, upon the surrender of this agreement by the said party of the second part, a good and sufficient deed with the ordinary covenants of warranty, conveying to said party of the second part in fee simple the following described real estate, to wit: [Here follows description of land.] In consideration whereof, the said party of the second part has and does hereby covenant and agree to and with the party of the first part:

"First. To pay to it at the office of the local treasurer of the Union Pacific Land Company in Omaha, Nebraska, as the remainder of the price of said land, the gross sum of fifteen hundred twelve (\$1,512) dollars with interest thereon on the several dates and in the several amounts as follows:

	Day	Mo.	Year	Prin.	Int.	Amt.
First payment	14th	April	1901	\$90.72	\$ 90.72	\$ 90.72
Second payment	14th	April	1902	\$168	90.72	258.72
Third payment	14th	April	1903	168	80.64	248.64
Fourth payment	14th	April	1904	168	70.56	238.56
Fifth payment	14th	April	1905	168	60.48	228.48
Sixth payment	14th	April	1906	160	50.40	218.40
Seventh payment	14th	April	1907	168	40.32	208.32
Eighth payment	14th	April	1908	168	30.24	198.24
Ninth payment	14th	April	1909	168	20.16	188.16
Tenth payment	14th	April	1910	168	10.08	178.08

"Second. To pay, at the time when by law the same becomes due and payable to the proper collecting officer, all taxes and assessments (special or general), which may be lawfully levied or assessed upon or against said lands (including any such taxes or assessments levied for or during the year 1900 or subsequent years).

"Third. That all improvements placed upon said premises shall remain thereon, and shall not nor any part thereof be removed or destroyed until final payment for said land, that he will punctually pay said sums of money above specified as each of the same becomes due.

"Fourth. That time and punctuality are material and essential ingredients in this contract. And in case the second party shall fail to make the payments aforesaid, and each of them, punctually and upon the strict terms and times above limited, and likewise to perform and complete all and each of the covenants and agreements aforesaid, strictly and literally without any failure or default, then this contract, so far as it may bind said first party, shall become utterly null and void and all rights and interest hereby created, or then existing, in favor of the second party, or any one claiming under him, shall utterly cease and determine, and the right of possession, and all equitable and legal interests in the premises hereby contracted, with all the improvements and appurtenances, shall revert to, and revert in, said first party without any declaration of

forfeiture or act of re-entry or any other act by said first party to be performed, and without any right of second party of reclamation or compensation for moneys paid or services performed, as absolutely, fully and perfectly as if this contract had never been made. The said party of the first part shall have the right, immediately upon the failure on the part of the second party to comply with the covenants and agreements herein written, or any part thereof, to enter upon the land aforesaid, and take immediate possession thereof without process of law, together with the improvements and appurtenances there unto belonging. And the said party of the second part covenants and agrees that he will surrender unto the said party of the first part the said land, improvements, and appurtenances, without delay or hindrance, and no court shall relieve the party of the second part upon failure to comply strictly and literally with this contract.

"Fifth. That no assignment of this contract, or of the premises herein described, shall be valid unless the same be made with the written consent of the party of the first part, and such consent and assignment be indorsed hereon, and that no agreements or conditions, or relations between the party of the second part and his assignee, or any other person acquiring title or interest from or through them, or either of them shall preclude the party of the first part from the right to convey the premises to the party of the second part, or his assigns, on the surrender of this agreement, and the payment of the unpaid portion of the purchase money which may be due to the party of the first part.

"And it is further expressly agreed that any consent which may be given to the assignment of this contract, or recognition thereof by the party of the first part, shall not exempt the original purchaser from any of his liabilities under this contract but the same shall thereafter continue in full force. And it is further covenanted and agreed that if said second party shall make default in the payment of principal, interest or taxes, or shall make default in the performance of any of the covenants and agreements on his part herein specified, the said party of the second part shall then be deemed to have been from the beginning the tenant of the party of the first part, and the tenancy of said second party shall, upon the default in the performance of any of the covenants and agreements by him herein agreed to be kept and performed, cease and determine, without any notice by the party of the first part of the termination of said tenancy; and the said party of the second part hereby waives any notice of the termination of said tenancy and agrees immediately upon such default as aforesaid to quit said premises and deliver possession of the same to said party of the first part, and that thereupon said party of

the first part may treat the said party of the second part as a tenant holding over and at sufferance and may at once proceed against said second party by summary action of forcible detainer to recover possession of said premises.

"It is further mutually agreed and understood that in case of such default, all payments of principal, interest and taxes and all improvements made upon said lands by the party of the second part shall be deemed and held to have been payments of rent for the use and occupation of said property during the occupancy thereof by said party of the second part as aforesaid and that the said party of the second part shall not have relief in any court of law or equity in respect to any payments made under this contract or any improvements made upon said lands."

The contract to Olson was the same as the one to Dineen, except that he was to pay \$1,800, in annual payments of \$200 and interest.

The notice (Exhibit B) reads:

"The Union Pacific Land Company, Omaha, Nebr., Nov. 28, 1903. To J. J. Dineen, Brookville, Kansas: The property herein-after described having been sold by the Union Pacific Land Company under contract, now standing on the records of said company in the name of J. J. Dineen, to wit: Southeast quarter of section five (5), township sixteen (16), south of range five (5), west of the state of Kansas, contract numbered 908 E, April 14, 1900. You are hereby notified that default has been made by the holder of said contract, in the payment of the deferred installments heretofore due and payable under the terms of said contract, and that he has likewise failed to perform and complete all and each of the covenants and agreements on his part to be kept and performed as in said contract specified, and that because of such default and failure to keep and perform the said covenants and agreements, the said contract has become null and void in accordance with the provisions therein contained, and all rights and interest thereby created or existing in favor of the said purchaser or any one claiming under him have utterly ceased and determined. You are further notified that the Union Pacific Land Company has elected to, and does hereby, declare said contract forfeited and canceled. The Union Pacific Land Company, by B. A. McAllaster, General Manager."

David Ritchie and C. M. Holmquist, for plaintiff in error. N. H. Loomis, R. W. Blair, and H. A. Scandrett, for defendant in error.

GRAVES, J. (after stating the facts). The plaintiff in error insists that his contract with the railroad company is not a lease, but a contract for the purchase of real estate, and therefore the justice of the peace before

whom the action was commenced did not have jurisdiction of the subject-matter involved in the suit. The claim in this respect is clearly and tersely stated in his brief as follows: "As to whether the above and foregoing contract is a contract of purchase or a contract of lease depends, as we believe, the correctness or incorrectness of the ruling of the district court in this case. It seems to us that it is clearly a contract of purchase and not a contract of lease, and it cannot be both. It must be one or the other." We do not deem it necessary to give this paper a name. Its provisions state the rights and duties of the parties thereunder and present the only questions to be considered. Justice will probably be better subserved by treating this exhibit as an ordinary written contract, containing the stipulations and agreements of the parties thereto, than by attempting to assign it to a place in the technical classification of legal instruments, by determining which of them it most resembles. The parties refer to this paper in their briefs as a contract, and for convenience it will be so designated here. It is conceded that whatever right plaintiff in error may have to the possession of the land in controversy is derived from this contract. By the covenants of such contract he agreed that in case of failure on his part to comply with its provisions, his right to the possession of the premises would cease at once, and all payments which had been made by him should be retained as rent for the prior use of the property. The agreed statements of facts shows that he failed to comply with his agreements in the contract, April 14, 1902, by refusing to make the payment then due. He has ever since remained in default. On January 21, 1904, he was notified that the contract was at an end. No payment or offer to pay has been made since April 14, 1901.

This suit was commenced May 16, 1904. The aggregate amount paid by Dineen is \$258.72. He had been in possession two years at the time of default. When this suit was commenced he had been in possession more than four years. The aggregate amount paid, when applied as rent, from the time he went into possession to the date of default, would be less than 80 cents an acre annually, and for the whole period of occupancy prior to the commencement of this suit, less than 40 cents an acre annually. It is not claimed that an injustice will be done to Dineen by compelling him to surrender possession of the land, nor that he has any meritorious defense to a proper action brought for that purpose. It is simply insisted that he has a legal right to stay there until ousted according to the strict letter of the law. It may be conceded that an action of forcible detainer is strictly possessory in its character, and the plaintiff must have a perfect right to possession at the time the notice to quit is given, and that when such an action is pending before a justice of the peace, a court without equitable

jurisdiction or power, it must be determined as an action at law. *Kellogg v. Lewis*, 28 Kan. 536; *Gilmore v. Asbury*, 64 Kan. 383, 67 Pac. 864. But for the purpose of determining the right of possession, questions of title, legal or equitable, may be incidentally considered. *Conaway v. Gore*, 27 Kan. 122; *McClain v. Jones*, 60 Kan. 639, 57 Pac. 500. In the case of *Conaway v. Gore*, supra, which was an action of this nature, Justice Brewer, who delivered the opinion of the court, used the following language: "It is true, as the court charged the jury, that questions of title are not to be litigated in actions of this nature. The question is simply one of the unlawful and forcible disturbance or withholding of possession; and yet, as we shall see hereafter, evidences of title are often properly received in evidence, and questions of title may often be considered and have an important bearing upon the final decision. Indeed, cases may arise under our statute where the plaintiff may rest his entire right of recovery upon mere proof of title." The plaintiff may always recover in an action of forcible detainer if he is entitled to possession and the defendant has no legal or equitable interest in the land. In the case of *Douglass v. Anderson*, 28 Kan. 262, it is held that where a tenant in a lease stipulated that upon failure to pay rent the lessor might enter and take possession, that upon default, the landlord might recover possession by an action of forcible detainer.

The provisions of the contract between defendant and the railroad company contain the measure and limit of the rights acquired by Dineen to the land therein described. He expressly agreed by said contract to quit the premises and deliver back the possession thereof in case of default by him in the performance of any of his agreements. It is admitted that he made default, and no cause or excuse is offered therefor. We can see no reason why he should not be held to this agreement. Upon the agreed facts, he has no right, legal or equitable, remaining in said lands, and does not claim to have. His right to possession has ended by reason of his own deliberate contract. The question as to whether a justice of the peace has equitable jurisdiction or not is immaterial, as nothing of an equitable nature is presented here to challenge such jurisdiction, if it existed. The court was clearly right in holding that, under the admitted facts, the right of Dineen to remain in possession was at an end. If, outside of the question of possession, he has rights concerning crops, improvements, or of any other nature, they can be adjusted in any appropriate proceeding without embarrassment on account of this judgment, as it is not a bar to any after action brought by either party. Gen. St. 1901, § 5396; *Waite v. Teeters*, 36 Kan. 604, 14 Pac. 146.

The judgment of the district court is affirmed. All the Justices concur.

(73 Kan. 333)

KEELER et al. v. LAUER et al. SAME v. HEILBRUN. CAUFFMAN et al. v. LAUER et al.

(Supreme Court of Kansas. April 7, 1900.)

# 1. TRUSTS—TESTAMENTARY TRUST—VALIDITY.

A testamentary trust authorized the trustee, who was the husband of the testatrix, to sell the property of the estate and invest the proceeds as he might deem best, and to appropriate so much of the estate to the education and maintenance of the children of the testatrix as the trustee might deem necessary. It provided, also, that no bond should be required of the trustee, nor a report of his doings to the court, but should have full power to sell and dispose of the trust property as his judgment might dictate so long as the proceeds should be applied to the purposes of the trust. *Held*, that the large discretion vested in the trustee did not invalidate the will.

# 2. TRUSTS—CONTROL OF TRUSTEE.

Notwithstanding the powers and discretion given to the trustee he is subject to the direction and control of a court of equity, which will have full power to prevent mismanagement of the estate and to correct any abuses of the trust.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 231.]

# 3. PERPETUITIES—TESTAMENTARY TRUST.

A provision in the will that the trust is to terminate, and the estate vest in the beneficiaries, within 21 years, or within common-law period, does not offend the rule against the creation of perpetuities.

# 4. WILLS—PROBATE—CONTEST—LIMITATIONS.

An order probating a will determines its due attestation, execution, and validity, and an heir or other interested person must contest the will, if at all, within two years from the time of probate, unless such person is under legal disability.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 600-606.]

# 5. SAME.

A creditor of an heir, who claims that the devised property has passed to the heir, occupies no better position, at least, and has no greater right to contest the will, than the heir himself.

# 6. SAME—WILL OF WIFE—CONSENT OF HUSBAND.

A consent of the husband that the wife may bequeath and devise more than one-half of her property is not to be regarded as a part of the will, and it is not necessary that it should be admitted to probate.

# 7. SAME.

The law does not require that such consent shall specify the particular property which may be so bequeathed and devised, nor that it shall particularly designate the will to which the consent applies.

(Syllabus by the Court.)

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Actions by E. Lauer and others against Isaac Keeler and others, by Isaac Keeler and others against Benjamin Heilbrun, trustee, and by Joseph Cauffman and others against C. Lauer and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Several creditors of Benjamin Heilbrun caused levies of executions to be made upon real estate in which it was claimed Heilbrun

had an interest, acquired by inheritance from his wife. These actions were brought to enjoin the sale of the land upon the executions, claiming that the property had passed by will of Carrie Heilbrun, in whom the title had rested, to her children. The following is a copy of the will:

"I, Carrie Heilbrun, of the county of Osage and state of Kansas, being of lawful age and of sound and disposing mind and memory, but fully realizing the uncertainty of human life, do make, publish and declare the following as my last will and testament, hereby revoking all former wills by me at any time heretofore made.

"I give, bequeath and devise all my real and personal estate of what nature or kind soever to my husband, Benjamin Heilbrun, in trust for the sale benefit, behoof and use of my children that may survive me. My said husband, Benjamin Heilbrun, is to hold all of said property as trustee only, and it is my will that in acting as such trustee he shall not be required to give bond or report his doings in any court. I hereby direct that my said trustee shall have full power to sell any real estate of which I may die seized, and invest the proceeds or any part thereof in other real estate, with like power of sale; and I hereby direct that he may sell any other property which may come into his hands in such trust capacity, with power to reinvest the proceeds or any part thereof with like power of sale.

"I hereby direct my said trustee to use and appropriate so much of the trust estate as may in his judgment be deemed necessary for the proper support, maintenance and education of my said children. It is my will and I hereby appoint and constitute my said husband, Benjamin Heilbrun, the sole trustee and financial agent of my estate for the benefit of my children, and in so doing my intention is not to hamper his movements but to give him full authority to sell and dispose of any of the property as his judgment may dictate, so long as the proceeds are applied according to the manner heretofore set out, but no person paying money or other thing of value in his stead to my said trustee upon my said trustee's receipt, shall be liable to see to the application or be answerable for the misapplication or the new application of the same.

"The said trust shall continue and be in force until my youngest child shall have arrived at the age of twenty-one years, at which time my said trustee shall proceed to divide the trust estate in the manner following, that is to say: To each of my children I direct my said trustee to give, pay over and transfer an equal portion of my trust estate as it then shall be found to consist of, to each child share and share alike; and in the event any of my said children shall have died leaving issue at the time of said division of said estate then the said issue shall take the part that his, her

or their parent would have taken had they been living; it being my intention that only such of my children as shall be living at the termination of said trust, and the living issue of such of my children as may have died before that time shall participate in the distribution of my said trust estate.

"For his services as such trustee said Benjamin Heilbrun shall be allowed such sum annually as it may require to compensate for the necessary time and labor expended in behalf of said estate.

"I hereby nominate and appoint said Benjamin Heilbrun the sole executor of this my last will and direct that he shall not be required to give security on his official bond. This will is typewritten on two sheets of paper.

"In witness I have hereunto set my hand this 9th day of April, 1901.

"Carrie Heilbrun.

"Signed, sealed, published and declared by said testator, Caroline Heilbrun, as and for her last will and testament in the presence of us, who, at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses this ninth (9) day of April, 1901.

"Gustav Wolf,  
"Jenny Wolf."

The same day on which the will was made, Benjamin Heilbrun executed a consent to the making of such a will. It reads:

"I, Benjamin Heilbrun of Osage county, and state of Kansas, of lawful age, and being of sound mind and memory, do hereby and herein consent that my wife, Carrie Heilbrun of Osage county, state of Kansas, give, will, bequeath and devise from me, the undersigned Benjamin Heilbrun, more than one-half of all the property she may own or be entitled to, both real and personal at the time of her demise.

"Further, I, the said Benjamin Heilbrun, do consent that my said wife may give, will and devise and bequeath all of her said property of whatsoever kind or nature to her children, or to any other person she may name, as her heirs at law, in any will she may make and publish, all to the exclusion of any and all rights I as her said husband have under the laws of the state of Kansas.

"In witness whereof I have hereunto set my hand this 9th day of April, A. D. 1901.

"Benjamin Heilbrun.

"Signed, sealed and delivered by said Benjamin Heilbrun as and for his consent given that his said wife, Carrie Heilbrun, may give, will, devise and bequeath her property from him, in the presence of us, who, at his request, and in his presence, and in the presence of each other, we have hereunto subscribed our names as witnesses this 9th day of April, A. D. 1901.

"Ben Lauer.

"Charlie A. Anderson."

The creditors answered and attempted to contest the execution and validity of the will,

claiming that Benjamin Hellbrun had an interest in the land which was subject to execution. The court found against the claims of the creditors and enjoined the sale of the land under the executions. The creditors complain.

Buck & Spencer, Chas. S. Briggs, and W. W. Harvey (Overmyer & Overmyer, of counsel), for plaintiffs in error. Thomson, Stanley & Price, McLaughlin & Messerley, and J. E. Jones, for defendants in error.

JOHNSTON, C. J. (after stating the facts). The title to the land sought to be subjected to the payment of the judgment against Benjamin Hellbrun was in his wife, Carrie Hellbrun, at the time of her death. While her ownership has not been exactly conceded, it is not seriously attacked. In one part of the answer there was a general statement that real and personal property of Benjamin Hellbrun was placed in his wife's name for fraudulent purposes, but there is no allegation that the property in question had ever been owned by him, nor that it was fraudulently acquired or held by her. The case must be determined on the theory that she was the owner of the land when it was devised and until her death.

It is contended that the terms of the will betray a wrongful purpose, are such as to render the instrument ineffective, and therefore one-half of the land passed to Benjamin Hellbrun at his wife's death. Nothing is found in the provisions of the will to avoid or discredit it. Large discretionary powers were conferred upon the trustee, it is true, but that was a matter for the testator, and after specifying particularly the purposes for which the estate should be devised, she evidently deemed it advisable to leave the management of it to the discretion of the trustee. One feature of the will is a provision that the trustee shall not be required to give bond, or report his doings to a court. He is authorized to sell any of the real estate and invest the proceeds, and to sell and reinvest as he may deem best; to appropriate so much of the estate as he may think necessary for the support, maintenance, and education of the children; and there is expressed in the will an intention not to hamper his movements, but to give him full authority to sell and dispose of the property, as his judgment may dictate, so long as the proceeds are applied to the purposes of the trust—that is, for the benefit of the children and an equal division of the estate among them when the youngest child should arrive at the age of majority. The omission of a bond is not unusual, and the attempted waiver of a report of the trustee's doings to a court does not destroy the will. The provision evinces a purpose of relieving the trustee of making reports that an ordinary executor would be required to make. The trust is within the scope of equity jurisdiction and the trustee is subject to the

power and direction of the court whenever there is an occasion for its exercise. Upon complaint of the beneficiaries that the estate was being mismanaged, or the trust abused, they can safely appeal to the jurisdiction of the court for the protection of the estate. Neither this provision, nor those vesting great discretionary power in the trustee, nor even the possibility of the abuse of the power by the trustee, furnishes any reason for declaring the trust invalid. It has been said that: "As a general rule, a court of equity will not interfere with or attempt to exercise discretionary powers conferred upon trustees, but the court never loses its power to review the use of such discretion, and to correct any abuse in its exercise. Moreover, equity will always so control a trustee that he shall not disappoint the true intent and purpose of the donor, as gathered from the instrument containing the power." 28 A. & E. Encyl. of L. (2d Ed.) 985, 991.

The contention that the will is void because it violates the rule against the creation of perpetuities is not good. There is no remoteness in the vesting of the estate, and it is to be noted that, instead of providing for a suspension of alienation, the will itself authorizes the trustee to sell and convey the land at any time. The trust is to terminate, and the property to pass to the children, when the youngest child arrives at the age of 21 years. Having no statute on the subject, the common-law rule prevails, under which the contingent interest must become vested within a life or lives in being and 21 years afterwards, to which, under some circumstances, is added the period of gestation. 22 A. & E. Encyl. of L. (2d Ed.) 708; Gray on Perpetuities (2d Ed.) § 201. If the contingency on which the estate is to vest, must certainly happen within the common-law period it does not offend the rule. As the minority of the youngest child comes within the gross period added to a life in being there is no room for disagreement. It is held, too, that the term of 21 years may be taken in gross, without reference to infancy, and the devise is not too remote if the contingency must happen within that period. *Barnitz's Lessee v. Casey*, 7 Cranch (U. S.) 456, 468, 3 L. Ed. 403; *Potter v. Couch*, 141 U. S. 296, 314, 11 Sup. Ct. 1005, 35 L. Ed. 721; *Johnston's Estate*, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621; *Cadell v. Palmer*, 1 Cl. & F. 392; *Brockdorff v. Malcom*, 30 Ch. Div. 172; Gray on Perpetuities (2d Ed.) §§ 186, 223; 22 A. & E. Encyl. of L. (2d Ed.) 709. The contingency, as we have seen, must happen within 21 years, and under any view the estate will vest within the common-law measure of time. The recent case of *Coleman v. Coleman*, 69 Kan. 45, 76 Pac. 441, is quite closely in point. There a will was made, giving an estate to children of the testator, but providing that the real estate should not be sold until the youngest child should reach

majority. In the opinion it is said: "It is finally contended that the limitation over, and the estate sought to be conferred thereby, is void for remoteness, and created a perpetuity prohibited by law. This claim is not well founded. Three of the testator's children were living when the will was made. The other child was born prior to his death, and the fee to the proceeds of the property in question was to vest in them when the youngest child became of age." The New York cases cited are based on a statute which does not conform to the common-law rule, and hence are not controlling.

The attack of the creditors of Benjamin Heilbrun upon Mrs. Heilbrun's will is collateral in character, and somewhat in the nature of a contest. The will is not open to contest, as it was probated and its validity established more than two years before the attack was made. Then, the matter of probate being within the jurisdiction of the probate court, its judgment in the premises is not open to collateral attack. *Callo-way v. Cooley*, 50 Kan. 754, 32 Pac. 372; *Proctor v. Dicklow*, 57 Kan. 119, 45 Pac. 86; *Watkins v. Mullen*, 62 Kan. 1, 61 Pac. 385, 84 Am. St. Rep. 372. The order of probate determined the due attestation, execution, and validity of the will, and in the absence of a contest within the appointed time it is forever binding, except as to those under legal disability. Statute of Wills, §§ 19, 20, 21.

It is contended that the will is not effective, nor the probate of it conclusive, because the consent of the husband that the wife might bequeath and devise all her property to her children was not presented to the probate court and probated. The statute does not declare that the consent is to be regarded as a part of the will, nor that it shall be probated. We cannot interpolate a clause that such consent shall be invalid unless it is proved and recorded. In the giving of consent such formalities are required, as that it shall be in writing and executed in the presence of two witnesses, and if the legislative purpose was that it should have been filed, recorded, or probated, these things certainly would have been included with the other requirements.

It is contended, also, that the consent must be to a particular will, and that the one in question is ineffectual because it is general. The statute controls, and it does not provide that the consent of husband or wife shall specify the particular pieces of property which the other may will away. On the other hand, it is general in its terms, stating that the husband or wife may consent "that the other may bequeath more than one-half of his or her property from the

other so consenting." Statute of Wills, § 35. In the present case, however, it appears that the will and consent bear the same date, and, being contemporaneous in execution, may well be considered as having been made with reference to each other. After the death of his wife, Benjamin Heilbrun went through the form of electing to take under the will. If the provision of the statute in regard to a widow's election applies to the widower, which we need not now determine, it is clear that the attempt made did not nullify or weaken the consent already given. The consent was sufficient for the purpose, and no further step was necessary. But probably it was not then within his power to revoke the consent previously given. With this consent, Mrs. Heilbrun had complete right to dispose of all her property by will. The will made is in due form, and the order probating it determined its due execution and validity.

Only interested persons can contest the will, and it may well be doubted whether the creditors of the husband can be regarded as entitled to that right. In *Lockard v. Stephenson*, 120 Ala. 641, 24 South. 996, 74 Am. St. Rep. 63, it was held that the words "any person interested therein" include only such persons as would take an interest in the estate of the testator under or by virtue of a provision of the will, and it was there said that "judgment creditors of the husband of a testatrix have not, under the statute, such an interest as gives them a right to contest the probate of the will of the testatrix by which a child is made the sole legatee and devisee, and the husband is deprived of his distributive share in the property of his wife." In *Page on Wills*, § 325, it is said that "the creditors of an heir of decedent cannot contest decedent's will disinheriting such heir by reason of creditor's hopes of expectations of being paid out of the heir's share of decedent's estate." See, also, *Shepard's Estate*, 170 Pa. 323, 32 Atl. 1040; *Cochran v. Young*, 104 Pa. 333. Even if the creditors could be substituted to the rights of Benjamin Heilbrun, the time had passed in which he could have instituted a contest of the will, and in no event could his creditors have any better standing to contest than he had.

It follows from what has been said that no error was committed by the court in overruling the demurrers to the amended petitions, nor in sustaining the demurrers to several of the defenses of the answers. The evidence, including that relating to the acceptance of the trust by the trustee, abundantly sustains the judgment of the trial court, and, no error appearing in the records, the judgment in the several cases will be affirmed. All the Justices concur.

CONTINENTAL CASUALTY CO. v.  
JOHNSON.

(Supreme Court of Kansas. June 9, 1906)

1. INSURANCE — ACCIDENT POLICY — “SUN-STROKE.”

The word “sunstroke,” when used in an insurance policy in describing one of the risks covered, should not be interpreted as applying only to an effect produced by the heat of the sun, unless the context or other special considerations require it. The term unexplained denotes a condition produced by any heat, solar or artificial.

2. SAME—EXPOSURE TO FURNACE.

In an action upon an accident insurance policy containing a provision that loss of time due to sunstroke should be deemed to be due to external, violent, and purely accidental causes, and should entitle the insured to full benefits according to the terms of the policy, where the plaintiff's claim is based upon a loss which he alleges was due to sunstroke, he is not precluded from recovery by the fact that his disability was occasioned by exposure to the heat of a furnace, not to that of the sun.

(Syllabus by the Court.)

Error from District Court, Harvey County;  
P. J. Galle, Judge.

Action by Grant G. Johnson against the Continental Casualty Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Bowman & Bowman (Manton Maverick, of counsel), for plaintiff in error. Branine & Branine and J. S. Henderson, for defendant in error.

MASON, J. Grant G. Johnson held a policy of insurance issued by the Continental Casualty Company, the principal purpose of which was to provide indemnity to the amount of \$10 a week against loss occasioned by accidental injury, its phraseology being that usually employed in contracts of that character. It also contained a provision as follows: “The loss of \* \* \* time, as above provided, due solely to \* \* \* sunstroke or freezing due solely to necessary exposure while engaged in his occupation, shall be deemed to be due to external, violent and purely accidental causes and shall entitle the insured to full benefits according to the terms of this policy.” What is called a “health insurance rider” was attached to and made a part of the policy, providing that for time lost by illness or disease the insured should be entitled to receive \$5 a week. Johnson was a fluewelder, and while engaged in that occupation was overcome by heat from the forge or furnace near which he worked and, in consequence thereof, became ill and suffered the loss of nearly a year's time. He brought an action upon his policy alleging that his loss was due to sunstroke, and recovered a judgment based upon that theory. The company prosecutes error and rests its case upon one general contention, which, if sound, requires a reversal of the judgment, namely that the word “sunstroke” as used in the policy referred only to an effect produced

by the heat rays of the sun. If, however, the word was there employed in a sense that made it applicable to a condition resulting from artificial heat the judgment must stand, for there was abundant evidence that the plaintiff suffered from sunstroke, if that term may be used to describe a disorder so occasioned.

The only definition of “sunstroke” given in Webster's International Dictionary, is as follows: “Any affection produced by the action of the sun on some part of the body, especially, a sudden prostration of the physical powers, with symptoms resembling those of apoplexy, occasioned by exposure to excessive heat, and often terminating fatally.” This language is not free from ambiguity but seems to recognize two meanings of the word; in the one case as colloquially used in a popular and general sense, referring to any ill effects resulting from exposure to the direct rays of the sun, and in the other as accurately employed in a scientific and technical way to denote a specific ailment caused by excessive heat from any source. The Standard Dictionary gives but one meaning, as follows: “A sudden cerebral disturbance, often with apoplectic symptoms, due to exposure to excessive heat, generally that of the sun.” The definition of the Century Dictionary is not so explicit, but is probably open to the same construction. It is: “Acute prostration from excessive heat of weather. Two forms may be distinguished—one of sudden collapse without pyrexia (heat exhaustion); the other with very marked pyrexia (thermic fever). The same effects may be produced by heat which is not of solar origin.” The Encyclopædia Britannica thus defines sunstroke, giving heat stroke as a synonym: “A term applied to the effects produced upon the central nervous system, and through it upon other organs of the body, by exposure to the sun or to overheated air.” In the course of the article introduced by the words just quoted it is said: “While attacks of sunstroke are frequently precipitated by exposure, especially during fatigue, to the direct rays of the sun, in a large number of instances they come on under other circumstances. Cases are of not unfrequent occurrence among soldiers in hot climates where there is overcrowding or bad ventilation in their barracks, and sometimes several will be attacked in the course of a single night. The same remark applies to similar conditions existing on shipboard. Further, persons whose occupation exposes them to excessive heat, such as stokers, laundry workers, etc., are apt to suffer particularly in hot seasons.” The Encyclopedia Americana article on the subject begins: “Sunstroke, prostration due to exposure to intense external heat. Such exposure may be to the direct or indirect rays of a tropical sun or to the excessive heat of an engine room. In either case heat and physical exertion combine to bring about the results. A high degree of humidity of the

atmosphere is one of the most important features, since this hinders free evaporation from the body." The New International Encyclopædia treats the word as a synonym of heat stroke, which it defines thus: "The effect produced upon the body by exposure to intense heat, whether from the sun, from furnaces, or from the atmosphere." The Universal Cyclopædia furnishes this definition: "Fever due to excessive heat, but most commonly to exposure to the direct heat of the sun; indirect solar heat or artificial heat may have the same effect."

A number of medical dictionaries apply the word to a specific fever, caused by heat, regardless of its origin, as shown by the following definitions: "Heat stroke, especially that due to exposure to the sun's rays." Billing's National Medical Dictionary. "A popular term for insolation or heat stroke." Gould's New Medical Dictionary. "A condition resulting from exposure to the heat of the sun or to heat from other sources." J. K. Fowler's Dictionary of Practical Medicine. "Heat stroke, especially from direct sun rays." Keating's New Pronouncing Dictionary of Medicine. "Certain pathological conditions resulting from exposure to solar or artificial heat." Quain's Dictionary of Medicine. The following named works fail to recognize the application of the term to any case not resulting from solar heat, but whatever significance might otherwise attach to this fact is diminished if not destroyed by the further fact that they treat "heat stroke" in the same way, the first five giving it as a mere synonym of "sunstroke," and the others ignoring it altogether: Appleton's Medical Dictionary, Lippincott's Medical Dictionary, Dunglison's Medical Dictionary, Foster's Encyclopedic Medical Dictionary, the Encyclopædic Dictionary, Thomas' Medical Dictionary, the Imperial Dictionary, Worcester's Dictionary, Stormonth's Dictionary, Zell's Encyclopædia and Dictionary. In H. C. Wood's work on "Thermic Fever, or Sunstroke," it is said (pages 9, 10): "My own experience is, that the only absolutely necessary, and the everpresent, immediate cause (of what the author calls sunstroke) is heat, solar or artificial. It was formerly believed that exposure of the head to the direct rays of the sun was requisite, but this is now well known not to be true. One of my own cases originated in a sugar refinery. Dr. Longmore tells us that out of 16 cases seen by him in one epidemic, thirteen originated in barracks or hospital." And in Herold's Manual of Legal Medicine, p. 421: "This affection (sunstroke) is produced by exposure to great solar heat, overexertion, and an insufficient supply of water. The term is also applicable to those cases occurring as a result of exposure to other sources of extreme heat." And in Peterson & Haines' Text-Book of Legal Medicine and Toxicology, p. 173: "Exclusive of the effects of burns and scalds, heat may produce lethal effects by what is

commonly known as sunstroke, heat stroke, or thermic fever. This condition, presenting several different phases, usually occurs from exposure to the direct rays of the sun, but may be induced by exposure to any excessive external heat if of sufficiently long duration." In 3 Wharton & Stille's Medical Jurisprudence, § 312, cases arising from exposure to the intense heat of the sun are spoken of as "true" sunstroke, and in Draper's Legal Medicine, p. 461, it is said to be correct to speak of such cases as sunstroke; but in each instance the context seems to indicate that what is intended is merely a suggestion that the word as ordinarily employed is in a sense a misnomer.

It seems clear from these authorities not merely that it is permissible to apply the word "sunstroke" to a condition produced by artificial heat, but that it accords with the best usage to do so; that such condition is comprehended within the ordinary meaning of the word wherever it is used with care and precision, whether in technical scientific treatises or in works designed for the general reader. Where the word is used carelessly or ignorantly it may well be supposed that reference is had to any temporary discomfort resulting from exposure to the direct action of the sun. So in *Insurance Co. v. Trefz*, 104 U. S. 197, 26 L. Ed. 708, it was held that the statement of a witness that he had had an attack of sunstroke was not necessarily to be taken as an admission that his ailment was in fact a real case of sunstroke, properly so called. But in the drawing of an instrument of the character and importance of an insurance policy the presumption should be that language is selected to express with entire accuracy and correctness the agreements of the contracting parties. And in the present case the word "sunstroke" may be deemed to describe, or at least to be inclusive of, the condition properly called by that name, whether occasioned by solar or artificial heat, unless some special reason exists for giving it a different meaning.

There may be an apparent incongruity in calling that "sunstroke" which has no relation to any effect produced by the sun, but this is only to say that the word is not happily formed to suggest the idea it is employed to express. Etymology is not always a safe guide to the meaning of a term. It is no more imperative that "sunstroke" shall always mean a disorder caused by the sun than that "lunacy" shall denote only an aberration due to the influence of the moon. It is true as urged by counsel for the plaintiff in error that "heat stroke" is a more logically constructed phrase. Words, however, are not to be interpreted by any theory of how they ought to be used, but in accordance with the actual use to which they are put by those whose custom establishes a standard. The history of the word "sunstroke" seems to be that it was coined to describe any suddenly perceived ill effects of sun

heat; as observation disclosed that a definite morbid condition ordinarily accompanied or followed such an incident the word was applied to that condition in the belief that it was peculiar to cases having that origin; as advancing medical science revealed that such condition was a distinct disease and might and often did result from artificial as well as from solar heat, the doctors, instead of at once inventing a new and more appropriate name, broadened the application of the old one and their example was naturally and properly followed by others until the usage became general. Later, as a visible mark of the advanced learning on the subject, a more suitable term was originated to describe the disorder—"heat stroke," the growing employment of which may in time restore "sunstroke" to its primitive meaning. That this result has not yet been accomplished is evidenced by the fact that the new word is given in but two of the general dictionaries—the Standard and the Encyclopaedic—and there merely as the equivalent for the old one. We are not directly concerned with the past or future meaning of the word, but with its present significance, and that, as already indicated, we think is comprehensive enough to cover the plaintiff's case.

The provision of the policy is that sunstroke "shall be deemed to be due to external, violent and purely accidental causes" and shall entitle the insured to indemnity at the full rate. It is argued not without plausibility, that this language points to a conception of sunstroke as something of sudden and unexpected occurrence, more or less in the nature of an accident, and that this conception is only appropriate to an attack brought on by exposure to the sun's rays. But prostration resulting from heat emanating from a furnace may be as swift in its development and as startling in its effects as though it were occasioned by hot and humid weather. In each case there would be present some of the features of an accidental injury but neither would justify a recovery upon an ordinary accident policy. In the only reported cases bearing on the subject (*Dozier v. Fidelity & Casualty Co.* [C. C.] 46 Fed. 446, 13 L. R. A. 114, and *Sinclair v. Maritime Pass. Assur. Co.*, 3 El. & El. 478, 107 E. C. L. 476, 7 Jurist [N. S.] 367), in disposing of the contention that the holder of an ordinary policy insuring him against accidental injuries is entitled to recover for disability due to sunstroke, it is held, that sunstroke is not an accident but a disease. These cases are frequently referred to by the medical and legal writers and seem to be regarded as definitely settling the proposition to which they are directed. The discussion in the case first named tends to support the view that sunstroke may be caused by artificial heat, and the decision is cited as having that effect in *Peterson & Haines' Text-Book of Legal Medicine and Toxicology*, p. 491.

It might not be unfair to assume that the policy here involved was drafted in the light of these decisions. Whether so or not we see nothing in its language to impair the effect of the presumption that the word "sunstroke" was used in its strictly correct sense. If the company wished to limit its liability under this clause to disability occasioned by natural heat it could easily have so framed the policy as to make this clear and it should have done so. The health rider is, of course, to be deemed a part of the contract. By its terms it covered sunstroke as well as other diseases. But in the body of the policy that disease is singled out and expressly classified as an accident for the purposes of fixing the extent of indemnity afforded against that particular disorder. The liability of the company must be determined by the specific rather than by the general provisions. Johnson had previously suffered a somewhat similar affliction while holding a like policy from the company, and made a claim and received payment upon the basis of its being ordinary sickness, covered by the rider. Evidence was offered by the company to show the full facts with reference to this matter, but was ruled out, and of this complaint is made. We do not think the evidence rejected had any tendency to show an interpretation of the contract by the parties or that the court committed error in this connection. The jury found that overwork was a contributing cause of Johnson's ailment, and the plaintiff in error argues that this should prevent a recovery, because it shows that his condition was not due solely to heat. Severe exertion according to the authorities already cited renders one more subject to sunstroke. The fact that the jury found in the present instance that there was overexertion does not affect the liability of the company. To hold otherwise would be to make the mere negligence of the insured a defense. The established rule is to the contrary. 1 Cyc. 282.

The judgment is affirmed. All the Justices concurring.

# STATE v. RICKSECKER.

(Supreme Court of Kansas. April 7, 1906.)

## 1. INDICTMENT AND INFORMATION—ELECTION BETWEEN COUNTS.

Where an information contains several counts, intended to charge the same substantial offense in different ways, and their allegations are not inconsistent, it is ordinarily not error for the trial court to refuse to require the state to elect upon which one it will rely for a conviction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 439.]

## 2. CRIMINAL LAW — VERDICT — SEVERAL COUNTS.

In such a case a verdict of guilty which fails to refer to any specific count is sufficient, and will be regarded as a finding of guilty upon all of them.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2099.]

### 3. SAME—EVIDENCE.

In such a case, if all the evidence introduced would have been admissible under one count, which states a public offense, the fact that one or more of the other counts may fail to do so, or may fail to bring the case within the operation of the particular statute under which they are drawn, is not fatal to the conviction.

### 4. SAME—INSTRUCTIONS.

Where an information contains one good count and several others which repeat its allegations, with others which are unnecessary and do not change the character of the offense, a conviction will not be disturbed on account of any failure to instruct upon such additional matters, where no prejudice results to the defendant with respect to his trial upon such good count.

### 5. SAME—JUDICIAL NOTICE.

The courts will take notice without proof that a municipality is a city of the second class, where it has been made such under the statute by a public proclamation issued by the Governor.

(Syllabus by the Court.)

Appeal from District Court, Montgomery County; Thos. J. Flannelly, Judge.

E. H. Ricksecker was convicted of embezzlement, and appeals. Affirmed.

J. H. Keith and Chas. Bucher, for appellant. C. C. Coleman, Atty. Gen., T. E. Wagstaff, and S. J. Osborn, for the State.

MASON, J. E. H. Ricksecker appeals from a conviction upon a charge of embezzling money that came into his hands as superintendent of the waterworks system owned and operated by the city of Coffeyville. The defendant held that position from April, 1900, to May, 1903. After he had retired from the office the claim was made that he had failed to account to the city for all of the public funds that he had received in virtue of it. An investigation followed, as a result of which a prosecution for embezzlement was begun July 12, 1904. The information which was afterwards filed, and upon which he was tried and convicted, contained three counts. The first charged him with embezzling as an officer of the city the sum of \$4,083.84, that evidently being considered the total amount of his shortage. Upon the theory that he might have converted a part of this to his own use more than two years before the criminal action against him was begun, it was alleged that he had concealed the fact of his crime until April, 1903; this allegation being plainly intended to avoid the effect of the statute of limitations. The second count was like the first except that the allegation of concealment was omitted, and the amount embezzled was placed at \$2,600. It is clear that it was the purpose of the pleader in this count to declare only upon such conversion as had taken place within the period fixed by the statute of limitations. The third count set out the amount of the entire shortage, and was drawn under that part of the embezzlement statute (section 2081, Gen. St. 1901) which was first enacted in 1873, and which makes

it a criminal offense for an agent under certain circumstances to fail to pay over upon demand money collected for his principal. Doubtless this count was added with the idea that it might evade any question of limitation upon the theory that the statute does not begin to run against proceedings under this part of the statute until a demand is made. At the conclusion of the evidence a motion was made to require the state to elect upon which count it would rely for a conviction. The motion was overruled. The verdict returned merely declared the defendant "guilty of the crime of embezzlement, all as in manner and form charged in the information," and that the value of the funds embezzled was \$2,366.65.

Under various assignments of error the defendant's counsel complain of rulings relating to the first and third counts, or having some connection therewith. It is contended that an election between the counts should have been compelled; that the form of the verdict was insufficient, inasmuch as it did not refer to any specific count; that the allegation in the first count of the concealment of the crime was too indefinite to have any effect; that the court gave no sufficient instruction as to what acts could be regarded as constituting a concealment; that the statute under which the third count was drawn had no application to the state of facts relied upon by the prosecution in this case; and that the instructions with regard to a demand were defective. All these complaints may be considered and disposed of together. It is manifest that the several counts in the information did not charge three separate and distinct offenses. They were obviously intended only as three different ways of stating the same offense, namely, the converting to his own use by the defendant of that part of the funds of the city which came into his hands as superintendent of the waterworks, and which was otherwise unaccounted for. Under such circumstances a verdict of guilty is valid, although it contains no reference to any particular count. "When but one offense is charged in various forms in separate counts of one indictment, a general verdict of guilty or of guilty as charged, without mentioning the count on which it is based, is sufficient. The same rule is applicable, although several distinct crimes are charged in different counts, if they all arose out of the same transaction." 12 Cyc. 693. Such a verdict is regarded as a finding that the defendant is guilty upon each one of the several counts, and it can therefore be sustained even if some of the counts are bad, for it will be held to respond to any good count that the information contains. "One good count in an indictment, if sustained by the proof, will support a general verdict of guilty, although there be other counts which are defective. So, where there are two or more counts in the indictment, and but one offense, in fact,

is charged, a general verdict of guilty is good if one of the counts be good and the allegations in it are sustained by the evidence." *Id.*, 694. For these reasons there was no necessity in this case for the state to elect upon which count it would reply, or for the verdict to refer in terms to any particular count. The same considerations make it needless to inquire whether the first count sufficiently charged a concealment of the offense, or whether the third count stated an "offense" within that part of the statute under which it was drawn. It may be conceded to the defendant that where the prosecution is compelled to show a concealment in order to convict, the facts relied upon as constituting concealment should be specifically pleaded (*Jones v. State*, 14 Ind. 120), and, also, that the decisions of this court tend to support the view that the part of the statute which is the basis of the third count, and which makes a demand and refusal to pay essential features of the crime there denounced, does not apply to any case where the offense of embezzlement could be complete without such demand and refusal (*State v. Bancroft*, 22 Kan. 170; *State v. Yelter*, 54 Kan. 277, 38 Pac. 320), and therefore cannot be invoked against a city officer with respect to money which it was his duty to turn over to the city without demand. Such concessions can avail him nothing. No question is made of the sufficiency of the second count. The first count is, in substance, the same as the second, except that a larger amount is named as the sum embezzled, and the allegation of concealment is added; the third count is the same as the second, with the allegation of demand added. No evidence was admitted under the first or third count that would have been materially erroneous if the second count had stood alone, and the defendant was in no way prejudiced by their presence in the information.

An important feature of the case made by the state was the testimony of an expert accountant, who undertook, not only to give the total amount of the defendant's shortage, which he fixed at \$2,366.65, but to separate this amount into two parts, the one (\$1,028.43) made up of items received more than two years before the prosecution was begun, the other (\$1,338.22) of those received within that period. As the jury found the amount embezzled to be \$2,366.65, it is clear that the verdict was based upon this testimony. It follows that the jury held the defendant criminally liable for all the money for which he failed to account, including that portion as to which he claimed immunity under the statute of limitations. But it also follows that they convicted him of embezzling that portion as to which no question of limitation could be raised. He was not convicted, however, of two offenses—of embezzling \$1,028.43 at one time and \$1,338.22 at another—but of the single offense of embezzling by one act

the sum of \$2,366.65, which included \$1,028.43 that was collected more than two years before the prosecution was begun. The crime of embezzling \$2,366.65 differs neither in degree nor kind from that of embezzling \$1,338.22. It requires no greater or different punishment. If it was error for the jury to include the latter amount in their statement of the amount embezzled it was harmless error. Inasmuch as the question of concealment was immaterial, there is no occasion to consider whether the court should have given more definite instructions concerning it. It may be remarked, however, that no special instruction in that regard appears to have been asked. Inasmuch as the instructions relating to a demand had no reference to second count, it is unnecessary to consider the criticisms made upon them, for the reasons already stated. Specific complaint is made of the admission of evidence of the payment of several warrants issued to the defendant for water used by the city. It appears that the city, although owning its own waterworks, kept the business done in that connection entirely separate from the other affairs of the municipality, and paid for water used for public purposes the same as any other consumer. The evidence warranted the finding that the proceeds of these warrants came into the hands of the defendant in his official capacity.

Error is also assigned because of the admission of evidence having some tendency to show that the defendant had been accused of being short in his accounts in another capacity. The evidence objected to was not offered for the purpose of showing this fact, but had some bearing upon the legitimate issues, and the fact that it incidentally suggested the commission of another offense did not bar its reception. The information alleged that Coffeyville was a city of the second class, and complaint is made that, while there was no proof of the fact, the court assumed its existence. Under our statute a city of the second class becomes such in virtue of a public proclamation made by the Governor, of which the courts take notice. 17 A. & E. *Encycl. of L.* (2d Ed.) 914; 16 Cyc. 903. *State v. Pittman*, 10 Kan. 593, in which it was said that judicial notice cannot be taken of the incorporation of a city under a general law, was decided under a different statute. See, also, *State v. Bowles* (Kan.) 79 Pac. 726, 69 L. R. A. 176, and *La Rue v. Insurance Co.*, 68 Kan. 530, 75 Pac. 494.

It is contended in behalf of the defendant that he should have been granted a new trial because, under the whole evidence, if he was guilty at all he was guilty of several distinct acts of embezzlement, inasmuch as he was under a duty to turn over to the city at stated intervals the public funds then in his hands. The mere failure to perform this periodical duty, however, did not of itself render him guilty of a criminal offense.

It is possible that he did, upon several different occasions, wrongfully convert to his own use the money then in his possession, but the evidence is consistent with the view that there was no criminal intent and consequently no crime until the entire missing amount had accumulated, and that he then wrongfully by one act embezzled the entire sum. This feature of the case appears to have been sufficiently covered by the instructions, and we are unable to perceive that the defendant has any just cause of complaint in connection therewith.

Other assignments of error have been examined, but are not thought to require separate discussion.

The judgment is affirmed. All the Justices concur.

(73 Kan. 506)

SMITH, County Treasurer, et al. v.  
HANEY et al.

(Supreme Court of Kansas. April 7, 1906.)

**1. COUNTIES—ERECTOR OF COURTHOUSE—USE OF GENERAL REVENUE FUNDS.**

Section 3, of chapter 167, p. 234, of the Laws of 1905, is to be interpreted as authorizing the commissioners of Gove county to use a part of the general revenue fund for the building of a courthouse.

**2. SAME.**

Such provision violates section 4 of article 11 of the state Constitution, forbidding the diversion of a tax from the object for which it is levied, and is therefore void.

**3. STATUTES—CONSTITUTIONAL LAW—PARTIAL INVALIDITY.**

Such provision is so related to the other provisions of said act that it cannot be said that the Legislature would have passed any of them independently of this one, and the entire act is therefore void.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 58.]

(Syllabus by the Court.)

Error from District Court, Gove County; J. H. Reeder, Judge.

Action by Alex Haney and others against J. E. Smith, county treasurer and the board of county commissioners. Judgment for plaintiffs, and defendants bring error. Affirmed.

J. S. West and O. B. Jones, for plaintiffs in error. A. D. Glikeson, E. A. Austin, and Lee Monroe, for defendants in error.

MASON, J. The Legislature of 1905 passed a law (Laws 1905, p. 234, c. 167) to authorize the county commissioners of Gove county to build and equip a courthouse without a vote of the people. The maximum cost of the building was fixed at \$16,000. Provision was made for the expense of the building and equipment by the levy of a special annual tax of not more than 3 mills on the dollar for not more than four years, the proceeds of these levies to form a separate fund to be known as the "county building fund," against which warrants were to be drawn

for all obligations arising from the construction and furnishing of such courthouse. A further provision of the act, upon the construction and effect of which the present litigation turns, reads as follows (section 3): "The said board of county commissioners are hereby authorized to use and expend in the erection, equipment and furnishing of said courthouse and county-office building, in the year or years in which a tax may be levied, as they may deem necessary, in addition to the amount or amounts raised by the levy of the tax as herein provided for, such sum or sums from the general fund of said county not otherwise appropriated after all other running expenses of said county shall have been provided for." A tax having been levied under color of such statute an action was begun to enjoin its collection upon the ground that the act was unconstitutional. An order was made granting a temporary injunction, to reverse which this proceeding is brought. The only attack upon the validity of the statute which it will be necessary to consider is based upon the claim that the portion above quoted is void, because it attempts to authorize the proceeds of a tax to be used for a purpose different from that for which it was levied. The defendants in error practically concede that if this portion of the act means anything at all it is open to the objection urged, but they argue first that it is unintelligible, and may be disregarded entirely, and second, that if it is given a construction which renders it obnoxious to the Constitution it may be rejected on that ground without affecting the validity of the remainder of the act. The three questions to be determined are therefore: (1) Does the language quoted mean that the commissioners may use in the construction of a courthouse such part of the general revenue fund of each year as shall prove not to be needed to pay the current expenses of that year; (2) as so construed is this part of the act void; and (3) if so, is it so far an independent provision that the remainder of the act may stand, notwithstanding its invalidity?

The criticism of the language of the part of the act which is quoted is based upon the apparent incompleteness of the last clause, introduced by the words "such sum or sums," the contention being that the omission of "as," the correlative of "such," leaves the phrase indefinite and meaningless. It is asserted in the brief of plaintiff in error that "no pedagogue, however high his learning, could successfully parse this sentence and diagram it." This may be true, but it is not important. "The rule that bad grammar will not defeat the operation of a statute is old and well settled." 28 A. & E. Encycl. of L. (2d Ed.) 612. If it be thought necessary to provide the missing "as" it may be located in either of two ways. The sentence may be deemed elliptical, the words "as are" being understood between "county" and "not," re-

sulting in this reading: "Such sum or sums from the general fund of said county [as are] not otherwise appropriated after all other running expenses of said county shall have been provided for." Or the phrase "as they may deem necessary" may be transposed so as to follow "such sum or sums," giving the reading: "Such sum or sums as they may deem necessary from the general fund," etc. Either of these interpretations would be permissible under the established rules governing statutory construction. *Id.* pp. 612, 613. But probably a sufficient solution of the problem is to be reached by a reasonable consideration of the language as it stands with a purpose to arrive at its intended effect. So regarded there is no difficulty in saying that the Legislature clearly meant to authorize the commissioners in their discretion to use the unexpended balance of the general revenue fund for several years toward paying for the construction of the courthouse. Although, as already said, it is practically conceded that this view renders this much of the statute unconstitutional it may not be out of place to state the grounds that compel that concession. Section 4 of article 11 of the state Constitution provides that: "No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same; to which object only such tax shall be applied."

The phrase "general fund" as applied to the fiscal management of a Kansas county has a definite and well-recognized meaning. It covers the proceeds of a tax levied to provide for the usual current expenses. The building of a courthouse is a special or extraordinary matter, and not one included in the purposes for which the general tax levy is made. To permit the diversion to that use therefore of any part of the unexpended proceeds of a general revenue tax would be a violation of the spirit and letter of the Constitution. *National Bank v. Barber*, 24 Kan. 534; *A. T. & S. F. R. R. Co. v. Woodcock*, 18 Kan. 20; *State v. Marlon Co.*, 21 Kan. 419. It remains to consider whether the invalidity of this portion of the act vitiates the whole of it. It would serve no purpose to review the cases deciding the effect of the partial unconstitutionality of statutes. Each of necessity turns upon its own peculiar facts and throws but little light upon the determination of others. There is no difficulty in stating the general rule, however much doubt may arise in its application. When a court finds that one part of a statute is in contravention of the fundamental law the inquiry, so far as relates to the effect of this holding on the remainder, is whether the Legislature would have passed such remaining and unobjectionable portion without the obnoxious feature. To give effect to any part of such act, the court must be convinced that the Legislature intended that part to become the law uninfluenced by any consideration growing out of the provisions that were

beyond the legislative power. It is not enough that it cannot be said with positiveness that the joinder with the objectionable matter did contribute to the passage of the rest of the act; there must be an affirmative assurance that the desire to accomplish the unconstitutional purpose formed no part of the motive of the lawmakers in permitting the passage of that portion of the act which is free from objection. In the present case it must be assumed that the Legislature, in undertaking to decide for the people of a county a matter which it is the general policy of the law to permit them to regulate for themselves, made an investigation of the needs and resources of the community affected, and acted upon the basis of the information so obtained—that the probable surplus that might be anticipated from each year's general revenue was estimated, as well as the amounts likely to be obtained from the special tax levies, and that the amount to be expended for the courthouse and the rate of the special tax may have been fixed with reference to these estimates. The act presents a complete and symmetrical plan for accomplishing a given object. In its title one of its purposes is stated to be "to appropriate money from the general fund" of the county to pay for the expenses of building and equipping the courthouse. We cannot say that the feature of the act having relation to the diversion of a part of the general revenue of the county to a building fund was so separate from and independent of its other provisions that they may be permitted to stand while it is stricken out by reason of its conflict with the Constitution.

The judgment is affirmed. All the Justices concurring.

#### HURST v. ALTAMONT MFG. CO.

(Supreme Court of Kansas. April 7, 1906.)

##### 1. SALE—CONTRACT—CONSTRUCTION.

When a seller of merchandise agrees to sell 20 car loads thereof, delivered to the buyer "f. o. b. cars," at the seller's place of business, it is not the duty of the buyer to furnish the cars to receive the goods; and in an action by the buyer against the seller, under such a contract to recover damages for nondelivery of the merchandise, the petition need not allege that the plaintiff furnished cars ready to receive the goods.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 227, 377.]

##### 2. SAME.

The phrase "f. o. b. cars," when used in a contract between a buyer and seller of commercial commodities, where the use of a common carrier is necessary, means that the seller will secure the cars, load them, and do whatever may be required to accomplish the shipment and consignment of the goods to the buyer, free of expense to him.

(Syllabus by the Court.)

Error from District Court, Bourbon County; W. L. Simons, Judge.

Action by William B. Hurst against the Al-

tamont Manufacturing Company. Judgment for defendant, and plaintiff brings error. Reversed.

John H. Crain and John V. McKinney, for plaintiff in error. Keene & Gates, for defendant in error.

GRAVES, J. A demurrer was sustained to the plaintiff's petition by the district court. The plaintiff excepted and brings that question here for review. The demurrer contained two grounds: (1) Several causes of action are improperly joined. (2) The petition does not state facts sufficient to constitute a cause of action. The demurrer was sustained generally. The record does not otherwise show whether the court considered the petition insufficient for both reasons or not. The case has been argued as though the last ground was the only one involved, and we will so assume.

The petition is of considerable length, and the points discussed by counsel can be sufficiently stated without giving a full copy of the pleading. After the proper formal and introductory averments, the petition states in substance that the defendant offered to sell to plaintiff certain goods, at a stated price as shown by Exhibit A. The plaintiff accepted the offer as shown by Exhibit B. That plaintiff afterwards made an additional order as shown by Exhibit C. That afterwards, the plaintiff by letter, confirmed and renewed previous orders, which were accepted by the president of the defendant company, as shown by Exhibit D. That afterwards and in pursuance thereof shipping orders were sent to and received by the defendant, as shown by Exhibit E. That defendant received all shipping orders sent by plaintiff as aforesaid, but "neglected and refused to deliver said egg cases as it agreed to do, and as ordered by this plaintiff." That at the time the first shipment should have been made, and ever since, such egg cases have been worth from 1½ to 2 cents more than the contract price. Whereby plaintiff has been damaged \$1,000. Then follows a prayer for judgment.

The exhibits are as follows:

#### Exhibit A.

"Altamont, Ill. Jan. 31st, 1903.

"W. B. Hurst & Co., St. Louis, Mo.—Dear Sir: Yours of yesterday at hand ordering 10 cars standard white wood cottonwood veneer egg cases. We note that you speak of a one piece end. The case we quoted you on has a 2-piece dressed end. Ready cleated. The price quoted you of 9 cents, cars, factory, is at the Cairo Illinois factory and the rate as before named you are as follows: Eldorado, 6 cts. per 100. Mariam, 5 cts. per 100. Mt. Vernon, 7 cts. per 100. Terms are, as you mentioned, 2% off for cash 10 days from date of invoice. These cases average 7 ½ pound each. Possible a little less. Hence it is no

trouble to tell almost precisely what the case will cost you f. o. b. cars at the above named stations. Cars are very scarce and we would suggest that you place your order early, say at least 20 days in advance of time you expect to use them. Awaiting your prompt reply, we are respectfully yours, Altamont Mfg. Co."

#### Exhibit B.

"St. Louis, Mo. Feb. 2nd, 1903.

"Altamont Mfg. Co., Altamont, Ill.—Dear Sirs: Replying to your favor of the 31st, if ends are two piece and cleated, as you say they are, balance of case filling required dimensions, being a standard whitewood case (veneer), it is alright, we will take the 10 cars. You may file our order now for shipment of one car to Fayetteville, Ark., and one car to our address South Greenfield, Mo. Would be glad to have you get these off at as early a date as possible. Since we know that the cases are at Cairo, we have bought a great many there, and know what the freight rates are ourselves to our various stations. Yours truly, W. B. Hurst & Company."

#### Exhibit C.

"St. Louis, Mo. Feb. 5th, 1903.

"Altamont Egg Case Co., Altamont, Ill.—Gentlemen: Confirming our conversation by telephone this morning, you can enter our order for 10 more cars of cases to be same as last order of 10 cars, at 9 cts. f. o. b. Cairo. We instruct you to order out immediately. 1 car to Fredonia, Kansas. 1 car to Monett, Mo. 1 car to Harrison, Arkansas. 1 car to Springfield, Mo. 1 car to Ft. Scott, Kansas. On the 3d, we gave you order for one car for S. Greenfield, Mo., and one car to Fayetteville, Ark. Let these cars to forward first. The Fredonia car next, and then let the other go as they come. Now relative to your pay: Do not worry about that. We supposed that Dun and Bradstreet had our rating. But you have our permission to address them, or to address the Citizens' Nat. Bank of Ft. Scott, Kansas. National Exchange Bank, Springfield, Mo., Bank of Commerce here, or any of the commercial agencies. It is our intention, however, to discount all these cases, as the old company did with you. We are agreeable to your passing draft if you desire, but make it subject to arrival of car, for we would not want to pay the draft until cars arrived and were properly checked. Kindly let us hear from you promptly confirming above order, and oblige. Yours truly, W. B. Hurst & Co."

#### Exhibit D.

St. Louis, Mo. 2—9—'03.

"Altamont Mfg. Co., Altamont, Ill.—Gentlemen: This will confirm purchase from you of thirteen cars of veneer cases (in addition to the seven cars, orders for which have already been placed with you) at nine cents track, Cairo, Illinois, the case to be standard

vencer case made of cottonwood. We will give you shipping instructions on these thirteen cars within the next few days. Yours truly, W. B. Hurst & Co.

"Accepted. Altamont Mfg. Co., J. E. R."

Exhibit E.

"Feb. 18th, 1903.

"Altamont Mfg. Co., Altamont, Ill.—Dear Sirs: To conform with our contract entered into a few days ago you will kindly book our orders on 13 cars of cases to be shipped as promptly as possible to the following points: 2 cars to Springfield. 2 cars to S. Greenfield, Mo. 1 car to Fredonia, Kansas. 1 car to Parsons, Kansas. 1 car to Cuba, Mo. 3 cars to Monett, Mo. 1 car to Clinton, Mo. 1 car to Fayetteville, Mo. We would like if possible for you to fill these cars in the following order, shipping the first: 2 cars to Fayetteville, Ark. 2 cars to Springfield, Mo. 2 cars to South Greenfield, Mo. 3 cars to Monett, Mo. 1 car to Clinton, Mo. 1 car to Cuba, Mo. 1 car to Parsons, Kansas. 1 car to Fredonia, Kansas. All of these points are now ready to take the cars in as promptly as they are shipped, so kindly move them as promptly as you can. Our egg season is open, and we will need them all between now and March 1st. Yours truly, W. B. Hurst & Co."

The supposed weakness of this petition, as we understand from the discussion of counsel, lies in its want of an allegation that the plaintiff furnished the necessary cars, at the time when shipment was desired. On the other hand, it is contended that it was the duty of the defendant to obtain the cars from the carrier, load the goods therein and consign them to the plaintiff. The real point in the controversy therefore seems to be this: Whose duty was it under the contract between these parties to cause the carrier to place cars in position to receive the goods to be shipped? The exhibits attached to the petition constitute the contract. If concisely stated it would be substantially as follows: Ship to us immediately, or as promptly as possible, 20 cars egg cases, distributed as hereinafter stated. We will pay therefor, nine cents a case f. o. b. cars Cairo, Ills., payment made when cars arrive at point of destination. This order was accepted.

In construing this contract, the difficulty centers in determining what the parties intended by the clause "f. o. b. cars, Cairo, Ills." It is conceded that the letters "f. o. b." are for brevity used instead of the words "free on board." The clause when expressed in words therefore stands thus: "Free on board the cars at Cairo, Ills." This language has been used in the transaction of commercial business many years, and has by general custom and usage among buyers, sellers, and shippers acquired a definite and specific meaning, which is well understood, of common knowledge, and of which courts will take judicial notice. The significance of this language,

when standing alone, is so well established that it has been generally held that proof in support of such signification is unnecessary and improper. *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 101 Ala. 446, 14 South. 672; *Capehart v. Furman Farm Improvement Co.*, 103 Ala. 671, 16 South. 627, 49 Am. St. Rep. 60; *Vogt v. Shlenebeck* (Wis.) 100 N. W. 820, 87 L. R. A. 756, 106 Am. St. Rep. 989 (Sept., 1904); *Hunter Bros. Milling Co. v. Kramer Bros.* (Kan.; May 6, 1905) 80 Pac. 963. This, like any other language may, however, be used in a sense different from that in which it is generally understood; and it may receive an interpretation from the acts of the parties using it, different from what the words seem to indicate.

It is important to bear this in mind as in the decided cases where the words "free on board the cars" have been defined, the decisions generally turn upon some modifying circumstance, wholly outside of and apart from the language itself. The decisions are practically unanimous in holding that these words bind the seller to place the goods on board the cars free of expense to the buyer, also that the carrier is the bailee of the consignee, and that delivery to the carrier amounts to delivery to the buyer. We are asked to extend this meaning a step further. It is apparent that the goods cannot be loaded until cars are in place to receive them. The duty to select the carrier and cause it to furnish the cars rests somewhere. The plaintiff in error insists that this duty belongs to the seller. At this point the authorities part company and seem to be somewhat conflicting. A careful examination of the cases, however, show this conflict to be more apparent than real. A few decisions, fairly recent in date, have held that this duty devolves upon the buyer. These cases, however, are limited to the particular facts presented, and in nearly every instance such facts furnish a reason for the meaning given to the contract under consideration. The most important of these cases are: *Consolidated Coal Co. v. Schneider*, 163 Ill. 393, 45 N. E. 126; *Hocking v. Hamilton*, 158 Pa. 107, 27 Atl. 836; *Baltimore & L. Ry. Co. v. Steele Rail Supply Co.*, 123 Fed. 658, 49 C. C. A. 419; *Evans-ton Elevator Coal Co. v. Castner* (C. C.) 133 Fed. 409; *Neimeyer Lumber Co. v. Burlington & M. R. R. R.*, 54 Neb. 326, 74 N. W. 670, 40 L. R. A. 534. In the case of *Coal Co. v. Schneider*, supra, the coal company leased its mine to the defendant, whereby the lessee was to furnish coal to the lessor, to be delivered at the mine which was some distance from the railroad station. The lessor furnished cars for a time and stated that he would continue to do so. Under these facts it was held to be the duty of the lessor to furnish the cars. In the case of *Hocking v. Hamilton*, supra, the commodity sold was coal to be delivered at the tipple, and the buyer agreed to receive it there. This was not a contract to deliver at any railroad sta-

tion, but at a different place, and because of this agreement it was held to be the duty of the buyer to furnish the cars. In the case of *Railroad v. Supply Co.*, supra, the plaintiff sold some old rails to the defendant to be shipped upon orders stating destination and name of consignee. No such orders were given. It was held that as the shipper could not know when, where, or to whom the shipment was to be made, he was not bound to furnish the cars. The case of *Elevator Co. v. Castner*, supra, was also a case where coal was to be delivered at the mine. In that case the court refers to the above and other cases, and while apparently approving all of them limited the decision to the facts of that case and held it to be the duty of the buyer to furnish the cars, but did not decide what the phrase "f. o. b." means, when standing alone.

The following cases hold that under the prima facie meaning of the phrase "f. o. b." it is the duty of the buyer to furnish the cars: *Kunkle v. Mitchell*, 56 Pa. 100; *Wetherell v. Coope*, 3 Campbell, 272; *Dwight v. Eckert*, 117 Pa. 490, 12 Atl. 32; *Chicago Lumber Co. v. Comstock*, 71 Fed. 477, 18 C. C. A. 207; *Davis v. Cement Co. (C. C.)* 134 Fed. 278. In the case of *Boyington v. Sweeney*, 77 Wis. 55, 45 N. W. 938, it was held that the duty of furnishing the cars rested upon the buyer. This decision was practically overruled by the subsequent case of *Lumber Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337, and the contrary rule adopted. This last case was followed in the later case of *Vogt v. Shienebeck*, 100 N. W. 820, 67 L. R. A. 756, decided by the same court in September, 1904. A noticeable feature of the cases here cited, holding it to be the duty of the buyer to furnish the cars, is that none of them involve an ordinary commercial transaction like or similar to the one here presented. On the contrary, each case had peculiar and exceptional conditions which clearly distinguish it from this case, and which furnished the reason for the decision given. We do not, therefore, regard these cases as in point on the question here involved. This case can be disposed of so far as the demurrer is concerned, without defining the meaning of the phrase "f. o. b. cars Cairo, Ills.," when standing alone. We think the correspondence attached to the plaintiff's petition, when considered as a whole, contains language outside of this phrase, which fairly indicates what was intended by it. It is not difficult to hold, aided by this language, that the formula "f. o. b. cars Cairo, Ills.," was understood by both parties to mean that the defendant would do all that was necessary to be done to accomplish the shipment of the goods to the plaintiff as directed, free of expense or further attention on his part. Here this opinion might end. But the case must be returned for further proceedings, and, as we cannot anticipate what facts will be developed when the issues are finally closed

ed we deem it best to consider and decide the whole question discussed by the parties.

It is our understanding that the phrase or formula "f. o. b. cars" has by long usage and custom acquired throughout the business circles of this country a definite and specific meaning generally understood by all business people. When such phrase or formula is used in a business contract between a buyer and seller of ordinary commercial commodities, where the use of a common carrier is necessary, the parties intend thereby that the seller will at his own expense do all that may be necessary to accomplish the loading and consignment of the goods to the buyer, including the placing of cars upon which to load the commodities sold; and, when nothing appears to modify or limit this meaning, courts should enforce the contract so as to effectuate this intent. This rule is reasonable, it harmonizes with existing business conditions, and is the universal practice among business people. It is conceded that by this phrase the seller is bound to deliver the goods to the buyer by placing them on board the cars. How can he do this unless he secures the cars? Why say that this duty belongs to the buyer? The language of the contract is silent upon this question. By the letter of the agreement it may be said that neither party has agreed to perform this duty, but it may not be said that there was no understanding upon this subject. Without such an understanding, the contract would be incomplete and not enforceable. What the parties intended upon this subject can only be ascertained by interpretation, and to do this the situation of the parties when the contract was made, the subject-matter thereof, and all the attendant circumstances and conditions must be considered.

It is within common knowledge that carriers are willing and even anxious to receive freight for transportation, and to invite business they furnish every reasonable facility and convenience to shippers. It is also well known that wholesale houses and manufacturing establishments have special shipping arrangements with carriers, whereby their business is provided for and accommodated. The facilities of the latter for the procurement of cars are for many reasons superior to those of the buyer. In large cities, where many railroads center, having receiving stations, more or less remote from each other, it might be a material advantage to a shipper to have the privilege of selecting the carrier to whom his goods should be delivered, which he might do if it was his duty to furnish the cars. The inconvenience which the seller will encounter in securing cars, upon which to load the goods sold, is merely nominal. While the difficulties to which the buyer would be subjected are such that it would be unreasonable to assume that he would undertake to do so. In view of the many serious objections in the way of such a contract, it seems clear, beyond doubt, that if the

parties to this case had deemed it necessary to state specifically who should perform this duty the seller would have been named. This manifest intention of the parties should be made effectual by giving to their contract the same legal effect which it would have if such agreement had been specifically written therein. In the case of *Lumber Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337, where the meaning of the phrase "f. o. b. cars" was the point discussed, it was said: "It would seem pretty obvious that one undertaking to load logs upon railroad cars ordinarily assumes the duty of obtaining the cars on which to load the logs, as much as any other implements with which to do the work," and also "we cannot avoid the conclusion that the written contracts upon their face, by necessary implication imposed on the appellants the duty of obtaining the cars upon which to load the logs." This language was approved and followed in the later case of *Vogt v. Shlenebeck*, 100 N. W. 820, 67 L. R. A. 756, decided by the same court in September, 1904.

We conclude that the judgment of the district court should be reversed. It is therefore directed that such judgment be vacated, that the demurrer to the petition be overruled, and that the further proceedings had be in accordance with the views herein expressed. All the Justices concurring.

#### O'KEEFE et al. v. BEHRENS et al.

(Supreme Court of Kansas. April 7, 1906.)

#### 1. EXECUTORS AND ADMINISTRATORS—SALE OF LAND—RIGHTS OF HEIRS—ACTION TO SET ASIDE—LIMITATIONS.

Section 16 of the Code of Civil Procedure, requiring actions brought by the heirs of a deceased person for the recovery of real property descending to them, but sold by an administrator of the estate of the decedent upon an order of court directing such sale, to be commenced within five years after the date of the recording of the deed made in pursuance of the sale, applies to sales which are void for want of notice to the heirs of the proceedings upon which the deed is based.

#### 2. PARTITION—TITLE TO MAINTAIN ACTION—DEBTS OF ANCESTOR.

Heirs suing for the possession and partition of real estate to which they have acquired title by descent are not required to show, as a condition precedent to recovery, that the land is not subject to appropriation for the payment of the decedent's debts.

#### 3. PLEADING—EXECUTION OF INSTRUMENT—DENIAL UNDER OATH.

An allegation that a party is the owner of real property "under a valid and legal deed of conveyance duly executed" describes no written instrument whose execution is admitted unless denied under oath.

#### 4. SAME—ADMISSIONS.

Failure to deny the execution of an administrator's deed under oath does not admit the validity of the proceedings upon which it is based.

Johnston, C. J., dissenting.  
(Syllabus by the Court.)

Error from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Action by Charles F. Behrens and others against William O'Keefe and others. Judgment for plaintiffs. Defendants bring error. Reversed.

J. B. Ziegler and S. H. Piper, for plaintiffs in error. O. P. Ergenbright and J. B. Tomlinson (P. O. Jones, of counsel), for defendants in error.

BURCH, J. John F. Behrens, the owner of the real estate in controversy, died intestate in June, 1890. On January 30, 1896, the plaintiff in error placed upon record an administrator's deed of the land to him, regular upon its face and duly approved, executed, and delivered in pursuance of a sale directly to be made by an order of the probate court. In December, 1903, the heirs of the decedent commenced an action of ejectment for the recovery of the land, and, on the trial, attacked the administrator's deed as void. They claimed that the probate court had no jurisdiction to grant the order of sale because no notice of the hearing of the application to sell had been given (*Mickel v. Hicks*, 19 Kan. 578, 21 Am. Rep. 161), and that unless founded upon a valid order of sale the deed could not divest them of their inheritance. Whether the proof offered was sufficient to establish this claim need not be discussed and is not decided. From the purposes of the case it will be assumed that no order respecting notice was made; that notice was neither given nor waived; that none of the heirs appeared in the probate proceedings, and hence, that the order of sale was void and open to attack in a collateral proceeding.

The question still remains whether the action was barred under the provisions of section 16 of the Code of Civil Procedure, which reads as follows: "Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed after the cause of action shall have accrued, and at no time thereafter: \* \* \* Second. An action for the recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person, or the ward of his guardian, or any person claiming under any or either of them, by title acquired after the date of the judgment or order, within five years after the date of the recording of the deed made in pursuance of the sale." The question suggested was fairly decided in the case of *Young v. Walker*, 26 Kan. 242. The action there under consideration was one of ejectment against a claimant under an administrator's deed. There were defects in the proceeding upon which the deed was found-

ed. The court held that the statute cited applied, and, in the course of the opinion, said: "We shall assume, for the purposes of the case, that, except for the statute of limitations, the administrator's deed would be void. We shall assume, for the purposes of the case, that the irregularities in the proceedings of the probate court, and of the administrator, are sufficient to render the administrator's deed void in any action or proceeding that might have been commenced before the statute of limitations had completely run, and this whether the deed was attacked directly or collaterally; and with such assumptions we shall proceed to a discussion of the question whether the statute of limitations has, in fact, so run as to make the deed valid. Of course the statute of limitations must have some use. It was not enacted for the purpose of curing administrators' deeds which were already good. It was really enacted for the purpose of curing administrators' deeds which would otherwise be void. \* \* \* If everything were regular, there would be no need of any statute of limitations. If the administrators' deed was valid without such statute, then there would be no need of the statute. Therefore it is evident that the statute was enacted for the purpose of curing administrators' deeds which would otherwise be void." This decision has never been overruled. In the case of *Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116, a guardian's deed was attacked in an action of ejectment. The defects in the proceedings supporting the instrument were held to be mere irregularities, the usual presumptions in favor of proceedings within the jurisdiction of the probate court were indulged, and it was decided that the deed was not vulnerable to collateral attack. The opinion was delivered by the justice who expressed the conclusion of the court in *Young v. Walker*. That decision was not referred to, but, apparently forgetful of what had been written in the earlier case, the learned judge made incidental use of language from which it might be inferred that the statute of limitations in question would not apply to void sales.

Some inconclusive references to the statute appear in other decisions, and, in order that all doubt regarding the matter may be removed, a restatement of the court's views, and of the reasons for entertaining them, may be proper. The probate business of this state has been exposed to administration by unskilled hands. The office is political, the terms short, and ignorance, inexperience, inefficiency, and carelessness are likely to register their effects upon the devolution of titles accomplished through probate proceedings. Upon the death of a resident of a county, his estate must be settled. His debts must be paid, and his real estate liable for the satisfaction of debts must be sold for that purpose in the absence of other available assets. In justice to all persons interested,

land ought to be sold to the highest possible advantage, and this cannot be done unless purchasers have confidence in the security of their titles. Men will not pay for land upon which to found homes unless they are to be protected in the undisturbed enjoyment of the fruits of their enterprise. After a fair purchase has been made upon the faith of an order of sale granted by a court of competent authority and the purchase money has been irretrievably distributed among creditors, it would result in the rankest kind of injustice to allow heirs to remain silent for years and then, prompted by some fortuitous circumstance, like the discovery of oil or other mineral in the vicinity of the premises, to claim them. The state itself, as a matter of public policy, is interested in the repose and stability of land titles, in the development and improvement of landed property which doubtful tenures prohibit, and in the repression of vexatious and speculative litigation. These considerations apply as well to sales made without notice as to those of which the heirs have been legally informed. A title which is not infirm needs no statute of limitations for its protection. If there be no defects, remedial legislation is superfluous. All the defects which vitiate probate sales must range themselves with one or the other of two classes—those which go to the jurisdiction of the court and those which are not jurisdictional. The latter class does not render sales void and subject to attack except in a direct manner by appeal or by statutory proceedings to reverse, vacate, or modify. The time limitations upon such proceedings are found in the provisions of the statutes fixing the period within which appeals may be taken, or proceedings in error, and the like, may be commenced. When such time has elapsed, no matter what the irregularities may be, for all purposes of the law the proceedings are valid, and ejectment against the purchaser will not lie. There is, therefore, no room for the beneficial application of the statute cited except to forefend collateral attacks.

Ejectment is a collateral proceeding. *Fleming v. Bale*, 23 Kan. 88; *Mastin v. Gray*, 19 Kan. 458, 466, 467, 27 Am. Rep. 149. The basis of the action must, of necessity, be the absence of some fact essential to probate jurisdiction. The language of the statute, which is plain and unambiguous, clearly applies to such an action, and to limit its operation sales made upon voidable orders only is to make an unauthorized and unwarranted interpolation. It is to be conceded that whatever is placed of record must be capable of description as an administrator's deed, or the statute will not be set in motion. It must also be tested by what appears upon its face. But if it can be said, from what appears there, that it fairly complies with the law, it will be sufficient, although informal and irregular. Such deed must also be made pursuant to an order or judgment directing a sale. The court must have acted, and what it did must

be of a character to make it identifiable as an order or judgment. A forged order would not be an order of a court any more than a forged deed would be a deed made pursuant to an order or judgment. If, upon appeal, an order of sale should be set aside or if the enforcement of the order should be permanently enjoined, no deed could be made pursuant to it. Other circumstances might be suggested under which something in the form of an order or a deed would not be such. But after an administrator's deed made pursuant to an order or judgment of the proper court directing a sale has been placed of record, heirs must sue to recover the property within five years, or be deemed to have admitted the validity of the sale and conveyance whether they had notice of the proceedings or not. After the expiration of that time the purchaser cannot be called upon to vindicate their legality.

Statutes of this character are common, and usually receive the interpretation here indicated. In Mississippi, a statute was passed barring actions brought on account of the invalidity of executors', administrators', and guardians' sales made under decrees of probate courts prior to October 1, 1871, and barring actions directed against such sales made under decrees of the chancery court, to which probate jurisdiction was transferred, subsequent to that time. The period within which such actions might be brought was limited to one year, but the protection of the act was confined to sales made in good faith upon which the purchase money had been paid. In construing this statute in a case in which the invalidity complained of was, in part, want of notice to heirs, the court said: "The manifest purpose of the statute was remedial. It is framed on the idea of giving repose and confidence to titles derived from probate sales made prior to the 1st of October, 1871, and to the same kind of sales made by executors, administrators, and guardians subsequently by the chancery court. The evil was that, because of the negligence and carelessness which experience had shown marked the history of the probate court, it was almost the exception to conform to the statutory directions, in the exercise of that special and limited jurisdiction for the sale of the real estate of decedents by their personal representatives, and of minors by their guardians; and, under the decisions applicable to that sort of jurisdiction, the titles of the purchasers were invalid. Persons who had in good faith paid their money, years afterwards lost their lands, and the heirs recovered the property oftentimes disincumbered of debts. The statute proposed to cure the evil by applying a short limitation where the sale was free from fraud, and the purchaser in good faith had paid his money; so that if the purchaser lost his land, he might indemnify himself in some mode or other. \* \* \* Mrs. Faler, having

been in possession for more than a year after 1st of October, 1871, before suit brought, can claim the benefit of the bar, unless the further position taken by counsel be true, that the statute does not apply if the sale be void, for some defect which makes the decree a nullity, such as want of notice to the heirs. It is said that the invalidity meant is some irregularity occurring after decree. If the court had jurisdiction of the subject-matter and parties, the decree of sale is valid, and the sale itself would stand on the same footing as other judicial sales, and would not be impeached collaterally for mere irregularities. The statute is remedial and curative, has its origin in that policy, and, if the words will admit of it, should receive that construction which will accomplish the end aimed at. It was meant to cure all defects in the sale, no matter from what cause, whether before or after decree, unless the heir brought his action within the time, to contest and show its invalidity. The vendee enters, claiming under the judicial proceedings and the administrator's deed. Though the sale be void, he is in under color and claim of title, and the statute does no more than to protect and perfect his imperfect right, after the expiration of a year from the time the right to bring the suit arose." *Morgan v. Hazlehurst Lodge*, 53 Miss. 665, 679, 682. In a subsequent decision the court commented upon the same statute as follows: "It originated in the known fact that a very large proportion of the sales of property by virtue of the orders of probate courts was void, from various causes; and, as insecurity of titles to property is a great public evil, it was determined to provide a short statute of limitations applicable to all cases falling within the existing evil. \* \* \* This section applies to all sales of the class mentioned which are invalid, no matter on what ground. Every sale which is included in the evil intended to be remedied is embraced. \* \* \* The section does not involve the idea of a legally appointed and qualified administrator, executor, or guardian, who made a sale by virtue of the order of any probate court. The language is 'any administrator, executor, or guardian by virtue of the order of any probate court.' It is not any legally appointed and qualified administrator, executor, or guardian; and to hold that the statute applies only to sales by a legally appointed and duly qualified one is to interpolate the section, and to circumscribe its beneficial operation within narrower limits than the evil to be remedied, and than, it is to be justly assumed, the Legislature intended. \* \* \* The statute was passed with direct reference to the known condition of things, and to meet that, and not upon the view that proceedings in the probate courts were what they should have been under the Constitution and laws." *Hall v. Wells*, 54 Miss. 280.

In the case of *Vanceleave v. Milliken*, 13 Ind. 105, an administrator's deed was attack-

ed as void for want of notice to the heirs in an action to recover possession of the land. The court held a statute of limitations, identical in effect with section 16 of the Code of this state, to be applicable, and adopted the reasoning employed in *Pillow v. Roberts*, 13 How. (U. S.) 472, 14 L. Ed. 228, saying: "It is held by the court, in that case, that such statutes are statutes of repose, and that it is not necessary that he who claims their protection should have a good title; that such statutes would be of little use if they protect those only who could otherwise show an indefeasible title to the land; and hence color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and, of course, adversely to all the world." In the case of *White et al. v. Clawson et al.*, 79 Ind. 188, the statute was applied to a void guardian's sale. "Nor did the averment that the guardian's sale was void add anything to it. The statute upon which the defense was based is a statute of repose, and it is not necessary that a person shall have a good title to invoke its aid. Such persons do not need it. It is only those who cannot assert a good title. It protects those who hold under void sales." In the case of *Harlan v. Peck*, 33 Cal. 515, 91 Am. Dec. 653, the court had under consideration a three-year statute of limitations similar to that of this state. The opinion reads: "There is nothing in the policy or language of the statute which excludes void sales from its operation. The policy of the statute is to quiet titles to real estate sold by order of the probate courts, and in view of that policy, merely, there can be no distinction between sales which may be termed void for the want of jurisdiction, and those which are voidable only. \* \* \* We think the statute applies to all sales, void as well as voidable, made by probate courts, of real estate belonging to persons who have died since the passage of the probate act." The syllabus of the case of *Ganahl v. Soher*, 68 Cal. 95, 8 Pac. 650, reads: "An action by the heirs of a deceased intestate to recover real property sold by a person acting as his administrator under the provisions of the probate act, and by order of the probate court, must be brought within three years next after the sale, or within three years after they attain majority, notwithstanding such sale was void because of the invalidity of the appointment of the acting administrator." In the case of *Scott v. Illickox*, 7 Ohio St. 88, persons who had not been made parties to a foreclosure suit undertook to recover the land in controversy in the face of a seven-year statute protecting purchasers at judicial sales. The court said: "On the face of the section there is no absurdity which might imperiously require a construction giving it a meaning different from its literal import; and the only argument by which we are urged to do so is derived from supposed cases of hardship which might arise under its op-

eration if literally construed. That such cases of hardship might possibly occur is readily admitted. But the same may be said of the operation of all statutes of limitation. It is in the nature of all such statutes that it should be so. And they all proceed upon the policy of compelling either a vigilant and timely prosecution of the rights of parties, or the sacrifice of those rights to the public repose. Where statutes of limitation are, on their face, free from ambiguity, it is now the established policy of courts to avoid giving them any other construction than that which their words demand. *Angell on Limitations*, 24. And, on the whole, looking at the examples of like legislation to be found in other states, we are not prepared to say but that the General Assembly, in the enactment of this statute, appreciating the advantages of public repose, and the evils of insecurity of land titles, may have intended to express all it has expressed, notwithstanding the cases of individual hardship to which its operation might possibly give rise. But, it is said, neither the plaintiff nor those under whom he claims have had their day in court, and therefore he ought not to be barred. This would be a valid objection if the defendant were setting up the decree as an estoppel, but as against a plea of this statute, it cannot avail; for the objection would lie equally against all pleas of any statute of limitations, and effectually prevent its operation." See, also, *Holmes v. Beal*, 9 Cush. (Mass.) 223; *Kaminerer v. Morlock*, 125 Mich. 320, 84 N. W. 319; *Cheesebrough v. Parker*, 25 Kan. 506.

Although length of years may not give jurisdiction or, in a certain sense, make good that which is void (*Foreman v. Carter*, 9 Kan. 678), an act of the Legislature may, out of consideration for the public welfare, oblige interested persons to assert their rights within a limited time or forever hold their peace. The power of the Legislature to enact a statute of this character is included in the general power to fix periods within which actions may be brought. On the score of reasonableness it may be observed that the practical protection to heirs afforded by a probate court order and a public record of the administrator's deed for five years is much greater than that secured by a notice published for a brief period in a newspaper, which step at the outset would have conferred jurisdiction. In many states proceedings for the sale of a decedent's lands to pay debts are treated as proceedings in rem, and notice to heirs may be dispensed with altogether. Generally heirs will know something of steps taken to settle the estate of their ancestor, and it cannot be unjust to require them to press objections at an early date or forfeit the right to do so. From the foregoing it follows that the court erred in admitting evidence of the invalidity of the defendant's deed.

Immediately upon the death of the ancestor, title to his real estate descends to his heirs, subject only to appropriation for the

payment of debts. *Black v. Elliott*, 63 Kan. 211, 215, 65 Pac. 215, 88 Am. St. Rep. 239. They are entitled to possession, and may require partition at once. Letters of administration may not be taken out for a long period of time, or not at all. Much time may elapse before claims are presented or established, or before it may be known that the personal assets are insufficient. During such periods they are entitled to the separate enjoyment of their several portions of the estate, and may proceed to enforce their rights unless some special state of facts should make it unjust or improper that they should do so. General creditors are not proper parties to partition proceedings at all, and the administrator should not be joined unless under exceptional circumstances. *Sheehan v. Allen*, 67 Kan. 712, 74 Pac. 245. If, after partition, the administrator should require the land, or some portion of it, for the payment of debts, it may then be sold. *Sample v. Sample*, 34 Kan. 73, 77, 8 Pac. 248. Therefore, it was not necessary that the heirs as a condition of recovery should either plead or prove that the decedent's estate had been settled or that no debts existed for the payment of which the land might afterwards be appropriated.

The allegation of the defendant's answer, that he is the owner in fee of the premises in controversy "under a valid and legal deed of conveyance duly executed," describes no written instrument whose execution is admitted unless denied under oath, and a failure to deny the execution of an administrator's deed under oath does not admit the validity of the court proceedings upon which it is based. It has only the prima facie effect which the statute gives.

For the error in allowing the administrator's deed to be impeached, the judgment of the district court is reversed, and the cause remanded.

GREENE, MASON, SMITH, PORTER, and GRAVES, JJ., concur.

JOHNSTON, C. J. (dissenting). Although not free from doubt, I incline to the view that the statute of limitations does not apply to a void sale. To give the probate court jurisdiction to order a sale of land by an administrator, notice to the heirs is essential. *Mickel v. Hicks*, 19 Kan. 578, 21 Am. Rep. 161; *Rogers v. Clemmans*, 26 Kan. 522; *C. & N. R. Co. v. Cook*, 43 Kan. 83, 22 Pac. 988. A sale without jurisdiction is a nullity, and the purchaser acquires no title. *Coulson v. Wing*, 42 Kan. 507, 22 Pac. 570, 16 Am. St. Rep. 503. An absolutely void sale and deed never starts the statute of limitations to running. *Taylor v. Miles*, 5 Kan. 498, 7 Am. Rep. 558; *Carithers v. Weaver*, 7 Kan. 123; *Hall's Heirs v. Dodge*, 18 Kan. 277; *Duffitt v. Tuhau*, 28 Kan. 202; *Delashmutt v. Parrent*, 39 Kan. 548, 18 Pac. 712. The statute of limitations invoked applies to executors', admin-

istrators', or guardians' sales upon an order or judgment directing such sales. It can have no application if there is no order or judgment directing such sales. If there is an entire absence of jurisdiction in the court to order a sale, then there was no sale, and hence no room for the application of the statute. If the sale and deed are absolute nullities, it is difficult to understand how they can be cured by a statute of limitations—how lapse of time alone can make something out of nothing. It may be that such a deed, in connection with adverse possession, would start the statute of limitations which would ultimately bar the heirs, as some of the cited cases hold, but a sale, void for want of jurisdiction, and which conveys no title to a purchaser, does not set the statute in motion. The sale in this instance is no better than if the land of third persons had been embraced in the order of sale and deed. The language of the opinion in *Young v. Walker*, supra, sanctions the view that the statute of limitations applies to a void deed, but in that case there was a notice, and therefore no want of jurisdiction. The proceedings were irregular and the deed voidable, but it could not be regarded as a nullity. It is true that some plausible arguments have been advanced to sustain the position of the court, and quite a number of authorities have been cited which tend to support that view. Several of those cases. It will be observed, were treating of voidable, rather than void, sales, and several of the decisions are rested on the fact that there was adverse possession in connection with the irregular proceedings. The Supreme Court of California, for instance, applies the statute of limitations to void probate sales, and yet, in *Gage v. Downey*, 94 Cal. 241, 29 Pac. 635, it is held that if no possession is taken by the purchaser at a void probate sale the statute of limitations will not affect the question of title or confer title upon the purchaser, but that the title will still remain in the heirs and their grantees.

As tending to sustain the view that the statute of limitations does not apply to probate sales which are mere nullities, I cite *Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116; *Pursley v. Hayes*, 22 Iowa, 11, 26, 92 Am. Dec. 350; *Good v. Norley*, 28 Iowa, 188; *Boyles v. Boyles*, 37 Iowa, 592; *Chadbourne v. Rackliff*, 30 Me. 354.

J. B. EHRSAM & SONS MFG. CO. v.  
JACKMAN.

(Supreme Court of Kansas. April 7, 1906.)

1. SALE—CONDITIONAL TEST—ACTION FOR PRICE.

It is competent for parties to a contract for the sale of mill machinery and its installation in a mill to provide that a guaranteed capacity shall be demonstrated by an actual operation of the mill under certain conditions before payment of the price. Such a provision is

not collateral, and the prescribed test must be made or waived before an action for the price can be maintained.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 403, 900.]

## 2. SAME—GUARANTY—CONSTRUCTION.

A contract for the sale of mill machinery and its installation in a mill, which provides that when the machinery is operated so as to meet the requirements of a milling guaranty under which it is sold, the purchaser will accept and pay for it, which guaranties that the mill will perform according to the milling guaranty when operated by the seller, and which requires the purchaser to furnish wheat, labor, and power, to operate the mill at its full capacity when the seller is ready to operate it, contemplates a mill-run demonstration of the guarantied capacity of the mill, as a condition precedent to the payment of the price.

## 3. SAME.

In arriving at the meaning of a contract the court should give effect to each word if possible, should take into consideration all its parts in ascertaining the meaning of each particular part, should construe written and printed portions together when they do not contradict each other, and should give weight to the practical construction placed upon the instrument by the parties themselves before litigation arose.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 723, 745, 753.]

## 4. SAME—DEFAULT OF PURCHASER.

If the purchaser of mill machinery under a contract of the character described should, upon request of the seller, furnish wheat for a test run, but the wheat should be inferior in quality to that stipulated for and the mill should fail to develop its guarantied capacity, the purchaser cannot take advantage of its own default and claim that the test is conclusive.

## 5. SAME—WAIVER OF CONDITIONS.

The use by the purchaser of mill machinery sold under a contract of the character described, pending a test of the capacity of the mill which the purchaser is under no obligation to bring about, and which the seller can delay indefinitely, does not constitute a waiver of the test or relieve the seller of the burden of showing that the mill complies with the guaranty if such use is not in violation of the contract or prejudicial to the seller's rights.

## 6. PLEADING—PETITION—ELECTION BETWEEN COUNTS.

A count of a petition which claims the price of property on the theory that the plaintiff has parted with title to it by sale, and that the defendant owns it, and hence is entitled to its possession, is inconsistent with another count which asks damages as in trover for the conversion of the same property on the theory that the plaintiff owned it and was entitled to its possession; and it is not error to require an election between such counts.

(Syllabus by the Court.)

Error from District Court, Ottawa County; R. R. Rees, Judge.

Action by the J. B. Ehrsam & Sons Manufacturing Company against R. C. Jackman. Judgment was rendered for plaintiff for a portion of his claim, and both parties bring error. Affirmed.

The plaintiff manufactures and erects mill machinery and the defendant owns a flour mill. The petition contains three counts. The first one pleads a contract whereby the plaintiff undertook to furnish and set up certain machinery for defendant's mill for a

price which the defendant agreed to pay. Performance by the plaintiff is alleged, credited it is allowed for payments made and the balance of the contract price is demanded, together with the foreclosure of a lien upon the mill property which the defendant perfected. The second count pleads specially a clause of the contract retaining title to the machinery until the price is paid. Default on the part of the plaintiff, demand for a return of the property, and refusal to comply with the demand are alleged and damages as for a conversion are claimed. The third count prays for the price of extras which the plaintiff placed in the mill. The answer denied performance of the contract, pleads its breach and asks for damages occasioned thereby. On motion the plaintiff was required to elect between the first and second counts of the petition. It chose to go to trial upon the first count, and the second was stricken out.

The court made findings of fact and conclusions of law as follows:

## Findings of Fact.

"(1) That the plaintiff now is, and that during all the times mentioned in its petition herein it has been, a corporation, duly organized and existing under and by virtue of the laws of the state of Kansas.

"(2) That on the 27th day of March, 1903, the defendant, R. C. Jackman, was and ever since that time has been the owner of the real estate described in the petition and of the flouring mill thereon.

"(3) That on the 27th day of March, 1903, the plaintiff and defendant, made and entered into a certain written contract, using therefor a blank furnished by the plaintiff, which said contract was partly printed and partly written, and was in words, letters and figures as follows, to wit: The material portions of the contract are as follows:

"'Guaranty. The first party makes the following guaranty, viz.: That the machinery herein mentioned to be furnished by the first party, shall be made of good material and in a workmanlike manner. Should any part be found defective in material or workmanship within six months from date of acceptance the first party promises to perform this guaranty by making good said part at the shops of the first party and allow freight without additional compensation. When said machinery and material are properly set up according to the first party's plan and flow sheet, and when operated under direction of the first party, said mill will be capable of producing flour in quality, percentage, and yield equal to that made on any mill of any make, having an equivalent line of machinery, and milling like grade, quantity and quality of wheat. [Printed.]

"The first party further guaranties that said mill will have a capacity of two hundred (200) barrels of flour, all grades per run of 24 hours, and will be capable of producing a

barrel of flour of all grades from 4 bushels and 24 pounds of No. 2 wheat cleaned on the receiving separator; the percentage of low grade not to exceed 3 per cent. [Written.]

"The leather belting is guaranteed to be of first class quality, and will be replaced free of charge if found defective. [Written.]

"The second party promises to provide promptly a suitable building ready for the installation of said machinery and material, to provide for heating and lighting said building during progress of work, to furnish material for and build all foundations, to do all mason work including the cutting of walls, to convey machinery and material from cars to mill house, and whenever the first party is ready to operate said machinery, to furnish good, plump, dry milling wheat, labor, and power to operate mill at full capacity, and not to hold the first party liable for damages caused by delays incident to starting up. The second party also promises that when said machinery is operated so as to fulfill the milling guaranty herein stated, then and there upon the second party shall accept said mill and settle therefor according to the terms herein mentioned. It is understood and agreed that until said mill shall have been accepted and paid for, the first party shall have for itself and its servants, the right of access to any and every part of said premises, for the purpose of carrying out the provisions of this agreement. [Printed.]

"The second party further promises to pay to the first party without relief from valuation or appraisal, exemption and bankrupt laws and without cost or expense to said first party, the sum of (\$5,000.00) Five thousand and no/100 dollars in installments as follows, to wit:

Upon arrival of machinery.....	\$2,500 00
When mill is started and milling guaranty fulfilled.....	1,000 00
Three months after mill is started and guaranty fulfilled.....	770 00
On January 1st, 1904.....	730 00

"[Partly printed and partly written.]

"(4) That the plaintiff furnished all the machinery provided for in said contract and put the same into the mill which was completed with the exception of some slight alterations afterwards made in the flow sheet, about the 20th day of August, 1903.

"(5) That upon arrival of the machinery as provided in the contract, the defendant paid to the plaintiff \$2,500, and that he sold to the plaintiff certain old machinery which was taken and accepted as a payment of the \$730, which was due January 1, 1904, by the terms of the contract, and that in anticipation of a completion of the contract he advanced to the plaintiff \$45, but failed and refused to make any further payments.

"(6) That all of the machinery sold to the defendant was with the express understanding that it should be set up and in fact it afterwards was set up in defendant's mill.

"(7) That the defendant furnished all the

material and labor he was required to complete said mill, and all the labor and power he was required to in making the tests provided for in the contract.

"(8) That on two separate occasions the plaintiff deeming the mill complete attempted to make tests of the mill as to its fulfillment of the guaranties set out in the contract, and the defendant at each of these times furnished a very high grade of wheat testing 61 pounds to the bushel, for the purpose of being used in these tests, but on each of these occasions, after operating the mill awhile, without any fault on the part of the defendant, the tests were abandoned at the suggestion of the plaintiff.

"(9) That thereafter the plaintiff wrote to the defendant as follows: 'Enterprise, Kansas, Oct. 12, '03. Mr. R. C. Jackman, Minneapolis, Kansas—Dear Sir: The sample of wheat which you promised to send us on Friday has not been received, and since telephoning to-day, we find that you forgot to send it. Now this matter has been dragging along enough, and we insist that you send us a sample of the wheat which you promise to furnish us to be used in making a test run of your mill. If this wheat grades in accordance with the grades called for in our contract, we will make arrangements to make a test run of your mill without delay. Give this matter immediate attention, please. Yours truly, The J. B. Ehram & Sons Mfg. Co., per J. B. Ehram, J. J. A.'

"(10) That immediately upon the receipt of this letter the defendant sent to the plaintiff, at Enterprise, Kan., by express, a sample of No. 2 wheat testing 59 pounds to the bushel, and requested that the wheat from which this sample was taken be used in making the test.

"(11) That after receiving this sample and on the 23d day of October, 1903, the plaintiff sent its representatives to Minneapolis, for the purpose of making the test, and the defendant furnished several hundred bushels of the wheat from which the sample referred to in finding No. 10 had been taken, to be used by the plaintiff in making another test; and the plaintiff thereupon took charge of the mill and operated the same, but were unable to make a barrel of flour out of 4 bushels and 24 pounds of the wheat furnished, it requiring of the wheat furnished 4 bushels and 34½ pounds to produce a barrel of flour of all grades with not to exceed 3 per cent. of low grade.

"(12) That all the wheat used in making this last test was dry No. 2 wheat testing 59 pounds to the bushel before being cleaned over the receiving separator, but that such wheat was not good, plump, dry No. 2 milling wheat, some of the grains being bleached and shriveled.

"(13) That the defendant made no complaint of the grinding quality or capacity of the mill, except that it would not produce a barrel of flour from 4 bushels and 24

pounds of the wheat furnished with not to exceed 3 per cent. low grade.

"(14) That the said mill has never at any time since its completion been capable of producing a barrel of flour of all grades with not to exceed 3 per cent. of low grade flour from 4 bushels and 24 pounds of No. 2 wheat, testing not to exceed 59 pounds to the bushel, cleaned on the receiving separator.

"(15) That said mill has never at any time since its completion been capable of producing a barrel of flour of all grades with not to exceed 3 per cent. of low grade flour from 4 bushels and 24 pounds of No. 2 wheat not testing to exceed 59 pounds to the bushel.

"(16) That the plaintiff furnished to the defendant at his request the extras mentioned in the third count to the petition and that the amount due thereon from the defendant to the plaintiff is the sum of \$461.34.

"(17) That on the 30th day of September, 1903, the defendant filed at the office of the clerk of this court its statement of a lien duly verified, a true copy of which is attached to plaintiff's petition.

"(18) That as soon as said mill was completed and before any of the tests were made the defendant commenced to operate said mill and has been continuing to operate it ever since.

"(19) That the roll belts were not first-class belting.

"(20) That the clutch coupling was defective when set up in said mill.

"(21) That from the 1st of September, 1902, until the 1st day of September, 1903, according to the rules in force adopted by the grain inspection department of the state of Kansas, the following regulations were in force determining what should constitute No. 1 hard wheat and No. 2 hard wheat. 'No. 1 hard shall be pure and hard winter wheat, sound, plump, and well-cleaned, and shall weigh not less than 59 pounds to the bushel. No. 2 hard shall be sound, dry, and reasonably clean hard winter wheat, and shall weigh not less than 59 pounds to the bushel.'

"(22) Quality and weight of wheat were in the year 1903, in the vicinity of said mill, both considered in determining its grades. The lowest weight for No. 2 hard wheat was 59 pounds to the bushel, while that weighing 60 and 61 was also graded as No. 2, if it otherwise had the requisite qualities. No wheat was graded No. 1 in that vicinity.

"(23) The quality of the wheat in the vicinity of the mill during the summer and fall of 1903, was not very good, and made it extremely difficult to procure a high grade of No. 2 wheat.

"(24) The evidence does not disclose that the defendant ever furnished any other wheat for making any further tests, nor does it appear that the plaintiff ever asked to make any further test.

"(25) That at the time of making the last test said mill was capable of producing a barrel of flour of all grades, with not to exceed 3 per cent. low grade, from 4 bushels and 24 pounds of good, plump, dry milling wheat, cleaned on the receiving separator, weighing 61 pounds to the bushel; but the court cannot say whether it has the capacity to produce that quantity and quality of flour from any wheat inferior to that. This finding is not based on any of the tests attempted.

"(26) That as it has not been determined by an actual test whether the mill was capable of fulfilling the guaranty, the court will make no findings upon the evidence offered by the defendant as to any damage he may have sustained by a breach of the warranty as to the quantity and quality of flour it was capable of producing from a given quantity and quality of wheat, although some evidence was offered for the purpose of sustaining that defense."

#### Conclusions of Law.

"(1) That before the plaintiff can recover upon its first cause of action it must appear from the evidence, either that the mill when completed fulfilled the guaranty, or that the defendant waived a compliance therewith.

"(2) That there was no such an acceptance of the mill on the part of the defendant as waived a strict performance of the guaranty.

"(3) That the only way in which it could be determined, according to the contract, whether the mill was capable of fulfilling the guaranty as to the quantity and quality of flour it would produce from a given quantity and quality of wheat, was by an actual test.

"(4) That a fair construction of this contract required that this actual test should be made with good, plump dry No. 2 milling wheat.

"(5) That by attempting to make the test on the wheat furnished by the defendant, the plaintiff did not estop itself from denying that it is bound by that test.

"(6) That until a fair test is made, according to the provisions of the contract, it cannot be determined whether or not the mill fulfills the guaranty with respect to the quantity and quality of flour it is capable of producing from a given quantity and quality of wheat.

"(7) That for any defect in the material furnished, the defendant's remedy as provided for in said contract was to return the defective parts and have them replaced by new ones.

"(8) That the plaintiff is not entitled to recover anything in this case upon its first cause of action.

"(9) That the plaintiff is entitled to recover upon its third cause of action, the sum of \$491.34.

"(10) That the defendant is not entitled to recover anything in this action."

Motions for a new trial by both the plain-

tiff, and the defendant were overruled. Judgment was rendered pursuant to the conclusions of law, and both parties prosecute error.

G. W. Hurd and T. F. Garver, for plaintiff in error. Thompson & King and E. C. Sweet, for defendant in error.

BURCH, J. (after stating the facts). The chief controversy is over the meaning of the contract. The plaintiff says that although the contract provides for a mill of a given capacity, no test is prescribed by which that capacity is to be ascertained; that an actual test with the kind of wheat described in the contract is not necessary, and that such capacity may be proved by any competent evidence, citing *Kinnard Press Co. v. Stanley* (Kan.) 79 Pac. 661, and *Edward P. Allis Co. v. Columbia Mill Co.*, 65 Fed. 52, 12 C. C. A. 511. The contract expressly provides that when the machinery is operated so as to meet the requirements of the milling guaranty the defendant shall accept the mill and pay for it. It is a part of the guaranty that the mill will perform according to the guaranty when operated under the plaintiff's own direction, and the defendant is required to furnish wheat, labor, and power to operate the mill at its full capacity when the plaintiff is ready to do so. These terms can mean but one thing. Besides the existence of mill machinery which, when properly set up, shall have a given capacity there must be an operation of the machinery in such a manner that it will demonstrate its powers.

The contract indicates that the defendant wanted a 200 barrel mill, the equivalent in all respects of those of his competitors, and which would make a barrel of flour from 4 bushels and 24 pounds of No. 2 wheat; that he was willing to pay the plaintiff's price for it whenever the mill produced the desired results, but that he wanted to see such results produced before parting with his money. The contract further indicates that the plaintiff, as a manufacturer of mill machinery, undertook to furnish the very kind the defendant needed, and agreed to wait for its pay until an actual working test of the mill demonstrated a capacity commensurate with the guaranty. So interpreted, the contract is fair and just, and businesslike and reasonable. Any other interpretation would strain the meaning of words, and would violate the rule relied upon by the plaintiff when discussing other features of the contract, that all of its parts are to be considered in ascertaining the meaning of any particular part. Any other interpretation would also be contrary to the practical construction which the parties themselves have given it by three attempts at a mill-run demonstration. When writing for wheat with which to make a "test run" and calling the attention of the defendant to the provisions of the contract respecting the matter the plaintiff had no doubt as to what was required of it. To substitute some kind of proof of capacity

other than that afforded by an operation of the mill would be to change the contract.

Since the mill must show for itself what it can do, the character of the grain to be used in making the test is important. The defendant says the special guaranty relating to the quantity and quality of flour to be made from a given number of bushels of wheat is to be considered as if standing alone; that it was written in a printed blank; that the printed clause relating to the kind of wheat to be supplied for a test run should be read solely with reference to the printed guaranty of an equal rating with other mills, and that it has no bearing upon the written guaranty; and his conclusion is that any kind of wheat which will grade No. 2 when cleaned on the receiving separator, even though some of the grains be bleached and shriveled, will satisfy his obligation in respect to material for a test. This interpretation of the contract appears to have occurred to the defendant after he had provided the wheat for two inconclusive tests. It would kill the effects of the words "good plump dry milling" when the contract speaks of wheat to be used in showing a compliance with the written guaranty, and it would utilize them when it prescribes the character of grain to be forthcoming to prove capacity according to the printed guaranty. To avoid this crux the defendant argues that the printed guaranty is meaningless, although he retained it in the contract after striking out other parts of the printed form. This court cannot assume that there are no other accessible mills having an equivalent line of machinery, or that the quality, percentage and yield of flour produced by such mills from a given grade, quantity, and quality of wheat cannot be ascertained. There is a likelihood, at least, that such mills exist, and that their owners have proved with perfect accuracy their exact capacity; and it may be that in order to fulfill the printed guaranty the plaintiff's machinery must be able to produce a barrel of flour with not to exceed 3 per cent. low grades from 4 bushels and 24 pounds of No. 2 wheat. The clause in which the words referred to occur is a very important one. It is the duty of the court to give effect to every word of the contract if possible, and to construe its written and printed portions together when they do not contradict each other. The obvious sense of this undertaking is that whenever a test run is to be made the defendant must furnish wheat, labor, and power to operate the mill at full capacity, and that the wheat furnished must be good sound dry milling wheat at all events, whether attention be directed specially to matching some other mill in some particular or to the competency of the machinery to extract flour from wheat grains a high percentage of flour.

Since this mill has not been operated to prove that it has the capacity called for, the condition precedent to payment of the price has not been performed. Since the defend-

ant has not furnished wheat of the kind required to perform the condition, he is not in a position to urge that the test made proves the mill to be inadequate. That operation merely showed what the mill will do with bleached and shriveled No. 2 wheat, and the defendant cannot in effect take advantage of his own default. There is no question in the case of the defendant defeating payment through a wrongful refusal to arrange the preliminaries of a test, or of a recovery by the plaintiff notwithstanding a wrongful refusal to operate the mill under proper conditions. The plaintiff says that if it requires a high quality of No. 2 wheat to produce a barrel of flour from 4 bushels and 24 pounds the contract should be construed to apply only to wheat of the superior kind. This court has no judicial knowledge of how much flour may be extracted from different grades of wheat. The plaintiff guaranteed that its machinery would produce a barrel of flour with not to exceed 3 per cent. low grade from 4 bushels and 24 pounds of good plump dry No. 2 milling wheat, and the court will not assume that it contracted to do an impossibility, or anything unreasonable. There is nothing before the court to call for its opinion upon the situation of the parties if performance of the strict conditions which they have imposed upon themselves should be impossible, or upon the question whether or not performance by either of them may be excused, or if excuses may be offered which ones are valid. Conceding, but not deciding, that what may be termed secondary evidence of the capacity of the mill might be proper under some circumstances, still the plaintiff is not entitled to recover in this action on the findings of fact. Finding No. 22 relates to a local custom not pleaded as affecting the contract, and hence is outside the issues. There is no finding that the custom was known to either party and they must be held to have contracted with reference to the law. Therefore finding No. 25, which described No. 1 wheat, does not show a compliance with the milling guaranty, and no other finding or set of findings is sufficient for that purpose. Neither is the plaintiff entitled to a new trial under the provisional concession. The facts being found the court can apply the law and will do so unless an erroneous theory of the law has prejudiced the trial, which does not appear. It is said the court erred in refusing to make additional findings of fact requested by the plaintiff relating to the efficiency and capacity of the mill, but such findings are not printed in the brief or further described, the evidence supposed to support them is not pointed out and the assignment of error is not argued. Hence the matter will not be considered. No complaint is made that evidence relating to the capacity of the mill was improperly rejected. This being true the facts found which are within the issues are to be regarded as the facts of the controversy.

The plaintiff claims that the second count of the petition was inserted on the theory that it may recover as in quantum meruit notwithstanding a deviation from the contract. No such theory is discoverable in the count itself. It asks damages as in trover for the conversion of property owned by the plaintiff and to the possession of which the plaintiff was entitled. This cannot be done while at the same time the first count of the petition claims the price of the property on the theory that the plaintiff has parted with title by sale, that the defendant owns it and hence is entitled to its possession. The two theories are inconsistent, and an election was properly required. The plaintiff says that the machinery having been accepted and used, the burden was on the defendant to allege and prove that it was not up to the requirements of the contract and cites *Hoffman v. Independence School Dist.*, 96 Iowa, 319, 65 N. W. 322, among other decisions, as authority. In that case the court says: "Parties may well stipulate as to the character and capacity of apparatus or machinery to be furnished or improvements to be made, and make affirmative proof of performance a condition precedent to the recovery of the contract price."

The contract under consideration is of the kind there described. Besides, there has been no acceptance of the machinery in the sense that a performance of the guaranty is waived. The defendant was under no obligation to bring about a test of the mill. The plaintiff could do so at once or delay as long as it saw fit. There is nothing in the contract or in the situation of the parties requiring that the mill lie idle until a compliance with the guaranty is shown, or requiring a forfeiture of the defendant's contract rights upon his setting the machinery in motion. If the plaintiff has not been prejudiced in any way, and there is no claim that he has been, simple use of the mill does not waive the test or shift the burden of proof. The written and printed portions of the contract relating to the belting should be construed together, and the conclusion of the trial court upon that matter was correct. The plaintiff recovered a judgment upon its third action after proof which it was obliged to make. Upon other matters which occasioned the bulk of the costs both parties asked relief and both were defeated. Under these circumstances the judgment that each party pay half the costs will not be disturbed.

The judgment of the district court is affirmed. The costs in this court are divided. All the Justices concurring.

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UNDERWOOD v. FOSHA et al.  
(Supreme Court of Kansas, April 7, 1906.)  
PROCESS—SERVICE—EXEMPTIONS.  
A resident of this state while in attendance upon a federal court in a county other

than that of his residence, either as a party or as a material witness, although not under subpoena, is exempt from the service of a summons in an action brought in that county.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, §§ 148-150.]

(Syllabus by the Court.)

Error from District Court, Wyandotte County; J. McCabe Moore, Judge.

Action by A. F. Underwood against Henry Fosha and Henry Quantie. Judgment for defendants, and plaintiff brings error. Affirmed.

Geo. E. Stoker, for plaintiff in error.  
Loomis, Blair & Scandrett and Robert J. Brock, for defendants in error.

MASON, J. While Henry F. Fosha and Henry Quantie, residents of Riley county, were in Wyandotte county for the purpose of being present at the trial—the one as a defendant and the other as a material witness—of a case pending in the federal circuit court in which A. F. Underwood was the plaintiff, they were served with summons in a new action brought against them by Underwood in the district court of Wyandotte county upon a promissory note executed by Fosha and indorsed by Quantie. They appeared specially and moved that the service upon them be set aside upon the ground that while outside of the county of their residence in attendance upon a court in the capacities stated they were exempt from being sued. The motion was sustained, and the plaintiff prosecutes error.

It is a familiar rule of law, generally although not universally accepted, that apart from any statutory immunity all nonresidents of a county in which they are attending court proceedings either as litigants or witnesses are privileged from civil arrest or the service of summons while there upon that business. Cases bearing upon this question are collected in a note in 25 L. R. A. 721, and in 40 Cent. Dig. Title "Process," §§ 148, 150. The reason of the rule is that the efficient administration of justice in the courts is promoted by encouraging the personal attendance upon trials, not only of the parties in interest, but of other witnesses as well: the removal of the risk of being put to the inconvenience of defending a law suit away from home being manifestly a substantial contribution to this end. In this connection, it is said in *Ela v. Ela*, 68 N. H. 312, 36 Atl. 15: "The right to take the deposition of a nonresident witness does not answer the requirements of justice. It is often indispensable to a just decision of a cause, and is always desirable that testimony shall be given orally in open court. The triers are more likely to understand the testimony fully and correctly. The appearance of the witness aids materially in forming a correct judgment of the credibility and weight of his testimony. All the issues of fact that may

arise at the trial can seldom be foreseen. A fact within the knowledge of a witness may appear to be so foreign to the case when his deposition is taken that it is not deemed worth while to question him upon it, and yet the course of the trial may be such that it is the fact which will control the verdict. See *Metcalf v. Gilmore*, 63 N. H. 174, 186-189. Every reasonable facility should therefore be provided for obtaining the attendance of witnesses in person. These and other considerations have led to the establishment, quite generally, of the doctrine that non-resident witnesses are privileged from liability to be sued while attending the trial, and going to and returning from it."

There is no doubt that the later and just tendency of the courts is to extend rather than to restrict the privilege referred to. So far as the case of Quantie, the defendant in the first action, is concerned, the ruling of the trial court may be affirmed upon the authority of *Bolz v. Crone*, 64 Kan. 370, 67 Pac. 1108. It was there held that: "A witness or suitor in necessary attendance in court, either in his own behalf or under process, outside the territorial judicial jurisdiction of his residence, is exempt from civil arrest and service of summons while in attendance upon such court, and while going to or returning therefrom." It is suggested that that decision was affected by the fact that the conduct of the plaintiff as stated in the opinion amounted to an abuse of judicial process, inasmuch as the defendants when served with summons were in attendance upon the court not for the purpose of any trial upon the merits, but merely to procure the setting aside of a wrongful service previously made upon them. This feature of the case however was only incidentally mentioned, and the conclusion reached was not based upon any theory of bad faith or fraud. The general rule stated, and the rule announced in *Bolz v. Crone*, would be equally conclusive upon the question of the sufficiency of the service upon Fosha if he had been in compulsory attendance upon the court in virtue of having been served with a subpoena. Such, however, was not the case. He lived more than 100 miles from the place of trial, and his attendance as a witness could not have been compelled. The great weight of authority is to the effect that in the absence of an express statute controlling the matter the same protection is to be extended to one who comes voluntarily to give his testimony, as to a witness brought in by process. See the cases already referred to and also those cited in 16 A. & E. Encycl. of L. (2d Ed.) 42.

Our Civil Code, however, contains this provision: "Sec. 337. A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county while going, returning or attending in obedience to a subpoena."

Section 4785, Gen. St. 1901. There is obviously plausible ground for contending that this specific grant of immunity to a witness who is acting in obedience to a subpoena implies that a mere volunteer is to be excluded from the privilege. Such seems to be the interpretation placed upon the same statutory language in Kentucky and South Dakota. See *Currie Fertilizer Co. v. Krish* (Ky.) 74 S. W. 268, and *Malloy v. Brewer*, 7 S. D. 587, 64 N. W. 1120, 58 Am. St. Rep. 856. In Kentucky, however, there are various other provisions of the statute relating to such exemptions, from which it may fairly be gathered that there was a legislative purpose to cover the entire subject-matter, while a necessary corollary of the doctrine announced in *Bolz v. Crone* is that such is not the case here, but, as suggested in *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731, the section of the Code quoted must be held "not to be an implied repeal of the common-law exemption, but a statutory declaration of it pro tanto." The construction placed upon the statute by the South Dakota court in the case cited is influenced by other sections in terms making Code provisions exclusive in all matters to which they relate. But even in that case it was held that the section referred to had no application to nonresidents of the state, and that such persons were protected during their attendance as witnesses although not under subpoena.

On the other hand expressions made use of by the courts of Nebraska and of North Dakota, in the statutes of each of which states the section quoted is found, seem to suggest a contrary view, although the question appears not to have been directly passed upon. See *Linton v. Cooper*, 54 Neb. 438, 74 N. W. 842, 69 Am. St. Rep. 727, and *Hicks v. Besuchet*, 7 N. D. 429, 75 N. W. 793, 66 Am. St. Rep. 665. In the former case a non-resident of the state was held to be exempt from the service of summons while voluntarily attending court as a witness. In the latter the same rule was applied to a resident of the state who was a nonresident of the county; but although spoken of as a voluntary witness the person concerned was also in fact a suitor. In neither case was this provision of the statute referred to. In *McAnarney v. Caughenaur*, 34 Kan. 621, 9 Pac. 476, it was held that a good service of summons might be made upon one who was attending a hearing in a United States Land Office contest in a county other than that of his residence, the action being for the recovery of damages for an assault and battery committed by him during such attendance. In the opinion reference was made to the fact that he was not under subpoena; but this consideration could not have been controlling, as the defendant was a suitor in the contest case as well as a witness. That the action was founded upon a wrong com-

mitted in the county where the action was brought, and during the period for which immunity was claimed, doubtless afforded sufficient ground for holding the service good. See, in this connection, *Mullen v. Sanborn*, 79 Md. 364, 29 Atl. 522, 25 L. R. A. 721, 47 Am. St. Rep. 421; *Iron Dyke Copper Min. Co. v. Iron Dyke R. R. Co.* (C. C.) 132 Fed. 208.

We cannot believe that it was the purpose of the Legislature in adopting the section in question to restrict instead of to preserve the privilege of a witness living in Kansas, by denying him all immunity from process while voluntarily attending a trial outside of his own county, when but for such enactment he would enjoy the same exemption as a nonresident of the state could claim under the same circumstances. The reason for the rule that persons living outside of the state cannot be sued while here to give testimony before a court is that they may be encouraged to come into the state for that purpose voluntarily, inasmuch as they cannot be required to do so. *Sherman v. Gundlach*, 37 Minn. 118, 33 N. W. 549. In *Christian v. Williams*, 111 Mo. 429, 20 S. W. 96, this principle was held not to apply to the case of a resident of the state who attends as a witness a trial outside of his home county; for the reason that in Missouri a subpoena may be issued to any county in the state. But in Kansas it applies with full force, for under our statute no one can be compelled to leave the county of his residence in obedience to a subpoena in a civil case. In *re Highbanks*, 44 Kan. 105, 24 Pac. 75.

We conclude that the service of summons upon Fosha, as well as that upon Quantie, was properly set aside, and the judgment is affirmed. All the Justices concurring.

#### SRAMEK v. SKLENAR.

(Supreme Court of Kansas. April 7, 1906.)

##### 1. PLEADING—PETITION—[IRRELEVANT MATTER—MOTION TO STRIKE OUT—MATTER IN AGGRAVATION.

In an action to recover damages for a breach of contract of marriage, it is not error to overrule a motion to strike out of the petition evidential facts, which form no part of the cause of action, but which are pleaded as aggravation of the damages.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1156.]

##### 2. PLEADING—MOTION TO STRIKE.

Even if such facts are redundant and surplusage and could be proven without being pleaded it is within the discretion of the court to strike out or retain.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1156, 1161.]

##### 3. BREACH OF MARRIAGE PROMISE—EVIDENCE.

Evidence tending to show that, after a contract of marriage has been made, the man seduces the woman by taking advantage of her plighted love and confidence, may be considered by the jury in aggravation of the damages for

a breach of the contract, and should not be stricken out.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Breach of Marriage Promise, § 42.] (Syllabus by the Court.)

Error from District Court, Marion County; R. L. King, Judge.

Action by Lizzie Sklenar against Peter Sramek. Judgment for plaintiff, and defendant brings error. Affirmed.

This action was brought by defendant in error in the district court of Reno county to recover damages against the plaintiff in error for an alleged breach of a contract of marriage. After a motion of the defendant to strike out portions of the petition as redundant had been overruled, the defendant joined issue by a general denial. The case was tried to a jury. A verdict for \$5,000 damages was returned in favor of plaintiff. A motion of defendant for a new trial was overruled. Judgment was rendered in accordance with the verdict, and the defendant brings the case here for review.

Keller & Dean and Henry Swan, for plaintiff in error. W. H. Carpenter, for defendant in error.

SMITH, J. (after stating the facts). Six assignments of error are made, of which the first is the refusal of the court to strike out certain portions of the plaintiff's petition which set forth the circumstances and long continuance of the engagement to marry and the seduction of plaintiff, which in themselves do not constitute a cause of action, or any part of a cause of action, but which are matters of proper proof and proper for the consideration of the jury by way of aggravation of the damages for the breach of the contract of marriage. "As a general rule it is not necessary to the plaintiff's right of recovery that the particular circumstances of aggravation should be set out in the declaration, although such matters are not infrequently alleged, and in some cases have been required in order to warrant a recovery." 5 Enc. Pleading & Practice, 705. In *Klopfer v. Bromme*, 26 Wis. 378, it is assumed that facts which go in mere aggravation of damages should not be allowed in evidence unless pleaded, if objection is made on that ground. The general rule, however, does not seem to go this far. The allegation of such facts, instead of being prejudicial, are generally considered, if not a matter of right, as, at least, highly favorable to the defendant. If the facts pleaded are evidential, but are so remotely connected with the cause of action as to form no part thereof, and, in so far as they pertain to stating a cause of action, are redundant and irrelevant, still it is within the discretion of the court to strike them out or to retain them. *Drake v. National Bank*, 33 Kan. 634, 7 Pac. 219. Some, if not all, of the facts alleged, are evidential upon the issue as to whether or not there

was a contract of marriage. *Johnson v. Leggett*, 28 Kan. 590.

The second and third claims of error relate to the admission and the refusal to strike out the evidence of plaintiff as to the courtship and oft-repeated promise of marriage from 1896 to 1902, when first, it is said, a time was agreed upon for the fulfillment of the contract; also the evidence as to the seduction of the plaintiff. We have examined this evidence, and find it all admissible for the purpose of establishing the disputed contract, or in aggravation of the damages for the alleged breach of the contract. *Johnson v. Leggett*, supra; *Klopfer v. Bromme*, supra.

It is urged, further, that the court erred in refusing to instruct the jury that it should disregard the evidence of the seduction of plaintiff by defendant in determining whether or not a contract of marriage was entered into. Some limitation upon the application of this evidence might well have been given, but the instruction asked was properly refused. True it is, as contended, that, if the defendant promised to marry plaintiff in consideration of her consent to sexual intercourse, no action could be maintained for damages for the breach of such contract, by reason of the immorality and illegality of the consideration. *Saxon v. Wood* (Ind. App.) 30 N. E. 797; *Hanks v. Naglee*, 54 Cal. 51, 35 Am. Rep. 67; *Steinfeld v. Levy*, 16 Abb. Prac. (N. S.; N. Y.) 26. On the other hand, it was contended that the seduction was accomplished in consideration of the promise to marry, and the barriers of modesty and virtue were overcome, long after the contract to marry had been made, by the defendant taking advantage of the plighted love and confidence of the plaintiff. The jury had a right to consider this evidence, and, if they believed the latter contention to be true, they might well give it weight in determining the amount of damages to be awarded. They might also properly consider, if they believed plaintiff's evidence, the years of courtship, the years of renewed promises of marriage, and all other circumstances which they found placed the plaintiff in a worse position, or debarred her from other opportunities of marriage, by reason of the contract with the defendant.

The judgment of the district court is affirmed. All the Justices concurring.

#### STARK et al. v. MORGAN et al.

(Supreme Court of Kansas. April 7, 1906.)

##### 1. PUBLIC LANDS — HOMESTEAD ENTRY — ALIENATION.

A mortgage in this state, being merely security for a debt, conveys no title, and is not an "alienation," within the meaning of section 2201, Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1390.]

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 366.]

##### 2. SAME—MORTGAGE.

A mortgage upon government land, made by a claimant holding under the homestead act,

prior to final proof, for the purpose of procuring money to improve the land, or for any purpose, provided it is not intended thereby to transfer the title in evasion of the statute, is not void, nor in violation of the homestead laws.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 366.]

### 3. SAME—HOMESTEAD ENTRY—ESTOPPEL.

A homestead claimant, who executed a mortgage under such circumstances, and afterwards procures the title to the land from the government, will be estopped from defeating, by his own act, the enforcement of the lien created by the mortgage. His after-acquired title inures to the benefit of the mortgagee.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 366.]

### 4. SAME.

The doctrine of *Brewster v. Madden*, 15 Kan. 249, and such portions of the opinion in *Mellison v. Allen*, 2 Pac. 97, 30 Kan. 382, as follow that case, disapproved.

(Syllabus by the Court.)

Error from District Court, Graham County; Chas. W. Smith, Judge.

Action by C. M. Stark and others against H. M. Morgan and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

R. V. Wilcox, for plaintiffs in error. G. W. Jones, for defendants in error.

PORTER, J. This action was brought to foreclose certain mortgage liens upon land, which, at the time the liens were created, was government land occupied by defendants under a homestead entry, and before final proof thereon. Defendant Morgan and his wife executed two written agreements, dated February 1, 1892, and November 28, 1892, respectively, which were promises to pay for certain fruit trees to be planted upon the land in question, and were in effect mortgages upon the land. The agreements were acknowledged and recorded. The answer of defendants raised the defense as follows: "And for a second defense defendant avers and says that said debt is not a lien upon the southeast quarter of section 2, township 8 south, range 25 west, Graham county, Kansas, because he says that at the time of the execution and delivery of the written contract declared upon and the creating of the debt the title of said land was in the United States of America, defendant having made homestead entry upon it and was occupying it under the United States homestead law and at the time of the execution and delivery of said contract and the creating of the debt he had not made final proof under the United States homestead law and did not do so until on or about September, 1894." A demurrer to this defense was overruled, a trial was had, and the court gave judgment against defendants for \$1,600, the amount of the indebtedness, but denied the lien and ordered plaintiff's mortgages canceled. Of that part of the judgment denying plaintiff's lien, and directing the cancellation of the mortgages, plaintiffs in error complain.

From the statement it appears that but one question is raised: Are the mortgages valid liens upon defendants' land? The provisions of the homestead act require the applicant at the time the original entry is made to make affidavit "that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person." Rev. St. U. S. § 2290 [U. S. Comp. St. 1901, p. 1389]. On final proof he is required to make affidavit "that no part of such land has been alienated, except as provided" therein. Section 2291 [U. S. Comp. St. 1901, p. 1390]. The exception mentioned relates to transfers for church, cemetery, school, or railroad purposes. Section 2296 [U. S. Comp. St. 1901, p. 1398] provides that no lands acquired under the homestead act, "shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." Defendants in error rely upon *Brewster v. Madden*, 15 Kan. 249, and *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97. In the former case the question considered was whether a mortgage given by a pre-emptor prior to the entry of the lands was void. The pre-emption act of September 4, 1841 (5 Stat. 453, c. 16), required the claimant prior to his entry to make oath that "he has not directly or indirectly made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself." It also provided that "any grant or conveyance which he may have made, except in the hands of bona fide purchasers for a valuable consideration, shall be null and void." The court, speaking by Mr. Justice Brewer, construed the pre-emption act to mean that Congress intended by this section that when title passed to the pre-emptor it should pass perfect and unencumbered, and the mortgage was held to be void. This is recognized as the leading case in support of the doctrine announced. We believe it has never been followed, except by this court in *Mellison v. Allen*, supra. *Brewster v. Madden* has been denied and overruled by most of the other courts. It relies upon the case of *McCue v. Smith*, 9 Minn. 252 (Gil. 237), 86 Am. Dec. 100, which was decided in 1864, and expressly overruled in *Jones et al. v. Tainter et al.*, 15 Minn. 512 (Gil. 423), decided in 1870, five years before *Brewster v. Madden*.

In overruling *McCue v. Smith*, the Minnesota court say: "It is true, that in *McCue v. Smith*, 9 Minn. 259 (Gil. 237), 86 Am. Dec. 100, and in *Woodbury v. Dorman*, 15 Minn. 338 (Gil. 272) it was held that a mortgage made in pursuance of an agreement such as appears in this case was void in the hands of the original mortgagee, and as against persons claiming under the mortgagee, not being

bona fide purchasers, and unquestionably the court below was justified by these cases in holding the mortgage here void in the hands of Tainter. In the case of *Woodbury v. Dorman* (in which one member of the court dissented) an application was made immediately after the filing of the opinion for a reargument by the appellant, who claimed that this court had fallen into error in holding a mortgage, given under circumstances similar to those presented by this case, void; and although a reargument was denied for reasons peculiar to that case, the majority of the court in denying the same took occasion to express their dissent from the holding in that case, and to announce that they should feel at liberty in future to re-examine the question there determined. The majority of the court think that the question ought not to be passed over in the case at bar, regarding it as one which affects interests of too much importance and extent, to permit them to sanction by silence, or acquiescence, what they deem a mistaken view of the law. In *McCue v. Smith*, which was followed in *Woodbury v. Dorman*, it was held that such mortgage was void under the thirteenth section of the pre-emption act of September 4, 1841. 5 Stat. 456, c. 16. \* \* \* In the opinion of the majority of this court, a simple agreement by a person proposing to apply for and enter land under the act of September 4, 1841, to execute a mortgage to secure the payment of money furnished him with which to pay for such land, is not such an agreement as is referred to in the provision just quoted from the pre-emption act. It is not an agreement by which the title to be acquired, that is to say, the fee should inure, in whole, or in part, to the benefit of any person other than the pre-emptor; on the contrary, the presumption is that a mortgagor intends to pay the mortgage debt and discharge his land from the encumbrance of the mortgage debt, so that his title shall not inure to the benefit of the mortgagee. \* \* \* But the result is not important. The question is, was there any contract or agreement by which the pre-emptor fixed this result. Did the pre-emptor contract or agree that the title to be acquired, that is to say, that fee should inure to the benefit of another? In other words, did the pre-emptor contract, or agree to do anything, which, when done, would pass the title, in whole or in part, to another, so that the pre-emption would, as to such whole, or part, be a mere conduit of the title? We are clear that no such contract or agreement is fairly to be inferred from a simple agreement, made before pre-emption, to secure the whole or a part of the purchase money by a mortgage upon the premises to be pre-empted. The mortgage contemplated by such contract, or agreement, is but a security (as this court has often held) and its execution does not have the effect of making the title acquired

by the pre-emptor, to wit, the fee, inure in whole or in part to the benefit of another."

The only other case cited and relied upon in *Brewster v. Madden* is *Warren v. Van Brunt*, 19 Wall. 646, 22 L. Ed. 219. There the question of the validity of a mortgage was not in any way involved. The contract held illegal was one by which the pre-emptor contracted before final proof to sell an interest in the land, which was, of course, in violation of the spirit and letter of the law. The court held that "an entry of the public land by one person in trust for another being forbidden by statute, equity will not, on a bill to enforce such a trust, decree that any entry in trust was made." The case of *Mellison v. Allen*, supra, was decided in 1883. The opinion in that case is also by Mr. Justice Brewer, and follows and approves *Brewster v. Madden*. The land involved was a homestead, and the court refused to decree the specific performance of a contract for the conveyance of an undivided interest in the land made before final proof. The distinction between the provisions of the homestead act and those respecting pre-emption is pointed out, but the decision is placed squarely upon the policy of the government expressed in the requirement that the occupant shall make oath at the time of final proof that no part of the land had been alienated. "It is true," the court say, "these sections contain no express prohibition on alienation, and no declaration of forfeiture or penalty in case of alienation; and yet the homestead right cannot be perfected, in case of alienation, without perjury by the homesteader." It is held that the contract whether absolutely void, or not, "is clearly against the will and policy of the government, and so necessarily resting upon perjury, that a court of equity will have nothing to do with it." *McCue v. Smith* is cited again and relied on.

The Supreme Court of California in *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693, had the same question before it in a case involving both the homestead and pre-emption laws. *Stewart* occupied the land under the homestead act and executed a mortgage to *Orr* for money to pay for the land. After the foreclosure and sale to *Orr*, and after *Orr* had taken possession of the land under the sheriff's deed, *Stewart* commuted the entry under the pre-emption act, and received a certificate of purchase. *Orr* brought the action to quiet his title against *Stewart*. The mortgage was held valid, and plaintiff's title was quieted as against any title defendant had acquired subsequently from the government. In a later case, decided in 1893 (*Stewart v. Powers*, 98 Cal. 514, 33 Pac. 486), the same court holds that a mortgage executed by a pre-emption claimant before final proof is not a "grant or conveyance" within the pre-emption statute and was therefore valid. It was held that the mortgagor was estopped from defeating by his

own act the lien attempted to be created, and that the mortgage was not void under the homestead act, "unless it is intended as a mode of transferring the title in evasion of the statute." The authorities are reviewed, and *McCue v. Smith* referred to as supporting the other view; and it is noted that the Minnesota court had expressly overruled the latter case in *Jones v. Tainter*, supra; and *Brewster v. Madden* is mentioned as in line with the earlier overruled cases in Minnesota.

When *Brewster v. Madden* was decided it was in accord with the rulings of the Commissioner of the General Land Office as well as those of the Department of the Interior; but in 1882 this department of the government faced about, and Mr. Teller, Secretary of the Interior, reviewed the former decisions in a careful opinion and showed their unsoundness. In *Larson v. Weisbecker*, 1 Land Dec. Dep. Int. 409, he used this language: "I am aware that the former rulings of your office and of this department, following the precedent of an early decision, have held that an outstanding mortgage given by a pre-emptor upon the lands embraced in his filing defeats his right of entry upon the ground that such mortgage is a contract or agreement by which title to the lands might inure to some other person than himself. A careful consideration of this section leads me to a different conclusion, and to the opinion that unless it shall appear under the rules of law applicable to the construction of contracts or otherwise that the title shall inure to another person, it does not debar the right of entry; and that the mere possibility that the title may so result, as in the case of an ordinary mortgage, is not sufficient to forfeit the claim. \* \* \*

The statute under consideration requires from a pre-emptor, in my opinion, in order to the defeat of his right of entry, a contract by force of which title to the land must vest in some other person than himself; and it must appear that such was his intention at the time of making it. If, on the contrary, the mortgage was a mere security for money loaned, and the contract does not necessarily divert the title from him, it was not a contract or agreement within the meaning of section 2262. [Rev. St. U. S.]." The Secretary held that the purpose of the law was to prevent speculative entries. The effect of this decision was limited to the case under consideration and to future cases. Since that time the rulings of the Department have uniformly held that a mortgage given in good faith, executed prior to final proof, in no manner violates either the provisions of the pre-emption or homestead laws. This change in the rulings of the Interior Department is referred to and commented on by the court in *Wilcox v. John*, 21 Colo. 367, 40 Pac. 880, 52 Am. St. Rep. 246, in the following language (at page 370 of 21 Colo., and page 881 of 40 Pac. [52 Am. St. Rep. 246]): "The rule then announced has, we think, been uni-

formly followed by the Department since. It is founded upon sound reasons, and in practice it has not infrequently been of benefit to settlers in negotiating loans to carry them over periods of drouth, or of business depression, and should be maintained if not inconsistent with the terms of the statute, as it is of the highest importance that the decisions of the courts in these matters should be in harmony with the rulings of the Land Department. The rule contended for by appellants, whereby a mortgage is held to be interdicted, is founded upon a somewhat forced construction of the words 'grant' and 'conveyance' as used in the statute. By the later, and as we think, the better considered cases, it is held that neither a mortgage nor a deed of trust is a grant or a conveyance within the prohibitory clause of the statute." In this case the Colorado court refers to *Brewster v. Madden* as one of the few cases holding to the contrary view. The Supreme Court of Montana in a well-considered case has held that a mortgage of a pre-emption prior to final proof is not a grant or conveyance within the provisions of the pre-emption act, expressly overruling a former decision of that court in *Bass v. Buker*, 6 Mont. 442, 12 Pac. 922. In the later case (*Norris v. Heald*, 12 Mont. 282, 29 Pac. 1121, 33 Am. St. Rep. 581) the two lines of cases are exhaustively reviewed, and the change in the rulings of the Interior Department since *Brewster v. Madden* is noted, and the reasoning of Secretary Teller in *Larson v. Weisbecker*, supra, approved. It is held, however, that "The purpose for which a sum of money may be borrowed becomes material to show that the mortgagor is acting in good faith, and not in collusion with the mortgagee to convey the title, and evade the provisions of the law." The case of *Stark et al. v. Duvall et al.*, 7 Okl. 213, 54 Pac. 453, is squarely in point. Plaintiffs in error in the case at bar are the same persons, the lien being for fruit trees and created in the same way. The land there was a homestead entry. The opinion reviews the changes in the rulings of the Interior Department, and refers to *Brewster v. Madden* and the other cases from this court, but refuses to follow them, preferring to adopt the reasoning of the later cases as in accordance with the rulings of the General Land Department of the government. See, also, the following cases: *Spless v. Neuberg and Wife*, 71 Wis. 279, 37 N. W. 417, 5 Am. St. Rep. 211; *Lang v. Morey*, 40 Minn. 396, 42 N. W. 88, 12 Am. St. Rep. 748; *Fuller & Co. v. Hunt*, 48 Iowa, 163; *Howard v. Reckling*, 31 Ore. 161, 49 Pac. 961; *Dickerson v. Bridges*, 147 Mo. 235, 48 S. W. 825; *Weber v. Laidler*, 26 Wash. 144, 66 Pac. 400, 90 Am. St. Rep. 726; *Orr v. Ulyatt*, 23 Nev. 134, 43 Pac. 916; *Mudgett v. Railroad Co.* (by Secretary Vilas) 8 Land Dec. Dep. Int. 243, 247; 26 A. & E. Enc. Law, 411 and 412.

A mortgage in this state is not an aliena-

tion, but a mere security for debt. It creates a lien, but vests no title. *Chick et al. v. Willetts*, 2 Kan. 384; *Kirkwood v. Koester*, 11 Kan. 471; *Hunt v. Bowman*, 62 Kan. 448, 63 Pac. 747; *Starr v. Flynn*, 62 Kan. 845, 62 Pac. 659. It thus appears that *Brewster v. Madden* stands opposed to the current of recent authorities. When it was decided, the principal case upon which it relied had been discredited and was no longer authority in the Minnesota court. It is itself no longer in harmony with the policy of the department of the government which has to do with public lands. When it was decided it accorded with the rulings of the Interior Department; and it may be noted that when it was followed in *Mellison v. Allen* it was expressly stated that the contract declared to be void was against "the will and policy of the government." This was true until the decision by Secretary Teller in *Larson v. Welsbecker*, and it is apparent that the court's attention was not directed to the then recent change in the rulings of the department which had occurred the previous year. In the case at bar the land was held under the homestead law, and something might be argued in favor of upholding these mortgage liens upon the theory that the restrictions in the provisions of the homestead law are less stringent than those in the pre-emption act. However, the courts as well as the Interior Department have recognized no distinction between mortgages executed upon land held under the pre-emption law, when that law was in force, and those held under the homestead law. The purpose of the requirements in both is held to be to prevent speculative entries, and the right of the claimant to execute a valid mortgage upon the land for any legitimate purpose is no longer doubted. There is much force in the suggestion that in cases of this kind the court should hold in harmony with the policy and will of the government as announced in the rulings of the Land Department; and in view of all that has been said, we are constrained to hold that the doctrine announced in *Brewster v. Madden*, and followed in *Mellison v. Allen*, should be disapproved. To do so requires little or no disturbance of any vested rights or rule of property.

It is contended that under section 2296 Rev. St. C. S. [U. S. Comp. St. 1901, p. 1398], *supra*, which provides that no land acquired under the provisions of the act shall be liable for any debt contracted prior to the issuance of the patent will prevent the lien of the mortgages from attaching. This contention has been decided squarely against defendants in error in *Watson v. Voorhees*, 14 Kan. 328, where it was held that Congress did not intend by this act to place any restriction on the right of the owner to voluntarily encumber the land. It is there said: "The limitation was on the creditor, and not upon the debtor." See, also, *Weber v. Laidler*, *supra*. Since it appears, therefore, that the mort-

gages in no wise conflict with the provisions of the statute in relation to homestead entries, and that in this state they do not constitute an "alienation" and can, in no sense, stand in the way of the claimant's honest oath on final proof, they are clearly valid liens. If, however, it should be made to appear that a mortgage given under such circumstances was intended as a means of transferring the title in evasion of the provisions of the homestead act, it would be void; made in good faith for any other purpose, it is valid. The principles of after-acquired title and equitable estoppel apply with full force. Defendants in error at the time the liens were created had no title; but it is well settled that in such a case, the title, being acquired after the mortgage, inures to the benefit of the mortgagee. *Watkins v. Houck*, 44 Kan. 502, 24 Pac. 361; *Orr v. Stewart*, *supra*; *Spiess v. Neuberg and Wife*, *supra*; *Rauch v. Dech*, 116 Pa. St. 157, 9 Atl. 180, 2 Am. St. 598 and note; 2 *Herman on Estoppel and Res Judicata*, 895. We hold, therefore, that the mortgages were valid liens upon the land in question, and not in violation of the provisions of the homestead laws; that defendants in error are estopped from defeating the lien attempted to be created by them; and that their after-acquired title inured to the benefit of the mortgagee.

The cause will be reversed, and remanded for further proceedings in accordance with these views. All the Justices concurring.

#### BRIGGS v. VOSS et al.

(Supreme Court of Kansas. April 7, 1906.)

JUDGES—DE FACTO JUDGE—VALIDITY OF ACTS.

One who claims to act as judge pro tem. of a city court by virtue of an appointment filed in a public office, who is recognized by the clerk and marshal of the court, and by litigants, attorneys, and others as judge pro tem., is a de facto officer, and his acts and judgments rendered by him while so acting cannot be attacked in a collateral proceeding.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, §§ 11, 12.]

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by Clarence Briggs against Thomas Voss and others. Judgment for defendants, and plaintiff brings error. Affirmed.

I. P. Campbell & Son, for plaintiff in error. Blake & Ayers, for defendants in error.

PORTER, J. Plaintiff in error brought this action to enjoin an execution issued upon a judgment recovered in the city court of Wichita. From a judgment of the district court dissolving the temporary injunction, he brings the case here for review.

The execution sought to be enjoined was issued upon a judgment against Briggs in an

action of forcible entry and detainer, rendered by James A. Conly as judge pro tem. of the city court of Wichita, and it is claimed that he was neither a judge de jure or de facto, and that the judgment for that reason was void. George H. Alexander was the regular judge, and Conly claimed to be acting by virtue of an appointment made by him. The statute creating the city court of Wichita (Laws 1899, p. 266, c. 130) provides: "Sec. 13. In case of the absence, sickness or disability of the judge of said court, such judge may appoint a judge pro tem. of said court, who shall hold court for him and hear and determine any matter pending therein to the same extent that such absent or disabled judge might do if personally present, and such judge pro tem. shall fill such position until the judge of said court can be personally present." On account of failing health Judge Alexander left the city of Wichita December 7, 1904, and went to Arizona. February 23, 1905, he returned, but was never able after that to resume his official duties, and remained at his home until his death. On December 6th, the day previous to his departure for Arizona, Judge Alexander appointed A. S. Houck as judge pro tem. under the provisions of section 13 (page 269) referred to, and at the suggestion of Mr. Houck that occasions might arise when Mr. Houck would be absent or disqualified from acting, Judge Alexander signed 30 blank appointments, leaving the name of the judge pro tem. to be written in as occasion might require, and handed these to Mr. Houck. For a time Judge Houck acted as judge pro tem., and when he was unable to act, he handed one of these blank appointments to James A. Conly, who filled in his name, took the oath of office, and acted as judge pro tem. On March 6, 1905, after the return of Judge Alexander, Houck handed one of these blank appointments to Conly, and the latter wrote his name in the blank space, and qualified by taking the oath of office before the clerk of the district court, as provided by section 15, c. 130, p. 268, Laws 1899. His oath of office as such judge was on file with the clerk of the district court, and he continued to discharge the duties of the office under this appointment from March 6th until after the trial of the forcible entry and detainer suit, which occurred March 16, 1905. He was recognized as judge pro tem. of the court by the officers of the city court, the clerk and marshal and by litigants and attorneys. The parties in the forcible entry and detainer case appeared before him, the case was tried, judgment rendered, and an appeal taken by plaintiff in error to the district court. The appeal was afterwards dismissed, and this action brought to enjoin the execution.

The one question here is whether James A. Conly was a de facto judge pro tem. at the time the judgment was rendered. He was exercising the duties of the office, claiming the right and authority to do so by an appointment regular on its face. So far as the pub-

lic knew, this appointment was in all respects regular. There was the situation contemplated by the statute; the regular judge was sick and disabled from acting; he was present in the city with authority to appoint; and there was on file in the office of the clerk of the court what purported to be his written appointment of Conly, with the latter's oath of office. The officers of the court recognized Conly as judge pro tem. and issued and served process in his name; the litigants and attorneys recognized him as such judge pro tem. These facts bring the case squarely within the rule laid down by this court in numerous cases. Chief Justice Butler's definition of a de facto officer in *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, is followed in *Railway Co. v. Preston*, 63 Kan. 819, 823, 66 Pac. 1050. The third subdivision of this well-recognized definition applies to this case, where the duties of the office have been exercised. "Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public." See, also, *Ritchie v. Mulvane*, 39 Kan. 241, 17 Pac. 830.

While this is a direct attack upon the judgment, it is a collateral attack upon the acts of the officer. It is said in *State v. Williams*, 61 Kan. 739, 741, 60 Pac. 1050. "The acts of a de facto judge cannot be collaterally attacked, and this right to the office is not open to question except in a direct proceeding brought by the state; and this is true in a case where the officer is incapable of holding the office." The principles which control these decisions are firmly established; they may be said to lie close to the foundations of law and order and the stability of government. It is clear that James A. Conly was the de facto judge pro tem. of the city court when the judgment was rendered, and it follows that his acts as such judge cannot be attacked in this collateral proceeding, and that the temporary injunction was properly dissolved.

The judgment will be affirmed. All the Justices concurring.

**PHARES v. GLEASON**, County Treasurer.  
(Supreme Court of Kansas. May 12, 1906.)

**PUBLIC LANDS—PURCHASE OF SCHOOL LANDS FROM STATE—FORFEITURE.**

To effect a forfeiture of a purchase of school land strict compliance with the requirements of the statute is necessary. Where the return of the sheriff upon a notice of default in payment fails to show that it was served upon "all persons in possession of the lands," such service is fatally defective, and a forfeiture cannot be predicated thereon.

(Syllabus by the Court.)

Error from District Court, Trego County;  
J. H. Reeder, Judge.

Application by William Phares for writ of mandamus to L. C. Gleason, county treasurer. From an order denying the writ, plaintiff brings error. Reversed.

Herman Long, for plaintiff in error. W. E. Saum, for defendant in error.

GRAVES, J. This was an application to the district court of Trego county for a writ of mandamus to compel the treasurer of that county to accept the tender of past due purchase money on school lands in that county, made by the plaintiffs herein. The court granted an alternative writ, but, after a trial, set it aside and refused any relief. The plaintiffs excepted and bring the case here for review.

The facts briefly stated are that Isaac Bow-ers purchased the land and assigned his certificate to S. S. Phares who put Martin J. Phares in possession as tenant, and removed to Texas with his family where he died. Default in the payment of principal and interest occurred and the then county clerk, J. W. Phares, with knowledge that S. S. Phares was dead, issued a notice of forfeiture directed to him, and delivered the same to the sheriff, for service, the sheriff made return thereof as follows: "Received this notice this 19th day of March, 1904, and served the same by delivering a true copy of within notice to Martin J. Phares, who is in the possession of said land, and by posting a true copy of said notice in a conspicuous place in the office of the county clerk of Trego county, Kansas, this 26th day of March, 1904, as the within-named S. S. Phares cannot be found in my county; and made return of this notice to the county clerk of the county and state aforesaid this 26th day of March, 1904. T. D. Hinshaw, Sheriff." The plaintiffs are the heirs of S. S. Phares, and, as soon as they heard of the forfeiture proceedings, they tendered the amount then due on the land, which was refused. The plaintiffs had and still have the right to pay up all principal and interest on the certificate which may be due, and thereby reinstate the contract of purchase, unless barred by these forfeiture proceedings.

It is claimed that service of the notice was insufficient, and the attempted forfeiture therefore void. The forfeiture proceedings are provided in section 6356, Gen. St. 1901, which directs how notices of forfeiture shall be served, using the following language: "The notice above provided for [which is the notice of forfeiture] shall be served by the sheriff of the county by delivering a copy thereof to such purchaser, if found in the county; Also to all persons in possession of said lands, and if such purchaser cannot be found, and no person is in possession of said land, then by posting the same up in a conspicuous place in the office of the county clerk." Statutory forfeiture proceedings must be strictly followed. Knott v. Tude, 58 Kan.

94, 48 Pac. 561; Furniture Co. v. Spencer, 59 Kan. 168, 52 Pac. 425; True v. Brandt, (Kan.) 83 Pac. 826. In this case the return of the sheriff does not show that he served said notice upon all persons in possession of the land, as required by the statute. This omission is fatal to the notice. No forfeiture was effected. This attempt to forfeit the rights of the plaintiff had no more effect than if it had not occurred.

The judgment of the district court is reversed, with direction to issue a peremptory writ, requiring the county clerk to accept the offer of the plaintiffs and to make such further orders in the case as may be necessary and proper to carry out the views expressed in this opinion. All the Justices concurring.

#### SPENCER v. SMITH, County Treasurer.

(Supreme Court of Kansas. June 9, 1906.)

#### 1. PUBLIC LANDS — SCHOOL LAND — SALE— FAILURE TO PAY INTEREST AND TAXES— TENDER.

A purchaser of school land, who has failed to pay interest and taxes when due, but whose rights as a purchaser have not been forfeited, is entitled to the remedy of mandamus to compel the county treasurer to accept a tender of money to meet delinquencies of interest and taxes.

#### 2. SAME— CERTIFICATE OF SALE— RIGHTS OF PURCHASER.

The equitable interest in school land acquired by a purchaser under a certificate of sale is not lost by mere abandonment.

#### 3. SAME— FORFEITURE OF RIGHTS.

A forfeiture of the rights of a purchaser of school land is based on the written notice of default issued by the county clerk and the return of the sheriff showing the time and manner of service on file in the county clerk's office, and where these fail to show legal notice to the purchaser there is no forfeiture, and in a proceeding to compel the treasurer to accept the money tendered by a purchaser to pay delinquent interest and taxes, oral proof offered to show that the notice was sufficient in fact, or to amend the return of service, is not admissible.

#### 4. SAME— UNORGANIZED COUNTY.

It was competent for the officers of Trego county on February 4, 1886, to sell school land situate in the unorganized county of Gove, which was then attached to Trego county for judicial purposes.

(Syllabus by the Court.)

Mandamus proceeding by George K. Spencer against J. E. Smith, as county treasurer of Gove county. Peremptory writ allowed.

L. C. True, for plaintiff. A. D. Gilkeson, E. P. Hotchkiss, and Lee Monroe, for defendant.

JOHNSTON, C. J. On February 4, 1886, while Gove county was unorganized and attached to Trego county for judicial purposes, the officers of Trego county sold to George K. Spencer a half-section of school land at \$3 per acre. He paid one-tenth of the purchase price in cash and continued to pay the accruing interest on the balance until February, 1897, when he made default. No other

payment was made by him, nor was there any offer of payment, either of interest or taxes until September, 1905, when he proposed to pay the interest and taxes then due, but the county treasurer to whom tender was made declined to inform him of the amount due according to the records, or to receive payment, upon the ground that Spencer's contract rights had been forfeited and the land sold to another. It appears that in 1898 an attempt was made to forfeit the contract rights of Spencer. Two notices of forfeiture, one for each of the quarter sections of land purchased by Spencer, were issued by the county clerk of Gove county, and placed in the hands of the sheriff for service. Within 15 days afterward that officer returned each notice with an indorsement: "Received this notice this 8th day of January, 1898, and served the same by posting a certified copy in the county clerk's office, as the within-named George K. Spencer cannot be found in the county. January 13, 1898. W. E. Terrill, Sheriff." An item of fees is appended to each. The notices and returns were filed in the county clerk's office, and, in pursuance of these, the land was sold to a third party, who purchased with such notice and knowledge of Spencer's rights as the public records imparted. Later an assignment of the purchaser's rights was made to Arthur Stansbury, who has since paid the balance of the purchase price, and has received a patent from the state. This proceeding is brought by Spencer to compel the county treasurer of Gove county to receive payment of the defaulted interest and taxes, upon the theory that the proceedings to forfeit his rights in the land were ineffectual and void.

It is first contended that mandamus will not lie in this case, and that if the plaintiff has any remedy it is an equitable one against Stansbury who holds under the second sale. If there has been no forfeiture of plaintiff's rights, it was the official duty of the county treasurer to accept the money tendered by plaintiff, and the performance of that duty may be compelled by mandamus. A purchaser in default is entitled to relieve himself from the default by making payment and perfecting his title to the land purchased. Payments can only be made to the county treasurer, and the plaintiff is not in a position to protect his rights nor to contest with others unless the tendered payment is received. He has no other adequate remedy as against the treasurer, and a remedy which will defeat the right to mandamus must be against the respondent, and not against some third party. *Williams v. Clayton*, 6 Utah, 86, 21 Pac. 398; *Palmer v. Stacy*, 44 Iowa, 340; 19 A. & E. Encycl. of L. 746. The fact that there was another claimant for the land is no reason why the county treasurer should have refused to accept payment instead of undertaking to decide between the rights of the contending parties. The only duty of the county treasurer in the matter was to accept payment

from Spencer, and give him a receipt for the amounts paid. *Willie v. Howe*, 27 Kan. 518; *Scott v. Schwab*, 70 Kan. 306, 78 Pac. 443. It is further contended that the action cannot be maintained because the plaintiff's rights have been lost by abandonment. Even if it were conceded that an interest in real estate could be divested by abandonment, there is no room for that contention. The general rule is that a title to land cannot be so lost. *Barrett v. Coal Co.*, 70 Kan. 649, 79 Pac. 150. Whatever the general rule may be as to the loss of an equitable interest under a contract of purchase by abandonment, the policy of the state in respect to the disposition of school land is against that theory. The statute which expresses the state's policy provides that a purchaser of school land who is in default may pay the delinquent interest and taxes, and this without limitation as to the time of default or the circumstance of possession. Laws 1903, p. 723, c. 477. The privilege accorded by statute cannot be denied by the county treasurer, and the right of redemption remains in the purchaser until his rights are forfeited as the statute provides. Even after the notice of forfeiture is given the purchaser still has 60 days within which to make payment of the delinquency, and may thus prevent a forfeiture. Gen. St. 1901, § 6356. Was there a forfeiture of plaintiff's rights? That must be determined from the notice issued and the return of service. The returns show fatal defects. No personal service was made, and the essentials to a constructive service do not legally appear. Notice can only be given by posting where the purchaser cannot be found and no one is in possession of the land. The returns of the sheriff show that Spencer could not be found in the county; but they do not show that no one was in possession of the land. The returns further fail to show that the notices put up in the county clerk's office were posted in a conspicuous place. The failure to observe these requirements defeats the attempted forfeiture. *Knott v. Tade*, 53 Kan. 94, 48 Pac. 561; *Furniture Co. v. Spencer*, 59 Kan. 168, 52 Pac. 423; *True v. Brandt* (Kan.) 83 Pac. 826; *Phares v. Gleason* (Kan.) 85 Pac. 572. To avoid the effect of these omissions the respondent proposes to show that no one was in possession of the land, and also that the notices were posted in a conspicuous place in the county clerk's office. The testimony is not admissible. The basis of a forfeiture is the notice and return of service. It rests upon written evidence of official action, and is not left to the uncertain recollection of officers who may be asked eight years afterward what steps toward a forfeiture were in fact taken. As was said in *Knott v. Tade*, supra, jurisdiction must affirmatively appear, and "the notice and return are jurisdictional." These are to be found in the county clerk's office, and to them any interested party may look to determine the status of the land. An exami-

nation of the notices issued in this case, and the returns of service made thereon, would have disclosed to the purchaser as well as to the officers or a proposed purchaser, that the proceedings were invalid. The jurisdiction cannot be supplied by oral proof or an attempt in this proceeding to amend the returns made in the forfeiture proceedings.

There is a final contention that the sale to plaintiff in 1886 was invalid, for the reason that the land was situated in Gove, then an unorganized county, while it was sold by the officers of Trego county. In the statutory provision relating to the sale of school lands there is no intimation of a reservation of the school lands situate in unorganized counties. It is expressly provided that all school lands within the state may be sold in the manner therein stated. Laws 1876, p. 280, c. 122, art. 14, § 1. By the attachment of Gove to Trego county the former became a municipal township of the latter, with township officers and all things pertaining to the rights and privileges of a township, and subject to the same regulations and liabilities, as other townships of the county. Some exceptions are named in the act, but none of them relate to the sale of school lands. Laws 1873, p. 154, c. 72, § 31. The proceedings to initiate a sale of school land is placed upon the householders of the township in which the land is situated. Since the unorganized county becomes a township of the organized county to which it is attached, the provisions for initiating and carrying out a sale of school land appear to be appropriate to an unorganized county. This appears to have been the legislative interpretation, as the Legislature of 1886 amended the school law, adding a provision that school lands lying in an unorganized county should not thereafter be subject to sale until three years after the county shall have been organized. Laws 1886, p. 198, c. 150, § 1. This act indicates a change of policy on the part of the state with reference to the sale of school lands in unorganized counties, and proceeds on the theory that theretofore they were subject to sale the same as in the organized counties of the state. Some other questions have been argued by counsel; but the decision reached renders them immaterial to this consideration.

The peremptory writ will be allowed. All the Justices concurring.

(73 Kan. 609)

In re BURNETTE.

(Supreme Court of Kansas. May 12, 1906.)

#### 1. ATTORNEY—DISBARMENT—PROCEDURE.

Under the statutes of this state the remedy of disbarment is a special proceeding to deprive the accused of the power to abuse the office of attorney and counsellor at law. It is not a criminal proceeding, but its gravity suggests caution and strictness. The special statute regulating it must be followed so far as the steps to be taken are prescribed. Otherwise it is

to be conducted in general harmony with the practice of the courts in civil cases.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 48.]

#### 2. COURTS—SUPREME COURT—ORIGINAL JURISDICTION.

Under the Constitution of this state, the original jurisdiction of the Supreme Court is confined to proceedings in quo warranto, mandamus, and habeas corpus; and, even in these matters, some special reason must exist for invoking its powers, or parties will be relegated to courts of general jurisdiction for relief.

#### 3. SAME—APPELLATE JURISDICTION.

Under the Constitution of this state, the appellate jurisdiction of the Supreme Court is limited to expounding the law and correcting errors appearing on the record in the proceedings of inferior courts, whether such proceedings be presented for review by proceedings in error or by appeal.

#### 4. SAME.

It is beyond the power of the Legislature to enlarge the scope of the original jurisdiction of this court, either directly by authorizing the primary consideration of cases other than those specified in the Constitution, or indirectly by including such cases within its review power on appeal.

#### 5. SAME.

The jurisdiction to consider causes de novo, on appeal, and to decide them on the law and the evidence according to the right of the case, independent of the rulings and judgment of the lower court, is original and not appellate.

#### 6. CONSTITUTIONAL LAW—STATUTES—CONSTRUCTION IN FAVOR OF VALIDITY.

If a statute be open or two interpretations, under one of which it would be constitutional and under the other unconstitutional, the court will adopt the meaning consonant with validity.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 46.]

#### 7. ATTORNEY AND CLIENT—DISBARMENT PROCEEDINGS—APPEAL—TRIAL DE NOVO.

The statute relating to appeals in disbarment cases, which provides that all the original papers, together with a transcript of the docket entries, shall be transferred to this court to be finally considered and acted upon, being ambiguous, is held not to authorize a trial de novo, but to create a special method for bringing such causes to this court for consideration according to its constitutional appellate jurisdiction.

#### 8. SAME—REMAND—PROCEDURE.

After a judgment of this court, in a disbarment appeal, remanding the cause to the district court for trial, it is not essential to jurisdiction that the accusation be refiled in the district court.

#### 9. SAME—TRANSFER OF ACCUSATION.

In such a case, the omission of this court to make a specific order relating to the transfer of the accusation to the district court, and its custody pending the proceedings there, does not deprive the district court of jurisdiction, and, if the accusation actually be present there and accessible to the court and to the accused during the trial, he sustains no injury of which he can complain.

#### 10. WITNESSES—ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.

After a party to a cause has voluntarily solicited and procured the reading of his unfiled pleading by a nonprofessional stranger, has published its contents in a newspaper interview, and has spread the substance of it upon the record of a court of general jurisdiction in a pleading filed against the attorney who assisted in preparing it, the privileged character of the document is waived; it then becomes common public property, the attorney is

released from the confidential relation he bore to it before its publication, and his production of a copy of it for use as evidence, in a subsequent proceeding brought against the party, is not a breach of privilege.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 782.]

#### 11. ATTORNEY — DISBARMENT PROCEEDINGS — FAILURE TO TESTIFY.

The failure of the accused, in a disbarment proceeding, to give testimony either in denial or explanation of incriminating facts, may be considered by the court in weighing the evidence of his guilt.

(Syllabus by the Court.)

Appeal from District Court, Sumner County; P. B. Gillett, Judge.

In the matter of the disbarment of Cleo D. Burnette. From judgment of disbarment, defendant Burnette appeals. Affirmed.

J. S. Dey, J. A. Burnette, and W. W. Schwinn, for appellant. Hackney & Laferty, Jas. Lawrence, and Waggener, Doster & Orr, for appellee.

BURCH, J. On September 2, 1903, the district court of Sumner county rendered a judgment revoking the license of Cleo D. Burnette to practice as an attorney and counsellor at law. From that judgment an appeal was taken to this court under the provisions of section 403, Gen. St. 1901, which reads as follows: "In case of a removal or suspension being ordered by a district court, an appeal therefrom lies to the Supreme Court, and all the original papers, together with a transcript of the docket entries, shall thereupon be transferred to the Supreme Court, to be there considered and finally acted upon. A judgment of acquittal in the district court is final." When the appeal was heard it was argued that the judgment was erroneous, because the accusation had been verified upon information and belief only, and because, after appellant had failed to answer, the court, acting under section 402, Gen. St. 1901, rendered such judgment as the case required without hearing evidence. Upon consultation it was understood that a majority of the court believed that the judgment should be reversed, because it had been rendered without evidence in support of the accusation. A minority also thought the accusation to be insufficiently verified. Therefore an order was made remanding the cause to the district court, with instructions to set aside its judgment and to proceed with a hearing upon the accusation. Various members of the court expressed their views, from which it appears that, while the order of reversal was agreed to by a majority, neither ground of reversal was sustained, and the judgment of the district court should have been affirmed. In re Burnette, 70 Kan. 229, 78 Pac. 440. This fact was not noted until the order of reversal had gone into effect. Upon the return of the cause to the district court a trial was had, and a judgment of disbarment was again entered, from which the present appeal was taken.

The defendant now claims this court had no power to remand the cause; that the appeal is for the purpose of a hearing de novo; that the object of filing all original papers and a transcript of the docket entries in this court is that a trial de novo may be had; that, when the original papers are transferred to this court, they are to be considered independently of the judgment of the district court; and that a final judgment must be rendered upon them here. In this state remedies in courts of justice are divided into two classes, actions and special proceedings. An "action" is an ordinary proceeding by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. There are two kinds of actions, civil and criminal. A "criminal action" is one prosecuted by the state as a party against a person charged with a public offense for the punishment thereof. Every other action is a civil action. Every remedy other than an action is a special proceeding. Gen. St. 1901, §§ 4431-4436, incl. A disbarment proceeding is not prosecuted by the state as a party. Many causes for disbarment are not denounced as crimes at all. Acts amounting to offenses under the crimes act which constitute causes for disbarment are such only because they disclose a disqualification to exercise the rights, privileges, and powers of an attorney and counsellor at law. Proceedings to disbar an attorney on account of criminal conduct connected with the practice of his profession are wholly independent of any prosecution for crime. The proceeding to disbar is not for the punishment of the delinquent attorney, but for the protection of the courts, the legal profession, and the administration of justice generally. The purpose is not to enforce a forfeiture against the defendant in the sense of an amercement, or to visit any kind of retribution upon him, but to deprive him of the power and opportunity to abuse an office. In all free governments crimes must be defined by the legislative power so that nothing is left to the courts but to interpret and administer its will. But every court has the right to purge its roll of persons guilty of misconduct, whether the acts done have been proscribed in advance or not. It is true, as stated in Peyton's Appeal, 12 Kan. 393, that the public is benefited by the disbarment of a disreputable lawyer, that it involves him in disgrace, and that it takes away from him the means of gaining a livelihood. The gravity of the matter suggests caution and strictness. But it contravenes the express classification of the statute, is destructive of scientific accuracy, and leads to confusion to call the proceeding criminal. This confusion is nowise clarified by using the hybrid expression "quasi-criminal." It involves an ancient fallacy to give a thing a name, and then attempt to prove its attributes by that name. The learned judge who presided at the last

trial was, no doubt, misled by the sometime description of the proceeding as criminal. He excluded important depositions taken against the defendant, holding that the accused had the right to meet the witnesses face to face. Such is not the law (4 Cyc. 915), and the circumstance illustrates the great danger lurking in the unnecessary employment of unauthorized terms. It is sufficient to say, with the Legislature, that the remedy of disbarment is a special proceeding. The special statute regulating the matter must be observed so far as the steps to be taken have been prescribed. Otherwise the proceeding must be conducted in general harmony with the practice of the courts in civil matters. Thus, notwithstanding the statute requires the evidence to be reduced to writing, filed, and preserved, and all original papers, together with a transcript of the docket entries, to be filed in this court upon appeal, testimony not incorporated in a bill of exceptions or case made allowed and settled by the judge will not be considered here. In *re Norris*, 60 Kan. 649, 57 Pac. 528.

In this state, except in certain specified matters, the Supreme Court is a court of error and review. In criminal cases it may reverse, affirm, or modify the judgment appealed from, or may order a new trial. In civil cases it may affirm, reverse, vacate, modify, or grant new trials, and, if the facts be found or agreed to, may designate the character of judgment to be entered. But in all appellate cases the Supreme Court considers the conduct of the lower court. Error must be assigned as inhering in the rulings, orders, and judgments appealed from. The Supreme Court decides the questions thus presented as they arise upon the record, and issues its mandate to the tribunal from which the appeal was taken to carry the judgment rendered into execution. Such being the general character of appellate procedure in this state, a trial de novo here would be an anomaly and can take place only under the compulsion of some sovereign command. Elsewhere it is held that trials de novo can be had in appellate courts only by virtue of express authority, and statutes to that effect are to be strictly construed. 3 Cyc. 260. It is doubtful if the disbarment statute of this state is of the peremptory kind required. The use of the word "appeal" does not alone import a trial de novo. The old civil law signification no longer obtains, and the term not merely includes, but is commonly used to designate, a review of the proceedings of an inferior court brought up as by writ of error. *Styles v. Tyler*, 64 Conn. 432, 458, 30 Atl. 165; *Dutcher v. Culver*, 23 Minn. 415, 420; *Lyles v. Barnes*, 40 Miss. 608; *State of Florida v. King*, 20 Fla. 399; *In re Jessup*, 81 Cal. 408, 465, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594. That the "appellate" jurisdiction of this court, under the Constitution, includes proceedings in error, no one will deny. The

limitation of final consideration and action to original papers, which do not include evidence (*In re Norris*, 60 Kan. 649, 57 Pac. 528), and a transcript of the docket entries, might be taken to indicate that the facts are not to be reinvestigated at all, rather than that they shall be tried anew; and the entire statute lacks the certainty and the mandatory quality necessary to engraft this alien practice upon our appellate procedure.

Appellant cites the case of *State v. Mosher* (Iowa) 103 N. W. 105, in support of his contention. The Iowa statute relating to appeals in disbarment cases reads like our own, and in the opinion it is said: "Under Code, § 329, in relation to the revocation of the license of an attorney, and providing that all the original papers, with a transcript of the record, shall be transferred to the Supreme Court on appeal, to be there considered, the Supreme Court is to consider the case de novo." Contrary to the law of Kansas, the practice of trying certain cases de novo in the Supreme Court is an established feature of the judicial system of Iowa. In the opinion cited the question at issue is not discussed at all, and the decision is rested upon the case of *In re Crum*, 7 N. D. 316, 75 N. W. 257, which was disposed of under a statute obliging the Supreme Court to try and determine disbarment appeals as the law and the evidence might warrant. Therefore *State v. Mosher* is not of controlling authority. The statute being ambiguous, it must be interpreted in a manner to uphold it if possible. If it were given the meaning recognized by the Iowa court, it would be unconstitutional and therefore void.

The jurisdiction to consider and decide causes de novo is in its essence original. The manner in which a case reaches the higher court is not the test. Jurisdiction being the power to hear and determine, the nature of the functions to be exercised controls, whether they are brought into activity by primary process or by removal from an inferior tribunal. Upon a trial de novo the power of an appellate court in dealing with the pleadings and the evidence, in the application of the law and in the rendition of judgment according to the right of the case, all independent of the action of the lower court, is no different from what it would be if the case were begun there originally, and hence is not "appellate," within the meaning of laws creating jurisdiction. *Lacy v. Williams*, 27 Mo. 280; *Co. of St. Louis v. Sparks*, 11 Mo. 203; *Ex parte Henderson*, 6 Fla. 279; *State ex rel. v. Vann*, 19 Fla. 29. The Constitution of this state provides: "The judicial power of this state shall be vested in a Supreme Court, district courts, probate courts, justices of the peace, and such other courts, inferior to the Supreme Court, as may be provided by law. The Supreme Court shall have original jurisdiction in proceedings in quo warranto, mandamus, and habeas cor-

pus; and such appellate jurisdiction as may be provided by law." The distinction between original and appellate jurisdiction is here clearly drawn. The Supreme Court, as the head of the judicial system, was not made the forum for general litigation. The protection and enforcement of rights, the prevention and redress of injuries, and the punishment of crimes are committed to district and inferior courts of general jurisdiction, where all ordinary actions are to be initiated and determined. A few matters of great public importance and certain depredations upon personal liberty are cognizable, in the first instance, by the Supreme Court through proceedings in quo warranto, mandamus, and habeas corpus. But, even in such cases, some special reason must exist for invoking its powers, or parties will be relegated to a court of general jurisdiction for relief. *State v. Breese*, 15 Kan. 123; *Evans v. Thomas*, 32 Kan. 469, 476, 4 Pac. 833; *Supreme Lodge v. Carey*, 57 Kan. 655, 47 Pac. 621; *People v. City of Chicago*, 193 Ill. 507, 62 N. E. 179, 58 L. R. A. 833; *People v. Board of Trade*, 193 Ill. 577, 62 N. E. 196, and cases cited in these opinions. It would be entirely impossible for a single Supreme Court to hear and decide controversies generally, arising within the state, upon their merits, and if any considerable number of them were to be heard anew little opportunity would remain for the performance of the true functions of an appellate court. Therefore the Constitution establishes a classification of its own, and in all except the extraordinary matters referred to the power of the Supreme Court is limited to expounding the law and supervising the conduct of inferior tribunals, by correcting errors in the decisions which they may promulgate. It is beyond the power of the Legislature to enlarge the scope of the original jurisdiction to which this court is confined, either directly by authorizing the primary considerations of causes other than those specified in the Constitution, or indirectly by including such cases within its review power on appeal. "This court is created by the Constitution, and the outlines of its jurisdiction established by that instrument. It has original jurisdiction in three specific classes of cases, which it possesses independent of any legislation, and such appellate jurisdiction as may be provided by law. The jurisdiction of the court, under this last provision, is wholly dependent upon the will of the Legislature. It may be enlarged or restricted, as the Legislature shall prescribe, but in all its acts the Legislature is still under the restriction that the jurisdiction conferred must be appellate, not original." *Auditor of State v. Atchison, T. & S. F. R. Co.*, 6 Kan. 500, 504, 7 Am. Rep. 575. See, also, *State ex rel. v. Wilson*, 30 Kan. 661, 2 Pac. 828.

In the case of *Klein v. Valerius*, 87 Wis. 54, 37 N. W. 1112, 22 L. R. A. 609, it was

held that, since the jurisdiction of the Supreme Court of Wisconsin, under the Constitution of that state, was appellate only, except in specified cases, a statute attempting to make it the duty of the court to examine and review the evidence preserved by bill of exceptions, and give judgment according to the right of the case regardless of the decision by the court below, upon questions of fact as well as of law, was unconstitutional and void. "It is suggested, however, that the recent amendment to section 3070, Rev. St. 1878, by section 2, c. 242, p. 299, Laws 1893, makes it the duty of this court to review 'all questions of law or fact presented by the record upon such appeal or writ of error' and 'to examine and review the evidence when the same is preserved by a bill of exceptions, and give judgment according to the right of the cause, regardless of the decision upon questions of fact or law made by the court below, according to law and equity.' \* \* \* Undoubtedly, within certain limits, the Legislature has power to regulate the practice of this court, but it must be remembered that this court, as well as the Legislature, gets its judicial power and jurisdiction directly from the Constitution. That instrument declares: 'The judicial power of this state, both as to matters of law and equity, shall be vested in a Supreme Court, circuit courts, courts of probate, and in justices of the peace.' Section 2, art. 7. It, moreover, declares that 'the Supreme Court, except in cases otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state; but in no case removed to the Supreme Court shall a trial by jury be allowed.' Section 3, art. 7. The case at bar is not one of those otherwise provided for in the Constitution, and hence is not within the exception mentioned. \* \* \* It may be added that much less can the Legislature take anything from the original jurisdiction of the circuit court and give the same to this court in cases in which it has only appellate jurisdiction. We must hold that, in so far as section 2, c. 242, p. 299, Laws 1893, has attempted to give this court original jurisdiction in cases in which, under the Constitution, it only has appellate jurisdiction, the same is null and void."

In Florida, the Constitution conferred jurisdiction in civil actions at law upon justices of the peace. If the amount or value involved should not exceed \$100. It also gave the circuit court original jurisdiction if the amount or value in controversy should exceed \$100, and final appellate jurisdiction in cases coming from justices' courts in which the amount or value should be \$25 or upward. The Legislature passed an act providing that, when an appeal should be perfected, the justice should transmit to the clerk of the circuit court a certified copy of all the entries in his docket and all papers filed in the case, and providing that: "Thereupon the

said appellate court shall proceed to hear the said cause, and may allow such amendments therein as may be just, and render such judgment as may be conformable to law and the justice of the case. The trial shall be by jury, if demanded by either party." A subsequent statute provided that "all appeals taken from a judgment of any justice of the peace shall be tried de novo." The Supreme Court held these acts to be unconstitutional, as attempting to confer original jurisdiction on the circuit court, saving them, however, to the extent that they provided a method of bringing up cases for review on error according to the proper appellate jurisdiction of the circuit court. In the opinion it is said: "'Appellate' pertains to the judicial review of adjudications. 'Appellate jurisdiction' is the power to take cognizance of and review proceedings had in an inferior court, irrespective of the manner in which they are brought up, whether by appeal, or by writ of error. \* \* \* The case of *Ex parte Henderson*, in 6 Fla. 279, decided that the trial de novo of a cause coming to the circuit court on appeal from a justice's court was the exercise of original rather than appellate jurisdiction. \* \* \* Where words confer only appellate jurisdiction, original is clearly not given. *Ex parte Henderson*. And especially where the Constitution draws the line distinctly, and clearly declares where the boundary is, it is beyond the power of the Legislature to establish a different one. The Constitution confers on circuit courts appellate jurisdiction, and it is confined to the limits there defined. Whether exercised by a writ of error, certiorari, or appeal, as may be provided by the statute, it is still appellate, and its office is to review the proceedings of the inferior tribunal and to decide the law of the case as presented by the record legitimately brought up by the appeal. The Constitution conferring on parties the right of appeal and on the circuit courts the power to entertain it, the statute has provided how an appeal may be taken. While it is evident that the Legislature had in view a trial by the exercise of original jurisdiction of the cause appealed, yet, so far as it provided the machinery by which the appeal might be effected, the law is valid to give the circuit court power to dispose of the case; while so much of the law as provided for a trial by a jury, or otherwise than by a review, is not authorized but conflicts with the constitutional restriction. The appeal here provided operates as a statutory writ of error, bringing up the proceedings for examination and judgment upon their validity. *Hendricks v. Johnson*, 6 Port. (Ala.) 472; *Lewis v. Nuckolls*, 26 Mo. 278; *Lyles v. Barnes*, 40 Miss. 608."

The Constitution of the state of Connecticut provides as follows: "The judicial power of the state shall be vested in a Supreme Court of Errors, a superior court, and such inferior courts as the General Assembly

shall, from time to time, ordain and establish; the powers and jurisdiction of which courts shall be defined by law." Article 5, § 1. In 1893 the Legislature of that state passed an act in the following terms (Pub. Acts Conn. 1893, pp. 318, 319, c. 174):

"Sec. 7. Either party may appeal, from any finding or refusal to find any fact, to the Supreme Court of Errors in the manner now by law provided."

"Sec. 9. The Supreme Court shall review all questions of fact raised by the appeal as well as all questions of law, and in all cases where no evidence has been improperly admitted or excluded in the trial court, shall determine the question of fact and law and render final judgment thereon. In passing upon said questions of fact, said Supreme Court shall not reverse the finding of the trial court upon any question of fact, unless it find the conclusions of such trial court upon such question clearly against the weight of evidence."

"Sec. 10. The rights of appeal under this act shall be in addition to those now provided by law, and the provisions of this act shall apply to all suits now pending."

From the use of the name "Supreme Court of Errors," and from a consideration of the history of the judicial establishments of the state prior to the adoption of the Constitution in 1818, the court came to the following conclusions respecting its powers: "The most significant feature in the establishment of the court is found in the fact that it was the deliberate adoption into our system of judicature of the fundamental principle, which has ever since characterized it, that the certainty of our jurisprudence, as well as the security of parties litigant, depends upon confining the jurisdiction of a court of last resort to the settlement of rules of law. \* \* \* Two courts are established and the character of their jurisdiction described by the Constitution itself; one with a supreme jurisdiction in the trial of causes, and one with a supreme and final jurisdiction in determining in the last resort the principles of law involved in the trial of causes. The 'superior court' is a 'superior court of judicature over this state,' with a supreme jurisdiction original and appellate over the trial of all causes not committed to the jurisdiction of inferior courts. The 'Supreme Court of Errors' is not a supreme court for all purposes, but a supreme court only for the correction of errors in law. \* \* \* The judicial power committed to the court was intended to secure the people against a mixed jurisdiction they deemed unwise and unsafe." Consequently, it was held that the act quoted did not authorize the court to determine, from evidence spread upon the record brought up by appeal, questions of pure fact settled by the trial court. The syllabus of the case reads: "The Supreme Court of Errors, as established by the Constitution of this state, is a court of last resort for the

correction of errors, and its jurisdiction as described in the Constitution relates to the determination of principles of law, and not to the trial or retrial of pure questions of fact. In view of such jurisdiction, chapter 174, p. 318, of the Public Acts of 1893, cannot be construed as requiring this court to determine, upon evidence spread upon the record, questions of pure fact settled by the judgment of the trial court." *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165.

In the case of *Jasper v. Hazen*, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58, it is said. "Under section 25, c. 120, p. 310, Laws 1891, this court is required, upon appeal, to review questions of fact in cases tried by the court or referee, when exceptions to the findings are duly taken and returned. But this court will not try the case *de novo*. The findings below are presumed to be correct. Appellant must show error, and a finding based upon parol evidence will not be disturbed unless the error be made clearly to appear." This doctrine is approved. The less pronounced views announced in the case of *Christianson v. Farmers' Warehouse Association*, 5 N. D. 438, 67 N. W. 300, 32 L. R. A. 730, are not in harmony with the principles which lie at the foundation of the judicial system of this state.

The decisions quoted are entirely sound and are conclusive against the appellant's contention. In the case of *Marbury v. Madison*, 1 Cranch (U. S.) 137, 2 L. Ed. 60, involving the power of Congress to authorize the Supreme Court of the United States to issue the writ of mandamus, Chief Justice Marshall said: "The act to establish the judicial courts of the United States authorizes the Supreme Court 'to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.' The Constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States, and, consequently, in some form, may be exercised over the present case, because the right claimed is given by a law of the United States. In the distribution of this power it is declared that 'the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction.' It has been insisted at the bar that, as the original grant of jurisdiction to the supreme and inferior courts is general, and the clause, assigning original jurisdiction to the Supreme Court, contains no negative or restrictive words, the power remains to the Legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been

recited, provided those cases belong to the judicial power of the United States. If it had been intended to leave it in the discretion of the Legislature to apportion the judicial power between the supreme and the inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning. If such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction, where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution is form without substance. When an instrument, organizing fundamentally a judicial system, divides it into one supreme and so many inferior courts as the Legislature may ordain and establish, then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to the obvious meaning. To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that, if it be the will of the Legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true; yet the jurisdiction must be appellate, not original. It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original, jurisdiction. Neither is it necessary, in such a case as this, to enable the court to exercise its appellate jurisdiction. The authority, therefore, given to the Supreme Court by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution."

The statute in question does no more than to provide in part a special method for bringing disbarment cases to this court for consideration according to its constitutional ju-

jurisdiction, which includes nothing except a revision of errors appearing upon the record and power to enforce the decision rendered. Therefor the judgment upon the first appeal, remanding the cause, was valid, and invested the district court with authority to proceed as directed.

At the second trial appellant objected to the jurisdiction of the district court, and after conviction moved an arrest of judgment, because the accusation had been transmitted to this court on appeal, and was not then technically on file in the district court. It is true that this court made no special order relating to the transfer of the original papers to the district court and their custody pending the proceedings there. But this fact did not deprive the district court of jurisdiction. When the cause was remanded the district court had the same jurisdiction it originally possessed, and the absence of the accusation from its files could not terminate its authority. The accusation having once been filed in the district court, no useful purpose could be subserved by refiling it. The reason for requiring papers to be filed is to preserve their identity and to afford them the protection secured to court records. So long as the accusation was in official custody this purpose was accomplished. It is true that the original papers ought to be present in the district court during the trial, in order that the court and the parties may be able to conduct and verify each step of the proceeding by them. The record indisputably shows that the original papers in this case not only were present in the district court at the trial, but that counsel for appellant used the accusation in the cross-examination of a witness and introduced another original paper in evidence. What danger to the appellant would have been circumvented, or what embarrassment he suffered because the accusation was not refilled, he forbears to disclose. The circumstance afforded no ground whatever for assailing the jurisdiction of the district court. It did serve the appellant, however, as a flimsy pretext for not answering the accusation, and for refusing to give testimony regarding the nefarious transaction disclosed by the evidence adduced by the prosecuting committee.

The legal sufficiency of the evidence to support the findings of the trial court is challenged. The charge against Burnette, briefly stated, is that he manufactured a spurious letter to be used as evidence on the trial of a civil action in the district court of Sumner county, and at such trial, as a witness, falsely swore to the genuineness of the letter. On July 21, 1902, May Randolph brought an action in the district court of Sumner county against Eli McCaulley and others for the specific performance of a contract for the sale of land. It was necessary to make out the alleged contract from letters written by Burnette to McCaulley and answers thereto by McCaulley to Burnette. On

May 30, 1902, Burnette reported a sale, and, among other things, said: "I started to make out a deed for the place, but discovered that I did not know the names of all the parties who should sign the deed, consequently I have made out a list of the heirs as best I could, and herewith inclose them on a separate sheet. I wish you would examine the names of these parties on this separate sheet, and those that I have not completed I wish you would complete if you can and return them to me." On June 4th Burnette wrote again: "Please send me list of heirs, stating whether they are married or single, and if married give the names of their husband or wife, as the case may be, so that I can make out deed at once. I sent you a statement in my last letter of this kind for you to fill out, but it seems that you overlooked it. Deed cannot be made until I have the names of the parties who are going to give the deed." Other letters passed between the parties. Mr. Ed. T. Hackney represented Randolph, and copies of the letters Burnette had written to McCaulley, made from Burnette's letter-press copies, were given to him. The original letters McCaulley had written were also given to him. Mr. Ivan D. Rogers represented McCaulley and received from his client the letters Burnette had written.

Preparatory to the trial the attorneys for the respective parties agreed that the correspondence might be introduced without preliminary proof. To avoid mistake, Hackney and Rogers checked over the correspondence, and Rogers was not informed of any letter of May 31, 1902. Shortly before the trial Rogers went to Burnette's office and told him he wanted to be sure he had all of Burnette's letters to McCaulley and asked him to get his letter book so the fact could be determined, as he wanted to be sure. Burnette took his letter book, Rogers held his letters, and the two went through them to ascertain the fact, and no copy of any letter of May 31, 1902, was pointed out to Mr. Rogers. When the trial occurred on May 29, 1903, a purported copy of a letter from Burnette to McCaulley dated May 31, 1902, containing important matter bearing upon the rights of the parties, was offered in behalf of the plaintiff. Objection was made because no such letter had ever been heard of by the defendant's counsel prior to that time. Burnette was sworn as a witness and testified that he had corresponded with McCaulley, that his stenographer kept copies of his letters to McCaulley, that the letters in a letter book produced were copied in the order in which they were written, that he wrote a letter of May 31, 1902, corresponding to a copy contained in the book, that he kept a copy of that letter, that the copy in the book was correct, and that the letter was mailed to McCaulley. He further stated that, in making copies of letters for Mr. Hackney, he made copies of the letters relating to the

sale as shown by the letter-press book. The court prudently adjourned the case to a later date. On August 6, 1903, when the trial of Randolph v. McCauley was resumed, Burnette declined to testify, on the ground that his testimony might incriminate him. He did testify, however, that he dictated the letter of May 31, 1902, to his stenographer, Miss Barnes. He was not pressed to state when or under what circumstances the dictation occurred. On August 6, 1903, the accusation involved in this proceeding was prepared and verified, and on the next day it was presented to the court. On September 2, 1903, the first judgment in disbarment was rendered. On September 4th an application was made to set aside the judgment, and the court made an order that, if before September 8th an answer should be filed containing a defense to the accusation, the judgment would on that day be set aside. On September 4th Burnette subscribed and swore to an answer to the accusation before a notary public, which answer gave a detailed account of the writing of the spurious letter in his office and the making of the copy of it in his letter book some time in the month of August, 1902. These acts, however, although committed in his presence, were attributed to another person. Various conversations with the party charged to be the actual writer, relating to the transaction, were narrated, and the following admission was made: "That some time afterwards, along in the first days of September, 1902, this respondent made a lead pencil copy of said letter on a piece of typewriter paper and dictated the same from said copy to said Morah Barnes, who was at that time a stenographer in the office of Elliott and Burnette. That this respondent afterwards told said Morah Barnes that she need not write said letter, and she could tear it up or scratch it out. The dictation of said letter to said Morah Barnes was done at the request and the suggestion of ——— [the person charged with writing the letter], and so said Morah Barnes could get, and would be under the impression, and of the opinion that she had written such a letter in which the name of Randolph was mentioned." The answer concluded with the statement that, while on the witness stand in the trial of Randolph v. McCauley, he did not intend to say he wrote or dictated the letter of May 31, 1902, or that he copied it in his letter book.

When Burnette presented himself before the notary to be sworn to this document, he asked the officer to read it, which he did. The paper was discussed between them, and the notary hesitated to have any relation to it, because it implicated other persons, and he feared it would cause trouble. On the same day Burnette gave an interview to Mr. H. L. Woods, editor of the Wellington Daily News, containing the same facts which were embodied in the answer, but somewhat more in detail. A portion of the interview

reads as follows: "On one of these occasions ——— said that he would write and copy the letter, and he and Randolph would take the witness stand when the suit came up and swear that they knew the letter was written before the it was filed, because they saw it. I finally yielded, and ——— sat down to write the letter on the typewriter. \* \* \* Who changed the figures in the index in the letter book? Burnette was asked. 'Those changes I made. I think it was along in February or March this year. I had given Miss Barnes orders to make copies of all the McCauley letters, and when this letter was not copied I thought it would be well to change the indexing so that the letter would show. The figures are mine, and I scratched the others out.'" The interview was printed in the evening issue of the paper named. On the evening of September 5th Burnette left the state, after making an effort to conceal the fact that he was going, and did not return until March 4, 1904. On his return he published the contents of his answer in the disbarment proceedings (which, however, had never been filed) in the petition filed against Mr. C. E. Elliott, which was considered by this court in the case of Elliott v. Burnette, decided ———, 190—. In this petition he denied the truth of the facts he had sworn to in the answer and asseverated the genuineness of the letter of May 31, 1902. Meanwhile Mr. Woods had been arrested for libel by the party implicated by Burnette, on account of the publication of Burnette's interview. On the trial of the libel case Burnette was a witness. He admitted the conversation with Woods on the morning of September 4, 1903, examined a copy of the Wellington Daily News of that date, and stated that it contained the substance of such conversation, but declined to say whether the matter was true, because it might incriminate him. He did, however, make the following further significant admissions: "Q. Do you refuse to testify on the ground that your testimony in regard to the statement made to Mr. Woods would tend to incriminate you, because of your testimony on the trial of Randolph against McCauley? A. I do. I think it might; yes, sir. Let me see that paper. (Exhibit C handed to witness.) A. (Continued) I think I can testify to parts of that article, except to the part that has to do with the writing or copying and the mailing of the letter. Q. Was there a conversation between you and ——— in regard to writing a letter to Eli McCauley and dating it back at any time after the suit of Randolph against McCauley had been brought? A. There was. Q. Where did that conversation take place? A. Took place in our office. Q. Office of Elliott and Burnette? A. Yes, sir. Q. Was Mr. Elliott there? A. No, sir. Q. Was Morah Barnes there? A. No, Sir. \* \* \* Q. Did you and ——— have any conversation in regard to the letter, or copy of

the letter, dated May 31, 1902, purporting to have been addressed to Eli McCaulley and written by you, after the 20th of May, 1903, and prior to the 6th day of August, 1903? A. Did we have any conversation? Q. Yes, sir. A. Yes, sir. Q. How many conversations did you have? A. Well, of course, I wouldn't undertake to say how many, but then there were 15 or 20. I should judge, at different times between those dates."

It is, of course, plain to every lawyer that there could be no occasion for talking about writing a post-dated letter if the letter of May 31, 1902, were genuine. A genuine letter would not have aroused the feverish agitation which led to 15 or 20 consultations about it. If the letter had been genuine, a copy of it would have been given to Hackney, who would have shown it to Rogers when they were checking up the correspondence, and Burnette would have called attention to its absence when Rogers was checking up the correspondence to be sure he had it all. Not being genuine, it was necessary to conceal it from Rogers until the trial, else Rogers would have had time to interrogate his client, a nonresident of the state, and the scheme would have failed or would have been exposed. Burnette's letter to McCaulley of May 30th contained the list of heirs. His letter of June 4th referred to that letter as the last and left no room for one of May 31st. These facts are all inconsistent with the genuineness of the disputed letter. They are consistent with the interview with Woods and with the disbarment answer. The statements in the petition against Elliott were probably inserted in a floundering attempt on the part of Burnette to rehabilitate himself after he had absconded and returned. Whether Burnette fabricated the letter alone or had a confederate is immaterial. The court was abundantly justified in finding the defendant guilty, and its conclusion is fortified by the failure of Burnette to interpose in court any single written or oral statement either in denial or explanation of the facts charged against him, from the day the accusation was filed to the present time. *Matter of Randel*, 158 N. Y. 216, 52 N. E. 1106; *In re Wellcome*, 23 Mont. 450, 468, 59 Pac. 445; *Ex parte Thompson*, 32 Or. 499, 40 L. R. A. 194, 52 Pac. 570; *People v. Webster*, 28 Colo. 223, 225, 64 Pac. 207.

Some objections to the admission of evidence are argued. The disbarment answer was proved, after the original had been traced into Burnette's possession, by a copy taken by one of his attorneys who furnished it to the prosecuting committee. It is claimed the paper was privileged. As already shown, Burnette published the matter contained in this answer to the notary who administered the oath to him. He published the same matter to Woods. He again published it in his petition against Elliott. It was then no longer private or confidential

or privileged. Whenever a party to a cause voluntarily solicits and procures the reading of his unfiled pleading by a nonprofessional stranger, bruits it in a newspaper interview and blazons it upon the records of a court of general jurisdiction in another pleading filed against the attorney who assisted in preparing it, the privileged character of the document is waived. It then becomes common public property, the attorney is released from the confidential relation he bore to it prior to its publication, and his production of a copy of it which he has retained, for use as evidence in a subsequent proceeding brought against the party, is not a breach of privilege. *In re Elliott* (opinion of this court filed February 10, 1906) 84 Pac. 750. If any decided cases have attempted to make the rule of privilege a by-word, by holding to the contrary, they are disapproved.

The newspaper interview with Woods was proved by an identified copy of the *Wellington Daily News* of September 4, 1904. It having been shown that, on the trial of the libel suit, after inspecting that issue of the paper, Burnette declared he made the statements it contained, the paper was the best evidence. This interview constituted an admission that the letter of May 31, 1902, was not genuine, and the fact that, on the trial of the libel case, Burnette declined to answer respecting its truth, did not affect its admissibility.

The judgment of the district court of Sumner county, revoking the license of Cleo D. Burnette to practice as an attorney and counsellor at law in the courts of Kansas, is affirmed. All the Justices concurring.

STATE ex rel. COLEMAN, Atty. Gen., v. WELFELT.

(Supreme Court of Kansas. May 12, 1906.)

SHERIFFS—REMOVAL FROM OFFICE.

A proceeding for the purpose of removing a sheriff from his office for failure properly to perform his duties should be brought first in the district court, and not in the Supreme Court by original proceeding in quo warranto.

Quo warranto by the state, on the relation of C. C. Coleman, Attorney General, against Adam O. Welfelt. Dismissed.

C. C. Coleman, Atty. Gen., and J. E. Torrance, for plaintiff. C. T. Atkinson and G. H. Buckman, for defendant.

PER CURIAM. This is an original proceeding brought in this court for the purpose of removing the sheriff of Cowley county from his office for failure properly to perform its duties. A motion to dismiss is made, upon the ground that it might more appropriately be brought in the district court. The reason given for invoking the action of this court is that the docket of the district court is so congested that a case begun there could not be finally determined before the

expiration of the defendant's term, in January, 1907. It is obvious that no final determination could be had of the present proceeding before that time, unless it should be heard out of its regular order. Time could doubtless be saved, however, by instituting such a proceeding in the court of last resort, and that might ordinarily be a sufficient reason for such course. But another feature of this case requires consideration. The sheriff is an officer sustaining a relation of peculiar intimacy to the district court. While he has duties to perform unrelated to that tribunal, he is, in a general sense, one of its officers. Allegations of misconduct with reference to carrying out the mandates of that court (and those here relied on are of that character), can be investigated with a greater assurance of reaching a just result in the county where the acts complained of are alleged to have been committed. The reasons stated in *State v. Breeze*, 15 Kan. 123, and *Supreme Lodge v. Carey*, 57 Kan. 655, 47 Pac. 621, for requiring applications to control the acts of the clerk of the district court to be made first to that court, apply with substantially equal force in support of the contention that the same rule should be enforced in the case of a proceeding of this character against the sheriff. The rule of this court requiring the plaintiff, bringing original proceedings here, to show by affidavit why that course is adopted, was not framed upon the theory that the existence of any particular class of reasons is jurisdictional, but with a view to afford an early opportunity in the history of each case for the court to determine whether there is good ground for the discretionary exercise of a conceded jurisdiction. The existence of the jurisdiction does not imply that a litigant has always an absolute and unconditional right to invoke it. In *re Burnette* (just decided) 85 Pac. 575. In the present instance the court is of the opinion that the controversy involved is one which can better be heard in the district court, and that the reasons given for a different course are not sufficient to overcome that consideration.

The cause is therefore dismissed.

#### In re SMITH.

(Supreme Court of Kansas. May 12, 1906.)

#### 1. VENUE—CHANGE—PREJUDICE OF JUDGE.

An apprehension of a party that a judge is prejudiced against him is not enough to require a change of venue, but it must satisfactorily appear that prejudice in fact exists.

#### 2. ATTORNEY AND CLIENT — DISBARMENT — GROUNDS.

The enumeration in the statute, of certain acts which will be deemed sufficient for the revocation or suspension of an attorney's license to practice law, does not limit the common-law power of the court in that respect, and attorneys may be disbarred for other than the statutory grounds.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 50.]

#### 3. SAME.

An attorney may be disbarred, not only for malpractice and dishonesty in his profession, but also for gross misconduct showing him to be unworthy of the privileges which the law confers on him and unfit to be intrusted with the duties and powers of an attorney.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 63.]

#### 4. SAME.

Where the charges made against an attorney involve moral turpitude, proof of a conviction is not essential to a disbarment.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 64.]

#### 5. SAME—DEFENSES—LIMITATIONS.

In a proceeding for the disbarment of an attorney, the statute of limitations is no defense.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 71.]

#### 6. SAME—METHOD OF PROCEDURE.

In such a case, the court itself is the trier of both facts and law, and these functions cannot be delegated to a committee, commissioner, or referee.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 73.]

#### 7. SAME—FORM OF CHARGE.

The formal and technical requirements of criminal pleading are not required in an accusation, but it is necessary that the charge against an attorney shall be so specific as to fairly inform him of the precise nature of the misconduct of which he is accused. If the facts of the charged misconduct are clearly brought to his attention, the form in which they are stated, and whether some of them are repeated in several paragraphs, are not vital.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 69, 70.]

#### 8. SAME—EVIDENCE—SUFFICIENCY.

The testimony of moral and professional delinquency of the respondent is *held* to meet the requirement that more than a mere preponderance of the evidence is necessary in such cases, and is sufficient to support the judgment of the disbarment.

(Syllabus by the Court.)

Appeal from District Court, Wyandotte County; J. McCabe Moore, Judge.

Proceedings for the disbarment of J. A. Smith, an attorney at law. From a judgment disbaring respondent, he appeals. Affirmed.

J. A. Smith and L. W. Keplinger, for appellant. Samuel Maher, John A. Hale, and Thomas J. White, for appellee.

JOHNSTON, C. J. This was a proceeding brought in the district court of Wyandotte county for the disbarment of J. A. Smith, a practicing attorney in the courts of Kansas. Upon a complaint made that Smith had been guilty of malpractice and other misconduct, the court appointed a committee of the bar to make a preliminary investigation of the charges and to report whether further action upon the complaint should be taken. This committee, after an extended inquiry, recommended that an accusation be filed against Smith. The court accordingly appointed another committee of lawyers to prepare and file an accusation against him, and one con-

taining three paragraphs was drawn and filed. In the first paragraph it was alleged that Smith was a material witness in a case pending in the district court of Lyon county, as to whether a certain deed purporting to convey the land in controversy was genuine or a forgery; that he was visited by J. W. Blank, who offered to give Smith \$200 if he would testify falsely in the case, or would absent himself so that his deposition could not be taken, or service of a subpoena made upon him; that Smith accepted the offer and agreed with Blank either to give the false testimony or to absent himself so that his evidence could not be had; that Blank paid Smith \$10 of the stipulated amount and to secure payment of the remainder gave Smith a diamond of the value of \$175; that later Blank brought an action of replevin for the recovery of the diamond against Smith in the district court of Wyandotte county, in which Smith stated and made the defense that the diamond was given to him for the immoral and illegal purpose mentioned in the offer; that the trial resulted in a verdict and judgment against Smith, whereupon he instituted a proceeding in error in the Supreme Court to reverse the judgment, and to that end argued there that, because the diamond had been given to him for the aforementioned immoral and illegal purpose, there should be a reversal of the judgment; but that upon his own statement and argument the Supreme Court denied any relief and dismissed the proceeding upon the grounds stated in the decision, reported in 69 Kan. 853, 76 Pac. 858. In the second paragraph it is alleged that Smith came into possession of the diamond mentioned in the first paragraph, but that the exact manner in which he gained possession of it was not known to the committee; that upon a demand for its return to the owner Smith refused to surrender it, setting up that it was obtained for the illegal purpose mentioned in the first paragraph. The details of the transaction, the bringing of the replevin action, and the attempted review of the judgment rendered in that action, together with the defenses, statements, and arguments made by Smith in those proceedings, were alleged in substantially the language employed in the first paragraph, closing with the averment that, notwithstanding the final judgment for the return of the diamond to its owner, Smith still refuses to give it up. In the third paragraph it is averred that Smith brought an action in behalf of a client to recover an indebtedness for labor, and, after having been informed by both of the parties to the transaction that the debt had been paid and the controversy settled, he continued the litigation, introduced false testimony, and made false statements, in the absence of the defendant, by which the justice of the peace before whom the case was tried was deceived, and was induced to enter a judgment against the defendant for \$10, when Smith well knew that

the debt had been fully paid and satisfied. After several motions directed at the accusation had been made and overruled, and a motion for a change of venue had been denied, the respondent answered, denying the charges made against him, pleading the bar of statutes of limitation, and also a former adjudication of the charge as to the diamond, and setting forth his version of the transaction upon which the charges in the accusation were based. Much testimony was offered, upon which the court found that the charges were sustained, and entered a judgment revoking the license of the respondent as an attorney and counselor at law, and barring him from practicing his profession in the courts of the state, and striking his name from the roll of attorneys.

The first question raised on this appeal is: Was there error in refusing respondent's application for a change of venue? In an affidavit Smith stated that he believed the district judge entertained a feeling of ill will and prejudice toward him, citing rulings in a number of cases as indicating such a state of mind, and that his apprehensions of prejudice were shared by his clients, and on that account he had been bringing most of his cases in the court of common pleas of Wyandotte county. Respondent states in his affidavit that he acquits the judge of any intentional misconduct or desire to wrong him, and that, although the judge seems not to be conscious of any prejudice toward him, he believes the judge's state of mind to be such that he cannot give respondent a fair trial. Eliminating mere conclusions, and looking to the facts stated in the affidavit, it is clear that a change of venue would not have been justified. It frequently has been held that the venue should never be changed upon this ground, unless the evidence clearly establishes the prejudice of the judge. The most that can be said of the showing in support of the application in this case is that it indicates a strong belief on the part of the respondent that a prejudice existed against him in the mind of the judge. It is not enough that a party apprehends or believes that a judge is prejudiced, but it must satisfactorily appear that prejudice in fact exists. If mere fear of prejudice in a judge would warrant a change, the applications for changes of venue would be numerous. The rule established by the statute and the decisions relating to changes of venue on account of the prejudice of the judge make it clear that no error was committed in denying the respondent's application. *City of Emporia v. Volmer*, 12 Kan. 622; *State v. Bohan*, 19 Kan. 50; *Protective Union v. Gardner*, 41 Kan. 401, 21 Pac. 233; *State v. Grinstead*, 62 Kan. 608, 64 Pac. 49; *State v. Stark*, 63 Kan. 529, 66 Pac. 243, 54 L. R. A. 910, 88 Am. St. Rep. 251; *State v. Parmenter*, 70 Kan. 513, 79 Pac. 123.

It is next contended that some of the chan-

ges against Smith do not fall within the causes for disbarment named in the statute. As will be observed, the statute does not provide that the only causes for which the license of an attorney may be revoked or suspended are those specified in the statute, nor does it undertake to limit the common-law power of the courts to protect itself and the public by excluding those who are unfit to assist in the administration of the law. It merely provides that certain causes shall be deemed sufficient for the revocation or suspension of an attorney's license. Gen. St. 1901, § 398. In the early case of *Peyton's Appeal*, 12 Kan. 404, it was held that this statute was not an enabling act, but that the power of the court to exclude unfit and unworthy members of the profession was inherent; that "it is a necessary incident to the proper administration of justice; that it may be exercised without any special statutory authority, and in all proper cases, unless positively prohibited by statute; and that it may be exercised in any manner that will give the party to be disbarred a fair trial and a full opportunity to be heard." If there is authority in the Legislature to restrict the discretion of the courts as to what shall constitute causes for disbarment, or to limit the inherent power which they have exercised from time immemorial, it should not be deemed to have done so, unless its purpose is clearly expressed. It is generally held that the enumeration of the grounds for disbarment in the statute is not to be taken as a limitation on the general power of the court, but that attorneys may be removed for common-law causes as well when the exercise of the privileges and functions of their high office is inimical to the due administration of justice. *Farlin v. Sook*, 30 Kan. 401, 1 Pac. 123, 46 Am. Rep. 100; *In re Norris*, 60 Kan. 659, 57 Pac. 528; *Boston Bar Association v. Greenwood*, 168 Mass. 169, 46 N. E. 568; *In the Matter of Mills*, 1 Mich. 392; *Laughlin's Case*, 10 Mo. App. 1, 31 S. W. 839; *State v. Harber*, 129 Mo. 271, 31 S. W. 889; *State v. Gebhardt*, 87 Mo. App. 542; *In re Boone* (C. C.) 83 Fed. 944; 4 Cyc. 905, 906. The nature of the office, the trust relation which exists between attorney and client, as well as between court and attorney, and the statutory rule prescribing the qualifications of attorneys, uniformly require that an attorney shall be a person of good moral character. If that qualification is a condition precedent to a license or privilege to enter upon the practice of the law, it would seem to be equally essential during the continuance of the practice and the exercise of the privilege. So it is held that an attorney will be removed not only for malpractice and dishonesty in his profession, but also for gross misconduct not connected with his professional duties, which show him to be unfit for the office and unworthy of the privileges which his license and the law confer upon him. *Ex parte Wall*, 107 U. S. 265, 2 Sup.

Ct. 569, 27 L. Ed. 552; *In re Burr*, Fed. Cas. No. 2, 186; 1 Wheeler, Cr. Cases 503; *In re O—*, 73 Wis. 602, 42 N. W. 221; *Delano's Case*, 58 N. H. 5, 42 Am. Rep. 555; *O'Connell, Petitioner*, 174 Mass. 253, 53 N. E. 1001, 54 N. E. 558; *Dormenon's Case*, 1 Mart. (O. S.; La.) 129; *In re Percy*, 36 N. Y. 651; *Sanborn v. Kimball*, 64 Me. 140; *In re Welcome*, 23 Mont. 450, 59 Pac. 445; *In re Weed*, 26 Mont. 507, 68 Pac. 1115; *Cohen v. Wright*, 22 Cal. 293; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407; *Jones's Case*, 2 Pa. Dist. R. 538; *State v. Byrnett*, 4 Ohio S. & C. P. Dec. 89; 4 Cyc. 910; 3 A. & E. Ency. of Law, 302. Respondent was charged with professional misconduct, and also with misconduct not directly connected with his professional duties, but all of the charges related to the administration of justice and seriously affected his professional and personal integrity. Although the charges involved moral turpitude, it is not necessary to a disbarment that there should be a conviction. *Ex parte Wall*, supra; *State ex rel. Hartman v. Cadwell*, 16 Mont. 119, 40 Pac. 176; *State v. Winton*, 11 Or. 456, 5 Pac. 337, 50 Am. Rep. 486; *Perry v. State*, 3 G. Greene (Iowa) 550; *Watson v. Citizens' Savings Bank*, 5 S. C. 159; *In re Davies*, 93 Pa. 116, 39 Am. Rep. 729; *Gates's Case*, 1 Pa. Co. Ct. R. 236. Even an acquittal upon a criminal charge does not prevent the disbarment of an attorney, where it clearly appears that the misconduct under investigation rendered him unfit to be intrusted with the powers and duties of his profession. *People v. Mead*, 29 Colo. 344, 68 Pac. 241.

It is contended that the proceeding is barred by some statute of limitations, but respondent points out no particular limitations applicable to cases of this character. Staleness in a charge against an attorney might prevent its being considered, because an unreasonable delay in the presentation of a charge of misconduct might make it impossible for an attorney to procure witnesses or the testimony available at an earlier time to meet such charge; but the statute of limitations itself is no defense to such a proceeding. *In re Elliott* (Kan.; recently decided) 84 Pac. 760; *In re Lowenthal*, 73 Cal. 427, 21 Pac. 7; *Ex parte Tyler*, 107 Cal. 78, 40 Pac. 33; *In re Weed*, supra; *United States v. Parks* (C. C.) 93 Fed. 414; 4 Cyc. 914, 915. It cannot be said that the charges in the present case have become stale, nor that there has been an unreasonable delay in presenting them to the court.

The respondent urges as a defense that a former inquiry as to his professional standing and conduct bars the maintenance of this proceeding. In 1901 complaint as to his misconduct was made to the court, and, among other things, the diamond transaction was mentioned. The court appointed a committee to investigate the charges and report the results with recommendations. The committee made an extended inquiry, reported that the charges presented were not true,

and their report, which was not preserved, was approved by the court, and it was ordered that the petition for disbarment should be denied. The argument is that, as the misconduct in respect to the diamond was included in the complaint, brought to the attention of the committee, and the committee's report acted on by the court, it is not open to further consideration. The action taken in that preliminary investigation by the committee, although approved by the court, is in no sense an adjudication. In the first place, it appears that the diamond transaction was not in fact investigated. At that time it was the subject of inquiry in the replevin action heretofore mentioned, and hence the committee concluded to leave it out of consideration. Again, the investigation appears to have been preliminary and only for the purpose of determining whether a formal accusation should be filed and the respondent cited to appear and make answer to the charges of misconduct. Like action was taken in the present case, for it appears that the accusation was not filed until a committee of the Wyandotte county bar had inquired into the charges and recommended that further proceedings be taken. This is not an uncommon practice, especially where the court is not satisfied that the charges made are well founded, or where it has not sufficient time to make the necessary inquiry in order to determine whether the attorney should be cited before the court to answer and defend. There is a further reason why the action taken cannot be considered as a binding adjudication. Charges of this character cannot be tried by a committee, nor can the functions of the court in this respect be delegated to any one else. The statute is specific and expressly places this responsibility upon the court itself. It provides: "To the accusation he may plead or demur, and the issues joined thereon shall in all cases be tried by the court, all the evidence being reduced to writing, filed and preserved." Gen. St. 1901, § 401. It was the evident legislative purpose that, in cases where the honor and dignity of the court are involved, and which so seriously affect one of its attorneys, the court itself should be the trier of both facts and law. In Colorado it is held that the testimony in such a case may be reported by a referee (*People v. Mead*, supra), but in a number of states it is ruled that the judge should not only make the findings of fact and law, but, also, that the witnesses should be examined in the presence of the court. *State v. Finley*, 30 Fla. 325, 11 South. 674, 18 L. R. A. 401; In the Matter of Albert L. Chandler, 105 Mich. 235, 63 N. W. 69; In the Matter of An Attorney, 83 N. Y. 164; In the Matter of —, an Attorney, 86 N. Y. 563. In the investigation of the respondent in 1901 there was certainly no trial by the court, and hence no adjudication. The testimony in the record makes it clear that such inquiry as the committee made was

only preliminary, that the transactions involved here were not in fact considered by the committee, and that there has never been a previous trial by the court of the charges now under consideration.

There is complaint of inconsistency in the charges contained in the accusation, and a contention that the prosecuting committee should have been required to elect whether it would stand upon the first or second counts. Both of these counts related to the conduct of the respondent in respect to the diamond. In the first it was charged that money and a diamond were given to and accepted by respondent as a bribe to assist in defeating the ends of justice, and that when possession and ownership of the diamond were presented to the courts he pleaded his own immoral and illegal acts to defeat a recovery. In the second count it alleged that the committee was unable to state the exact manner in which the respondent gained possession of the diamond, but that he unlawfully refused to give it up, and when proceedings were brought for its recovery he set up that the money was paid and the diamond delivered for the immoral purpose related in the first count. It is manifest that the complaint was framed to meet the exigencies of the proof. The proceeding is not criminal, and the formal and technical requirements of criminal pleading are not necessary in an accusation. In *re Burnette* (Kan.; just decided) 85 Pac. 575. In criminal cases, however, the pleader is permitted to charge the same offense in several counts, in order to meet the requirements of the evidence. While formal and technical pleading is not essential to this proceeding, it is important that the charges against an attorney shall be so specific as to fairly inform him of the precise nature of the misconduct with which he is accused. If the facts of the charged misconduct are clearly brought to his attention, the form in which they are stated and whether in one or two paragraphs is not of great importance. In any event, the penalty can be no more than disbarment. So, in this case, respondent was notified that the committee would endeavor to prove that the money and property were offered to and accepted by him on the condition that he would either testify falsely or would assist in defeating justice by absenting himself so his testimony could not be had, and, if they failed in establishing that, that they would attempt to show that, however he may have acquired the possession of the diamond, he at least stated and pleaded that it was given to him for the immoral and illegal purpose stated. The respondent could not have been misled as to the nature of the misconduct charged against him, and we think no error was committed by the court in refusing either to quash the charges or to require an election by the committee.

Little need be said as to the sufficiency

of the proof upon which the judgment of disbarment rests. Although the proceeding is not criminal it is of such a nature, and the judgment of disbarment is so severe and so direful in its results to an attorney, that something more than a mere preponderance of proof is necessary. A judgment deprives an attorney of an office, of a means of livelihood, and to a great extent of his good name, and should only be rendered upon clear and satisfactory legal proof. The evidence in the record appears to be sufficient to meet the strictest requirement in this respect. Indeed, the respondent, in statements, pleadings, and arguments seriously made in courts, seems to have admitted much of the misconduct alleged against him. His recital of the negotiations for the giving of false testimony by him in court, or of the evasion of a subpoena so that his testimony as to the real facts in the case could not be obtained betrays a moral obliquity and an utter lack of appreciation of the dishonesty of his acts. The explanation that he took money and property tendered as the price of his dishonor, expecting later to make an exposure of the man who bought him, if it had been believed by the trial court does not go far toward exculpation. Instead of resenting the corrupt offer, the money was accepted and the diamond securing a further payment was received and kept, and, when the owner of the diamond brought replevin for the recovery of his property, respondent set up the immorality of the transaction and his own shame to defeat the action. The testimony showing both moral and professional delinquency was such that the duty of the trial court was clear, and no other course was open than the revocation of the abused license. An attorney is admitted upon a satisfactory showing of his good character and fitness to be an officer of the court. He is afterwards required to maintain the same ethical standard, and is only entitled to hold the high office of "minister of the law" during good behavior.

The proofs of misbehavior and of moral and professional delinquency are so clear that there appears to be no escape from the unpleasant duty of affirming the judgment of disbarment. All the Justices concurring.

#### SMITH v. WHITE et al.

(Supreme Court of Kansas. May 12, 1906.)

#### RELEASE—JOINT NOTE—EFFECT.

The release by the holder of a promissory note of one or more joint makers does not operate to discharge other joint makers, except as to the full proportional amount which would be payable by those released.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Release, § 57.]

(Syllabus by the Court.)

Error from District Court, Sumner County:  
C. L. Swarts, Judge.

Action by F. S. Smith against W. W. White and others. Judgment for defendants. Plaintiff brings error. Reversed.

W. W. Schwinn, for plaintiff in error.  
Ready & Ready, for defendants in error.

GREENE, J. The plaintiff's cause of action was based on a promissory note, signed by 11 persons, which contained a statement that "this note is subject to a contract." The contract referred to was a guaranty of a stallion for the purchase price of which the note was given. The guaranty was pleaded, and full performance alleged. Wallace W. Wicks, one of the signers of the note, pleaded a written agreement between himself and the payee of the note, dated two days after the note, by which the payee agreed that if Wicks desired at any time to be released from the note, and should so notify payee within 11 months therefrom, that he would release him; that he had expressed such desire within the time, and was entitled to a discharge. This agreement was admitted by the plaintiff, and the action dismissed as to Wicks. The answer of the other defendants was construed to contain two defenses: first, that the note had been altered after its delivery, and second, that the sale of the horse and the signatures of the defendants to the note had been obtained by the owner of the horse and payee of the note by falsely and fraudulently stating to them that Wallace W. Wicks would become a joint purchaser of said stallion and would be one of 11 persons to sign a note for the purchase price thereof, that all of such representations and statements were false, and that they had relied upon them, by reason whereof they were induced to sign the note. Plaintiff's reply denied these statements. In plaintiff's opening statement he admitted having made the written agreement with Wicks, but denied that it was made prior to its date which was two days after the date of the note. The cause was submitted to the court upon plaintiff's petition and his oral opening statement. Upon these the court rendered judgment for the defendants.

All facts pleaded as defenses were denied, and there was no evidence offered to sustain any of them. The only fact admitted by the plaintiff was that he had entered into the written agreement to release Wicks, and it must have been concluded by the court that the voluntary release of one maker of a promissory note by the payee will, in law, operate as a release of all makers. The written agreement of release states that it was for a consideration, and if it did not, the law would imply a consideration therefor. The plaintiff was only asking judgment against the defendants for the amount due on the note after deducting the proportion Wicks would have been required to pay. Section 1194 of the General Statutes of 1901 reads: "Any person jointly or severally

liable with others for the payment of any debt or demand may be released from such liability by the creditor, and such release shall not discharge the other debtors or obligors beyond the proper proportion of the debt or demand for which the person released was liable." Under this statute one joint maker of a promissory note may purchase his release, at any time, for any consideration that the payee is willing to accept, or the payee may voluntarily acquit him of liability without consideration. In either event the remaining makers would not thereby be also released. They could not be held for the proportion owing by the maker thus released. The court could not have found the facts in favor of the defendants without evidence, and they were not entitled to a judgment because the payee of the note had released one of the makers.

The judgment must be reversed, and the cause remanded. All the Justices concurring.

#### DUNCAN v. HUSE.

(Supreme Court of Kansas. April 7, 1906.)

##### TRIAL—DEMURRER TO EVIDENCE.

Upon a demurrer to the evidence the trial court is not called upon to weigh the evidence. If there is any testimony tending to establish the material facts necessary to sustain the plaintiff's cause of action, the demurrer should be overruled.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 346-358.]

(Syllabus by the Court.)

Error from District Court, Cowley County; C. L. Swarts, Judge.

Action by J. D. Duncan against A. F. Huse. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

C. T. Atkinson, for plaintiff in error. L. C. Brown, for defendant in error.

GREENE, J. J. D. Duncan sued A. F. Huse on a promissory note. The note was signed "A. F. Huse Coal Company, per Alex Wilson." The defendant denied that he had ever executed the note, and denied that Alex Wilson had any authority to execute a note for him or for A. F. Huse Coal Company. The court sustained a demurrer to the plaintiff's evidence, and rendered a judgment for the defendant. This presents the question whether the evidence introduced by the plaintiff, construing it in the most favorable light for him raised a question of fact for the consideration of the jury. The material part of the evidence introduced by the plaintiff is as follows:

A. F. Huse testified: "What business were you engaged in at Arkansas City during the time you were there, and for several years prior to going to Manhattan, Kansas? A. In the coal business and in the implement business, and was in the hardware business a

short time. Q. Now, did you sell your business when you left Arkansas City to go to Manhattan? A. No, sir, I had the coal business there. Q. You left the coal business? A. Yes. Q. When was that? A. It was in April 1901. Q. Well, now, whom did you leave in possession of your coal yard down there? A. I left Alex Wilson. Q. You left Alex Wilson? A. Yes, sir. Q. Now, when you left there you left him in possession of every thing there, did you? A. I left him there to run the business for me. \* \* \* Q. He conducted everything connected with the coal yard, and fully represented you? A. Yes, under my instructions. Q. When did you sell this coal yard out? A. Sold it out in '93 I think. Q. In 1903? A. 1903; I mean 1903. Q. About what time? A. I think it was September. Q. September, 1903? A. I think it was the latter part of September. Q. You think it was the latter part of September. A. I think that is when it was. Q. Now, from the time you left in 1901 until 1903, Mr. Wilson had control of all the business there—of the coal business? A. He had charge of the business there for me, yes, sir."

J. D. Duncan testified: "Q. Now, during the time that Mr. Wilson was there as one of his clerks was he a minor or subordinate clerk or chief clerk? A. Why, he seemed to be chief clerk; he done the business. Q. Now, at the times that Mr. Wilson was in charge there and Mr. Huse was still there also in that business, did Mr. Huse ever borrow any money from you? A. Yes, sir. Q. Through whom did he borrow it? A. Alex Wilson. Q. Who paid it afterwards? A. Huse. Q. Huse paid it himself? A. Yes, sir. Q. Now, coming down to the time that Mr. Huse left as he says—you heard his testimony, did you? A. Yes, sir. Q. Now he states that Mr. Alex Wilson had charge of his business there. A. Yes, sir. Q. Was you around there as a rule? A. I was there sometimes, not very often. Q. Did you have a conversation with him about the business? A. Alex Wilson? Q. Yes. A. Yes, sir. Q. It was while he was in possession there of the business as Mr. Huse has stated he placed him there? A. Yes, sir. Q. Now, on or about the 6th of July, did you have any conversation with him about borrowing money? A. Yes, sir. Q. Did he borrow any money from you for this company? A. Yes, after coaxing hard. Q. You may look at that note. A. That is the note he gave me. Q. Now, what did he say to you at the time he gave you this note about what he wanted the money for—if connected with this business I mean? A. He said the bank refused to let him have any more money, and he had to borrow it to save Huse to buy coal with."

Albert H. Denton testified that he was the cashier of the Farmers' State Bank of Arkansas City; that he knew A. F. Huse and John D. Duncan and Alex Wilson during his lifetime; that Huse conducted the coal busi-

ness in person until 1901; that when he left he left Alex Wilson in charge; that the business was conducted in the name of "A. F. Huse Coal Company," thereafter; that they did business at his bank a part of the time; that they drew checks signed by "A. F. Huse Coal Company, by Alex Wilson"; that the coal company had borrowed money at his bank; that the note was signed "A. F. Huse Coal Company, by Alex Wilson"; that besides the note given to his bank signed in this manner, and afterwards paid, he had seen seven other notes signed in the same way.

George S. Hartley testified that he was in the banking business in the Citizens' State Bank; that during the time that Mr. Wilson was in control and management of the business, he transacted business at his bank; that he borrowed money there for the A. F. Huse Coal Company; that at the time he borrowed the money he gave notes to the amount of \$1,500 as evidence of the debt; that the notes were signed "A. F. Huse Coal Company, by Alex Wilson"; that the notes were renewed by Alexander Wilson, and afterwards paid by him. This court has no hesitancy in saying that under the evidence the case should have been submitted to the jury.

The judgment is reversed, and the cause remanded. All the Justices concurring.

#### BOARD OF COM'RS OF DECATUR COUNTY v. LEAMAN.

(Supreme Court of Kansas. May 12, 1906.)

##### SHERIFFS—ALLOWANCE FOR DEPUTIES.

In the absence of provision therefor in the statute fixing the fees and allowances of a sheriff, he cannot recover for the services of deputies furnished by him.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, § 85.]

Error from District Court, Decatur County; A. C. T. Gelger, Trial Judge.

Action by J. B. Leaman against the board of county commissioners of Decatur county. Judgment for plaintiff, and defendant brings error. Reversed and directed.

L. M. Parker (G. Webb Bertram, of counsel), for plaintiff in error. W. S. Langmade, for defendant in error.

PER CURIAM. J. B. Leaman held the office of sheriff of Decatur county for a period of five years from January 8, 1900, to January 9, 1905. Two days before his term of office expired he filed a claim against the county for \$1,250 for deputy hire at the rate of \$250 for each of the five years. The claim was disallowed by the board of commissioners, and on appeal to the district court the cause was tried by the court without a jury, and he was given judgment for \$750, the court holding that the claim for deputy hire

for the first two years was barred by the statute. The county brings error.

It appears from the evidence that during the five years he was sheriff he presented claims against the county for the services of himself and deputy for each day and mileage for each mile either he or his deputy traveled, and these claims were from time to time allowed. The peculiar claim is advanced by defendant in error in support of the judgment in this case that the conditions existing in Decatur county at the time he was so unfortunate as to be called upon to fill the office of sheriff were such as to authorize a special dispensation of justice. It appears that the courthouse, sheriff's residence and jail were all separated by a distance of several blocks requiring extra help and assistance in caring for the prisoners. In addition, the sheriff's own testimony discloses that the earnings of his office were small during the years he held it. In some years he thinks he only averaged about \$900 as receipts. A former sheriff, who immediately preceded him in the office, testified that his earnings were on an average of \$1,700 a year. Authorities are cited to the effect that, when a party knowingly appropriates to its own use the property or services of another, there is an implied contract to pay for the same. It is argued that the county appropriated to its use the services furnished by the sheriff, and should allow him for it. The claim is not based upon any testimony that in each year defendant in error hired a deputy and paid him \$250. The amount claimed for each year appears to be a sort of estimate on the part of the sheriff that this amount would about square him with the county for each year. The statute fixes the fees and allowances of sheriffs, and we know no way he can avoid rendering services to the county for an inadequate compensation except by resigning the office when dissatisfied with the emoluments fixed by the statute. To uphold this judgment would open the door to the allowance by the boards of county commissioners of innumerable claims which might with as much propriety be presented by county officers after their terms have expired for additional compensation for services claimed to have been rendered.

There is no law that we know of or have been referred to which would sustain the judgment, and it will therefore be reversed, and remanded, with instructions to enter judgment for defendant below for costs.

#### MATHIS et al. v. STRUNK.

(Supreme Court of Kansas. May 12, 1906.)

##### INJUNCTION—USE OF PARTY WALL—QUESTION AS TO TITLE.

Where there is a dispute whether the wall of a building stands wholly upon the land of its owner or rests in part upon that of another, the owner of the building, being in the peaceable possession thereof, may maintain injunc-

tion to prevent the adjoining proprietor from using such wall as a party wall until he has established his right thereto in a proceeding brought by him for that purpose.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 86, 87.]

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by S. C. Strunk against E. Mathis and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Adams & Adams and W. B. Bailey, for plaintiffs in error. H. C. Sluss, for defendant in error.

MASON, J. S. C. Strunk is the owner of lot 103 on Main Street in the City of Wichita, and E. Mathis and others are the owners of lot 101, which adjoins it on the south. In 1888 the owner of lot 103 built a three-story brick building thereon, which he and his grantees have ever since occupied. In 1905 the owners of lot 101 asserted a claim that one-half of the south wall of the building stood upon their property, and therefore belonged to them. Under color of this claim they were about to erect a building of their own upon lot 101, using for its north wall the south wall of the one already constructed. Strunk brought an action to enjoin them from doing so, and, upon a trial was granted an injunction restraining them from making use of the wall until they should have established their right thereto in a proceeding brought for that purpose. The defendants prosecute error from this judgment.

As the matter has been argued in this court some confusion exists as to the exact legal question involved. The defendant in error contends that even if his wall stands in part upon the lot of his opponents, he has acquired a prescriptive right to the land actually occupied, by adverse possession for more than 15 years. This contention cannot be sustained, for there is nothing in the pleadings or the evidence to suggest that there was ever any intention on the part of an owner of lot 103 to assert a right to encroach upon lot 101, and the mere physical occupancy of a part of it through mistake as to the situation of the boundary line could not set the statute of limitation in operation. *Winn v. Abeles*, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138. The defendant in error further claims that the district court could not have tried out in this action the question of the true location of the boundary because upon that matter the parties were entitled to the decision of a jury. This point seems not to be well taken, for a dispute regarding a boundary does not in a proper sense involve the title to real estate (5 Cyc. 951, 952) and is not of that class of controversies for the determination of which a jury trial may be demanded as a matter of right. *Swarz v. Ramala*, 63 Kan. 633, 66 Pac. 640. The vital question in this regard is not whether the

court in the injunction action could have investigated and decided the true position of the boundary line between the lots, but whether it was obliged to do so at the instance of the defendants. The petition on its face seemed to invite the consideration and settlement of this matter, but in his opening statement the plaintiff made it clear that such was not his purpose, but that he invoked the aid of the court to prevent the defendants from interfering with his possession of the building until the line should be ascertained in some other proceeding. The answer contained no prayer for any specific affirmative relief, and was essentially a denial of the averments of the petition. Although it claimed ownership of one half of the wall, it gave the defendant no standing to insist upon the trial of the title thereto. If the allegations of the petition were sufficient to warrant the judgment rendered the defendants cannot complain that they also authorized a further inquiry into the disputed facts. If necessary the petition may be regarded as amended so as to conform to the position taken by the counsel for the plaintiff in the opening statement.

The precise question to be determined therefore is whether under the circumstances stated the plaintiff, being in the actual possession of the building, was entitled to the aid of a court of equity to protect that possession until the right of the defendants should be established in an action brought by them. This question must be answered in the affirmative. The plaintiff for the time being was in the peaceful occupancy of the building, claiming such occupancy to be rightful. If the defendants desired to challenge that right it was incumbent upon them to assume the burden of instituting some legal proceeding to that end. They could not by forcibly seizing the debatable ground deprive the plaintiff of the advantage his possession gave him, and compel him to become the moving party in an action to determine the true boundary of his lot. The case of *Echelkamp v. Schrader*, 45 Mo. 505, is very similar to the one at bar. There a double house was supposed to stand so as to be bisected by the dividing line between two adjoining tracts of land having different owners, each of whom occupied one half of the building. It was discovered that the real boundary lay three feet to one side of the middle of the house, and the owner whose holdings were enlarged by this discovery began to tear down the building upon his side up to the dividing line as newly located. The other owner brought an action to restrain such interference with his occupancy. It was held that he was entitled to such relief to the same extent to which it was granted in the present case. The court said: "It is usual in cases like this, where the title itself comes in controversy, to grant a temporary injunction to await the event of an action at law to be prosecuted by the plaintiff. But here the

plaintiff is in actual possession, and has been for many years, and is therefore not in a position, nor has he any occasion, to sue. The defendant is the proper party to bring an action and test the rights of the respective parties at law. If he neglects to do this in a reasonable time, he will have no just grounds of complaint if the injunction is made perpetual against him in consequence of his own negligence." The right of the actual occupant of real estate to enjoin interference with his possession by one claiming title is affirmed under circumstances more or less analogous to those here presented in the following cases: *Western Union Telegraph Co. v. St. Jo. & W. Ry. Co.* (C. C.) 3 Fed. 430; *La Chapelle v. Bubbs* (C. C.) 69 Fed. 481; *Pittsburg, S. & W. Ry. Co. v. Fiske*, 123 Fed. 760, 60 C. C. A. 621; *Jones v. Brandon*, 60 Miss. 556; *Penn. Coal Co. v. Savage*, 1 Lack. Leg. N. 213.

The judgment is affirmed. All the Justices concurring.

#### NICHOLSON v. HALE.

(Supreme Court of Kansas. May 12, 1906.)

##### 1. EJECTMENT—WHO MAY MAINTAIN.

Where a tax deed, valid on its face, has been of record for five years, with the tax-title holder in actual possession, and one claiming adversely wrongfully dispossesses him by force, or fraud, or stealth, the holder of the tax deed may maintain ejectment to regain what was wrongfully taken from him.

##### 2. LIMITATION OF ACTIONS—EJECTMENT.

The two-year statute of limitations has no application to such a case.

(Syllabus by the Court.)

Error from District Court, Cowley County; C. L. Swarts, Judge.

Action by D. A. Hale against Samuel Nicholson. Judgment for plaintiff. Defendant brings error. Affirmed.

James McDermott, for plaintiff in error.  
G. H. Buckman, for defendant in error.

PORTER, J. This is an action in ejectment for possession of a town lot in the city of Dexter, Cowley county. In a trial by the court plaintiff had judgment. Defendant below brings error.

Each claims title under a different tax deed. In 1890, the title to the lot was in J. H. Serviss. The taxes for that year were not paid, and, in September, 1891, the lot was sold and bid off by Cowley county. Ten years later, in June, 1901, the County Treasurer assigned the certificate to William Greenwell. He assigned to plaintiff in error, and, on March 10, 1902, a tax deed was issued to the latter and recorded on the same day. In December, 1902, plaintiff in error also obtained a quitclaim deed from Serviss the original owner. He claims to have entered into immediate possession of the premises at the time his tax deed was issued. The taxes for the year 1891 remaining unpaid, the lot

was sold again at the regular sale in September, 1892, and the purchaser assigned his certificate to the National Bond & Debenture Company. A deed was issued to that company October 10, 1895, and recorded on the same day. By subsequent conveyances this tax title passed to defendant in error who claims by virtue thereof, and, on July 14, 1903, being then out of possession, he brought this action. By Gen. St. 1901, § 7654, it is provided that when lands or town lots are bid off by the county, they shall not be sold for taxes levied subsequently until they have been redeemed or sold by the county, or the tax certificate assigned by the county. It is conceded that this tax deed was voidable. *Belz v. Bird*, 31 Kan. 139, 1 Pac. 246; *Flint v. Dulany*, 37 Kan. 332, 15 Pac. 208. But defendant in error contends that as it was of record for more than five years during which time he and his immediate grantors had been in possession of the lot, his title thereto cannot be assailed; that his possession was unlawfully disturbed by plaintiff in error immediately before he brought this action.

Plaintiff in error contends, first, that the right based upon the statute of limitations is a personal one, and is waived unless expressly pleaded. The only issue was ownership and the right to the possession. Under the pleadings in ejectment provided for by the Code, it is not necessary for plaintiff to state in his petition how his title or ownership is derived. Code Civ. Proc. § 595, Gen. St. 1901, § 5082.

The second contention raises a more serious question. The tax deed, under which plaintiff below claimed, was not void on its face, but merely voidable. With defendant in error and his immediate grantors in the actual possession, what is the effect of the five years' statute of limitations? Did it give to defendant in error a right which he could use affirmatively and assert for the purpose of recovering the possession of the premises; or was the right which he thus acquired merely one which he might use as a defense in case his title and ownership should be assailed? It is contended that having lost possession he could not use the five-years' statute for the purpose of seeking affirmative relief. *Myers v. Coonradt*, 28 Kan. 211; *Walker v. Boh*, 32 Kan. 354, 4 Pac. 272; *Doyle v. Doyle*, 33 Kan. 721, 7 Pac. 615, and *Stump v. Burnett*, 67 Kan. 589, 73 Pac. 894, are cited and relied upon. In the latter case the authorities are reviewed, and it is held that notwithstanding the statute a tax deed valid on its face and recorded for five years may be impeached when used as a foundation for affirmative relief in an action brought by the tax-title holder. In that case, however, the land was vacant and unoccupied. The only possession relied upon was constructive possession. This is mentioned as a controlling circumstance. It is there said: "It is perfectly plain that this is an action to procure something which the plaintiff has

never enjoyed. He never had actual possession of the land. He might have taken such possession, but he neglected to do so. True, the tax deed, good on its face, cast upon its holder constructive possession, but constructive possession exists only in legal contemplation, and falls far short of the immediate occupation in fact which actual possession requires. The plaintiff, therefore, seeks to enlarge the scope of his actual proprietorship and add to the sum of enjoyment hitherto furnished by his tax deed the new, distinct increment of actual possession."

In the case at bar the party setting up the tax deed claimed to have had actual possession of the lot from a few months after the recording of the tax deed in 1895, until dispossessed by plaintiff in error. There was evidence tending to support this claim and the general finding of the trial court may be conceded to have settled that contention in favor of defendant in error. An exception to the rule that a statute of limitations can only be used as a shield of defense and not as a weapon of attack is recognized where the person claiming under the statute has been wrongfully dispossessed after the prescribed period has run. He may be restored to his rights in an action for possession and base his claims upon the statute. Tiedeman in his work on Real Property, § 740, says: "But in any case a temporary recovery of possession by the original owner after the running of the statute of limitations will not affect the disseisor's title, where there has been no voluntary surrender to the original owner." To the same effect see *Hinchman v. Whetstone*, 23 Ill. 185; *Angell on Limitations*, § 380.

Where one has held adverse possession of land for the prescribed period under a claim of title other than a tax deed, his title becomes absolute. He is not required thereafter to continue his possession in order to protect his rights, and while they have been acquired under a statute which in terms only barred the remedy, and made no provision for extinguishing the title of the original owner or casting it upon him, nevertheless that is the net result, and courts will grant him affirmative relief in an action based upon the title thus acquired. *Leffingwell v. Warren*, 2 Black (U. S.) 599, 17 L. Ed. 261; *Faloon et al. v. Simshauser et al.*, 130 Ill. 649, 22 N. E. 835; *Alexander et al. v. Pendleton*, 8 Cranch (U. S.) 461, 3 L. Ed. 624; *Angell on Limitations* (6th Ed.) § 381. The title acquired becomes as perfect as a title by deed. 1 A. & E. Enc. of Law, 883. If there is any reason why this rule should not apply to the title acquired under a tax deed, valid on its face, where the five-years' statute has run, it must be found in the nature of the thing itself, and because tax deeds are not favored.

It has been said that after the five-year

statute has run, the holder of the tax deed may retain all that he is possession of by virtue of it, but that he may not use it to obtain something more. *Walker v. Boh*, supra. In that case the land was vacant and unoccupied, and the action was not in ejectment, but one to quiet the title of the tax deed holder. Here plaintiff seeks to regain something he had and was entitled to and which was wrongfully taken from him. We think that when a tax deed, valid on its face, has been of record for five years, and the tax-title holder is in possession, claiming by virtue of the tax deed, and one claiming adversely wrongfully dispossesses him by force, or fraud or stealth, the holder of the tax title may maintain ejectment to regain what was wrongfully taken from him. He does not thereby seek to enlarge the scope of his original claim or to add to the sum of enjoyment furnished by his tax deed; but his cause of action arises by virtue of the wrongful dispossession, and the courts will permit him to base his claim upon his tax deed and former possession and the wrongful act of the other party. To hold otherwise would encourage reprisals and efforts to obtain scrambling possession which the law discourages. Before the limitation has run the original owner may enter. His entry then is not wrongful even though made against the will of the person claiming under the tax title. After the limitation has run, his right to enter has lapsed. If section 141 of the tax law (Laws 1876, p. 95, c. 34), prevents him after five years from maintaining an action to regain possession from one holding either actual or constructive possession, how can it be said with reason that he can lawfully acquire any rights by a possession obtained by force, or fraud, or stealth against the person in actual possession? If he can acquire no rights by possession obtained wrongfully, the courts should be open to the one wrongfully dispossessed, and the parties should be restored to their original position.

There is no force in the claim that the two-year statute of limitations barred the action, or that defendant in error waived any rights by failure to plead the facts relied upon to avoid the statute. As before observed, the petition was in the statutory form, and it was not necessary for defendant in error to plead any of the facts relied upon to show his title. He claimed that the lot was in the actual possession of himself and his immediate grantors from 1895, shortly after the deed was recorded, until he was wrongfully dispossessed by plaintiff in error. The judgment of the trial court settled these contentions in his favor. Under these facts the two-year statute had no application. *Thornburgh v. Cole*, 27 Kan. 490.

The judgment will be affirmed. All the Justices concurring.

**MISSOURI, K. & T. RY. CO. v. FITHIAN.**

(Supreme Court of Kansas. May 12, 1906.)

**RAILROADS—LIABILITY FOR FIRES.**

A railroad company is liable for destruction of a building through the negligence of its employes in burning its right of way, though because of the direction of the wind the fire was burning towards the track; the employes acting under orders of the company's representative.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1660, 1673-1676.]

Error from District Court, Lyon County; F. A. Meckel, Judge.

Action by W. C. Fithian against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, defendant brings error. Affirmed.

John Madden, W. W. Brown, and L. B. Kellogg, for plaintiff in error. Buck & Spencer, for defendant in error.

**PER CURIAM.** An icehouse was burned through the negligence of the employes of the railway company who were burning and clearing the right of way. It was not an accidental fire, but was purposely set out under orders of a foreman and to carry out the company's scheme of clearing the company's right of way and protecting it against loss. The fire was set out just beyond the right of way and within a few feet of the icehouse, but the company cannot escape liability on that account. Because of the direction of the wind the men thought it to be more practicable to burn from the outside toward the railroad track, instead of from the track outward, but it proved to be a careless and disastrous plan. The fire was started near the right of way by employes of the company, under orders of its representative, and for its own benefit. For their negligence the company is responsible.

The question of contributory negligence was properly submitted to and settled by the jury.

We find no error in the instructions, or other rulings, and therefore the judgment will be affirmed.

**CHRISTISEN v. BARTLETT.**

(Supreme Court of Kansas. May 12, 1906.)

**COURTS—RECORDS—CORRECTION—POWER OF COURT.**

A district court has inherent power to correct the record of its proceedings, so that it shall speak the truth and show what actually took place. This power is not lost by lapse of time, and may in the discretion of the court be exercised upon its own motion and without notice to the parties affected.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 369-373.]

(Syllabus by the Court.)

On motion for rehearing. Denied.

For former opinion, see 84 Pac. 530.

**MASON, J.** In the original opinion in this case it is stated that one objection made by the plaintiff in error to the order of the district court amending the record of its judgment was that the purported correction did not accord with the real facts and was not supported by sufficient evidence. In a motion for a rehearing it is truly said that this statement is incorrect, and that the only objections made to the order were based on the contention that the district court had no jurisdiction to make it. This court was mistaken in supposing that counsel for the plaintiff in error were relying upon a claim that the first journal entry showed the actual proceedings that took place and that the second one did not. This mistake resulted from their having filed here an affidavit tending to impeach the second entry and support the first, and from the circumstance that at the oral argument the question of fact was the subject of some controversy. This affidavit, however, was presented in resistance of the motion of the defendant in error for leave to file a supplemental transcript, and the oral discussion referred to was only incidental. Neither upon the final submission of the cause here, nor in his motion in the lower court to set aside the order amending the journal entry, did the plaintiff in error raise an issue as to what was actually done at the time judgment was rendered. At the hearing of that motion affidavits were offered and rejected, the contents of which are not shown, but the motion itself was based on purely jurisdictional grounds. The plaintiff in error stands upon the proposition that the district court had no power after the expiration of the term at which the judgment was rendered to order a change in the record of the judgment of its own motion, and without notice to him. If his contention is sound he has done nothing to waive its benefits and is entitled to a reversal of the order.

In support of his position the plaintiff in error cites a number of decisions which are quite beside the question because they refer to actual changes in the action of the court, while we are concerned here only with an alteration in the record made of such action. He also relies upon the language of the first sentence of section 569 of the Code of Civil Procedure (section 5053, Gen. St. 1901), which reads: The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action." This language has obvious reference to the third subdivision of the preceding paragraph which by the context is shown to have relation to the vacation or modification of judgments or orders actually made, and not to the correction of mistakes made in attempting correctly to register them. Whether it has any application to the matter of rectifying errors made by the clerk in recording orders

need not be decided. If so the method pointed out for accomplishing that purpose is not exclusive. A court of record has an inherent power over its own records which includes the authority to require the correction of any errors that may creep into them. This power is not lost by lapse of time or the expiration of a term of court. The duty of a court to see that its records speak the truth is an affirmative and active one, and it is not a jurisdictional prerequisite to its performance that one party should invoke it by motion or that the other should have notice before action is taken. See 17 Enc. of P. & P. 912, 913, 914, note 2. The proposition is thus stated in the syllabus to *Balch v. Shaw*, 7 Cush. (Mass.) 282: "Courts of record have power, at any time, as well after, as during the term, at which any entry is made, of their own motion or on the suggestion of any party interested, and without notice to any one, to correct the mistakes and supply the omissions of their clerks or recording officers, so as to make the record conform to the truth of the case, and are the exclusive judges of the necessity and propriety of so amending and extending their records, and of the proofs and of the sufficiency of the proofs on which to proceed." In *Lewis v. Ross*, 37 Me. 230, 59 Am. Dec. 49. It is said, citing *Balch v. Shaw*, supra: "On general principles, it is competent for a court of record, and incident to its authority, to correct mistakes in its records, which do not arise from the judicial action of the court, but from the mistakes of its recording officer. In doing this, it may regulate its own action upon its own sense of responsibility and duty, and proceed upon suggestion, or on motion of those interested, or upon its own 'certain knowledge and mere motion.' It would not be an adversary proceeding, in which, of necessity, there should be parties, or in which notice would be required." In applying this principle in *Strickland v. Strickland*, 95 N. C. 471, the court says: "The court did not enter the judgment it intended to enter, nor that authorized by what appeared in the record. Such errors may be corrected at any time, and after a long while, upon motion or the court may and ought to correct them *ex mero motu* as soon as it sees them. This is necessary and proper, to the end the record shall speak the truth. The object is to make the record show what the court, in fact, resolved, intended, and in contemplation of law, did."

The further citation of authorities is unnecessary. The power referred to is undoubted and is essential to the prevention of injustice. The manner of its exercise is necessarily committed to the sound discretion of the court, and must be governed by circumstances. Unquestionably, as suggested in the original opinion, it would ordinarily be better practice that a notice should be given. Possibly conditions might arise in which a failure to give a notice would tend to show an abuse of discretion. In the present case

the omission to give notice affords the plaintiff in error no cause of complaint. As already stated a notice was not necessary to confer jurisdiction to make the order, and it is manifest that its absence affected no substantial right of the plaintiff in error. His motion to strike out the new entry was based solely upon technical grounds, and raised no issue as to what the record should say in order to speak the truth; but the fact that it was filed, noticed, argued, submitted, and decided, shows that he had abundant opportunity if he cared to to exercise it to seek a remedy for any real wrong he believed he had suffered. As was said in *Balch v. Shaw*, supra: "Surely a court of record need not give notice to all the world to come in and show cause why it should not make its record conform to the truth of the case. Any party, who supposes he can show such cause, should apply to the court to have the record set aside or expunged, after it is made."

The motion for a rehearing is denied. All the Justices concurring.

# CHICAGO, R. I. & P. RY. CO. et al. v. WYNKOOP et al.

(Supreme Court of Kansas. May 12, 1906.)

## 1. VENUE—ACTIONS IN PERSONAM—CLOSING UNDERGRADE CROSSING.

An action of injunction to prevent the closing of an undergrade crossing of a railroad operates in personam, and is not one of those provided for in section 46 of the Civil Code, which must be brought in the county in which the subject of the action is situated.

## 2. RAILROADS—RIGHT OF WAY—UNDERGRADE CROSSING—CONTRACT.

A contract between the owner of land and a railroad company, in connection with a proceeding to condemn a right of way for a railroad, which reserved to the landowner an undergrade crossing as a means of access from one part of the farm to the other, and which was taken into account by the condemnation commissioners in the award of damages for the appropriation of the right of way, is binding upon both of the parties.

(Syllabus by the Court.)

Error from District Court, Atchison County; B. F. Hudson, Judge.

Action by Albert L. Wynkoop and others against the Chicago, Rock Island & Pacific Railway Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

M. A. Low, W. F. Evans, and Paul E. Walker, for plaintiffs in error. J. L. Berry and C. D. Walker, for defendants in error.

JOHNSTON, C. J. This was an action to enjoin the closing of an undergrade farm crossing of a railroad. In 1886 the Chicago, Kansas & Nebraska Railway Company laid out a railroad and condemned the right of way across the farm of David Wynkoop. The route selected was between the buildings on the Wynkoop farm and the public highway. In a depression which extended from the

buildings to the public highway a private roadway had been built for the accommodation of the owner and occupants of the farm. The railroad was laid out and built across this depression, and the plan of the railroad required a high embankment, which extended 85 rods across the farm, and the height of which was about 25 feet at the intersection of the private roadway. When the commissioners met to condemn a right of way over the farm, the matter of passing from one side of the railroad to the other by the use of the private roadway was considered, and it was agreed between the owner and the representative of the railway company that an opening would be left for an undergrade crossing at the intersection of the private roadway, and the damages of the owner were assessed by the commissioners upon the understanding that he should have such a crossing at that point. The railroad was built in accordance with the plan, and a bridge constructed over the private roadway. In 1891 the plaintiff in error acquired the railroad property, and in 1895 some negotiations were had between the railway company and the owner of the farm in regard to narrowing the passageway under the railroad and the substitution of an arch stone culvert for the bridge first built. No agreement was reached by them, however, and another bridge similar to the one first built was erected, without interfering with the private roadway. In 1903 the railroad company, desiring to improve its roadbed and to put it in a condition for the use of heavier equipment, again negotiated with Wynkoop with reference to placing a stone culvert where the private roadway crossed under the railroad tracks. At that time the representative of the railway company suggested the substitution of a stone culvert about 10 feet wide, while Wynkoop insisted that the necessities of the farm required an opening 14 feet wide. There was a suggestion, too, by the railroad company that a grade crossing might be made at the end of the embankment; but the parties were unable to agree, and the company proceeded to close up the roadway, when this action was brought, which resulted in a permanent injunction against the destruction of the undergrade crossing.

It is first contended that, as the situs of the undergrade crossing is in Doniphan county, the district court of Atchison county was without jurisdiction to consider the case; that the provision of section 46 of the Civil Code, requiring that actions "for the recovery of real property or of an estate or interest therein, or for the determination in any form of any such right or interest," must be brought in the county in which the subject of the action is situated, applies. This is not an action to recover real property, nor for the determination of an interest therein. It is an action which operates in personam, and its object is to prevent the commission of a wrong by obstructing a roadway. Wynkoop

was not asking to have an interest in land determined, nor could any judgment be rendered in the action which would have that effect. The legal title in the land was in himself, and ever since the right of way for the railroad was condemned and the railroad was built there has been an undergrade crossing from one part of his farm to the other. The proposed closing of this roadway is the wrong of which complaint is made. In establishing the wrong, the ownership of the land, as well as the condemnation of a right of way over it, was to some extent drawn in question; but these matters were only incidental to the gravamen of the action—the prevention of a threatened wrong. Not every action growing out of transactions concerning real property is local. Where the decree sought is to operate on the person, and not upon the real property, the location of the property indirectly affected is not material. It was held in *Close v. Wheaton*, 65 Kan. 830, 70 Pac. 891, that an action to compel the specific performance of an agreement to convey land did not come within the provisions of section 46 of the Civil Code, and that, while it related to real estate, it could be brought in any county where the defendant might be legally served with personal process. In *Massie v. Watts*, 6 Cranch (U. S.) 148, 3 L. Ed. 181, Chief Justice Marshall, speaking of such an action, said: "In cases of fraud, trust, or contract, the jurisdiction of a court of chancery is sustainable wherever the person may be found, although lands not within the jurisdiction of that court may be affected by the decree." It is held that jurisdiction of this character is strictly in personam and that the court may exercise it independently of the locality where the act is to be done. The relief sought, not being the determination of an interest in real estate, but against the defendant personally, was rightly brought where personal service could be had. As tending to sustain this view, see *Alexander v. Tolleston Club*, 110 Ill. 65; *Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572; *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462; *Clad v. Palst*, 181 Pa. 148, 37 Atl. 194; *Jennings v. Beale*, 158 Pa. 283, 27 Atl. 948; *O'Connor v. Shannon* (Tex. Civ. App.) 30 S. W. 1096; *Roche v. Marvin*, 92 N. Y. 398; *Rose v. Choteau*, 11 Ill. 167; *Royston v. Royston*, 21 Ga. 161; *McArthur v. Matthewson*, 67 Ga. 134; 11 A. & E. Encyl. of L. 173.

There is a contention that under the evidence Wynkoop was not entitled to an undergrade crossing. In that connection it is argued that the right of Wynkoop to use the crossing is in the nature of an easement, and that it is worthless unless evidenced by writing. The case is not to be treated as an easement obtained by Wynkoop from the railroad company. The private roadway passed over his own land and he never parted with the right to it or to its use. The company acquired no more than it paid for, and according to the testimony the open passageway was excepted from the right of way, and that

fact was taken into account in the allowance of damages by the commissioners. If the right to make a solid embankment had been sought and obtained, an award of damages for the obstruction and the resulting inconvenience of the owner in passing from one part of his farm to the other must have been allowed. The question of whether the undergrade crossing was practicable and should be maintained was a proper consideration in the condemnation proceeding. If such a crossing is a part of the plan of the railroad company, and it is considered in awarding damages to the landowner, the company is bound to construct and maintain such crossing. *Railroad Co. v. Kregelo*, 32 Kan. 608, 5 Pac. 15; *Railroad Co. v. Cosper*, 42 Kan. 561, 22 Pac. 634; *Railway Co. v. Davenport*, 65 Kan. 296, 69 Pac. 195, 15 Cyc. 717. A contract reserving a crossing, which diminishes the damages to be paid by the railroad company, surely has a binding effect upon such company. The crossing was maintained by the railroad company, and used by the landowner, about 17 years without interruption before this controversy arose; but the right to the crossing does not depend upon inferences based on the conduct of the parties, nor yet upon the necessity for the crossing, but rests upon an agreement reserving it to the owner, and which largely affected the compensation paid for the right of way. The landowner cannot insist that the opening shall remain in the same form, nor as wide as it was originally left, but under the agreement is entitled to such an undergrade crossing as will meet the ordinary necessities of a farm. The fact that the parties were unable to agree just what should be the width of the crossing did not abrogate the original agreement, nor warrant the closing of the crossing.

There appears to be substantial support in the evidence for the findings of the court, and hence its judgment must be affirmed. All the Justices concurring.

# STATE LIFE INS. CO. v. JOHNSON.

(Supreme Court of Kansas. May 12, 1906.)

## 1. EVIDENCE—PAROL EVIDENCE—FRAUD.

In an action to avoid a written contract and to recover money paid thereon, on the ground that the party seeking to avoid and recover the payment had no opportunity to read the contract and was induced to execute the same by false and fraudulent representations, the rule that parol testimony will not be received of conversations had between the contracting parties prior to the signing of the contract, for the purpose of disputing, altering, or changing the terms of the contract, does not obtain.

## 2. CONTRACTS — RESCISSION — FRAUDULENT REPRESENTATIONS—QUESTION FOR JURY.

A defense to such an action, that the false and fraudulent representations alleged to have been made were so palpably false or unreasonable that the party claiming to be injured could not be and was not deceived thereby, is ordinarily a question of fact for the jury, and not a question of law.

(Syllabus by the Court.)

Error from District Court, Jefferson County; C. F. Hurrell, Judge.

Action by John N. Johnson against the State Life Insurance Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Defendant in error sued plaintiff in error to recover \$132.12 paid by him to said insurance company on a contract of insurance which, as claimed, was procured through fraud and fraudulent representations. Judgment was rendered for the full amount claimed by Johnson in the district court of Jefferson county, and the insurance company brings the case here for review.

Chas. F. Coffin and Phinney & Raines, for plaintiff in error. H. B. Schaeffer, W. A. Killey, and D. L. Stanley, for defendant in error.

SMITH, J. The first error complained of is the overruling of the demurrer filed by the insurance company to the amended petition, and as principal ground therefor the company claims that the representations alleged to have been falsely made by the insurance company's agent were so palpably unreasonable that they were not likely to deceive, and hence the allegation that the plaintiff below did rely upon the same is not admitted by the demurrer. The general rule is that a demurrer to a pleading admits, for the purposes of the hearing thereof, the truth of the facts alleged in the pleading, and while there may possibly be exceptions to this rule courts will not carefully weigh the degree of credibility which a particular person may lend to what appears to be an unreasonable story told to him for the purpose of defrauding him. It comes with poor grace from one defending against an alleged fraudulent representation that the representations were so palpably false and unreasonable as to be absolutely incredible. At most, it is rather a question of fact for the jury than a question of law for the court. The other objections to the petition, except the fifth, are somewhat in the same line.

The fifth objection is that the plaintiff does not allege that the policy he received was worth less than he actually paid for it, and consequently that he was not damaged and is not entitled to relief. This is not an action to recover damages but to avoid a contract for fraud, and to recover the money procured through the fraud. We think the petition stated a cause of action and that the demurrer thereto was properly overruled.

We have examined the specifications of error assigned on the introduction of evidence. As to the witness Johnson the only evidence which we think worthy of comment to which our attention is called is the answer to the question: "State whether you ever received from defendant the kind of policy that was represented would be sent to you by this man, Marks." Answer: "No, sir." This was a conclusion of fact which should not have been

drawn or made by the witness, but should have been left to the jury. The representations said to have been made by Marks, however, were detailed to the jury, and a copy of the policy was also produced in evidence, and we cannot say that the defendant was prejudiced by the answer. In fact, the jury was practically left to draw its own conclusions as the witness does not seem to have detailed in what respect he considered the policy was of different kind than that promised.

The plaintiff in error further complains of the testimony of Barnes, Huddleston, Henderson, and Younkin. We have been unable to discover anything in the evidence of Barnes that was really material to the case, or that could aid the plaintiff below or injure the defendant, except a letter from the insurance department to Johnson which was identified by Barnes and admitted in evidence over the objection of defendant but the court struck this out, and instructed the jury to disregard it. Otherwise it would have been material error. We remark here that the practice permitted in this trial of allowing an attorney, after the court had sustained objections to certain questions, to make oral offers, in the presence of the jury, of what he expected to prove by the witness, and to assert that he had plenty of evidence to sustain the offer, is not good practice. The court, however, remedied the evil so far as possible by telling the jury to disregard or pay no attention to the offer. The better practice is to require offers of proof to be made in writing. Many jurymen are not able, at the end of a long trial, to discriminate between the matters heard on the trial, which are submitted to them as evidence and those matters which are not so submitted. The production of evidence should therefore be made as simple as possible, and counsel should not be allowed, during the introduction of evidence, to make assertions with reference to the strength of their evidence or the weakness of their opponent's. We cannot say, however, that after the corrections made by the court that the defendant was materially prejudiced in this respect.

As to the evidence of the witnesses Huddleston, Younkin, and Henderson, we think it was admissible for the purpose of showing the design and plan of the agent, Marks, in procuring the insurance application from Johnson under the rule of evidence laid down in Wigmore on Evidence, vol. 1, § 304; but, of course, such evidence should not have been considered in determining what representations said agent made to Johnson. If, however, the evidence was admissible for any purpose it should not have been excluded and if the insurance company desired to have its application limited it should have requested an instruction to the jury, defining the purposes for which it could be considered, and for which it should not be considered. We think there was sufficient competent evidence not only to justify, but to require the overrul-

ing of the demurrer to plaintiff's evidence. It must be borne in mind that this was not an attempt on the part of the plaintiff below to vary or to contradict the terms of the written contract, but is an action to annul and set aside a written contract and to recover the money paid thereon on the ground that the contract was procured through fraud. The real issue in this case is whether or not the agent for the purpose of inducing Johnson to take the insurance, made material misrepresentations as to the cost or conditions of the policy or as to the payments therefor, or the benefits to be derived therefrom, and whether Johnson did rely thereon, and was deceived thereby, and induced thereby to take such insurance, and make the payment thereon. If this question is answered in the affirmative, and the company accepted the benefits of the fraud practiced by its agent, the contract should be set aside, and the plaintiff should recover. We have examined the instructions complained of and think the questions in issue were fairly presented to the jury, and that the jury was not misled. The issues were practically all issues of fact. There seems to have been a fair trial, and the verdict of the jury is supported by sufficient evidence.

The judgment of the district court is affirmed. All the Justices concurring.

(73 Kan. 558)

#### CUE et al. v. JOHNSON.

(Supreme Court of Kansas. May 12, 1906.)

##### 1. VENDOR AND PURCHASER—DEFAULT OF PURCHASER—FORFEITURE.

Courts abhor forfeitures, and will resort to any reasonable rule of construction, to avoid them. But when, in a contract for the sale of real estate, it is stipulated that time shall be of the essence of the agreement, and a forfeiture upon default is provided for, such contract will be upheld and enforced, unless under the circumstances shown would be grossly inequitable.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Vendor and Purchaser, §§ 360-372.]

##### 2. SAME—WAIVER.

When the right to declare a forfeiture under such a contract exists, the party entitled thereto must assert his right promptly, and his acts relating thereto must be unequivocal, and inconsistent with the continuance of the contract, or he will be held to have waived such right.

(Syllabus by the Court.)

Error from District Court, Trego County; J. H. Reeder, Judge.

Action by L. G. Johnson against C. E. Cue and others. Judgment for plaintiff, and defendants bring error. Reversed, with direction.

W. E. Saum, for plaintiff in error. J. J. Schenck, for defendant in error.

GRAVES, J. This action was brought in the district court of Trego county, by the defendant in error, to cancel a contract for the sale of real estate, which he had exe-

cuted to the plaintiffs in error, who made default in payments due thereon. The contract sought to be canceled was executed June 13, 1903. By it the grantor agreed to convey 320 acres of land, upon payment by the grantees of \$4,505.10 as stipulated. Payment was to be made in installments. Time was by express terms made of the essence of the contract. Under a prior agreement of sale the grantees had been in possession of the land one year, and had paid to the grantor \$500. The balance remaining due on the sale of the land, at the date of the contract sought herein to be canceled, was the aggregate sum therein stated, \$4,505.10. Of this amount the grantees had paid \$822.03. On May 1, 1904, an installment of \$133 became due, it was not paid, the grantor declared the contract at an end, and demanded possession of the land, which being refused he brought this action. Upon a trial a decree was granted in favor of the plaintiff and the defendants now ask that such decree be reversed.

By this decree the grantor retains \$1,322.03 paid on the purchase price, and also recovers the possession of the land. The grantees have been in possession two years. Upon these facts, the plaintiffs in error claim: First, that the defendant in error is not entitled to a forfeiture; and, second, if he was entitled thereto, it has been waived. This court in the case of *National Land Company v. Perry*, 23 Kan. 140, held that where parties to a contract for the sale of real estate, make time of the essence of the contract, a forfeiture will be upheld as stipulated, unless under the circumstances of the case it would be grossly inequitable. At the same time courts do not favor, but, on the contrary, they abhor, forfeitures, and will resort to very liberal rules of construction to avoid them. *English v. Williamson*, 34 Kan. 216, 8 Pac. 214; *Hartley v. Costo*, 40 Kan. 559, 20 Pac. 208; *Ritchie v. Kansas, N. & D. Ry. Co.*, 55 Kan. 36, 39 Pac. 718; *Insurance Co. v. Hardesty*, 182 Ill. 30, 55 N. E. 139, 74 Am. St. Rep. 161; *Grigg v. Landis*, 21 N. J. Eq. 494; *Robinson v. Cheney*, 17 Neb. 673, 24 N. W. 378. In the case last cited, in speaking of a contract where time was made of the essence of the agreement, and provided for a forfeiture in case of default the court said: "A court of equity will not declare a forfeiture unless compelled to do so. It violates every principle of justice to take the property of one man, and give it to another without compensation, upon a simple failure to pay at the day, where there had not been gross laches." It seems to be a well-established rule in such cases, that the party claiming the benefit of a forfeiture, must show himself to be strictly within the terms of the instrument which confers that right. He must act promptly in asserting his claim and his acts relating thereto must be positive, unequivocal, and inconsistent with the continuance

of the contract. *Faw v. Whittington*, 72 N. C. 321; 29 Am. & Eng. Enc. of Law, 677, 681; *Boone v. Drake*, 109 N. C. 79, 13 S. E. 724; *Hipwell v. Knight*, 1 You. & Coll. Ex. 401. In the case last cited, Baron Alderson said: "The result of all the cases on this subject seems to be, that slight circumstances are sufficient in a court of equity to prevent a party from taking the benefit of such a stipulation, and that whenever a party has done any act inconsistent with the supposition that he continues to hold his opponent strictly to his part of the agreement, he is to be taken to have waived it altogether."

In addition to the facts before stated, it appears that all payments had been made according to the contract prior to May 1, 1904. At that time interest to the amount of \$133 became due. A short time before that date, April 28th or 29th, the defendant informed the plaintiff that he would be unable to pay promptly, asked for further time, and offered additional security for the delay. The plaintiff declined, stating that he needed and wanted the money when due. On Monday, May 2d, the defendant saw the plaintiff, and again reported his inability to pay. They talked over the situation; plaintiff claimed that by failure to pay, the contract was forfeited, and the defendant admitted such to be the case. The plaintiff stated to the defendant that he wanted the money or the property. The defendant then said he thought he could raise the money by Thursday or Friday of that week and would be back Saturday with the money or the papers. At this time, the plaintiff did not expressly consent to any further time, but he then intended to wait until Saturday and take the money if at that time offered. The defendant failed to come back on Saturday, and on the following Monday, May 9th, the plaintiff went to the defendant, who resided on the land in controversy. Upon arrival he said to the defendant, "You did not come down Saturday as you agreed?" Defendant replied, "No, I changed my mind." Plaintiff then demanded possession of the land. This suit was commenced May 7, 1904. May 24th, plaintiff filed an amended petition in which for the first time he tendered back the unpaid notes given for the land; the defendant tendered the full amount then due to the plaintiff which was refused, and the amount was deposited with the clerk where it has since remained for the plaintiff. During the trial in October, 1904, the defendant tendered the further sum of \$530 to apply upon the \$614.54 which would become due November 1, 1904, and offered in open court to let judgment go against him at that time if the remainder of the amount which would then become due was not paid; the offer was refused. We find that the plaintiff by his conduct at and about May 2, 1904, when the forfeiture is claimed to have occurred, waived his right thereto. When the defendant informed the plaintiff

that he was unable to pay, and wanted more time, stating that he thought he could possibly raise the money by Thursday or Friday, and if he could would return with it on Saturday, the plaintiff, if then determined to insist upon the forfeiture, ought to have said so in positive and unequivocal terms. He ought to have informed the defendant that he need not make any effort to raise money as the time had passed, and the money would not be received on Saturday if tendered. On the contrary, he carefully refrained from giving express consent to further time, but in his own mind did consent and decided to wait until Saturday, and then take the money if offered, and if not, take back the unexpressed consent and waiver formed in his own mind and insist upon the forfeiture. He permitted the defendant to engage in another effort to raise the money in the belief that if secured the plaintiff would accept it. This attempt to hold on to the forfeiture and waive it, does not show such candor and fairness as the circumstances demanded. He ought to be held to this waiver. This makes it unnecessary to consider the question as to whether the amount paid by the defendant was so great as to make a forfeiture grossly inequitable or not. It is apparent, however, that the defendant is ready, able and willing to carry out his contract, and it would be a loss and hardship to him if deprived of the opportunity.

The judgment of the court will be reversed, with direction to enter judgment for the defendant for costs.

#### AVERY v. UNION PAC. R. CO.

(Supreme Court of Kansas. May 12, 1906.)

##### TRIAL—DEMURRER TO EVIDENCE.

It is error for a trial court to sustain a demurrer to evidence, or to direct a verdict, unless it can be said that the adverse party has failed to introduce any substantial evidence in support of a vital point in his case.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 381-389.]

(Syllabus by the Court.)

Error from District Court, Riley County; Sam Kimble, Judge.

Action by A. J. Avery, administrator of George Avery, against the Union Pacific Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Waters & Waters, for plaintiff in error. N. H. Loomis, R. W. Blair, and H. A. Scandrett, for defendant in error.

GREENE, J. George Avery was run over and killed on a public crossing by one of the Union Pacific Railroad Company's trains. A. J. Avery, as his administrator, sued to recover damages therefor. The court overruled a demurrer to the plaintiff's evidence. The defendant introduced its evi-

dence, and then upon its request the court directed the jury to find a verdict for the defendant, upon which a judgment was rendered.

The error assigned is that the court directed a verdict for the defendant and rendered judgment thereon. Numerous acts of negligence are charged in the petition, among which is the negligence of the engineer of the train which ran over Avery to sound the whistle 80 rods from the crossing. Plaintiff introduced some evidence tending to show that the whistle was not sounded at a point 80 rods from the crossing, while the testimony on the part of the defendant very strongly tended to show that it was so sounded. Whether it was or not was a material fact upon which the evidence, when all in, was conflicting. The rule controlling where a demurrer is interposed to evidence applies in directing a verdict. If there is any substantial testimony tending to sustain the material facts contended for by either party as against such party, the trial court should overrule a demurrer, and where all of the evidence has been submitted on both sides, and there is a conflict upon any material question of fact, the cause must be submitted to the jury. As suggested, there was evidence introduced by the plaintiff tending to show that the railroad company did not sound the whistle at a point 80 rods before reaching the crossing upon which Avery was killed, and presumably it was because of this that the court overruled the demurrer to the plaintiff's evidence. This evidence still remained in the case. Notwithstanding the defendant had offered testimony to the contrary, and notwithstanding that evidence might have been sufficient to satisfy a jury, and did satisfy the court, that the defendant's engineer had complied with the law in this respect, and notwithstanding the court felt that it would be compelled under the evidence, in case a verdict should be returned for the plaintiff, to set it aside and grant a new trial, it was nevertheless the duty of the court to submit the cause to the triers of the facts. It is only where it can be said that the plaintiff has wholly failed to introduce any substantial evidence in support of some material point in this case that a court is authorized either to sustain a demurrer to his evidence or direct a verdict for the defendant. The jury are the triers of the facts, and, whenever the testimony has reached that point that it must be weighed and conclusions deduced therefrom, the jury alone must make the deductions in the first instance, and not the court. *Sullivan v. Phenix Ins. Co.*, 34 Kan. 170, 8 Pac. 112; *K. P. Ry. Co. v. Couse*, 17 Kan. 571; *Brown v. A. T. & S. F. Rld. Co.* 31 Kan. 1, 1 Pac. 605; *Jansen v. City of Atchison*, 16 Kan. 358; *St. Jos. & D. C. Rld. Co. v. Dryden*, 17 Kan. 278. The judgment is reversed, and the cause remanded. All the Justices concurring.

**LEWARK et al. v. PARKINSON.**

(Supreme Court of Kansas. May 12, 1906.)

**1. CARRIERS—PROPRIETORS OF HACKS—DUTIES TOWARDS PASSENGER.**

Proprietors of hacks and cabs carrying passengers for hire are liable for all injuries caused by their failure to provide suitable vehicles, safe horses and harness, and a competent, careful driver.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1088, 1141, 1185.]

**2. SAME—NEGLIGENCE OF DRIVERS.**

When the proprietors of a line of hacks and cabs, engaged in carrying passengers for hire, are sued for damages sustained by a passenger in a runaway, caused by the team becoming frightened and the harness breaking, an instruction is properly refused which charges that carriers are not liable for a mistaken exercise of judgment on the part of their servants in an emergency, nor for a failure of such servants to act with the utmost promptitude when the circumstances are such as to afford no time for deliberation.

**3. DAMAGES—PERSONAL INJURIES—EXPENSES.**

Expenses incurred by an injured passenger, which resulted from the injuries, including compensation for services of nurses, are proper elements of damages in an action against the carrier in such a case, notwithstanding the services were performed by a member of the family of the injured person, if the services were necessary and the charges reasonable.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 243.]

(Syllabus by the Court.)

Error from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Action by Sophia Parkinson against W. H. Lewark and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. H. Keith and Chas. Bucher, for plaintiffs in error. Benson & Harris, for defendant in error.

**PORTER, J.** Plaintiffs in error are proprietors of a line of hacks and cabs operating at Coffeyville as common carriers of passengers and baggage between railway depots and elsewhere in the city. On the 7th day of March, 1902, Mrs. Parkinson, defendant in error, who was 72 years of age, was a passenger in one of the cabs on her way from one depot to another and was injured in a runaway. She brought this action to recover damages for the injuries sustained. The jury returned a verdict in her favor for \$400 of which they allowed \$150 for expenses incurred by reason of the injuries, and the remainder for pain and suffering. Plaintiffs in error seek to reverse the judgment and assign numerous errors.

Defendant in error at the time of the accident was traveling from her home at Pomona, in Franklin county, to visit her sons who lived at Wagoner, in the Indian Territory. It was claimed in her petition, and established by the evidence, that she was the only passenger in the cab when the team started to run; that she looked out and saw that the driver had dropped or in some way

lost the lines. She says that he jumped from his seat and ran to the door of the cab which was at the rear and opened the door and held his hand to assist her in getting out; that while attempting to get out she was thrown down and received the injuries complained of. The answer set up contributory negligence. Upon the trial the driver testified that the horses became frightened at a large piece of paper which the wind carried into the street in front of them; that one of the tugs broke, and then one of the lines broke and he jumped off. He denied that he opened the door for defendant in error, or that he did anything to induce her to get out, but claimed that he was endeavoring to prevent her from doing so. The injuries to Mrs. Parkinson were serious enough to prevent her from continuing her journey. She was carried into a private residence near by and cared for by strangers. Her sons came at once from Wagoner, and, while one remained to care for her, the other went back to Wagoner, returning the next day with his family physician who took charge of defendant in error. The court admitted evidence of the expense incurred by the sons in these trips, and also in taking their mother from Coffeyville to Wagoner, where she remained several weeks, and the expense of one of the sons in taking her later to her own home. These expenses, and the time of the sons in nursing and caring for defendant in error, were allowed by the jury as a part of the expenses incurred.

It is seriously contended that, as the sons were in duty bound to care for their mother, and that, because it appeared from the evidence that the wages of one of the sons who was employed as a clerk in a store were paid him by his employer during the time he claimed to have cared for his mother, it was error for the jury to allow defendant in error for these items of expense. If defendants below are liable at all, they are liable for the necessary expense caused by the injury to the passenger, including traveling expenses made necessary by the circumstances in which defendant in error was left by the accident. It became necessary for her sons to come to her and to take care of her to the end of her journey, and, again, for some one to travel with her to her home. Reasonable compensation for nurse hire and attendance was a proper item of recovery, notwithstanding the persons who performed the services were relatives who might have been bound to take care of her without compensation, if she paid or became liable for the expense, and the service was required. In *Brosnan et al. v. Sweetser*, 127 Ind. 1, 26 N. E. 555, where the services were rendered by members of the family, it is said: "If this be done by some good friend or member of the family, who donated his services, that is the good fortune of the appellee, and a matter with which the persons liable have no con-

cern. If she had paid ten times the true value of such services she could only have recovered what such services were reasonably worth." See, also, *Trapnell v. City of Red Oak Junction*, 76 Iowa, 744, 39 N. W. 884; *Kendall v. City of Albia*, 73 Iowa, 241, 34 N. W. 833. *Pennsylvania Company v. Marlon*, 104 Ind. 239, 3 N. E. 874; *Varnham v. City of Council Bluffs*, 52 Iowa, 698, 3 N. W. 792.

Error is claimed because the court refused to permit defendant to prove that the driver was a competent, experienced driver of horses, and that his reputation in that respect was good. As well might a railway company seek to defend an action for injuries to a passenger by proving that the engineer whose negligence caused a wreck was a capable and experienced engineer and that he bore a good reputation as such. The theory of an unavoidable accident was not pleaded as a defense, and there was nothing in the evidence to warrant the court instructing in reference to it. The jury found, in answer to a special question, that the injuries were not the result of an unavoidable accident. It is complained that the court erred in refusing to give the following instruction: "You are instructed that carriers are not liable for mistaken exercise of judgment on the part of their servants in an emergency, nor for a failure upon the part of their servants to act with the utmost promptitude when the circumstances are such as to afford no time for deliberation." This was properly refused. The negligence of the carrier in permitting the emergency to arise is lost sight of in the instruction. Moreover, it was not a correct statement of the law with respect to the liabilities of a common carrier for injuries caused to a passenger by the negligence of the carrier. In *Sawyer v. Sauer*, 10 Kan. 466, the trial court instructed the jury as follows: "That a stagecoach proprietor who carries passengers for compensation is responsible for all accidents and injuries happening to passengers which might have been prevented by human care and forethought. He is bound to furnish gentle and well-broke horses, skillful, prudent and sober drivers, and the smallest degree of negligence in those particulars will render such proprietor liable for any injury to passengers therefrom." This instruction was conceded to be correct in the abstract by counsel for plaintiff in error in that case, and was approved by this court, and afterwards cited with approval in *Topeka City Ry. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754. The law imposes certain duties upon the carrier, and it is from these that his liabilities flow. He is not an insurer against all defects. He is, however, liable for all injuries caused by his failure to provide suitable vehicles, safe horses and harness, and a competent, careful driver. It was said in *Crofts v. Waterhouse*, 3 Bing. 319-321: "If there be the least failure in

any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." See, also, *Budd v. United Carriage Co.*, 25 Or. 314, 35 Pac. 660, 27 L. R. A. 279, and cases cited. The testimony of the driver established the carriers' negligence. He testified that one of the horses "would run away if he got a chance." The opportunity came, the horse ran away, the harness broke in two important places, the driver jumped off, and the passenger was injured. The doctrine of unavoidable accident and the reputation of the driver were never seriously involved in this case.

The judgment will be affirmed. All the Justices concurring.

#### HAMLIN v. KANSAS RY. CO.

(Supreme Court of Kansas. May 12, 1906.)

#### EMINENT DOMAIN—RAILROAD RIGHT OF WAY—FORFEITURE.

A court cannot say as a matter of law that the mere failure of a railroad company for any fixed period to complete a track upon a right of way, which it has acquired by condemnation, works a forfeiture of its rights, where there has been no adverse possession.

(Syllabus by the Court.)

Error from District Court, Wilson County; L. Stillwell, Judge.

Action by James Hamlin against the Kansas Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Mikesell & Wilson, for plaintiff in error. T. J. Hudson and A. M. Harvey, for defendant in error.

MASON, J. In 1882 the Kansas Railway Company condemned a right of way across Wilson county. A grade was constructed, but no track was ever laid. In 1903 James Hamlin, as owner of the fee of a portion of the tract so appropriated, brought an action to quiet title against the railway company upon the ground that whatever rights it had acquired with respect thereto had been forfeited. A trial was had upon oral evidence, a part of which tended strongly to show an abandonment by the company, and a part of which had some tendency to the contrary. The court decided in favor of the defendant, and the plaintiff prosecutes error. No special findings were made, and it is impossible for this court to know upon what view of the facts the decision was based. The judgment must therefore be affirmed, unless it can be said that the mere fact that no railroad was ever completed compelled a different result. It may be assumed that there was no adverse possession by the plaintiff, for the evidence does not conclusively show it. Where there is no adverse possession, nonuser does not of itself work an extinguishment of the company's right. 23 A. & E. Encycl. of L. (2d Ed.) 705. Of course the Legislature might have provided that a

failure to complete a railroad within a stated time should have that effect, but no claim is made that the Kansas statute is to be construed as fixing such a limit. In the absence of a statutory limitation a court cannot say as a matter of law that irrespective of all other considerations the mere failure of the company to complete its track within any fixed period operates as an extinguishment of all rights acquired by the condemnation proceedings. 3 Elliott on Railroads, § 931; Nicomen Boom Co. v. North Shore Boom and Driving Co. (Wash.) 82 Pac. 412, and cases there cited.

It results that the judgment must be affirmed. All the Justices concurring.

UNION PAC. R. CO. v. KANSAS CITY  
et al. (two cases.)

(Supreme Court of Kansas. May 12, 1906.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—PETITION—PROTEST—ENJOINING ASSESSMENT.

Where a landowner, who claims to be a resident of a city of the first class, files with the city clerk a written protest against a petition for the improvement of a street, and the petition is regular on its face, and purports to be signed by one-half of the resident owners of the lands abutting upon the street to be improved, and the mayor and council consider the petition and protest and order the petition spread upon the journal, and proceed to cause the improvements to be made, their action is a final and conclusive determination of the sufficiency of the petition, and such landowner cannot question the validity of the proceedings in an action to enjoin the assessments, unless such action is brought within 30 days from the time the amount of the assessment is ascertained.

(Syllabus by the Court.)

Errors from Court of Common Pleas. Wyandotte County; Wm. G. Holt, Judge.

Actions by the Union Pacific Railroad Company against the city of Kansas City and W. B. Trembly, city clerk. Judgment for defendants, and plaintiff brings error. Affirmed.

N. H. Loomis, R. W. Blair, and H. A. Scandrett, for plaintiff in error. Ralph Nelson and E. S. McAnany, for defendants in error.

PORTER, J. Plaintiff in error brought these actions to enjoin the assessment and collection of special improvement taxes for the grading, paving, and curbing of Fifth street from Euclid avenue to Central avenue in Kansas City, Kan. From a judgment refusing a permanent injunction, plaintiff appeals.

The cause was tried upon an agreed statement of facts. The plaintiff's petition claimed that, previous to the adoption of the resolution declaring the improvement necessary, there had not been filed with the city clerk a petition, signed by the resident owners of one-half of the feet fronting or abutting upon the street, asking that such improve-

ments be made; that plaintiff, being a resident owner of a majority in front feet of the property liable to be taxed under the improvement, duly filed its written protest against the improvement, notwithstanding which the council proceeded to pass the ordinances and caused the improvements to be made. A special objection to the validity of the proceedings was also made upon the ground that plaintiff was the owner of an irregular shaped, unplatted piece of ground, a portion of which abuts on Fifth street a distance of 1,725 feet. The other portion of said irregular shaped tract is land which does not abut upon the street improved, but extends for a distance of about 1,400 feet parallel with Fifth street, but distant therefrom 200 feet. This irregular tract was assessed as one entire tract of land. Kansas City is a city of the first class. The defense is made that the 30-day statute of limitations (section 706, Gen. St. 1901) bars plaintiff from raising any of the contentions relied upon to defeat these special improvement taxes. The agreed statement of facts recites that the action was commenced more than 30 days after the time of the ascertainment and levy of the assessment for the cost of the improvements complained of; also that the mayor and council had done all things necessary so far as form is concerned upon which to base the assessment.

The validity of an assessment for special improvements authorized by the mayor and council of a city of the first class, when the proceedings upon their face are regular in form, cannot be attacked by an action to enjoin the collection and assessment, unless the action is brought within 30 days from the time the amount of the assessment is ascertained. Gen. St. 1901, § 706; Simpson v. Kansas City, 52 Kan. 88, 34 Pac. 406; Doran v. Barnes, 54 Kan. 238, 38 Pac. 300; City of Argentine v. Simmons, 54 Kan. 680, 39 Pac. 181; Arends v. City of Kansas City, 57 Kan. 350, 46 Pac. 702; Kansas City v. Kimball, 60 Kan. 224, 56 Pac. 78. Plaintiff in error is a corporation organized under the laws of Utah, with its principal office in that state, but claims that, under the ruling of State v. Bogardus, 63 Kan. 259, 65 Pac. 251, it is a resident of any city or county in which it operates its railway or exercises corporate franchises. It seeks to avoid the effect of the 30-day statute of limitations by the argument that the mayor and council were without jurisdiction, and all the proceedings in reference to the improvement and the ascertainment and apportionment of the cost thereof were void, because the city and its officers had a list of the property owners and a map showing the location of the land, and, in addition, knew that plaintiff in error was a resident of the city and owned a majority of the front feet, and had filed its written protest against the improvement. On the other hand, it is contended that plaintiff in error is not a "resident own-

er" of land in Kansas City, within the terms of section 730, Gen. St. 1901. The further contention is made that, if it be conceded to have been a resident at the time the petition for the improvements was presented, the determination of the mayor and council that the petition was signed by the requisite number of resident owners is conclusive, and that the railroad company lost its rights by failing to bring an action within 30 days after the ascertainment and apportionment.

Without passing upon the question of whether a railway corporation which is a citizen of another state, with its principal office in that state, can be considered a resident of any city in this state in which it operates its railway or exercises corporate franchises, we are of the opinion that the determination by the mayor and council that the petition prescribed asking for the improvement contained the requisite number of signers is final and conclusive, unless a suit is brought within 30 days after the ascertainment and levy of the taxes. This also covers mere irregularities in the detail of the apportionment and levy of the tax, such as is claimed occurred with reference to a portion of the irregular tract of land, which was within less than 300 feet of the street improved. The action of the mayor and council in determining the sufficiency of the petition has been said not to be final and conclusive, in the absence of legislative provision to that effect. 2 Dillon on Mun. Corp. (4th Ed.) § 800. Our statute contains such a provision (Gen. St. 1901, § 733), which reads as follows: "When hereafter the mayor and council of any city of the first class shall have ordered any petition presented to them for the paving, curbing or guttering of any street to be spread upon the journal, said order shall in all respects be a final determination and conclusive evidence as to the sufficiency of such petition." Plaintiff in error filed its written protest against the making of the improvement. It claimed to be a resident of the city, and it knew of all the objections to the proceedings which it now sets up against the assessments after the improvements have been made. Its claim for relief does not appear to be any stronger upon equitable grounds than that of an absent, nonresident owner, who was in entire ignorance of the proceedings, but whose property is assessed, and all right to object cut off by this 30-day statute. After the expiration of 30 days the validity of the assessment cannot be attacked for any purpose, when the proceedings are regular on their face, and here the regularity is conceded.

The two cases were submitted together, and are in all respects similar, except that the question with respect to the assessment of the irregular tract of land is not involved in No. 14,500.

The judgments will be affirmed. All the Justices concurring.

## SCOTT v. BANKERS' UNION OF THE WORLD et al.

(Supreme Court of Kansas. May 12, 1906.)

### 1. INSURANCE — FRATERNAL ASSOCIATION — POWER TO ISSUE NOTES.

An incorporated fraternal insurance association, organized under a charter which does not expressly confer the power to issue promissory notes, has no implied power to do so, when such authority is unnecessary to enable the association to exercise the powers expressly given, or to accomplish the purpose of its creation.

### 2. CORPORATIONS—POWERS—NOTICE.

Every person dealing with a corporation or with its obligations is bound to take notice of the power possessed by such corporation and of the purpose for which it was created.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1547, 1893.]

### 3. BILLS AND NOTES—BONA FIDE PURCHASER.

The purchaser of a promissory note, executed by a corporation not having the legal power to issue such an obligation, cannot recover thereon from such maker, even when the note is taken in good faith and for value.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 947, 948; vol. 12, Cent. Dig. Corporations, §§ 1825, 1894.]

### 4. SAME.

A person who is the joint maker of a promissory note, with a corporation which does not have the power to issue such an obligation, may be liable thereon to an innocent holder thereof, even though no recovery can be had against the corporation.

(Syllabus by the Court.)

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action by W. T. Scott against the Bankers' Union of the World and E. C. Spinney. Judgment for defendants, and plaintiff brings error. Affirmed as to the Bankers' Union, and reversed as to Spinney, and judgment entered against Spinney.

In 1901 the Bankers' Union of the World was a fraternal beneficiary association organized under the laws of the state of Nebraska. Its principal officers were E. C. Spinney, president, and C. M. Chittenden, secretary. At that time the National Aid Association was also a fraternal beneficiary association located in Topeka, Kan.; and its principal officers were L. R. Lewis, president; S. D. Cooley, secretary; and M. Ware, medical director. The National Aid Association was very much reduced financially, having about \$100 in its mortuary fund and about \$2,400 in its expense fund. It owed its officers nearly \$5,000, for past due salaries, and there were claims due against its mortuary fund aggregating \$34,330. The officers of these associations held a conference in October, 1901, for the purpose of effecting a consolidation of the organizations. Arrangements were considered and written agreements signed, which were satisfactory to the officers. Efforts were then made by them to obtain the consent of the associations to the plans which had been agreed upon. The board of directors of the Bankers' Union of the World, which had all the power

legally conferred upon the association, authorized its president, E. C. Spinney, on October 23, 1901, to make such arrangements as "he deems necessary and proper to effect such consolidation." In pursuance of this authority E. C. Spinney confirmed the former arrangements made with the officers of the National Aid Association, whereby it had been agreed between them that Lewis, Cooley, and Ware should use their influence in securing a transfer of the management of the National Aid Association to the management of the Bankers' Union of the World; that they should surrender all claims for back salary and otherwise held by them against the National Aid Association, and assist as far as possible in obtaining the final amalgamation of the two orders. In consideration whereof, the Bankers' Union of the World agreed to assume the liabilities of the other association, not exceeding the sum of \$34,330, and pay to said Lewis, Cooley, and Ware the sum of \$10,000, in 30 equal monthly installments, beginning November 1, 1901, if the consolidation was completed at that time, and, if not, then on the first day of the next month after it was completed. These installments were each evidenced by a promissory note executed by the Bankers' Union of the World by its president, E. C. Spinney, and by him personally. Ten of these promissory notes were made payable to the order of Ware, and the same number to each of the other obligees, Lewis and Cooley. The notes were in all respects negotiable in form. In furtherance of this arrangement Lewis and Cooley called a meeting of the directors of the National Aid Association, resigned from their positions as president and secretary of the order, and the directors elected Spinney and Chittenden to fill the vacancies made by such resignations, who at once assumed the management and control of that association. Afterwards a meeting of delegates sent from the subordinate lodges of the National Aid Association throughout the country met at Topeka, Kan., and, after full discussion thereof, ratified and confirmed the acts which had been taken in the direction of a consolidation of the associations, and ordered that proper steps be taken to complete such arrangements. Spinney and Chittenden managed the National Aid Association as a separate organization until December 15, 1901, when they resigned, and the management devolved upon Elsie Buckman, acting secretary, who conducted the affairs of the order until January 8, 1902, when it passed into the hands of a receiver. The promissory notes held by Lewis, Cooley, and Ware, which fell due November 1, 1901, were paid by Spinney, with checks drawn upon the funds of the National Aid Association. The note becoming due December, 1, 1901, was not paid when due, and suit was brought thereon, but Spinney afterwards settled the suit and paid the note. As a result of the attempted consoli-

dation, the Bankers' Union of the World received nothing. Its officers, E. C. Spinney and C. M. Chittenden, received nothing. The National Aid Association received nothing. Its officers, Lewis, Cooley, and Ware, received the notes as above stated. In the transaction, however, they had resigned their offices, and faithfully worked to accomplish the purpose in view, as agreed by them. M. Ware, the payee and holder of eight of the notes above mentioned, exchanged said notes for the home farm and live stock thereon of the plaintiff herein, which is located in Hodgeman county, Kan. The plaintiff gave to Ware a bond for a deed to the real estate, a bill of sale for the stock, and agreed to retain possession thereof, and care for the same one year. Suit was brought on the note which became due January 1, 1902, on January 2, 1902, and afterwards, by stipulation, the other notes were added, so that this suit embraces the eight notes of \$333.33 each. The plaintiff still retains possession of all the property deeded to Ware. The plaintiff took the notes in good faith, for full value and without notice of the circumstances under which they were executed.

The Bankers' Union of the World was organized under the provisions of chapter 47, p. 266, of the Laws of Nebraska of 1897. The title of the act contains the following:

"An act defining fraternal beneficiary societies, orders or associations and regulating the same and to repeal. \* \* \*

"Section 1. A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each such society shall have a lodge system, with ritualistic form of work and representative form of government.

"Sec. 2. Such society shall make provision for the payment of benefits in case of death. \* \* \* Provided the payment of such benefits in all cases be subject to compliance, by the member, with the contract, constitution, rules and laws of the society.

"Sec. 3. The fund from which the payment of such benefits shall be made, and the fund from which the expenses of such society shall be defrayed, shall be derived from beneficiary calls, assessments, or dues collected from its members."

Section 4 defines who may be beneficiaries.

"Sec. 5. Such societies shall be governed by this act and shall be exempt from the provisions of statutes of this state relating to life insurance companies except as hereinafter provided, and no law hereafter passed shall apply to them unless they be expressly designated therein."

Section 6 defines where such association may be served.

Section 7 exempts proceeds of beneficiary certificate for debts of holder.

Sections 8 and 9 provide the steps to be taken to obtain a permit to do business under this act.

Section 10 provides reports to be made to the auditor of public accounts.

Section 11 requires foreign associations doing business under this act to appoint a person upon whom service may be made.

Section 12 provides terms upon which such orders may do business in the state.

Section 13 limits right to solicit membership.

Section 14 concerns charges to beneficiaries.

Section 15 permits transaction of business outside the state.

Sections 16, 17, and 18 recite causes which forfeit right to do business and provide penalties for violation of statute.

Section 19 requires examination of members by physician.

Section 20 provides for voluntary association doing business under this act.

"Sec. 21. All societies, orders, and associations contemplated in this act shall be exempt from the provisions of chapter 16 of the compiled statutes of 1885. \* \* \* The monies collected by any such society from its members according to the plan or method provided in its constitution and by-laws, for the payment of death or disability claims arising under the terms of its beneficiary certificates, shall be kept separate and apart from the other funds of such society, and shall be used only in payment of such claims, and no part thereof shall be used by such society in payment of expenses of any kind or character."

Section 22 requires copy of constitution and by-laws to be filed with auditor.

#### Constitution.

"Sec. E. How Maintained.—The expense of the fraternity shall be defrayed by a percentage of the premium income, per capita tax, and membership and certificate fee upon every member thereof. The same shall be collected and forwarded to the Bankers' Union of the World by the Subordinate Lodges, and shall be placed in the designated funds. The amount available for general fund for expenses and the membership fees shall be established by the Board of Directors, but the amount of premium income so available shall not, after the first year of each policy, exceed the ratio of \$3 per \$1,000 of life insurance on a single policy and a ratio of \$4.50 per \$1,000 in case of a joint policy, or a ratio of \$3 for each accident policy of the lowest amount provided for, all calculated per annum. To meet this expense the first premiums received on each policy by said Bankers' Union of the World shall be available till said limit is reached.

"Sec. F. Duties of the Supreme Banker.—The Supreme Banker shall receive all money belonging to the general, reserve and benefit funds of the order, and shall give a receipt when each payment is received. \* \* \* He

shall pay all orders on the reserve, benefit and general funds, signed by the Supreme President and attested by the Supreme Secretary, keeping a separate account with each of the three funds."

"Sec. H. Duties of Board of Directors.—The Board of Directors shall have complete control of the financial affairs of the fraternity, shall protect the charter of the same and exercise its corporate powers as provided by the laws of the state of Nebraska. \* \* \* Payment of Claims. To authorize and order payment of all proper claims against the fraternity, and direct payments to be made from the General Fund of such as may be properly paid therefrom. The Supreme Secretary shall not issue any order on the Supreme Banker for the payment of any claims unless such order shall have been first signed by the Supreme President.

"Sec. I. General Manager authorized to publish paper for membership and to employ an attorney when necessary, compensation in each case to be fixed by General Manager."

"Sec. D. Reserve Fund.—For the purpose of creating a reserve fund, to guard against poor risks, protect healthy members, equalize the cost to all, and absolutely insure the perpetuity of the Union, all insurance in the Bankers' Union of the World will be adjusted and paid on the following plan: Should any member holding a policy die before having lived out his expectancy of life based on his age at entry according to the American Experience Table of Mortality, there shall be deducted from the death benefit payable under such policy held by such member, a sum equal to the amount of one payment [at the rate paid by the member] for each month of the unexpired period of such life expectancy, with four per cent. on the unpaid balance of such sum. Accident and disability benefits payable under all policies shall be subject to proportionate deduction. All such deduction made in payment of policies at times when the mortuary fund equals or exceeds \$10,000 over and above all claims on file and approved against said mortuary fund shall constitute a reserve fund. All such deductions in payment of policies made at times when the mortuary fund amounts to less than \$10,000 over and above all claims on file and approved against said fund shall be placed in the mortuary fund of the Company. The reserve fund of the Bankers' Union of the World shall not, under any circumstances, be used for any purpose except to meet death losses in excess of six deaths per thousand members per year, and for the payment of old age benefits to members over 70 years of age. It is declared to be the fundamental principle and policy of this Union that no more than twelve premiums at the rate at entrance age shall be made in any one year for the payment of mortuary, disability and accident benefits and expenses of the Union. But if for any cause now unforeseen and not anticipated, the rate fixed at entrance according to

age falls to produce the necessary amount, then it shall be the duty of the Board of Directors to order a special call, which shall be paid by each member to the Secretary of his or her Subordinate Lodge within thirty days from the date of such call, which funds shall forthwith be transmitted by such secretary to the Bankers' Union of the World. Members failing to pay any special call within thirty days from the date of the said call of the same shall stand suspended."

#### By-Laws.

Sec. A. "Provides that the Supreme Lodge shall have exclusive charge of printing and furnishing lodge supplies, at prices fixed by directors, proceeds to go into the general fund of the Supreme Lodge."

In addition to the foregoing there are many other expenses provided for which are necessary to the existence of the order, and which it is necessary to pay out of the funds of the association. E. C. Spinney is joint maker of the notes sued on with the Bankers' Union of the World, of which he was president. A copy of the note is as follows: "Omaha, Nebraska, Oct. 26, 1901. January 1st, 1902, after date for value received, we promise to pay to the order of M. Ware at the office of Stebbins & Evans, 509 Kansas Avenue, Topeka, Kansas, three hundred and thirty-three dollars and thirty-three cents, interest at ten per cent. per annum, after due until paid. The Bankers' Union of the World, by E. C. Spinney, President and General M. E. C. Spinney." Indorsed as follows: "Pay to the order of W. T. Scott. M. Ware."

Overmyer & Overmyer, for plaintiff in error. E. A. Austin and Otis E. Hungate, for defendants in error.

GRAVES, J. (after stating the facts). This action was commenced by the plaintiff to recover upon the eight promissory notes obtained by him from M. Ware, each being for the sum of \$333.33. The notes were given in consideration of services performed in an effort to effect a consolidation of the Bankers' Union of the World and the National Aid Association. The defendant the Bankers' Union of the World objects to the payment of the notes: (1) Because the purpose for which the notes were given was beyond the power of the association, which make them void in toto; (2) the plaintiff is not in a position to claim the protection ordinarily due to an innocent holder of commercial paper, as he is still in possession of all the property sold and secure from loss, without such protection. The plaintiff insists that a corporation having power to create debts or incur liabilities for any purpose whatever, has the power to issue its promissory note therefor, and the purchaser of such note in the absence of notice or knowledge to the contrary, has the right to assume that it was given for such rightful purpose. Also, that this association has ex-

press power to provide many things that can only be obtained either by cash or credit, and to carry out the manifest purposes of the order it is necessary for it to have the power to contract debts for these essential purposes and issue its promissory notes therefor. Also, that the plaintiff has delivered all of the property sold, and is in possession thereof merely as agent of the owner, and therefore cannot protect himself. And, further, that the defendant association having received the services of the payees of the notes, and caused them to surrender their offices, and receipt for their past due salaries, is now estopped from denying its power to make the contract and execute the notes.

There are other questions presented, but they are minor to and involved in the principal ones mentioned, and, in the view we have taken, they are not material to the conclusion reached, and need not be considered. Corporations are created by law, and have such powers only as are expressly or impliedly conferred upon them. The charter of a corporation is the measure of its power. 7 Am. & Eng. Enc. of Law (2d Ed.) 695. In the case of *Head v. Providence Insurance Co.*, 2 Cranch, 127, 2 L. Ed. 229, Chief Justice Marshall said: "Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers." In the case of *New York Firemen Insurance Co. v. Ely*, 5 Conn. 560, 13 Am. Dec. 100, Chief Justice Hosmer said, when speaking of the powers of corporations: "The law of its nature or its birthright in the most comprehensive sense is such and such only as its charter confers." In the case of *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 48, 11 Sup. Ct. 484, 35 L. Ed. 55, Justice Gray said: "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental." This is the generally accepted and recognized rule. The implied powers which a corporation has are only such as are necessary to fully carry out the powers expressly given and to accomplish the purpose of its creation. 7 Am. & Eng. Enc. of Law, 700; *People v. Gas Co.*, 130 Ill. 283, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; *Gas Light Co. v. Gas Light Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; *Bank v. Bank*, 36 Ohio St. 355, 38 Am. Rep. 594. In the case of *National Loan Association v. Home Savings Bank*, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245, Chief Justice Ma

gruder said: "A corporation is a creature of the law having no powers but those conferred upon it. A corporation has no natural rights or capacities such as an individual or an ordinary partnership, and if a power is claimed for it, the words giving the power, or from which it is necessarily implied, must be found in the charter or it does not exist."

It may therefore be said that, as a general rule, a private corporation possessing the powers usually conferred, has authority to issue promissory notes, either when authorized to do so in express terms, or when it is necessary to carry out other powers expressly given, and is essential to the accomplishment of the purpose of its creation. But it may also be said that corporations may be created which do not have such power either express or implied. Whether a given corporation has such power or not will depend upon the express provisions of its charter and the purpose it was intended to accomplish. When a law whereby a corporation is created does not confer in express terms the power to issue promissory notes, such power will not be implied, if it appears from the general scope of the law and from the purpose to be accomplished by such corporation that it is not essential to the proper exercise of the powers expressly conferred nor to the accomplishment of the objects for which it was created. Applying these principles to this case, we have concluded that the Bankers' Union of the World did not have power, either express or implied, to issue the notes sued upon. It was organized under the provisions of a statute enacted for the purpose of placing such associations in a separate and distinct class. By the express terms of this statute associations organized under it are excluded from the provisions of all laws relating to ordinary corporations and life insurance companies. This indicates an intention to deprive them of the ordinary business powers incident to other corporations, and to withhold all power not expressly given. This association was not organized for trading or business purposes, or to acquire profit in any way. It is without capital, and has no revenue. Its only financial resource is the voluntary contributions of its members. Its only business is to receive and disburse these contributions in accordance with the rules of the order. No power exists to enforce the payment of assessments, but when they are voluntarily paid, a fixed per cent. thereof is placed in a fund, out of which all the expenses incident to the management of the order are to be paid. This fund is the sole means at the disposal of the officers of the association, and it is, and of necessity must be, an uncertain and conjectural quantity. The issuance of a promissory note with no security for payment when due, other than this fund, would be a very unbusinesslike transaction. It would seem like folly to permit any obligation of the association to be issued beyond the

present extent of this fund. An obligation payable upon the contingency that this fund would be sufficient, might work no injury, but a promissory note negotiable in a commercial sense, payable absolutely, is wholly incompatible with the plans, resources and necessities of such an organization. A law permitting a corporation of this character to issue such notes, and thereby deceive and entrap the unwary and credulous, would be open to serious criticism. It may be conceded that the Legislature of Nebraska might confer such power upon such an association, but it should not be assumed to have done so, until its language to that effect is so clear and explicit as to admit of no other reasonable interpretation.

The statute under which the Bankers' Union of the World was organized and the constitution and by-laws of such order have been fully pleaded, and constitutes a part of the record in this case. The decisions of the Nebraska Supreme Court, so far as deemed applicable, have been cited in the briefs of counsel, and, to further aid this court, depositions of eminent lawyers in that state have been taken wherein opinions have been given pro and con as to whether or not under this statute, and the decisions and other laws existing in Nebraska, the Bankers' Union of the World had the legal power to issue a promissory note. But since we have the statute and reports before us we have concluded to follow our own judgment in the decision of this question. It is familiar law that whoever deals with a corporation or buys its obligations is bound to take notice of the powers conferred by its charter, and the purposes for which it was created. When the plaintiff was about to purchase the notes in question, he was charged with notice of the powers, express and implied, possessed by the Bankers' Union of the World, and was bound to take notice that it had no authority or power to issue such notes for any purpose whatever. Charged with such notice he could not become the owner of the notes so as to be entitled to the protection usually accorded an innocent holder of commercial paper. *Alexander v. Cauldwell*, 83 N. Y. 485; *Jamison v. Bank*, 122 N. Y. 140, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. Rep. 482; *Sturdevant v. Bank* (Neb.) 95 N. W. 819; *National Home Building Association v. Bank*, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245; *Bank v. Turner*, 71 Minn. 413, 74 N. W. 160, 70 Am. St. Rep. 334; *Bank v. Whitehead*, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 302; *Durkee v. People*, 155 Ill. 354, 40 N. E. 626, 46 Am. St. Rep. 340. This conclusion disposes of the case so far as the Bankers' Union of the World is concerned, and makes it unnecessary to consider the question of estoppel on account of benefits received, as the plaintiff took the notes with notice of this infirmity,

and is not therefore entitled to the rights of an innocent holder. It seems, however, that this defendant received very little, if anything, of value, out of the transaction. The scheme of consolidation failed. These notes were not to be paid unless it succeeded. It is true that the president and secretary of the Bankers' Union of the World, while in control of the National Aid Association, used its funds in a way that might give just cause of complaint, but that association is not in this case. These funds were not transferred to the Bankers' Union of the World, nor used in any way for its direct benefit. They were used to defray the expense incurred in the furtherance of the scheme in which both associations were interested.

The National Aid Association was insolvent and unable to pay the salaries due its officers, and the release thereof resulted in very little, if any, loss to them, and no advantage to the other association. We think E. C. Spinney, the other maker of these notes, is liable thereon. He was personally, as well as officially, interested in securing the consolidation of the associations; except for his supposed personal financial responsibility, nothing would have been done by the payees of the notes to secure the union of the two companies. He knowingly and voluntarily executed negotiable notes and consented to their delivery. The transaction in which they were given was not unlawful or contrary to public policy. The consolidation of such corporations might be desirable and useful to both associations and proper and legitimate in every way. The officers of the National Aid Association did not attempt to sell out their company, nor to betray their trust; they only undertook to advise with and urge the subordinate lodges and members to consent to the proposed merger. This was proper. The National Aid Association could not exist alone very long, and any change which promised protection to its certificate holders was desirable. We think this effort on the part of the officers was not vicious, but commendable. The notes are not enforceable against the other maker simply because it had no power to execute them, and the plaintiff had legal notice thereof, when he took them. The plaintiff having bought these notes in good faith, and for value, and without notice of the circumstances under which they were given, is an innocent holder as against Spinney, and is entitled to recover thereon.

The judgment of the district court will be affirmed so far as the Bankers' Union of the World is concerned, and reversed as to E. C. Spinney; and it will enter judgment upon the facts found by it against E. C. Spinney in accordance with the views herein expressed. The costs in this court will be divided equally between the plaintiff and the defendant Spinney. All the Justices concurring.

## STATE v. MILLER. (S. F. 4367.)

(Supreme Court of California. April 11, 1906.)

## 1. ESCHEAT—ENFORCEMENT—INFORMATION—ABSENCE OF HEIRS—SUFFICIENCY OF ALLEGATION.

Civ. Code, § 1386, provides that if a decedent leaves no heirs to take his estate, the same escheats to the state. Section 1404 provides that the title of nonresident alien heirs is forfeited unless they appear to claim the property within five years from the death of deceased. Code Civ. Proc. § 1269, regulates proceedings by the Attorney General for the forfeiture of escheated estates, and provides that the information must set forth the facts in consequence of which the estate is claimed to have escheated with an allegation that by reason thereof the state has right to the estate. *Held*, that in this information an allegation that there are no heirs to take the estate is sufficient as against resident heirs, while an allegation that five years have elapsed within which no nonresident alien heirs have appeared to claim the estate is sufficient as to that class of heirs.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Escheat, § 13.]

## 2. SAME—TIME FOR PROCEEDINGS.

Inasmuch as the rights of possible nonresident alien heirs cannot be barred within less than five years after the death, an escheat proceeding commenced within less than five years is premature.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Escheat, § 10.]

## 3. SAME—ABSENCE OF HEIRS—EVIDENCE—PRIMA FACIE CASE.

Under the further provision of Code Civ. Proc. § 1271, declaring that all persons named in the information or any other person claiming interest in the estate may appear and answer, and that, if no such person does appear, judgment must be rendered that the state is the owner of the property, it is not necessary in an escheat proceeding to offer any evidence in support of the allegation that there are no heirs, but the failure of claimants to appear is sufficient to support a judgment of forfeiture.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Escheat, § 16.]

Department 1. Appeal from Superior Court, Sonoma County; Albert G. Burnett, Judge.

Proceeding by the state of California against G. F. Miller, as administrator of the estate of Henry Hemker, deceased, to escheat the property of decedent to the state. From a judgment for defendant, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., George A. Sturtevant, Deputy Atty. Gen., and H. W. A. Weske, for the State. L. W. Juillard, for respondent.

SHAW, J. Henry Hemker died in this state, intestate, on May 9, 1903. His estate was duly administered by the defendant, and on February 27, 1905, upon settlement of the final account therein, it was adjudged that the defendant had in his hands belonging to said estate, for distribution, the sum of \$2,053.55 in money. No person having ever claimed as heir, or otherwise, any part of the estate, the Attorney General on May 15, 1905, began this proceeding by information, under section 1269, Code of Civil Procedure,

to obtain a judgment of the court declaring said property escheated and the title thereto vested in the state of California. The court below sustained a general demurrer to the complaint, and thereupon gave judgment for the defendant. The plaintiff appeals.

The complaint alleges that the deceased left "no surviving wife or kindred of any kind or degree," and that "there are no heirs to take said estate." In *People v. Roach*, 76 Cal. 296, 18 Pac. 407, in a proceeding of this kind begun within 12 months after the death of the deceased, there was a similar allegation that the deceased left no wife or heirs to take the estate. It was held that this was an allegation of fact which was "impossible in law, and which cannot be admitted by demurrer," citing *Louisville, etc., Co. v. Palmes*, 109 U. S. 255, 3 Sup. Ct. 193, 27 L. Ed. 922, in which case it was declared that an alleged fact, impossible in law, is not admitted by a demurrer. In *People v. Roach*, supra, and in *State v. Smith*, 70 Cal. 156, 12 Pac. 121, it was further decided that our statutes on the subject of escheats, when considered together, do not contemplate that a proceeding of this kind should be commenced before the expiration of five years after the death of the deceased, and that it is premature if begun sooner, although it may have been commenced after the settlement of the administration. The reason given for this ruling is that there may be nonresident alien heirs, in whom the title would vest, subject to forfeiture or escheat upon failure to appear and claim within the five years, and that, in that event, until that time has elapsed, the state can have no title or right to a judgment declaring an escheat. In *State v. Smith* there were nonresident alien heirs who were known to exist. In *People v. Roach* this did not affirmatively appear, but the existence of such heirs was assumed as a possibility necessary to be considered in the disposition of the case. In both of those cases it is clear from the opinions that the court had in mind the existence of nonresident alien heirs, only, and was discussing the rule which should be applied with reference to them alone. Under our law of succession the title to the estate of a person dying intestate vests in the heirs, whether known or unknown, immediately upon his death. Civ. Code, § 1384; *Smith v. Olmstead*, 88 Cal. 586, 26 Pac. 521, 12 L. R. A. 46, 22 Am. St. Rep. 336; *Phelan v. Smith*, 100 Cal. 164, 34 Pac. 667; *Bates v. Howard*, 105 Cal. 183, 38 Pac. 715; *Murphy v. Clayton*, 114 Cal. 528, 43 Pac. 613, 46 Pac. 460; *Estate of Packer*, 125 Cal. 397, 58 Pac. 59, 73 Am. St. Rep. 58. In the case of nonresident alien heirs this title becomes barred, or forfeited, under the provisions of sections 672 and 1404 of the Civil Code, at the end of five years from the death of the deceased, unless within that time such heir appears and claims the property. *Estate of Pendergast*,

143 Cal. 140, 76 Pac. 962. And this occurs without any judicial proceeding, and even if the heirs be well known. In such cases the purpose of a proceeding under sections 1269-1272, Code of Civil Procedure, is merely to establish the disputable facts, that the heirs are nonresident aliens and that they have not claimed. From these facts spring the forfeiture, and the investiture of title in the state. As to such nonresident alien heirs, therefore, it follows that the proceeding could not be maintained until after the lapse of the five years necessary to produce the forfeiture. As applied to the fact considered by the court in those cases, the fact that the heirs were nonresident aliens, it was proper enough to hold that the cases were prematurely begun. The resident heirs, however, are not barred ipso facto by any statutory forfeiture. They can be barred only by a judgment in a proceeding by information such as is here sought, and then only after the lapse of 20 years from the judgment. The only sound reason for holding the proceeding premature as to this class of heirs, is that it is necessary to await the five years before proceeding against the nonresident aliens, whose existence is always possible where the heirs are unknown, and as the statute provides for but one proceeding, it must be postponed as to all classes of heirs until it can be maintained against all.

Upon another point, however, we think the case of *People v. Roach*, supra, requires some modification. The case went off upon the theory, that such heirs as there might have been in that estate were nonresidents and aliens. The existence of such alien heirs being assumed, the only point necessary to be decided in the case was that it was prematurely begun. The effect of an allegation, that there were no heirs was fully considered, but there does not seem to have been any consideration of the question, how that fact could be alleged and proved, where such allegation and proof are required by a statute. If it were legally impossible that it could be true, then, manifestly it could not be legally established at all. An examination of the provisions of the statute leads us to the conclusion that it is not thereby intended that the fact of the nonexistence of heirs shall be established in that proceeding, in the ordinary method, by the production of evidence to that effect. Such a requirement would defeat every such proceeding and render the statute wholly nugatory. Section 1269 provides that the information must set forth "the facts and circumstances in consequence of which the estate is claimed to have escheated, with an allegation that, by reason thereof, the state of California has right by law to such estate." With respect to resident heirs, the estate could not escheat, unless there were no such heirs in existence, or at least unless there were none in existence in contemplation of law, however the actual fact might be. It would be necessary, under

this provision, therefore, with respect to such heirs, to make an allegation that there were "no heirs to take the estate," which is the condition necessary under section 1386 of the Civil Code, to cause the property to escheat to the state. We do not see how this can be done except by a direct averment to that effect, nor how it can be held that this is not a sufficient allegation of the fact to serve as a support for the proceeding. As to nonresident aliens, it would be sufficient to aver that none has appeared and claimed and that the five years had elapsed. The proof is regulated by section 1271. It provides that any person named in the information, or any person claiming an interest, though not named, may appear and contest the title of the state, but that "if no person appears and answers within the time, then judgment must be rendered, that the state be seised" of the property claimed in the information. From this it is clear that there need be no further proof. The failure of any claimant to appear, after the 40 days' publication required, is by this statute made sufficient proof, provisionally and for the purpose of authorizing a judgment of the fact that there are no heirs, "to take the estate," and of the right of the state to such judgment. It is true that it also provides that if any claimant appears, and takes issue upon the information, there must be a trial of the issue, as in civil actions, and that if, upon such trial, "it appears from the facts found or admitted that the state has good title" to the property or any part thereof, "judgment must be rendered that the state be seised thereof, and recover costs of suit against the defendant." It is silent with regard to the effect of a finding that the person so appearing is entitled to a part of the estate, but obviously in that event there should be a judgment in his favor for such share. This provision for a trial, however, must be taken to refer solely to the issue between the claimant and the state concerning the share claimed by such person, and not to the right of the state against persons not appearing. The meaning and effect of the statute is that if, on the trial of such issue, the proof shows that the claimant is not an heir, or entitled to the estate, or some share thereof, then such claimant must fail, and judgment must thereupon go in favor of the state for the whole of the property described, although there may be no proof of the nonexistence of heirs, other than the constructive proof afforded by the fact that no heir or person entitled has appeared." The state is not required to prove the impossible in any other manner, or to any greater extent, than this.

The reasonableness of this construction is shown by the provisions of section 1272, that at any time within 20 years after judgment of escheat, any person not a party or privy to the proceeding, may appear and prove his heirship, or right to the property, and there-

upon shall receive the property, or its proceeds if it has been sold in the proceeding. This shows that the real purpose and effect of the proceeding, with regard to unknown heirs, is not to establish by ordinary modes of proof, the nonexistence of heirs, but merely to make a statutory, prima facie, showing of failure of heirs, in order to start the running, as against such nonappearing heirs, of a period of 20 years, after which such heirs will be barred, if not under legal disability, otherwise, within five years after such disability ceases. We are of the opinion that the information shows no present right in the state, because begun within the five years after the death of Hemker, but that the allegations are sufficient to have put all claimants upon their proof, if the proceeding had been instituted after the five years had elapsed.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

#### STATE v. MIZIS.

(Supreme Court of Oregon. June 12, 1906.)

##### 1. CRIMINAL LAW — APPEAL — CHANGE OF VENUE—DENIAL—ABUSE OF DISCRETION.

An application for a change of venue, in a prosecution for a felony, because an impartial trial cannot be had in the county where the action is brought, authorized by B. & C. Comp. § 1250, is addressed to the discretion of the trial court, and its action in granting or refusing the same will not be disturbed on appeal, in the absence of a showing of manifest erroneous exercise of discretion to the substantial injury of accused.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3044.]

##### 2. SAME.

Where, in a prosecution of certain Greeks for riot, the state, in resistance of an application for a change of venue for local prejudice, filed affidavits of five of the seven grand jurors who returned the indictment against defendant, the affidavits of the sheriff and his deputy, and the affidavits of 106 citizens of the county, to the effect that they were familiar with the sentiment of the people in reference to the crime charged, and that in their opinion a fair and impartial trial could be had in the county, and no difficulty was experienced in securing a jury, the denial of the application, supported largely by nonresident countrymen of accused, who claimed they had made diligent inquiry concerning the feeling of the inhabitants, and that it was unsafe for them to go to trial in that county, was not an abuse of discretion.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 243.]

##### 3. SAME—POSTPONEMENT — APPEAL — DISCRETION.

Denial of an application by accused for a postponement of the trial will not be reviewed on appeal, except for abuse of discretion.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3045-3048.]

##### 4. SAME—GROUNDS FOR CONTINUANCE.

Where counsel for accused, after the denial of a change of venue, made no request for a postponement for a reasonable time to enable them to prepare for trial, but requested a continuance of the cause over the term because they had not had sufficient time to pre-

pare for trial, the denial of the application was not an abuse of discretion.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1316, 1317.]

#### 5. RIOT—OFFENSE—ELEMENTS.

B. & C. Comp. § 1913, defines riot as the use of any force or violence or any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons acting together and without authority of law. *Held*, that it was not necessary, under such section, that three persons should do the same identical act, but that it was sufficient to constitute the offense if three persons had a common purpose to do the act complained of or were engaged in aiding or assisting one another in accomplishing such common purpose with the use of force and violence or threats without authority of law, though the individual act of each was separate from that of the others.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Riot, §§ 1-5.]

#### 6. SAME—COMMON PURPOSE—PROOF.

In a prosecution for riot, it is not necessary that the common purpose of the rioters should be established by positive proof, but such purpose and intent may be inferred and found from the circumstances and acts committed.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Riot, § 11.]

#### 7. SAME—EVIDENCE.

In a prosecution for riot, evidence *held* sufficient to sustain a conviction.

#### 8. CRIMINAL LAW—APPEAL—OBJECTIONS NOT MADE AT TRIAL.

Where, in a prosecution for riot, the only objection to the introduction of impeaching testimony was that it was not proper impeaching testimony, such objection was insufficient to sustain a contention on appeal that the witnesses were not shown to be competent to testify.

#### 9. RIOT—INSTRUCTIONS.

Where, in a prosecution for riot, the court charged that, before either of the defendants could be convicted, the jury must find beyond a reasonable doubt, not only that such defendant participated in the alleged riot, but that at least two of the other persons whose names were averred in the indictment were present at the time the riot occurred, if one occurred, and were acting in concert with said defendant, and that they assembled with the common intent to do the act charged in the indictment, an instruction that each of the defendants must have been "acting in conjunction with not less than two other persons in committing the act," was not objectionable, as misleading the jury to infer that any two persons would answer the requirement.

Appeal from Circuit Court, Douglas County; L. T. Harris, Judge.

Anton Mizis was convicted of riot, and he appeals. Affirmed.

The defendants, together with James Piantes and Anton Mizis and three others, whose names were to the grand jury unknown, were indicted for riot. They were all Greek laborers, engaged with some 75 or 80 of their countrymen in repairing the track of the Southern Pacific Company at or near Glenbrook, a station about 30 miles south of Roseburg. They were under the charge of foremen and lived in "outfit cars," which, for about a week prior to the commission of the alleged crime, had been standing on the siding at Glenbrook. About 10 o'clock on the night of October 10, 1905, an extra

freight train "headed in" on the siding to clear the main track for the north-bound passenger train then about due. It coupled onto the outfit car nearest the switch and pushed it and those connected with it down against the other cars with such force and violence as to cause considerable damage to the furniture and belongings of the occupants. This so enraged the Greeks that a large number of them rushed out of the cars, ran down the track toward the freight train armed with guns, pistols, and other firearms, and began a general fusillade at and in the direction of the freight train and its crew. The fire was returned by one of the brakemen, who secured a gun from a house nearby, and some shots were fired by the foreman. There were fired in all from 75 to 100 shots. During the difficulty the wife of the foreman was killed and one of the Greek laborers injured. The passenger train arrived a short time after the difficulty commenced, when it ceased, and the Greeks returned to their cars. The freight train then backed down to the nearest station and the county officers at Roseburg were notified of the trouble, and the sheriff sent a posse in charge of a deputy to the scene of the difficulty, who arrested and brought all the Greeks to Roseburg, where they were confined in a warehouse guarded by the state militia who had been ordered out by the county judge at the request of the sheriff.

The circuit court, with a grand jury, was in session, and the grand jury, after an investigation of the matter, returned an indictment on the 19th against the defendants for riot, charging, among other things, that being armed with dangerous weapons, namely shotguns, pistols, and rifles, they made a felonious assault with such weapons on Jesse L. Woodson and Jesse McCulloch, the engineer and fireman of the freight train, by shooting at them. The defendants were arraigned and given until the next morning at 8:30 o'clock to plead. At that time they appeared by counsel, entered a plea of not guilty, and moved for a change of venue, on the ground that they could not expect a fair and impartial trial in the county. This motion was supported by and based upon the joint affidavit of the defendants and the affidavits of Mr. Voicy, the deputy consul for Greece, residing in San Francisco, Andrew Papageogopoulos, and John Marandas, two Greeks residing in Portland; the latter being a labor agent of the Southern Pacific and Oregon Railroad & Navigation Companies.

The affidavit of the defendants states that they are natives of Greece employed by the Southern Pacific Company and had been so employed for a long time; that there is a strong prejudice among the people of the county against them and their fellow countrymen being so employed, and that such feeling was greatly intensified by the trouble at Glenbrook, that immediately after such trouble they, in company with other of their

fellow workmen, were arrested and brought to Roseburg, where they had since been confined and held in custody under guard of the militia; that a large number of persons were in attendance upon the circuit court at the time they were taken to Roseburg, and that the matter of the alleged riot had been discussed by every one in the city, and reports thereof, garbled and in the main untrue, had been carried all over the county by persons in attendance upon the court and by the daily and weekly newspapers of the county and of the city of Portland; that by such means the alleged riot had been given great publicity throughout the entire county to the prejudice of the defendants; that members of the regular panel of jurors had been in Roseburg since the difficulty and had, as affiants believed, conversed with the witnesses for the state and other persons pretending to know the facts in relation thereto, and had freely expressed opinions concerning the same prejudicial to affiants; that, on account of such reports and of the publicity given the matter, there is great prejudice in the county against the affiants; and that they could not obtain a fair and impartial trial therein. Mr. Volcy says in his affidavit that he came to Roseburg in response to a telegram advising him that 84 Greeks in the employ of the Southern Pacific Company were under arrest; that upon his arrival he found them confined in a warehouse guarded by the militia; that he made diligent inquiry among the prisoners and citizens of the county and ascertained that there is a strong prejudice against the defendants, on account of which it would be impossible for them safely to go to trial; and that he did not believe a fair and impartial trial could be had in the county. Papageogopoulos states that he came to Roseburg on the 11th of October after the difficulty at Glenbrook; that when he first came he secured a room at a hotel, but when it was discovered that he was a Greek he was compelled to vacate and was unable to obtain another until aided by the sheriff; that during his stay in Roseburg he had found a prejudice among the people against the Greeks so intense that in his opinion the defendants could not secure a fair and impartial trial in the county.

Marandas' affidavit was substantially to the same effect as the others. He attaches thereto articles from the Roseburg papers giving an account of the difficulty. One of these is from the Roseburg Review. It is headed: "Death in a Riot. Wife of Section Foreman at Glenbrook Killed. Is Mrs. John A. Petersein. Freight Train Jolts Cars Occupied by Greeks Who Open Fire—One Wounded by Brakemen"—and proceeds to say that, during a riot of Greek section hands, precipitated by the severe jolting of their cars by the freight train, the wife of the foreman was killed and a Greek injured; that the Greeks to the number of 83 were arrested and brought to Roseburg

that day and were quartered in the Josephson warehouse, where they were closely guarded by the militia pending an investigation; that the body of the foreman's wife was also brought and taken to the undertaker's, where an autopsy was held; that complete and accurate details of the difficulty were hard to obtain, but according to reports the Greeks became enraged because the cars occupied by them were struck with unusual severity by the freight train, and armed with rifles, revolvers, and shotguns, swarmed out of the cars and made a rush for the freight train, and the engineer and fireman were driven from the engine by a fusillade of bullets which riddled the cab; that the rest of the freight train crew were obliged to flee for safety; that one of the brakemen ran to a nearby house, secured a rifle, and returned to the train giving battle to the Greeks, when he fired four shots, so the story goes, wounding one of the Greeks and causing the rest to disperse; that the foreman and his wife, attracted by the shooting, went to the door of their car to look out, when suddenly three shots were fired in quick succession, one of which pierced the breast of the woman, instantly killing her; that the identity of the person who fired the shot could not be ascertained, but the belief prevails that it was intended for the foreman and was fired by one of the Greeks as threats had been made against his life; that, as soon as the news of the riot reached Roseburg, a posse of 28 men and a deputy sheriff and the city marshal left in a special train; that when they arrived at Glenbrook they found the Greeks in bed and everything quiet; that the Greeks were brought to Roseburg and unloaded from the cars about noon and placed in the warehouse in charge of the militia, which had been ordered out for the occasion by the county judge at the request of the sheriff; that an autopsy on the remains of the foreman's wife would be held that afternoon and the inquest on the morrow.

Another article was from the Roseburg Plaindealer of the 12th, the headlines of which were: "Drunken Greeks Attack and Kill the Foreman's Wife. While under the Influence of Liquor They Create a Bad Disturbance at Glenbrook, with Disastrous Results." It states that seldom has Roseburg been more aroused than it was by the trouble at Glenbrook Tuesday night; that Foreman Petersein had an extra gang of Greeks surfacing the road, and they went on a big drunk, quarreled with Petersein, and finally cornered him in his car, and, when he attempted to defend himself, shot and killed his wife who was at his side; that about that time an extra freight train came along and a regular warfare began, the engineer being kept busy dodging bullets until Brakeman Johnson got a rifle from the caboose and began firing in the air, when the Greeks scattered and the trouble soon subsided. It

then gives an account of the sheriff's posse going to the scene of the trouble, the arrest and bringing of the Greeks to Roseburg on the special train; that by the time the train arrived at Roseburg a large crowd had congregated at the depot expecting to see trouble, but that the Greeks were meek and submissive and were not in a fighting mood; that the members of the militia were much in evidence and rendered the sheriff valuable assistance in handling the crowd and getting the prisoners to the warehouse, where they will camp until the trouble is over and they are discharged; that several ladies were at the train and seemed to take much interest in the matter; that every available space on top of box cars, warehouses, and elsewhere was filled by the crowd to see the sheriff search the prisoners as they were marched up by the soldiers; that it was an orderly crowd, and, although there was thought to be ground for lynching, there seemed to be a desire for the law to take its course, all hoping that the guilty ones would be amply punished. The article then states that an autopsy was had on the remains of Mrs. Petersen, and that the inquest was then in progress and would likely continue throughout the day; that in the meantime the militia had the prisoners in hand, and had kept them safely through the night before, although it was rumored that they would be dynamited; that during the afternoon the 83 Greeks were being marched by the militia to the coroner's inquest and from there to the grand jury room.

Another article was from the Roseburg Review of the 17th, with headlines as follows: "No Foreign Labor. Local Merchants Association Goes on Record. Resolutions are Passed Asking S. P. Co. to Displace Its Alien Laborers in Douglas County with Americans." It states that, in accordance with the prevailing sentiment throughout the community, the Merchants' Protective Association has passed certain resolutions, which were published in full, requesting the Southern Pacific Company to remove all gangs of foreign laborers from the county because they were disposed to insulting conduct on the streets and public highways, to committing larceny from the farmers and those living in the vicinity of their camps, and manifested a general disrespect for law and order.

The remaining article was from the Review of the 19th, purporting to be a reprint of an article from a Portland paper. It was headed: "As Viewed by Trainmen"—and was to the effect that investigation of the trouble had revealed the startling fact that every caboose is an arsenal, and that every freight brakeman and engineman on the road wears a 44-caliber Colt's revolver strapped to his body, as the train crews believed their lives to be in danger from the excitable and ignorant Greeks, and have therefore for some time been taking precautions to defend themselves in any emergency that might arise.

In refutation of the proofs submitted by the defendants in support of their motion for a change of venue, the state filed the affidavit of five of the seven grand jurors that returned the indictment against the defendants, the affidavits of the sheriff and his deputy, and the affidavit of 106 citizens of the county, to the purport and effect that they were each and all residents of the county and were familiar with the feeling and sentiments of the people in reference to the crime charged against the defendants, and that in their opinion a fair and impartial trial could be had in the county. Upon this showing the court overruled the motion. The defendants then moved for a postponement of the trial until the "next regular term" of the court. This motion was based upon the affidavits previously filed for a change of venue, and the additional affidavit of the defendants' counsel to the effect that neither they nor the defendants were advised of the charge until the indictments were returned late in the afternoon of the 19th; that the defendants were immediately arraigned and given until the next morning at 8:30 in which to plead; that Messrs Fullerton & Orcutt were not retained as counsel until late in the afternoon of the day the indictments were returned; that the brief time since the arraignment had been consumed in preparing and submitting the motion for a change of venue, and therefore counsel had had no time, since being informed of the nature of the charge, in which to confer with their clients or prepare for the defense. This motion was likewise overruled, and the defendants required to go to trial immediately. The defendant Mizis demanded a separate trial, and it was commenced on the 20th. Seven of the jurors were secured from the regular panel and the remaining five from a special venire of fifteen. On the 23d a verdict of guilty was returned against him, and the trial of the other defendants jointly commenced. The record discloses no special difficulty in securing a jury. Georges and Demas were convicted on the 25th and the defendant Pilantes acquitted. Motions for new trials in each of the cases were overruled, and judgment entered on the verdicts, and defendants appeal. The two appeals were argued and submitted as one, and will be so treated for the purposes of the decision. The points relied upon for reversal will be noted in the opinion.

Frank G. Micelli, J. C. Fullerton, and A. N. Orcutt, for appellant. George M. Brown, Dist. Atty., for the State.

BEAN, C. J. (after stating the facts). The first point relied upon for reversal is that the court erred in overruling the motion for a change of venue. Where an action for a felony is at issue upon a question of fact, the place of trial may be changed, when it appears by affidavit to the satisfaction of the court that a fair and impartial trial cannot be had in the county where the action

is brought. B. & C. Comp. § 1250. But an application for that purpose is addressed to the discretion of the trial court, and its action in granting or refusing the same will not be disturbed on appeal, unless there is manifestly an erroneous exercise of such discretion to the substantial injury of the accused. *State v. Pomeroy*, 30 Or. 16, 46 Pac. 797; *State v. Savage*, 36 Or. 191, 60 Pac. 610, 61 Pac. 1128; *State v. Humphreys*, 43 Or. 44, 70 Pac. 824; *State v. Armstrong*, 43 Or. 207, 73 Pac. 1022. Upon the showing made in the case there was, in our opinion, no abuse of discretion. The affidavits in support of the motion were all made by non-residents who had been in the county but a few days, and, in the nature of things, could not have been familiar with the general public sentiment. On the contrary, the affidavits filed by the prosecution were by officers, citizens, and residents of the county who all state that they were familiar with the public feeling, and that in their opinion a fair and impartial trial could be had in the county. This view was subsequently confirmed by the fact that no particular difficulty seems to have been experienced in securing a jury. It is true the newspaper articles made a part of the record were inaccurate in many particulars and somewhat sensational, but they were not particularly inflammatory or calculated to so prejudice the citizens of the county against the defendants as to prevent a fair and impartial trial.

The next contention is that the court erred in overruling the motion for a continuance. The grounds of the motion were the alleged excited state of the community and the want of sufficient time for counsel for the defense to prepare for trial. The postponement of a trial, like that of a change of venue, rests in the discretion of the trial court, and its ruling will only be reviewed for abuse. *State v. O'Neil*, 13 Or. 183, 9 Pac. 284; *State v. Hawkins*, 18 Or. 476, 23 Pac. 475; *State v. Howe*, 27 Or. 138, 44 Pac. 672; *State v. Flester*, 32 Or. 254, 50 Pac. 561. A defendant in a criminal action is entitled as a matter of right to the aid of counsel and to a suitable time, after he is informed of the nature of the accusation against him, to prepare for trial, and, if the application in this case had been for a postponement for a reasonable time for such purpose, quite a different question would have been presented to the trial court. But the application was to postpone the trial for the term, which would have taken it over until the following January, and there was not sufficient reason shown for such a delay. If counsel desired more time in which to prepare for trial, they should have so advised the court and asked for a postponement for that purpose, and it would probably have been granted. Having confined their application to a request for a continuance for

the term, there was no reversible error in denying it.

At the close of the state's case, defendants moved the court to direct an acquittal, for the reason that there was no proof of the commission of the crime of riot, or that either of the defendants participated therein. Whatever the definition of a "riot" may be at common law or in other jurisdictions, it is settled here by statute as "any use of force or violence, or any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons acting together, and without authority of law." B. & C. Comp. § 1913. To constitute a crime under this statute, there must be: First, the use of force or violence or threats to use force or violence, accompanied by immediate power of execution; second, such force or violence or threats must be by three or more persons acting together; and, third, they must be acting without authority of law. It is, of course, not necessary that the three persons should do the same act in the sense that what one does must be identical with what is done by each of the others to constitute an "acting together," within the meaning of the statute. It is enough if they have a common purpose to do the act complained of or are engaged in aiding and assisting one another to accomplish such common purpose, although the individual act of each may be separate from that of the other. Otherwise riot is an impossibility. For, as said by Mr. Justice Stephens, in *Prince v. State*, 30 Ga. 27: "It is impossible that the action of each shall not have a certain individuality which will distinguish it from the action of all the rest. In tearing down a house, for instance, one rioter breaks down a door, and another breaks down a window, and a third merely hands a crowbar to one of his associates. Here each one's act is different from the acts of the others, and the act of one of them has in it nothing of violence. But there is an obvious legal sense in which they all do the same act. The common intent, which covers all the individual parts in the action, cements those parts into one whole, of which each actor is a responsible proprietor. The part performed by himself is his by perpetration, and the parts performed by the others, in execution of the common intent, are his by adoption. The principle is that each one adopts the performance of all the rest and adds them to his own, and thus does the whole, in the sense of the definition, so long as they are acting in execution of the common intent, but no longer." Nor is it necessary that there should be direct and positive proof of a common purpose, or that the parties should deliberate beforehand or exchange views before entering upon the execution of their design. The purpose and intent may be inferred and found by the jury from the circumstances and the acts

committed by them. *United States v. McFarland et al.*, 1 Cranch, C. C. 140, Fed. Cas. No. 15,674; *United States v. Peaco et al.*, 4 Cranch, C. C. 601, Fed. Cas. No. 16,018; *Astor Place Riot Case*, 11 Daly (N. Y.) 1.

Now, let us apply these principles to the testimony and see whether there was any evidence of a riot and of the defendants' participation therein. Mr. Petersein, the foreman of the gang to which the defendants belonged, testified that, about the time of the difficulty, he was returning from a nearby house accompanied by his wife and Assistant Foreman Claudfelder, and as he approached the railroad track he saw a brakeman having some difficulty with his men; that he went to his car, got his rifle, and fired several shots into the air and ordered the men to return to their cars, but they did not do so and continued down the track toward the engine; that he immediately heard perhaps 25 or 30 shots fired near or about the engine of the freight train, and from 75 to 100 shots in all, and there was quite a difference in the volume of the sound; that on his way to his car he saw the defendant Mizis armed with a gun in a crowd going in the direction of the engine; that Mizis said they had broken his stove and he was going "to kill the son of a bitch"; that he could not say whether all his men were out of the cars or not, but that most of them were. Claudfelder said that, as he and Petersein came onto the right of way, he looked down the track toward the freight train and saw quite a body of men moving in that direction; that he started to his own car, and, as he did so, passed a number of men going north and recognized Mizis, who was armed with a pistol and said they "had broken his stove and he was going to kill" them; that he saw a number of guns and pistols flash in the moonlight, and just had time to get to his car, when he heard a great number of shots fired in the vicinity of the engine of the freight train, and there was a difference in the volume of the reports; that he was acquainted with Georges and Demas, as they both belonged to Petersein's gang, but he did not see either of them that night.

McCulloch, the fireman of the freight train, testified that, at the time the train pulled in on the siding and stopped, the defendant Georges and 10 or 15 other men came up to the gangway of the engine, and Georges said to the engineer, "Come down, you son of a bitch, if you want to fight," and that he would kill him; that several shots were fired at the engine before the witness left it, three passing through the witness' window and one through that of the engineer and the glass was broken out of the front of the cab; that witness examined the engine the next day and found marks of bullets and shot, which indicated that the firing had been done from the front. Woodson, the engineer, testified that, about the time or soon after his train

came to a stop on the siding, somebody commenced shooting at the engine; that the firing first came from the right side of the cab through the front door and then from the left side; that a number of Greeks, none of whom he recognized, came to the engine, and one of them put his hand on the side of the tank and said to witness, "Damn son of a bitch, I kill you," and invited him to get down from the engine and was mumbling something about upsetting a stove or something of that kind; that, after several shots had been fired at the engine, witness jumped down and started to run toward the caboose, and some one commenced shooting at him and kept it up until he fell into a ditch which crosses the track; that at least 8 or 9 shots were fired at him from the time he left the engine until he reached the ditch, and that more than 100 shots were fired in all that night; that he examined the engine the next morning and found the shots came through the doors in front, and he also found the impress of a large bullet on the main reservoir under the fireman's seat and grains of shot in the cab and tank box. Johnson was a brakeman on the freight train, and testified that after the train pulled in on the siding he heard shots up front, and, supposing the head brakeman was having some trouble with "hoboes," started in that direction and met the defendant Georges and Demas in company with several other persons; that Georges grabbed him by the arm and inquired if he was the conductor, and, being answered in the negative, asked where the conductor was, and was told that he was in the caboose; that Georges said, "I kill the conductor," and, "I kill you, you son of a bitch," and slammed him up against a car; that witness broke away from Georges and started to run toward the caboose, and when he got about two car lengths from it some one commenced firing at him, and he dodged between the cars and over to the other side of the train and ran to the caboose and told the conductor that if they would kill him they would kill him; that the conductor went out the front door of the caboose, and witness out the rear and ran for the track-walker's shanty; that shots were fired at him all the time he was going there; that at the time Georges told the witness that he would kill the conductor, Demas was standing at his side mumbling something which the witness did not understand; and that Georges and Demas seemed to be the leaders of the crowd, but witness could not say whether either of them was armed or not. Gallings, the conductor of the freight train, testified that, after he was advised by Johnson to leave the caboose, he started to run toward the trackwalker's shanty, and on the way he met Georges, who wanted to know if he was the conductor, and, being answered in the negative, said he would "kill the son of a bitch," and started on toward the caboose; that Georges was armed with a gun of some kind at the time, and although witness did not see

any other persons he heard others talking nearby.

There was much additional testimony as to the general character of the difficulty, the number of shots fired, and the like, but this is sufficient to show that there was abundant evidence tending to prove the use of force and violence by three or more persons acting together and without authority of law, and hence the crime of riot; and that the defendants Georges, Demas, and Mizis were either actively engaged in such riot or present aiding and assisting others to commit the crime.

A claim is made that the proof does not show that there was any community of action between the defendants, or that either of them did the shooting at the fireman and engineer as charged in the indictment, or assisted, aided, or encouraged the same. But there was sufficient proof on both of these points to take the case to the jury. Mizis, in company with a crowd of his fellow countrymen, was seen approaching the engine armed with a gun and was using threatening language toward the trainmen just before the firing began. Georges was at the engine about that time threatening the life of the engineer, and Demas was shown to have been in the crowd a few minutes later actively participating in the difficulty. So the jury were justified in finding that they were acting together and with a common purpose, and that they either did the firing at the engineer and fireman, or induced or encouraged others to do it. "Riot" is a compound offense, to constitute which there must be a joint action of three or more persons. But all who aid, encourage, or promote it by words, signs, or other acts, are principals and jointly guilty of the offense. It is not necessary that a party should commit some personal violence or do some other physical act, but any act of assistance or encouragement is sufficient to make him a principal. If he is busy while the riot is in progress in guiding, directing, inciting, or encouraging others to commit acts of violence, he is as guilty as the instrumentalities he puts in motion.

The defendants testified as witnesses in their own behalf. And, for the purpose of impeaching them, the state called Petersein, Claudfelder, and Wonacott, who each testified that the general reputations of the defendants for truth and veracity were bad. No objection was made to this testimony when offered or to any of the questions propounded to the witnesses, except the question asked Petersein if he knew the general reputation of Georges for truth and veracity, and the objection then made was that the question was incompetent, immaterial, and irrelevant. After the testimony of each of these witnesses had been admitted, counsel moved to strike it out, on the ground that it was not proper impeaching testimony, and an assignment of error is based on the overruling of this motion. The objection now made to the tes-

timony is that the witnesses were not shown to be competent to testify as to the general reputations of the defendants for truth and veracity in the community where they resided. But, as such an objection was not made when the testimony was offered, it cannot avail the defendants at this time. A technical objection which goes to the form of a question or to the competency of a witness to testify as an expert, or on a question of character, should be specific so as to apprise the court and opposite party of the ground of the objection, that they may act accordingly. And, as a general rule, it is not error for a trial court to refuse to strike out evidence, although immaterial or irrelevant, which has been admitted without objection at the time it is offered. 12 Cyc. 565.

It is also claimed that the court erred in instructing the jury that each of the defendants must have been "acting in conjunction with not less than two other persons in committing the act," because the jury might naturally infer that any two persons would answer the requirement. The instruction quoted, however, must be considered in connection with that portion of the charge in which the court told the jury specifically that, before they should convict either of the defendants, they must find beyond a reasonable doubt, "not only that such defendant participated in the alleged riot, but you must also find that at least two of the other persons, whose names are stated in the indictment, were present at the time the riot occurred, if one occurred," and "were acting in concert with said defendant, and that they assembled with a common intent to do the act charged in said indictment."

There are objections to other parts of the charge, but they are mere verbal criticisms and do not affect the merits.

Finding no error in the record, the judgment is affirmed.

KATZ v. OBENCHAIN, Sheriff, et al.

(Supreme Court of Oregon. June 12, 1906.)

# 1. ATTACHMENT—LIEN—WAIVER—DOCKETING JUDGMENT.

B. & C. Comp. § 301, provides that the sheriff's certificate of an attachment of real property shall be delivered by the sheriff to the county clerk of the county in which the attached property is situated, and section 303 requires the clerk to immediately file the same in his office and record it in a book to be kept for that purpose, and that thereupon the lien in favor of the plaintiff shall immediately attach to such real property described therein. Section 309 provides that if judgment be recovered by plaintiff, the court shall order and adjudge the attached property to be sold to satisfy plaintiff's demand. *Held*, that where a suit was brought against a nonresident by attachment, the proceeding was in rem, and plaintiff's failure to properly enter his judgment when recovered in the judgment lien docket did not operate as a waiver of his attachment lien.

## 2. SAME—DURATION OF LIEN.

An attachment lien continues after the rendition of the judgment until the debt is

paid or the property is sold under execution issued on the judgment or the judgment is satisfied or the attachment discharged or vacated in some manner provided by law.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, §§ 583, 593, 594, 596.]

### 3. JUDGMENT—LIEN—NONRESIDENTS—ATTACHMENT.

In an action by attachment against a non-resident, no personal judgment against defendant could be rendered, and hence the entry of the judgment recovered in the general lien docket could not operate as a general lien on property of the judgment debtor not attached.

### 4. ESTOPPEL—KNOWLEDGE OF FACTS—RIGHT TO PLEAD.

Where plaintiff had no knowledge that M.'s attorney had directed the sheriff not to sell certain real estate subject to an attachment sued out by M., under a previous execution, at the time plaintiff purchased the property, plaintiff was not entitled to claim that M. was thereby estopped to claim that he had not waived and abandoned his attachment lien.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, §§ 136-139.]

### 5. ATTACHMENT—WAIVER OF LIEN—ACTS OF ATTORNEY.

Where the attorney for the holder of an attachment lien on certain property which was subject to a mortgage directed the sheriff not to sell the property at the time because of the attorney's opinion that the property was not then worth the amount of the mortgage and the costs and expenses of the sale, and it was not shown that the attorney either had authority to waive the attachment lien or that he intended to do so, such facts were insufficient to show a waiver of the lien.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, §§ 585, 596.]

### 6. MORTGAGES—CONVEYANCE TO MORTGAGEE—MERGER OF INTERESTS.

Where property subject to a mortgage and a subsequent attachment lien was conveyed through a third person to the mortgagee, there was no merger of the mortgage as between the mortgagee and the attaching creditor.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 821.]

### 7. QUIETING TITLE—ADVERSE CLAIMS—LIMITATIONS.

Where the holder of a prior mortgage on certain real estate subject to an attachment lien acquired the fee and while in possession brought suit against the holder of the attachment lien to restrain a sale under the attachment such suit was not barred by limitations because a suit to foreclose the mortgage was then barred.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, § 63.]

### 8. EQUITY—PRAYER FOR RELIEF—DECREE.

Where, in a suit to restrain the sale of certain real estate under an attachment lien, the complaint alleged the facts out of which the equities in plaintiff's favor arose and contained a general prayer for relief, it was sufficient to enable the court to award such a decree as the law and the facts justified.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 1009, 1012.]

Appeal from Circuit Court, Klamath County; Henry L. Benson, Judge.

Action by Israel Katz against Silas Obenchain, sheriff of Klamath county and others. From a judgment for plaintiff, defendants appeal. Reversed.

On December 8, 1892, Quincy A. Brooks and wife mortgaged blocks 71, 72, 73, 86,

and 87, in Klamath Falls, to the plaintiff to secure the payment of a promissory note for \$1,250 due one year after date, and bearing interest at 10 per cent. per annum, and such mortgage was duly recorded on December 16, 1892. Brooks and wife were at the time and continued thereafter to be nonresidents of the state. On July 21, 1894, one Meyer commenced an action at law against them in the circuit court for Klamath county to recover money and caused the property included in the plaintiff's mortgage, together with a large amount of other real property belonging to them in that county, to be attached to satisfy any judgment he might recover. Thereafter service was had by publication upon Brooks and wife, and on November 20, 1894, Meyer recovered a judgment against them for \$5,727.75 and costs, and an order adjudging and directing the sale of the attached property to satisfy the same. This judgment was immediately entered in what was used as the judgment lien docket, but was insufficient to create a lien because it did not show the time when docketed. *Hutchinson v. Gorham*, 37 Or. 347, 61 Pac. 431; *Western Sav. Co. v. Currey*, 39 Or. 407, 65 Pac. 360, 87 Am. St. Rep. 660. Soon after the rendition of the judgment an appeal was taken to this court, pending which Brooks and wife conveyed the mortgaged property to one E. C. Brooks. The Meyer judgment was subsequently affirmed, except in so far as it was a personal one against Brooks and wife. The mandate was entered in the court below on November 18, 1896, and the judgment again entered in the pretended judgment lien docket. On April 12, 1897, an execution and order of sale were issued thereon and all the attached property sold thereunder except that included within the plaintiff's mortgage. On May 30, 1898, E. C. Brooks and wife in consideration of the payment to them of \$500 in money by the plaintiff, and the release by him of Quincy A. Brooks and wife from any liability on their note and mortgage, conveyed the mortgaged property to the plaintiff and he is now and has ever since been the owner thereof. On February 1, 1905, an alias execution was issued on the Meyer judgment, and the property conveyed by E. C. Brooks and wife to plaintiff seized and advertised for sale, when this suit was commenced by plaintiff to enjoin such sale. In his complaint he sets out in detail the giving of the mortgage to him by Brooks and wife and the recording of the same, alleges that no part of the principal or interest has been paid, and that on May 30, 1898, he demanded payment thereof, and thereupon E. C. Brooks and wife conveyed the mortgaged property to him in consideration of the payment to them of \$500 and the release of Quincy A. Brooks and wife from further liability on such note and mortgage, and that such conveyance was recorded on October 30, 1900; that at the time of such conveyance E. C. Brooks was the owner in

fee of the property, and that plaintiff accepted the conveyance from him and paid the consideration therefor in good faith, without knowledge of any lien or incumbrance on the property, and has ever since been in the peaceable and quiet possession thereof, paying taxes thereon, and has either by himself or through his tenants made valuable improvements to the extent of more than \$3,000; that the defendant sheriff has seized and advertised the property for sale under the Meyer judgment, and that neither Meyer nor any one else has a valid and subsisting lien or claim on such property. The prayer is for an injunction restraining the sale of such property, and for such other and further relief as in equity may seem just. The defendants answered jointly, admitting and denying the allegations of the complaint, and for an affirmative defense pleads the Meyer judgment and the issuance of an execution thereon and that plaintiff's mortgage is barred by the statute of limitations. The reply puts in issue the averments of the answer, and affirmatively alleges that the lien of the attachment and judgment in the action of Meyer against Brooks, so far as it affected the property now in controversy, was abandoned at the time the execution was issued on the judgment in 1897, because the attorney for Meyer then directed the sheriff not to sell such property for the reason that it was of less value than the amount due the plaintiff on his mortgage. A decree was rendered in favor of the plaintiff as prayed for in the complaint, and the defendants appeal.

F. H. Mills, for appellants. J. C. Rutenic, for respondent.

BEAN, C. J. (after stating the facts). The important questions on this appeal are (1) whether the attachment lien in the action of Meyer v. Brooks was waived or lost by the failure to make a proper entry of the judgment in the judgment lien docket; and, if not (2) whether the plaintiff's rights under his mortgage were, as against the subsequent lien of Meyer's attachment, merged in the legal title acquired by him through E. C. Brooks.

The statute provides that the sheriff's certificate of the attachment of real property shall be by such officer delivered to the county clerk of the county in which the attached property is situate (B. & C. Comp. § 301), and that such clerk shall immediately file the same in his office and record it in a book to be kept for that purpose, and thereupon "the lien in favor of the plaintiff shall immediately attach to such real property" described therein (Id. § 303), and that if judgment be recovered by the plaintiff, the court shall order and adjudge the attached property to be sold to satisfy plaintiff's demand (Id. § 309). The proceeding by attachment is, therefore, in the nature of a proceeding in rem. It is against the particular property. The attach-

ing creditor thereby acquires a specific lien upon the attached property which ripens into a judgment against the res when the order of sale is made. Such a proceeding is in effect a finding that the property attached is an indebted thing and a virtual condemnation of it to pay the owner's debt. The statute does not provide the length of time an attachment lien shall continue after the rendition of the judgment, and it must therefore necessarily continue until the debt is paid, or sale is had under execution issued on the judgment, or until the judgment is satisfied, or the attachment discharged or vacated in some manner provided by law. The validity or continuation of an attachment lien is not made dependent upon the entry of the judgment in the judgment lien docket. A levy and sale under an execution issued on a judgment may be made without the judgment being docketed at all. A judgment itself, however, is no lien upon real property until docketed, but the lien acquired by an attachment remains and may be enforced, and the sheriff's certificate filed with the county clerk and recorded by him informs parties dealing with the debtor of the attaching creditor's claim upon the property as effectually as does the docketing of a judgment in the lien docket. It is optional with the creditor whether a judgment is docketed at all. If it is not properly entered in the judgment lien docket the creditor has no general lien on the real property of the defendant and the rights of bona fide purchasers and lien creditors subsequent to the judgment and prior to the seizure of property under execution issued thereon are in no way affected by the judgment. But the failure to docket the judgment does not waive or suspend the lien acquired by the previous attachment and order of sale. In the case under consideration, there could have been no benefit to Meyer in entering the judgment in the judgment lien docket. The action brought by him was against a nonresident. There was, therefore, no personal judgment against the defendants, and it would not have become a general lien if it had been docketed. The only remedy of Meyer was against the specific property. His lien thereon was acquired by the attachment; and, in the absence of a statute to the contrary, continued during the period an execution could issue on the judgment. *Bank of California v. Cowan* (C. C.) 61 Fed. 871; *Emery v. Yount*, 7 Colo. 107, 1 Pac. 686; *Floyd v. Sellers*, 7 Colo. App. 496, 44 Pac. 373; s. c., affirmed 24 Colo. 484, 52 Pac. 674. But, it is argued that Meyer waived and abandoned his specific lien upon the property in controversy because his attorney directed the sheriff not to sell it under a previous execution. The plaintiff had no knowledge of this fact at the time he purchased the property and therefore could not invoke the doctrine of estoppel as against Meyer. Besides there is no proof that the attorney had authority to waive the lien, or

that he intended to do so. The evidence is that he directed the property not to be sold at that time because in his opinion it was not then worth as much as the amount of plaintiff's mortgage, and the costs and expenses of the sale could not have been realized out of it. We think, therefore, that Meyer's attachment and judgment are still a valid and subsisting lien upon the property and may be enforced by execution.

The remaining question is whether such attachment and judgment take precedence over the prior mortgage of plaintiff or rather whether such mortgage was merged in the legal title acquired by him from E. C. Brooks, and was thereby satisfied. Mergers are not favored in equity. When a lessor and a higher estate meet and coincide in the same person they will be kept separate when equity and justice require it, unless there is an expressed intention to the contrary. "It is only in those cases," says Mr. Justice Lord, in *Watson v. Dundee M. & T. I. Co.*, 12 Or. 474, 483, 8 Pac. 548, 553: "Where it is perfectly indifferent to the party in whom the interests had united whether the charge or term should or should not subsist, that in equity the term is merged. But if the owner has an interest in keeping them distinct, or there is an intervening right, there will be no merger. \* \* \* In the absence then of an express intention to the contrary, the intention to keep the two estates separate will be implied or presumed, when it is for the interest of the party that they should be kept separate. It will not do, then, as was said by Elliott, J., to assume, as a matter of course, that there was a merger, for there are many cases in which, in order to prevent injustice, courts will not allow merger to take place, although all the essential elements of a technical merger combine in the particular case." It is consequently said by Mr. Pomeroy that "where a mortgagee takes a conveyance of the land from the mortgagor or from the grantee of the mortgagor, if the transaction is fair, the presumption of an intention to keep the security alive is very strong. It is generally for the interests of the party in this position that the mortgage should not merge, but should be preserved to retain a priority over other encumbrances. As the mortgagee acquiring the land is not the debtor party bound to pay off either the mortgage or the other encumbrances on the land, there is nothing to prevent equity from carrying out his presumed intent, by decreeing against a merger." 2 Pomeroy, Eq. (3d Ed.) § 793.

Now, the mortgage of the plaintiff was prior in time and right to the lien of Meyer's attachment, and it was therefore manifestly to the interest of the plaintiff that it should not be extinguished as against any subsequent lien by the conveyance to him of the legal title to the mortgaged property, and as there was no express intention of a merger, a court of equity will, in order to prevent an injury

to him, keep the two estates separate and distinct. *Watson v. Dundee, etc., Co.*, supra; and *Floyd v. Sellers*, supra. But, it is said the mortgage is now barred by the statute of limitation and cannot be foreclosed. This, however, is not strictly a proceeding to foreclose a mortgage, but rather a suit by the owner in fee of real property, who is in possession thereof, against one who is claiming or asserting some adverse claim or lien thereon, to have such right or claim determined, and is therefore not barred by the statute of limitation. *Meier v. Kelly*, 22 Or. 136, 29 Pac. 205. Again, it is said that the plaintiff does not by the prayer of his complaint ask to have his mortgage restored as against the Meyer's judgment. The complaint sets up the facts out of which the equities in favor of the plaintiff arise and contains a general prayer for relief. This is sufficient to enable the court to award such a decree as the law and the facts afford. *Rutenic v. Hamaker*, 40 Or. 444, 67 Pac. 196.

The decree of the court below will, therefore, be reversed, and one entered here directing the sale of the property in controversy and the distribution of the proceeds among the several parties interested therein according to their rights as set out in this opinion.

#### WOLF v. CITY RY. CO.

(Supreme Court of Oregon. June 12, 1906.)

APPEAL—FILING OF TRANSCRIPT—EXTENSION OF TIME.

Under B. & C. Comp. § 553, providing that upon the appeal being perfected, the appellant shall, within 30 days or within such an extension of time as the judge may allow, file a transcript, etc., an order granting an extension of time within which to file a transcript may be made immediately after notice of appeal has been given and before the filing of an undertaking.

Appeal from Circuit Court, Multnomah County; Alfred F. Sears, Jr., Judge.

Action of Mollie Wolf, as administratrix of the estate of Isaac Wolf, deceased, against the City Railway Company. From a judgment for plaintiff, defendant appeals. On motion to dismiss the appeal. Motion denied.

Alexander Bernstein, for the motion. O. F. Paxton and Wm. P. Lord, opposed.

PER CURIAM. Motion to dismiss an appeal because the transcript was not filed within the time allowed by law. The judgment from which the appeal was taken was rendered on October 7, 1905, and a notice of appeal thereupon given in open court. Thereafter and on the same day an order was made by the trial judge enlarging the time 60 days in which to file the transcript. On October 17, 1905, the undertaking on appeal was filed. On December 2d, a further order was made extending the time in which to

file the transcript, and similar orders were subsequently made, each within the time allowed by the previous order, until February 26, 1906, when the transcript was filed in this court. The statute provides, in effect, that upon the appeal being perfected the appellant shall, within 30 days, or within such an extension of time as the trial court or judge thereof, or the Supreme Court or justice thereof, may allow, file with the clerk of this court a transcript or such abstract as the rules of the court may require, but that the order enlarging the time "shall be made within the time allowed to file the transcript." B. & C. Comp. § 553. And it is argued in support of the motion to dismiss that, under this statute, an order enlarging the time in which to file a transcript cannot be made by the trial court or judge thereof until after the appeal is perfected by the filing of an undertaking and the expiration of the time in which to except to the sureties thereon, and that such is the meaning of the words "within the time allowed to file the transcript." Consequently the order of October 7th was null and void, and as no transcript was filed within 30 days after the appeal was perfected, nor an order obtained within that period extending the time in which to file the transcript, the appeal should be dismissed. But this is too technical a construction of the statute to meet with our approval. The act of 1899 (Laws Or. 1899, p. 227), which is now in force governing the procedure on appeal, was designed to simplify such procedure, and to remove many of the technicalities with which it was hedged about prior to that time. It should, therefore, receive a liberal construction to accomplish the end intended. The provision that an order enlarging the time "shall be made within the time allowed to file the transcript" simply means that it should be made before the appellant is in default. *Tallmadsge v. Hooper*, 37 Or. 503, 61 Pac. 349, 1127. And there is no valid reason why the trial court or judge thereof should not make such an order after the notice of appeal has been given, and before the appeal is perfected by the filing of an undertaking.

Motion denied.

#### PIERSON et al. v. FISHER et al.

(Supreme Court of Oregon. June 12, 1906.)

#### 1. APPEAL—ADMISSION OF EVIDENCE—PRESUMPTIONS.

Where no objection was made to certain evidence inadmissible under the pleadings at the trial, it would be assumed on appeal that the cause was tried as though the issue to which the evidence related, which was germane to the cause, was regularly made, and that the evidence was properly admitted.

#### 2. CANCELLATION OF INSTRUMENTS—DEEDS—SURRENDER OF CONSIDERATION.

A decree for the cancellation of a deed cannot be sustained without a return or a tender by the injured party of all property rights or

franchises that may have been received as a consideration for the deed.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, §§ 33-36.]

#### 3. SAME.

Where the grantor in a deed executed the same, but never voluntarily delivered it to the grantee, and never consented to receive as a part of the consideration the grantee's note and certain stock, which the latter left with the grantor on taking the deed from a table without the grantor's permission, no title passed by the deed, and no obligation rested on the grantor to offer to return the note and stock as a condition of the right to have the deed set aside as a cloud on title.

#### 4. DEEDS—DELIVERY—PRESUMPTION—BURDEN OF PROOF.

Where, in a suit to set aside a deed as a cloud on title, the executed deed was found in the possession of the defendant, who was the grantee named therein, such facts were sufficient to raise a presumption that the deed was regularly delivered, and the burden of overcoming the same was on the person alleging the contrary.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 577.]

#### 5. SAME.

Delivery of a deed is accomplished by the grantor voluntarily passing it to the grantee, or handing it to some person for him, or by the grantor doing or saying something by means of which he discloses an unmistakable purpose to part with all control over the instrument and put it out of his power to regain possession thereof.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 117-121.]

#### 6. SAME—EVIDENCE.

In a suit to set aside a deed as a cloud on title, evidence held sufficient to rebut the presumption that the deed found in the possession of the grantee was voluntarily delivered by the grantor with intent to pass title.

Appeal from Circuit Court, Yamhill County; William Galloway, Judge.

Action by Clark M. Pierson, as executor of the last will of Mary E. Burbank, deceased, and others, against Charles F. Fisher and Roswell L. Conner. From a judgment for plaintiffs, defendant Fisher appeals. Affirmed.

This suit was instituted January 12, 1905, by Mary E. Burbank against Charles F. Fisher, to remove a cloud from the title to real property. The complaint alleges in effect that plaintiff's mental faculties, by reason of advanced age, were impaired; that the defendant having knowledge thereof and with intent to defraud her, falsely represented that the stock of the American Alarm Company, a corporation, was of the par value of \$50 a share; that he had found a person who would purchase her farm in Yamhill county and pay therefor the sum of \$8,850, if she would accept \$4,000 in cash and stock of that corporation of the face value of \$4.850; that such representations were false, and so known to be by the defendant and such stock was worthless; that plaintiff having no knowledge of the value thereof, or of the falsity of such statements but firmly believing them, verbally agreed that in consid-

eration of the payment of that sum and of the delivery of such stock she would convey her farm to such person as the defendant might designate; that pursuant to the terms of such agreement, she signed, sealed, caused to be witnessed, and acknowledged a deed, purporting to convey to the defendant the legal title to the farm, but she did not deliver the instrument, leaving it on a table intending to retain possession of it until the consideration specified had been paid and delivered to her; that without her knowledge or consent, the defendant took such instrument and carried it away and unless restrained, will cause it to be recorded, thereby further clouding the title to the premises, to prevent which she has no plain, speedy, or adequate remedy at law. The prayer for relief is for an injunction to prevent the deed from being recorded, for the removal of such cloud and to require the defendant to surrender the deed that it may be destroyed. The answer denied the material allegations of the complaint and averred that January 2, 1905, the defendant entered into a contract with the plaintiff by the terms of which it was stipulated that in consideration of the delivery to her of the stock of such corporation, of the par value of \$7,500 and \$1,000 in cash, she would convey her farm to him or to such purchaser thereof as he might secure; that five days thereafter this contract was modified so that she accepted the defendant's promissory note for \$1,000, payable in one year with 8 per cent. interest, in lieu of that sum in cash, and executed and delivered to him her deed of the premises, receiving such stock and note, except that by agreement he retained the sum of \$50 for procuring an abstract of the title to the land; that at the time the deed was executed the stock referred to was of the reasonable value of \$50 a share, which fact plaintiff then well knew; that at such time the defendant was and now is solvent and is ready, able, and willing to pay the sum so expressed and interest, and tenders the amount thereof to her; that the note and stock were delivered to plaintiff January 7, 1905, the control of which she now has and defendant holds possession of the deed and is the owner of the land. The reply put in issue the allegations of new matters in the answer and the cause having been tried, it was decreed that the defendant had no interest in the land or any part thereof, and the temporary injunction which had been issued was made perpetual, whereby he was restrained from recording the deed and from incumbering or conveying any part of the premises, and he appeals. After the appeal was perfected the plaintiff died testate, whereupon Clark M. Pierson, the executor of her last will and testament, and her devisee, the state of Oregon as trustee, were substituted as respondents.

Thomas O'Day, for appellant. James McCain, for respondents.

MOORE, J. (after stating the facts). The evidence shows that a patent was issued February 3, 1903, to Ira S. Bunkard for a fire and burglar alarm. This devise, as appears from blue prints offered in evidence, consists of clock machinery which is set in motion by the severing of a cord by fire or by the raising of a window or the opening of a door, causing a bell to ring and disclosing on an indicator the location of the disturbance and the probable cause of the alarm. The American Alarm Company was incorporated under the laws of this state, with a capital of \$50,000, divided into 1,000 shares of \$50 each. Bunkard, in consideration of \$600, assigned all his interest in this patent to the incorporators of that company who transferred such right to the corporation for its entire capital stock, on the assumption that it had been fully paid up. The company delivered to the incorporators, who paid for an assignment of the patent, \$30,000 of its stock, and the remainder of the issue, which is designated as "treasury stock," was held in trust for the corporation, to enable it by the sale thereof to secure money to be used in perfecting the invention and in manufacturing and selling the apparatus. About one-half of the treasury stock has been disposed of, a small part of which was given to persons whose influence was considered advantageous to the company, and the remainder sold at par. The corporation, January 7, 1905, possessed in cash about \$325; manufactured alarms costing about \$1,800; patterns of the value of \$1,800; and office furniture worth about \$75, making the value of its tangible property about \$4,000. The company in a year and a half prior thereto, or during the period of its existence, had disposed of the right to manufacture and sell its alarms in one county only and had sold only six fire and burglar alarms to persons who were not the owners of its capital stock. These meager sales were accounted for by the delay necessitated in developing the machinery and in perfecting its operation, and also by difficulty experienced by the agents of the company in finding a factory where the alarms could be manufactured at reasonable prices, which obstacles, so it is claimed by defendant's witnesses, had been overcome only a few days prior to January 7, 1905. The company issued circulars which, for a prelude, contained the following couplet:

"Dollars and dimes, dollars and dimes,  
An empty pocket is the worst of crimes."

The prospectus showed how much money had been made by investing a single dollar in various enterprises and what sales of alarms could be expected, asserting that from the purchase of one share of alarm stock at \$50, the sum of \$1,500 might be realized. The plaintiff, Mrs. Burbank, became acquainted with the defendant soon after the corporation was organized, when he called upon her with a view of selling its capital stock and

at that time she received one of these circulars. In May, 1904, he visited her again and gave her one share of such stock, whereupon she purchased of him five more shares of the stock for which she paid \$250. At that time Mrs. Burbank was 77 years old, and until the death of her husband, which occurred about four years prior thereto, she had never transacted any business of importance, though possessed of considerable property. The defendant, having only thrice met the plaintiff, wrote her as follows: "American Alarm Company, Portland, Ore., Nov. 14th, 1904. Mrs. Mary E. Burbank, Lafayette, Oregon—Dear Mrs. Burbank: I have recently bought a home here in Portland and am happily located, and Mrs. Fisher and myself wish to extend to you a special invitation to come and spend Thanksgiving week with us. We have both lost our parents, and we dearly love elderly people, and feel we would be glad to do all in our power to make you happy and enjoy your visit with us. You have not as yet met my wife, but I have so often spoken of you that she already feels she is acquainted with you. Hoping that you are well and that you will be able to come, I am, respectfully, C. E. Fisher, 670 Tillamook St." Mrs. Burbank, as a witness in her own behalf, testified that the defendant visited her in January, 1905, telling her he had found a purchaser from California who would take her land and make a nut farm of it; that she told him the premises contained 190 acres which she would sell for \$45 an acre and take \$4,000 in cash and a mortgage on the land to secure the remainder of the purchase price; that after discussing the proposed sale a short time, he suggested the acceptance of Alarm stock instead of cash, to which proposition she did not accede, telling him she wanted it distinctly understood that she must have cash when she sold her farm; that he thereafter returned with a deed which had been prepared and asked how much money was required to be paid down and she informed him that she must have \$4,000; that after doing some writing, he said: "Here, Mrs. Burbank, is where you sign your name to the deed," and she subscribed her name to the instrument, which was witnessed and acknowledged and left on a table; that going into another room and returning in a few minutes she was unable to find the deed; that she was then called to dinner, whereupon he left, saying there were the certificates of stock and a promissory note, but she did not take them. On cross-examination, she says that prior to signing the deed she never entered into any agreement with the defendant to sell her farm; that she never consented to take Alarm stock as a part of the consideration therefor, though she told him if a sale of the premises was effected she might buy some of the stock from him; that she did not see him take the deed, but immediately after he left the house she found that it was gone; that she signed

the deed thinking the defendant had issued a check to her for \$4,000, and that the remainder of the consideration would be secured by a mortgage on the premises, though nothing was said about giving security; that she did not give him a lease from which to obtain a description of the farm and if he secured the evidence of a demise of the premises, it was when he was examining her papers; and that the deed which she signed was not read by or to her.

P. P. Olds, a notary public, testified that at defendant's request he went to the home of Mrs. Burbank, to take her acknowledgment to a deed; that the defendant having preceded him was at her house when he reached it; that about 10 or 15 minutes after his arrival the defendant took a deed from his pocket, to which she subscribed her name and having been witnessed, he thereupon appended his certificate, after taking her acknowledgment, leaving the deed on a table; that Mrs. Burbank, having signed the instrument, took a seat at the right of and about 10 feet from the witness, who occupied a chair between her and the defendant; that after the deed had remained on the table about five minutes, the defendant took it, and put it in his pocket without paying her any money as a consideration for the conveyance; that when the deed was so taken he did not observe Mrs. Burbank and could not say whether or not she saw the defendant get the instrument; that at that time there was no other person present; that just prior to picking up the deed the defendant was talking about some Equitable stock which the witness was thinking of taking; and that about January 20, 1905, the defendant called upon him, saying that the reason he did not tell him anything about Mrs. Burbank's deed was because she was capable of conducting her own business, and did not care to have her transactions known.

Charles Bynum testified that January 7, 1905, he was employed in a livery stable at McMinnville from which city he rode in a buggy with the defendant to Lafayette, where Mrs. Burbank then lived; that the defendant returned with him part of the way and on the road remarked to him that he had purchased a farm for \$8,000 from her for some person in California who expected to raise walnuts on the land.

The defendant, as a witness in his own behalf, testified that Mrs. Burbank requested him to find a purchaser, if possible, for her farm, saying she expected to leave her property to some charitable institution, and was anxious to settle her business affairs, so as to secure a permanent income; that January 2, 1905, she agreed to sell the farm for \$8,500 and accept therefor Alarm stock of the face value of \$7,500 and the remainder in cash; that she looked over her papers to find the deed of the premises but being unable to discover it she asked him to assist her in the search, and doing so, he found a lease of the

farm from which she said a description of the premises could be obtained; that he took the lease, promising to return in a few days with a deed of the premises prepared for execution; that five days thereafter he again visited Mrs. Burbank, telling her that he had been disappointed in a business venture whereby he expected to secure the sum of \$1,000 with which to pay the cash part of the consideration for the land; that in lieu of such payment she agreed to accept his promissory note for that sum payable in a year with interest, which he executed and also assigned to her Alarm stock of the face value of \$7,500 and delivered the same to Mrs. Burbank, who placed such writings in an envelope; that when the deed was executed he put it in his pocket and thinks she saw him doing so; that he thereafter exhibited the deed to her, after the notary public left the house, saying that if the abstract, which he had ordered, should show that the instrument was insufficient for any reason, to convey the legal title to the premises intended, she would be expected to execute a quitclaim deed to correct the matter, to which she replied, "Certainly;" that there never was any agreement whereby she was to receive the sum of \$4,000 in cash; that the contract to assign to her Alarm stock of the face value of \$7,500 was the only agreement ever entered into January 2, 1905, and which was thereafter modified only in respect to giving a promissory note for the sum of \$1,000 in lieu of the cash. The defendant admits that he told Bynum that he had purchased Mrs. Burbank's farm, for an equivalent of \$8,000 in cash and would receive a commission of 5 per cent. on account thereof, but that he did not remember saying that he had a partner in the transaction. He also admits that the first time Mrs. Burbank spoke to him about desiring to sell her farm she stated that she would take \$8,500 for it and accept \$4,000 thereof in cash and the remainder on time, saying: "That conversation occurred several times."

Mrs. Burbank, on rebuttal, testified that she never saw the deed after she signed it and left it on the table; and that the defendant did not thereafter take the instrument from his pocket or ask her to make a quitclaim deed. It further appears that when the deed was signed, Mrs. Burbank was 77 years old and her physician, Dr. E. E. Groucher, who had known her about 25 years, testifying as to her condition at that time, said that she had been sick and was feeble. Mrs. Mamie Cone, who, with her husband, was keeping house for the plaintiff, January 7, 1905, testified that at that time Mrs. Burbank was not at all well. Mrs. Burbank did not tender to the defendant the note which he drew in her favor or the certificates of stock which he had assigned to her, nor were they deposited in court for him. She wrote him, however, January 12, 1905, when this suit was instituted, to call

at her home and take them away and to return to her the deed which he had taken.

It is contended by defendant's counsel that the complaint having alleged that the remainder of the purchase price of the land, in excess of \$4,000 in cash, was to have been paid by the delivery of shares of stock of the American Alarm Company, the plaintiff was bound by such averment and therefore estopped to deny it, which, as a witness, she did by testifying that no agreement had ever been entered into with the defendant whereby any part of the consideration was to be paid in stock. The testimony referred to was brought out on cross-examination by defendant's counsel, who did not move to strike it out as immaterial, or object to it in any manner. Nor was any motion made by plaintiff's counsel to amend the complaint so as to make it conform to the testimony given. In this condition of the record, it must be assumed, after decree, that the cause was tried as though the issue was regularly made, which being germane to the cause, it is now too late to invoke the legal principle insisted upon.

It is maintained by defendant's counsel that the complaint stated that the deed was obtained by fraudulent representations and without consideration and as the prayer for relief is that the sealed instrument be surrendered so that it may be destroyed, the suit is for the cancellation of a deed, but as the plaintiff retained the stock and promissory note, she was not entitled to any equitable alleviation until they were returned or tendered to the defendant, and hence an error was committed in rendering the decree complained of. In all cases of rescission the parties who would be affected thereby must be placed in statu quo as an incident to the abrogation of their agreement, which necessitates a return or tender by the injured party of all property, rights, or franchises that may have been received, as the consideration for an executed contract, before a court is authorized to grant the relief asked, on the theory that he who seeks equity must do equity. Rescission always implies that a contract has been duly executed, the binding force of which is attempted to be avoided by one of the parties in consequence of some act of the other. If a party were compelled by force or fear to exchange any of his property for that of another, he would not be required to return or tender that which had been imposed upon him as a condition precedent to securing his own, because there had never been a meeting of their minds whereby a consent to the interchange was given. The delivery of a deed of real property is the last act of a grantor that serves to transfer his title to the premises and evidences the aggregatio mentium of the parties respecting the entire subject-matter of the contract. Until such delivery has been made by the grantor or by some person authorized

to surrender possession of the deed for him, the contract to convey real property has never been executed, and in such case, if the grantee surreptitiously, or without the consent of the grantor, obtains the sealed instrument, no title passes. If Mrs. Burbank's deed was not delivered, the certificates and the note which were left in her house by the defendant would not impose on her the duty to return or tender them, unless she consented to accept them as the consideration for the conveyance.

An examination of the averments of the complaint and of the prayer for relief might seem to support the contention of the defendant's counsel that this suit was instituted to cancel a deed, but when the pleading is construed according to the liberal rules which the statute prescribes (B. & C. Comp. § 86), we think the allegations referred to were inserted as matters of inducement to illustrate the situation of the respective parties and that the part of the prayer mentioned should be regarded as the court treated it, as an inadvertence. This being so, if the defendant attempted to impose on Mrs. Burbank by taking the deed without her knowledge or consent and leaving the stock and note, she was not obliged to return or tender them to him, nor even write him, as she did, to take them away from her house, for if he chose to leave his property under the circumstances supposed, his voluntary act was tantamount to an abandonment, for which he alone is responsible. The executed deed having been found in the possession of the defendant, who is the grantee named therein, a presumption arises that the sealed instrument was regularly delivered, and the burden of overcoming this disputable presumption, which results from such fact, is imposed on the person alleging to the contrary. *Filnt v. Phipps*, 16 Or. 437, 19 Pac. 543; *Tyler v. Cate*, 29 Or. 515, 45 Pac. 800; *Swank v. Swank*, 37 Or. 439, 61 Pac. 846. The delivery of a deed is accomplished by the grantor's voluntarily passing it to the grantee or handing it to some person for him, or by the grantor's doing or saying something by means of which he discloses an unmistakable purpose to part with all control over the instrument and thus forever to put it out of his power to regain possession thereof. *Fain v. Smith*, 14 Or. 82, 12 Pac. 365, 58 Am. Rep. 281; *Allen v. Ayer*, 28 Or. 589, 39 Pac. 1; *Hoffmire v. Martin*, 29 Or. 240, 45 Pac. 754.

The testimony fails to show that Mrs. Burbank handed the deed to the defendant or to the notary public for him, or that she said or did anything that could possibly be construed as an intent irrevocably to surrender the possession of the instrument. The defendant testified that in the presence of Mr. Olds, the notary public, he took the deed, just after Mrs. Burbank signed it, and in answer to the inquiry, "Did she see you take

the deed?" he replied, "I think she did. She was sitting facing me." It will thus be seen that the testimony of the defendant overthrows the presumption which the law raises from his possession of the deed. It will be remembered, however, that he testified that after taking the deed and putting it in his pocket, he exhibited it to Mrs. Burbank, who said that if the description of the premises should prove incorrect she would execute a quitclaim deed to rectify the mistake. This is the entire testimony of the defendant on the question of delivery. Mrs. Burbank testified that she did not see the defendant take the deed, and that he never exhibited it to her or asked her to make a quitclaim deed. This dispute leaves for consideration the question of the probable preponderance of testimony as between the plaintiff and the defendant. The method pursued by the defendant to gain the confidence of Mrs. Burbank, whom he had met only two or three times in a business matter, by soliciting her to visit and spend a week with his wife, who had not even seen her, and justifying his invitation on the plea of the love of orphans for, and their desire to promote the happiness of, aged people, would seem to show a personal interest in Mrs. Burbank's welfare not disclosed by his letter, when it is remembered that she possessed considerable means.

The circular issued by the American Alarm Company, showing what vast sums of money might be realized by purchasing its capital stock, was well calculated to excite the interest of an aged and feeble woman, who desired to place her property so it would best subserve the maintenance and education of orphans, thereby inducing her to agree to accept such stock, in excess of \$4,000, as equaled the estimate she placed upon her farm. It is not intended to say anything disparaging about the stock of the corporation, for the patent owned by it is undoubtedly valuable, thus making its assets greater than would appear from the value of its tangible property. The alarm manufactured by the company is useful and as it is retailed at a moderate price, the sales thereof ought to be extensive, but whether or not the expectations of the incorporators respecting such sales as indicated in their prospectus, will ever be realized is problematical. It is probably true that what is said in the circular of the company as to the value of its stock, is only a matter of the consensus of opinion of the incorporators, the roseate hues of which reflect their ardent desires and upon which purchasers of stock ought not to rely. Mrs. Burbank, however, by reason of her inexperience in business and her extreme age and infirmity was unable to resist the allurements of the company's prospectus which she had received, or wholly disregard the blandishments of the defendant who told her she was a person of

such wealth that her influence was a sufficient consideration for the assignment to her of one share of stock.

Not any one particular act of the defendant hereinbefore adverted to is sufficient, perhaps, to overcome his declarations under oath, respecting the delivery of the deed, but when all are considered and his conduct towards Mrs. Burbank is viewed in the light of his interest, we believe her testimony on the particular subject involved, preponderates; and, this being so, the decree is affirmed.

**HONERINE MIN. & MILL CO. et al. v. TALLERDAY STEEL PIPE & TANK CO. et al.**

(Supreme Court of Utah, June 9, 1906.)

**APPEAL—FINAL JUDGMENT—ORDER QUASHING SUMMONS.**

Const. art. 8, § 9, and Rev. St. 1898, § 3300, provides that from all final judgments of the district court there shall be a right of appeal to the Supreme Court, and Rev. St. 1898, § 3183, declares that a judgment is a final determination of the rights of the parties in an action or proceeding. *Held*, that an order quashing the service of the summons, without dismissing the action, was not a final judgment and was not appealable.\*

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 464.]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by the Honerine Mining & Milling Company and another against the Tallerday Steel Pipe & Tank Company and another. From an order quashing service of summons, plaintiffs appeal. Dismissed.

Snyder & Snyder, for appellants. Stephens & Smith and Dey & Stevens, for respondents.

**STRAUP, J.** This is an appeal from an order made by the district court quashing a service of summons. The plaintiff claimed service on the defendant, a foreign corporation, by serving a person claimed to be its agent and claimed to have property in his possession belonging to it. The defendant appeared specially and moved to quash the service, on the ground that the person served was not its officer or agent, and had no property, belonging to it, in his possession, or under his control. Upon a hearing of the motion on affidavits and testimony, the court made an order quashing the service. This was the last proceeding had or action taken in the case in the court below. The case was not dismissed, but is still there pending.

At the outset, the defendant urges that the order is not a final judgment, within the meaning of the statute or the Constitution,

and is therefore not appealable. The point is well taken. The Constitution (section 9, art. 8) and the statute (section 3300, Rev. St. 1898) provide: "From all final judgments of the district court there shall be a right of appeal to the Supreme Court." Section 3183, Rev. St. 1898, provides: "A judgment is a final determination of the rights of the parties in an action or proceeding." This order is not a final judgment. The Nebraska statute is broader than the Utah statute, for the former confers jurisdiction upon the Supreme Court to review, by proceeding in error, all judgments rendered or final orders made by the district court. It defines a final order to be "an order affecting a substantial right in an action, when such order, in effect, determines an action and prevents a judgment," etc. Thereunder it was held by the Nebraska courts that an order quashing a service of summons was not such a final order as could be reviewed by the Supreme Court on error until a final judgment was rendered. *Perslinger v. Tinkel*, 34 Neb. 5, 51 N. W. 299; *Standard Distilling Co. v. Freyhan*, 34 Neb. 434, 51 N. W. 976; *Lewis v. Barker*, 46 Neb. 602, 65 N. W. 778. Under a statute like the Nebraska statute the Supreme Court of Washington held such an order appealable, but based its decision expressly upon the ground that the lower court quashed the service of summons because it "was of the opinion that upon the merits of the action the plaintiff could not prevail," and stated that it was extremely doubtful if an appeal would lie from an order quashing the service, where the action of the court was based upon some imperfection in the summons, a departure from the form prescribed, or for insufficiency of service and the like. *Embree v. McLennan*, 18 Wash. 651, 52 Pac. 241.

It will be observed that the statutes give the right of an appeal not only from a judgment rendered, but also from a final order, while the Utah statute gives the right of an appeal only from a final judgment. From what has been said by this court in prior cases, where the question as to what is a final judgment within the meaning of the statute was considered, this order cannot be regarded as a final judgment. *North Point Irr. Co. v. Utah Canal Co.*, 14 Utah, 155, 46 Pac. 824; *Eastman v. Gurrey*, 14 Utah, 169, 46 Pac. 828; *Watson v. Mayberry*, 15 Utah, 265, 49 Pac. 479; *Laundry Co. v. Dole*, 20 Utah, 469, 58 Pac. 1109; *Popp v. Min. Co.*, 22 Utah, 460, 63 Pac. 185. In this connection plaintiff urges that to constitute a final judgment it is not necessary that there be a final determination on the merits, if the case is otherwise put out of court, and that the order had such effect. It is true that to constitute a final judgment it is not essential that there be a final determination of the rights of the parties with reference to the subject-matter of the litigation, but merely with reference to the particular suit. It is the termination of

\**North Point Irr. Co. v. Utah Canal Co.*, 46 Pac. 824, 14 Utah, 155; *Eastman v. Gurrey*, 46 Pac. 823, 14 Utah, 169; *Watson v. Mayberry*, 49 Pac. 479, 15 Utah, 265; *Laundry Co. v. Dole*, 58 Pac. 1109, 20 Utah, 469; *Popp v. Mining Co.*, 63 Pac. 185, 22 Utah, 460.

the particular action which marks the finality of the judgment. A decision which terminates the suit, or puts the case out of court without an adjudication on the merits, is, nevertheless, a final judgment. 1 Black on Judgments, § 21; Mutual Reserve, etc., Ass'n. v. Smith, 169 Ill. 284, 48 N. E. 208, 61 Am. St. Rep. 172; Thomas v. Clark County Nat. Bk., 103 Ky. 335, 45 S. W. 73; Bolton v. Donovan, 9 N. D. 575, 84 N. W. 357; 6 Pl. & Pr. 997; Watson v. Mayberry, supra. All that plaintiff claims with respect to what constitutes a final judgment may be and is conceded, but it does not necessarily follow that the order had the effect to terminate the particular action and put the case out of court, when the case has not been dismissed but is still pending in the lower court, and where the plaintiff was, and even now is, entitled to an alias summons. It cannot be said that the case was terminated in the district court when it is still pending there. The plaintiff will not be permitted to place itself in a position where with one arm it may invoke the jurisdiction of this court, while it may with another invoke the jurisdiction of the lower court pertaining to the same subject-matter. While plaintiff is here seeking to have determined that it has the defendant in court upon the process served, it may, at the same time, also apply for and obtain an alias summons from the district court with which it may serve the defendant and bring it in. But the plaintiff here asserts that an alias summons is of no avail because plaintiff cannot make a better or different service than was made, and that if it has not the defendant in court upon such service it is unable otherwise to bring in the defendant. That may or may not be true. If such were the situation, plaintiff well could have indicated such fact to the trial court, together with a desire to stand upon the record as made and a refusal to further proceed in the action whereupon, no doubt, the court would have entered an order dismissing the action. In other words, the mere granting of the motion to quash the service of summons did not authorize the court to end the suit and dismiss the action, but, by plaintiff's indicating a desire to stand upon the record and a refusal to further proceed, the court would then be authorized to do so. Such a proceeding would not, as is claimed by plaintiff, amount to a voluntary dismissal on its part and bar its right to appeal from the judgment and have reviewed the ruling made quashing the service. The dismissal, as to it, would be submitted to, if at all, because of the adverse ruling, and therefore would be involuntary. 6 Pl. & Pr. 828. Such a judgment of dismissal would be final and appealable. 6 Pl. & Pr. 998. What we have here said as to plaintiff's procedure is not to be construed as a holding that such is the proper or the exclusive remedy. All that we are called upon to decide, and do decide, is that the order before us is not a final judgment and is not appealable.

The defendant's motion to dismiss the appeal is granted, with costs.

McCARTY, J., concurs. BARTCH, C. J., concurs in the result.

#### CARLSON et al. v. CURRAN et ux.

(Supreme Court of Washington. June 5, 1906.)

#### 1. LANDLORD AND TENANT—IMPLIED TENANCY—TAX SALE—EFFECT.

A tax sale does not create the relation of landlord and tenant between the vendee at the sale and tenants in possession under a lease from the former owner; such vendee taking the property free from any contracts or obligations of such former owner.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 20, 31; vol. 45, Cent. Dig. Taxation, §§ 1463, 1546, 1552, 1553.]

#### 2. SAME — OFFER TO PAY RENT — EFFECT — EJECTMENT.

Where an offer by tenants in possession under a lease from the former owners of property was rejected by the vendee thereof at a tax sale, which tender and refusal were set forth in a complaint in ejectment by the vendee against the tenants, the offer constituted only an offer to pay whomsoever the court should adjudge entitled thereto, and did not create the relation of landlord and tenant between the parties.

#### 3. JUDGMENT—CONSTRUCTION.

Where, in ejectment by a vendee under a tax sale against tenants in possession under a lease from the former owner, there was nothing in the record showing that the relation of landlord and tenant existed between the parties to the suit, a conclusion of the court that defendants were entitled to a notice or demand for possession before suit did not constitute an adjudication that such relation existed.

#### 4. EJECTMENT—DEMAND FOR POSSESSION BEFORE SUIT—NECESSITY.

Where the relation of landlord and tenant does not exist between the parties, no notice or demand for possession need be served on defendants in ejectment.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 76.]

Appeal from Superior Court, Pierce County; Thad Huston, Judge.

Action by Levin Carlson and another against J. C. Curran and wife. Judgment for defendants, and plaintiffs appeal. Affirmed.

Boyle Warburton, for appellants. J. W. A. Nichols and T. W. Hammond, for respondents.

RUDKIN, J. On the 1st day of December, 1890, Charles Meuhlenbruch and wife were the owners of the premises in controversy in this action, and on that date leased a portion thereof to the defendant J. C. Curran for the purpose of erecting certain buildings thereon, which the lessee was authorized to remove on the expiration or termination of the lease. On the 31st day of August, 1901, the plaintiff Inga Carlson obtained a tax deed for the premises from the county treasurer of Pierce county, and on the same day served a written notice on the defendant J. C. Curran to the effect that she was the owner of

the premises, and that after the 1st day of September, 1901, the rental for the use of the premises must be paid to her in advance. Some time after this the plaintiffs brought an action of ejectment against the defendants to recover possession of the premises and for damages. The complaint was in the usual form in such cases. The answer was a general denial, accompanied by an affirmative defense that the defendants were in possession under the lease from the Meuhlenbruchs, and that they had paid the Meuhlenbruchs or their agents the rental agreed upon, except the sum of \$4 due September 1, 1901, which sum they had tendered and were ready and willing to pay. To whom this tender was made does not appear, but it was presumably to the plaintiffs, as no reason is suggested why the Meuhlenbruchs should refuse to accept it. A judgment of dismissal in this action was rendered on December 16, 1901, but for some reason the judgment was not signed or entered until February 4, 1903. Soon after this the plaintiffs commenced a second action in ejectment against the same defendants to recover the same premises. The complaint in the second action differed from the complaint in the first action only in the fact that the plaintiffs set forth the source of their title and pleaded facts tending to show that the title to the buildings claimed and occupied by the defendants passed to the plaintiffs by virtue of the tax deed. The prayer of the complaint was that the plaintiffs be decreed the owners of the property, together with the improvements thereon, and that they have judgment for possession and for damages. The answer in the second case was in effect a denial of the allegations of the complaint, accompanied by substantially the same affirmative defense as in the former action, and a plea of *res adjudicata* by reason of the former judgment. The court sustained the plea of *res adjudicata* and on the 29th day of June, 1903, entered a judgment of dismissal. On the 30th day of October, 1905, the present action was brought under the forcible entry and detainer statute. The complaint set forth the title of the plaintiffs, the lease from the Meuhlenbruchs to the defendants, the issuance of the delinquency certificate, the tax foreclosure and sale, the tax deed to the plaintiffs, the former ejectment proceedings, the answer of the defendants therein and their testimony given on the trial thereof, the service of a notice to pay rent or surrender possession, and a refusal to comply therewith. It is unnecessary to set forth in detail the allegations of the answer. The action was tried by the court without a jury. The court found that the relation of landlord and tenant did not exist between the parties and entered a judgment of dismissal. From this judgment the plaintiffs have appealed.

The appellants concede that the judgment must be affirmed, unless the relation of land-

lord and tenant existed between the parties, and this presents the only question for our consideration. The relation of landlord and tenant did not arise by reason of the tax sale, as the appellants acquired their title, if any, from an independent source, and took the property free from any contracts or obligations of the former owners. The appellants have contended throughout this litigation that the lease by the former owners did not concern them and that they were not bound thereby. This contention is, no doubt, sound in law, and the appellants do not take any different position on this appeal; but they earnestly insist that the respondents are estopped to deny that the relation of landlord and tenant does in fact exist by reason of the issues tendered, the testimony given, and the judgments rendered in the ejectment suits. From a careful examination of the record, which is very brief, we fail to see wherein the respondents have taken inconsistent positions in the course of this protracted litigation, or why they should now be estopped to deny that they are tenants of the appellants. In their answer to the complaint in the first ejectment suit they set forth the relation existing between themselves and the former owners, their payment of rent to the former owners, except the sum of \$4, and their readiness to pay the balance. There was no intimation in the answer that they were tenants of the holder of the tax title by contract, by operation of law, or otherwise. In fact, they denied her title and claim to the property in toto. Nor did the offer to pay rent create the relation. The offer was never accepted, and under the circumstances must be construed as an offer to pay whomsoever the court should adjudge entitled thereto. The complaint in the first action did not recognize the relationship of landlord and tenant, and the complaint in the second action repudiated any such relationship by averring that the respondents offered to pay \$4 per month rental, while the appellants insisted upon the payment of \$10. There was therefore, nothing in the pleadings or testimony to show, or even intimate, that the relation of landlord and tenant existed between the respondents and the appellants here, or was relied upon as a defense.

The appellants contend, however, that the court dismissed the first ejectment suit because the statutory notice required by law in actions between landlord and tenant was not given. There were no findings of fact, and the order of dismissal was general in its terms, assigning no reason therefor. This action was tried about four years after the first ejectment suit, and the attorneys for the parties differ as to the reasons assigned by the court for its decision. According to the recollection of the attorney for the plaintiffs on the first trial the court ruled that the owners of the buildings were not made parties to the tax foreclosure, that the

title to the buildings did not pass by the tax deed, and that the defendants were entitled to notice to quit before an action could be maintained against them. What kind of a notice the attorney does not state, and perhaps the court itself did not indicate. According to the recollection of the attorney for the defendants, on the other hand, the action was dismissed because no demand for restitution was made before suit. Counsel differ, therefore, only as to the form of the demand or notice which the court deemed necessary. The appellant's counsel now contend that the demand referred to by the court was a written notice required in actions between landlord and tenant, whereas counsel for respondents contend that it was a simple demand for possession. We do not consider this difference of opinion between the attorneys material, as neither view would sustain the appellants' contention. As we have stated, there was not even a suggestion in the record that the relation of landlord and tenant existed between the appellants and respondents, and the only reasonable view we can take of the court's conclusion is that it was of opinion that inasmuch as the original possession of respondents was lawful a demand for restitution must precede a suit against them. But, whatever the view of the court may have been, its conclusion that the respondents were entitled to a notice or demand of some kind before suit fell far short of an adjudication that the relation of landlord and tenant existed between the parties. Nor would the offer to pay rent establish the relationship. The offer was never accepted, and, as stated above, we do not think it could properly be construed as anything more than an offer to pay the appellants, should the court adjudge them entitled thereto. The respondents, on the other hand, contend that whatever may have been the view of the court on the trial of the first ejectment suit, or the reasons given for the judgment of dismissal, the second judgment establishes the fact for all time that the former judgment was final and conclusive as between the parties. The appellants contend that the second judgment decided that the first judgment was final to the extent that no action would lie until after notice was given, but nothing more. Inasmuch as the title to the property is not involved and cannot be tried in this action, we will not determine the force or effect of either of these judgments further than to hold that they did not establish the relation of landlord and tenant between the parties now before the court.

The appellants have made three unsuccessful attempts to establish their right to the property in controversy, and each time have failed of a hearing on the merits. For this reason we have endeavored to find some way to afford them relief consistent with the established rules of law. But while the first judgment against them was clearly erro-

neous, as the relation of landlord and tenant did not exist, and no notice or demand is necessary in such cases before suit [*Lewis-ton Water Power Co. v. Brown* (Wash.) 85 Pac. 47], and while the second judgment was erroneous, if it determined anything beyond the fact that the first judgment was res adjudicata until notice was given or a demand made, yet these judgments are not before us for review, and we are constrained to hold that the judgment appealed from is free from error, and the same is affirmed.

MOUNT, C. J., and FULLERTON, HAD-  
LEY, CROW, ROOT, and DUNBAR, JJ.,  
concur.

# HASSE v. HERRING.

(Supreme Court of Colorado. April 2, 1906.)

## 1. APPEAL—RECORD—FAILURE TO SHOW ER- ROR.

On appeal from a judgment of the county court affirming a judgment of a justice of the peace, a contention that the plaintiff was permitted in the county court to change his cause of action cannot be upheld, where the record does not indicate what issue was tried in the justice court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2950.]

## 2. JUSTICES OF THE PEACE—APPEAL—TRIAL DE NOVO—EVIDENCE.

On appeal to the county court from a judgment of a justice of the peace, the trial is de novo, and any competent evidence relating to the same transaction tried in the justice court is admissible in the county court, and is not objectionable as a change in the cause of action.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 660.]

## 3. APPEAL—OBJECTIONS AND EXCEPTIONS BE- LOW—GIVING OF INSTRUCTIONS.

Where the instructions are in writing, separately paraphrased and numbered, an exception to the giving of "each and every instruction" is good as to instructions containing but one proposition of law, but is not sufficient to raise the question of error in an instruction containing several legal propositions, some of which are correct and some erroneous.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1622.]

Appeal from County Court, El Paso Coun-  
ty; Robert L. Hubbard, Judge.

Action by Warren Herring against Her-  
man Hasse. Judgment for plaintiff. De-  
fendant appeals. Affirmed.

McKesson & Little, for appellant. Rob-  
ert L. Hubbard, for appellee.

MAXWELL, J. This suit was commenced before a justice of the peace by appellee, Herring, against appellant, Hasse, whence it was taken on appeal to the county court, where a trial before the court and a jury resulted in a judgment against appellant, from which this appeal.

The controversy grew out of a horse trade. Plaintiff below contended, that he made an absolute trade with the defendant whereby

a bay mare, his property, was exchanged with defendant for a gray mare, two pigs, and services rendered. Defendant contended that the trade or exchange was not absolute but conditional upon the bay mare being all right. The bay mare was delivered to defendant and shortly thereafter died. It was developed by the testimony, that both parties knew the animals involved in the trade for a number of years. Plaintiff's contention was supported by the testimony of three witnesses who were present at the time the trade was made, while the contention of defendant rested upon his testimony alone. Appellant insists that the cause of action tried in the county court was different from the cause of action tried in the justice court, and that the county court permitted appellee to change his cause of action during the trial in that court. There is no evidence in the record to indicate what issue was tried in the justice court, and hence it is impossible to determine from the record whether or not this contention of appellant is well founded, for which reason we must hold that this assignment of error is unsupported by the record.

Appellant further insists that the county court erred in refusing to permit him to introduce testimony to prove that the cause of action tried in the county court was different from that tried in the justice court. The only offer made by appellant in this behalf was to prove by the plaintiff that upon the trial of the cause in the justice court, no evidence was given to prove the value of the gray mare, and that the issue in the justice court was wholly and solely to recover the value of the bay mare. The trial in the county court upon an appeal from a justice court is *de novo*. Any competent evidence relating to the same transaction tried in the justice court, is admissible upon the trial in the county court, and the admission of such evidence by the county court, is not a change of the cause of action. There was no error in the ruling of the court refusing to permit defendant to introduce the testimony offered for the purpose for which it was offered, as stated by him at the time of its offer. It is further contended by appellant that the court erred in its instructions to the jury.

The only instruction which is called to our attention in the assignment of errors is instruction No. 2. Following all the instructions given, is this exception: "To the giving of each and every of said instructions said defendant by counsel then and there duly excepted." The instructions given were in writing, separately paragraphed and numbered. The above exception is good when each instruction contains but one legal proposition. When one instruction contains two or more independent and distinct propositions of law, one of which is right, and another or the others wrong, a general exception directed to the whole instruction

will not entitle a party to be heard as to that portion of the instruction which he deems to be wrong. *Beals v. Cone*, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92; *Pueblo v. Timbers*, 81 Colo. 215, 72 Pac. 1059; *Big Hatchet Co. v. Colvin*, 19 Colo. App. 405, 75 Pac. 605. The instruction complained of states several distinct propositions of law, some of which are manifestly correct. The exception saved was wholly insufficient to direct the attention of the trial court to the error of law complained of, and is also insufficient to present the instruction for review to this court.

It follows that the judgment must be affirmed.

Affirmed.

The CHIEF JUSTICE and GUNTER, J., concur.

(36 Colo. 331)

# PHILBIN v. DENVER CITY TRAMWAY CO.

(Supreme Court of Colorado. April 2, 1906.)

## 1. STREET RAILROADS—OPERATION—COLLISION WITH VEHICLE.

A driver on a street had a right to cross street railway tracks between the intersecting streets, while a car was approaching up a steep grade at a distance of 150 feet.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 210.]

## 2. SAME—CONTRIBUTORY NEGLIGENCE—PLEADING.

A complaint alleging that a driver, while attempting to cross a street railway track 150 feet ahead of a car approaching up a steep grade, was detained because the tracks were raised 6 inches above the surface of the street, but that the plaintiff did not know and had no reason to believe that the horse drawing the wagon would be unable to safely make the crossing, or that the wagon would be detained, negated any imputation of negligence of the driver, on account of the raised track.

## 3. SAME—NEGLIGENCE OF RAILROAD COMPANY.

A complaint alleging that, while a driver was detained in attempting to cross street railway tracks because the tracks were raised 6 inches above the level of the street, a street car was approaching up a steep grade at a distance of 150 feet, and, had the motorman exercised reasonable care, he could have seen the wagon and have stopped the car before the collision occurred, but failed to do so, shows actionable negligence on the part of the street railway company, as the direct and proximate cause of injuries to the driver.

## 4. SAME—LAST REAL CHANCE.

Where a driver attempting to cross the street railway tracks, having his back toward an approaching car, was unaware of the imminency of danger of a collision, the doctrine of "last real chance" cannot be invoked by the street railroad company.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 210.]

Error to Arapahoe County Court; Ben B. Lindsey, Judge.

Action by Michael J. Philbin against the Denver City Tramway Company. From a judgment in favor of defendant, plaintiff brings error. Reversed.

Carlton, Skelton & Morrow, for plaintiff in error. Charles J. Hughes, Jr., and Albert Smith, for defendant in error.

MAXWELL, J. Action for damages for personal injuries. A general demurrer to a second amended complaint having been sustained, plaintiff electing to stand thereon, a judgment dismissing the action was entered, to reverse which a writ of error was sued out of the Court of Appeals. The only proposition which will be considered is: Does the complaint state facts sufficient to constitute a cause of action?

The material allegations of the complaint are that the defendant is a corporation operating a street railway system in the city of Denver; that plaintiff, as a guest, in a wagon drawn by a single horse, was riding north along Broadway, a public street in the city of Denver, which street was traversed by a line of street railway operated by defendant; that due to a change of the grade of the street the tracks of the railway were raised about 6 inches above the surface of the street; that the driver attempted to drive his horse and wagon across the street at a point between Eighth and Ninth avenues, two intersecting streets, where the tracks were so raised; that plaintiff did not know and had no reason to believe that the horse drawing the wagon would be unable to safely make the crossing, or that the wagon would be detained on the tracks; that in attempting to make the crossing the wheels of the wagon so slipped along the rails that the horse was unable to draw the wagon across the track, and the same was detained thereon; that at the time the wheels crossed the outside rails, one of defendant's cars was approaching from the south up a steep grade, at a distance of about 150 feet; that had the motorman on said car exercised reasonable or ordinary care and precaution he could have seen the wagon on the track, and could have stopped the car before the collision occurred, but the motorman negligently failed to do so and negligently permitted the car to run into the wagon; that plaintiff's back was toward the approaching car, and he did not see the same; that he did not hear the gong or any warning of the approach of the car, and was wholly unaware of the close approach of the car; that the motorman and agents of defendant having control of the car carelessly and negligently failed to sound a gong or give any warning of the approach of the car, and carelessly and negligently ran said car into the wagon, upsetting the same and causing injuries to the plaintiff, hence this suit.

It is contended that the allegations of the complaint, which are admitted to be true by the demurrer, disclose that plaintiff was guilty of such contributory negligence as to prevent a recovery. "Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff,

amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of." Beach on Con. Neg. § 7. "Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." 7 A. & E. Ency. Law (2d Ed.) 371. What act or omission of plaintiff, amounting to want of ordinary care upon his part, is disclosed by the allegations of the complaint, sufficient, as matter of law, to pronounce him guilty of contributory negligence within the above definitions? An answer to this question is dependent, to some extent, upon a statement and consideration of some of the mutual rights and duties of the traveler in a vehicle along a public street, upon which is operated a street railway, and the operator of the street railway system. The rights of persons using vehicles and horses on the streets of a city and street railway companies operating cars on the same streets are mutual, and such persons and companies are required to use ordinary care and diligence to avoid collisions with each other. It is not negligence for a person to drive across street railway tracks whenever and wherever he may have occasion to do so, and this right of crossing the tracks is not confined to street crossings. The question of negligence in such cases depends upon the proximity or remoteness of the car, its speed, and other circumstances. It is the duty of a traveler to look out for himself, and to exercise such ordinary care as would be exercised by a reasonably prudent person under attendant circumstances. The duty imposed upon persons crossing stream railway tracks to stop, look, and listen is not rigidly applied to persons traveling a street used by a street railway.

The failure of a person to look for approaching cars before crossing street railway tracks does not place him in any worse position than if he had looked and seen the car, and therefore, if, at the time when he started to drive across the track, the car was at such a distance that an attempt to cross after having seen it would not have been contributory negligence, his failure to look for the car will not preclude his recovery. A person is not guilty of contributory negligence merely because he attempts to cross a street railway when a car is approaching; if that were so, he could never attempt to cross such a track, in the crowded part of the city, where there is practically always an approaching car. In such case, negligence depends upon the proximity or remoteness of the car, its speed, and all other circumstances surrounding the occurrence. It is not negligence per se for one to cross a street railway track in front of an approaching car which he has seen, and

which is not dangerously near. The driver or occupant of a vehicle passing along a street railway is not, as matter of law, required to keep a constant watch to the rear to discover approaching cars. The street car has, and from the necessities of the case must have, a right of way on that portion of the street upon which it alone can travel, paramount to that of ordinary vehicles, but this superior or preferential right of way does not prevent others from driving across or along its tracks at any place or at any time when by so doing they will not interfere with the progress of cars. It is the duty of the motorman to exercise ordinary care and diligence to ascertain whether the track ahead is clear and to avoid striking persons or objects upon the track when, by the exercise of ordinary care and diligence, it is reasonably possible to do so, and he is bound to notice the presence of other vehicles and pedestrians ahead of his car, and should be watchful for that purpose, and, if he has reason to apprehend danger, he should regulate the speed of his car, so that it might be quickly stopped, should occasion require it.

If a person or vehicle is unavoidably detained upon the track, while attempting to cross the same, by a fall, slippery rails, or other casualty, although negligent in attempting to cross, those in charge of the car must endeavor to stop it in time to prevent injury, and if they fail through lack of ordinary care and diligence to use such means as the exigencies of the case require to stop the car in time to prevent injury, the railway company will be liable, notwithstanding the prior negligence of the injured party. If the motorman saw, or, by the exercise of ordinary care and diligence, should have seen, a person or vehicle ahead of his car, and through the careless or negligent failure to apply such means as the exigencies of the case require to stop the car, a collision occurs, the company will be liable for the damages occasioned thereby. *Davidson v. Tramway Co.*, 4 Colo. App. 283, 35 Pac. 920; *Beach on Con. Neg.* 288a; *Booth, Street Railway Law*, §§ 305, 306, 315-317; *Lawler v. Hartford Ry. Co.*, 72 Conn. 74, 43 Atl. 545; *Adolph v. Central Park Ry. Co.*, 76 N. Y. 530; *Clark v. Bennett*, 123 Cal. 275, 55 Pac. 908; 27 A. & E. Ency. of Law, 68, 70, 74, 75, 77. In *D. & R. G. Ry. Co. v. Buffehr*, 30 Colo. 27, 69 Pac. 582, the rule is announced that if the defendant fails to see what he was bound to look for and ought to have seen, he is guilty of negligence. We believe this rule applies with peculiar force to those in charge of street railway cars propelled by electricity along the streets of a city. In *Davidson v. Tramway Co.*, supra, it is said: "It is pretty universally adjudged that before one can cross a steam railway, he is bound to stop, look, and listen to discover the approach of a train before he shall be permitted to cross the track and escape the responsibility of his own

negligence if he fails in any of these particulars. While in a sense, and a very limited one at that, this rule has been applied to the acts of the pedestrian or the driver of a vehicle in crossing the transportation company's line, the difference between the steam railway and the electric or cable line must be borne in mind. The absence of the exclusive right to the occupancy of the street compels the distinction. The grant of a franchise to the company in no manner takes away from the other users of the highway their right to its entire occupation, save that their right to enjoy is limited by the contractual right of the transportation company, and its preferential privilege in the use of that part of the road occupied by the tracks. If the pedestrian or the driver of a vehicle were compelled to stop, look, and listen before he crossed the tracks, it would be an unnecessary and unusual burden and restriction upon his common-law right to use the King's highway which still remains with him. Notwithstanding this exception, neither the pedestrian nor the driver of a vehicle may undertake to cross a track heedlessly and recklessly, and without the exercise of the greater care which he is bound to use in crossing the tracks of a company using powerful, rapid, and dangerous modes of locomotion."

We have carefully examined the multitude of authorities cited by counsel for both parties in the numerous briefs filed in this case, many of which, on account of dissimilarity of facts, are palpably inapplicable. Many are cited on questions not properly before the court upon this record. A review of the authorities cited, and a discussion of the same, would be unavailing for the accomplishment of any good purpose. We think that the principles above announced are not in conflict with any authorities cited, except upon points where the courts are at variance with each other, and the principles we have announced are supported in our judgment by the greater weight of authority.

Reading the complaint in the light of the above principles, we conclude that plaintiff had a right to cross the railway tracks where he attempted to do so, ahead of the car, approaching up a steep grade at a distance of about 150 feet; that any imputation of negligence on account of the disturbed condition of the tracks with reference to the surface of the street is negatived by the allegations of the complaint; that the allegations are sufficient to charge defendant with actionable negligence, as the direct and proximate causes of the injury complained of; that, under the allegations of the complaint, the doctrine of "last real chance" cannot be invoked by the defendant, as the complaint charges, in substance, that the imminency of the danger was unknown to plaintiff, his back being toward the approaching car, and that by reason of the negligence of defendant in not sounding an alarm or in anywise warning the near

approach of the car to the vehicle in which plaintiff was seated, he was without knowledge of such danger; that the court erred in sustaining the demurrer, for which reason the judgment must be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed.

The CHIEF JUSTICE and GUNTER, J., concur.

# MONARCH MINING & DEVELOPMENT CO. v. DE VOE.

(Supreme Court of Colorado. April 2, 1906.)

## 1. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where a miner noticed the dangerous condition of a shaft because of its not being lined with timbers for about 20 feet, and called the attention of the superintendent of the mine to it two days previous to an accident in which the miner was injured, and the superintendent promised to have it timbered right away, the miner did not assume the risk of injury from failure to timber the shaft.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 638-640.]

## 2. SAME—CONTRIBUTORY NEGLIGENCE.

Where a miner noticed that the unlined portion of a shaft in which he was working had a somewhat shattered and broken appearance, that it looked dangerous, and that it looked as if rock could fall from the walls of the shaft but not as if it would, his continuance in the work two days after receiving a promise from the superintendent that the shaft would be lined with timber, together with the eight or nine more experienced men than himself, did not constitute contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 686.]

## 3. SAME—CAUSE OF INJURY—EVIDENCE—SUFFICIENCY.

In an action for injuries to a miner, evidence held sufficient to justify the jury in finding that the injury was caused by the falling of a rock from the unlined portion of the wall of the shaft.

Error to District Court, Teller County; Louis W. Cunningham, Judge.

Action by William De Voe against the Monarch Mining & Development Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Wm. J. Miles, for plaintiff in error. Temple & Crump, for defendant in error.

MAXWELL, J. Defendant in error, 31 years of age, having had about four years' experience as a miner, was employed by plaintiff in error as a trammer at the Caledonia mine in the Cripple Creek mining district. The mine workings in which he was employed consisted of a shaft 220 feet deep, from the bottom of which a drift was driven. The shaft was timbered with square sets of timbers. The first 100 feet were tightly lined. The second 100 feet were lined so as to partially cover the sides. The last

20 feet were wholly unlined. It was defendant in error's duty to take the empty buckets from the hoisting cable in the shaft, place them on a truck, run them to the breast of the drift, load them, tram the loaded buckets to the shaft, and attach them to the cable. In taking an empty bucket from the cable it was necessary for him to take hold of it by the rim to settle it squarely on the truck. While in the performance of this duty, his right hand resting on the rim of the bucket, a falling rock struck his hand, injuring three fingers so as to necessitate amputation of the two middle fingers. This suit is to recover damages for the injury occasioned thereby. At the close of plaintiff's testimony defendant, plaintiff in error here, moved a directed verdict, which was denied. The errors assigned and discussed are based upon this ruling.

The negligence charged was the failure to properly timber the shaft. The defense was contributory negligence and assumed risk. The doctrine of assumed risk by an employé is settled in this jurisdiction. As applicable to the facts in this case it is thus stated in *Denver Tramway Co. v. Nesbit*, 22 Colo. 408, 411, 45 Pac. 405, 406: "An employé assumes all the risks naturally and reasonably incident to the service in which he engages, and those arising from defects or imperfections in the thing about which he is employed that are open and obvious, or that would have been known to him had he exercised ordinary diligence. By voluntarily continuing in the service with knowledge, or means of knowledge equal to his employer's, of any defect in the appliances or the machinery used, and without objection, or promise on the part of the employer to remedy the defect, the employé assumes all the consequences that result from such defect, and waives the right to recover for injuries caused thereby." See, also, *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50; *Iowa G. M. Co. v. Diefenthaler*, 32 Colo. 391, 76 Pac. 981; *Harvey v. Mountain Pride G. M. Co.*, 18 Colo. App. 234, 70 Pac. 1001; *Dickson v. Newhouse (Colo.)*, 82 Pac. 537. All the authorities recognize an exception to the above rule, which exception is recognized by this court in the italicized portion of the foregoing quotation. See, also, *Colo. Cent. R. R. Co. v. Ogden*, 3 Colo. 499; *B. & C. R. R. Co. v. Liehe*, 17 Colo. 280, 29 Pac. 175; *C. F. & I. Co. v. Cummins*, 8 Colo. App. 541, 46 Pac. 875; *Hough v. Railway Co.*, 100 U. S. 224, 25 L. Ed. 612, a leading case, was an action by the representatives of a locomotive engineer against the railroad company. The negligence complained of, and to which was attributed the death of the engineer, was the defective condition of the pilot of the engine, of which the engineer had given notice to the proper officers of the company, and they promised that it should be remedied. Justice Harlan, in the course of the opinion, quoted with approval *Shearman & Redfield on Neg-*

ligence, § 96: "But there can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept"—citing cases, and also the following from Cooley on Torts, 559: "If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant by continuing the employment engages to assume the risks." In *Indianapolis, etc., Ry. Co. v. Watson*, 114 Ind. 20, 27, 14 N. E. 721, 725, 5 Am. St. Rep. 578, cited by plaintiff in error, Judge Elliott states the rule and the exception as follows: "The rule which we regard as sound in principle, and supported by authority, may be thus expressed: The employé who continues in the service of his employer, after notice of a defect augmenting the danger of the service, assumes the risk as increased by the defect, unless the master, expressly or impliedly, promises to remedy the defect." And again at page 32 of 114 Ind., page 727 of 14 N. E.: "Where there is a promise to repair which induces the employé to continue in the service, then, doubtless, he may, for a reasonable length of time, rely on the promise and continue in the service, unless the danger of continuance, without a removal of the cause of it, is so great that a reasonably prudent man would not assume it." See, also, *Conroy v. Vulcan Iron Works Co.*, 62 Mo. 35; *Mfg. Co. v. Morrissey*, 40 Ohio St. 148, 48 Am. Rep. 609; *Mo. Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425, and Colorado cases above cited. Here the plaintiff testified: That a few days preceding the accident he noticed that the unlined portion of the shaft, about 15 feet from the bottom, had a somewhat shattered and broken appearance. That it looked dangerous. That two days before the accident he told the defendant's superintendent that the shaft was not safe, and said: "Don't you think it ought to be lined clear down?" The superintendent replied: "Yes, and I am going to do it at once. I am going to do it right away." That he continued to work in the shaft, relying upon this promise. That at the time the injury was received he had not abandoned the expectation that the promise would be kept. We think this promise of the employer brought the plaintiff within the exception to the rule above stated.

It is contended by plaintiff in error that plaintiff's testimony disclosed that the danger was so great, continuous, and imminent

that plaintiff's continuance in the employment with knowledge of such danger, was per se, such contributory negligence, as would prevent a recovery, and that where such imminent danger exists, there is no such thing as a reasonable time to repair, other than presently and before the work proceeds further. The plaintiff testified, in substance, upon this point, that the shaft looked as though it was dangerous; "it had a somewhat shattered appearance;" he "did not consider it real safe;" that he had worked there 13 shifts preceding the accident, and no rock had fallen; that 8 or 9 more experienced men than himself were using the shaft; that he did not expect it to fall until the superintendent would have time to timber it; that it did not look as though the whole shaft would cave in; that, while it looked as though rock could fall at any time, it did not look as though it would fall. The motion for a directed verdict admits the truth of plaintiff's evidence, and every legitimate inference which might be drawn from it. It is only when the facts are undisputed, as they are in this case, and are such that reasonable, intelligent men can fairly draw but one conclusion therefrom, that the question of negligence or contributory negligence is ever considered one of law for the court. There have been repeated decisions by the courts of this state, as to when, in cases of this character, a court is warranted in granting a nonsuit, or directing a verdict at the close of plaintiff's case.

The rule here established is, in substance, that the court must not invade the province of the jury, except in the clearest of cases, and will not grant a nonsuit, or direct a verdict unless the evidence, in the most favorable light in which it may be considered in behalf of plaintiff, shows that plaintiff was guilty of contributory negligence. *Noffatt v. Tenney*, 17 Colo. 191, 30 Pac. 348; *Railroad Co. v. Martin*, 7 Colo. 590, 4 Pac. 1118; *Lord v. Pueblo S. & R. Co.*, 12 Colo. 393, 21 Pac. 148; *Empson Packing Co. v. Vaughn*, 27 Colo. 66, 59 Pac. 749; *D. & R. G. R. R. Co. v. Spencer*, 27 Colo. 313, 61 Pac. 603, 51 L. R. A. 121; *Denver v. Soloman*, 2 Colo. App. 540, 31 Pac. 507; *Allen v. Florence & C. C. Ry. Co.*, 15 Colo. App. 213, 61 Pac. 401; in *Denver v. Soloman*, supra, it is said: "In order to justify the court in withdrawing the case from the jury, the facts of the case should not only be undisputed, but the conclusion to be drawn from those facts indisputable." In *D. & R. G. R. R. Co. v. Spencer*, supra, this court said: "When the question of negligence is dependent upon inferences to be drawn from acts and circumstances of that character that different intelligent minds may honestly reach different conclusions on the question. It is for the jury to determine, under appropriate instructions, whether or not negligence has been established. [Citing cases.] \* \* \* When, on the question of contributory negligence,

the facts and circumstances are such different minds may honestly draw different conclusions therefrom, on this subject, it is within the province of the jury to determine that question. [Citing cases.]”

The only negligence, if any, imputable to plaintiff, was his continuance in the employment with knowledge that the danger arising from the defect complained of, and which the master had promised to remedy, was so imminent, constant, and great that no one but a reckless person, utterly regardless of his personal safety, would venture upon it. Thus the degree or character of the danger, arising from the defect, became a question of fact to be determined as any other fact in the case. Otherwise stated, the imminency of the danger, due to the defect, is a question of fact to be determined as any other fact in the case, upon the testimony adduced; and when the facts or circumstances presented by the testimony and the inferences to be drawn therefrom are such that honest, intelligent men may draw different conclusions therefrom, this question should be submitted to the jury. Quoting again from *Hough v. Railway Co.*, supra: “We may add, that it was for the jury to say whether the defect in the cowcatcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without it being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances, and as matter of law, absolutely conclusive of want of due care on his part. \* \* \* In such a case as that here presented, the burden of proof to show contributory negligence was upon the defendant.” “Running through all the cases examined on this subject is the principle that if the danger from continuing in the master’s service is so imminent that no one but a person utterly reckless of his personal safety would venture upon it, the master is not responsible. Under such circumstances the law holds it to be negligence on the part of the servant that will bar any recovery in case of accident. It is, however, a question of fact to be found as any other fact in the case, whether the servant is guilty of negligence by continuing to use defective machinery for a reasonable time for the fulfillment of the promise after the master has promised to make the needed repairs.” *Mo. Furnace Co. v. Abend*, 107 Ill. 44-53, 47 Am. Rep. 425.

The inferences to be drawn from the facts that no rocks had previously fallen, and that eight or nine men, more experienced miners than plaintiff, presumably of ordinary intelligence and prudence, with facili-

ties for discovering the defect in the shaft equal to those possessed by the plaintiff, used the shaft without complaint and without apprehending danger from the untimbered portion thereof, speak potently in plaintiff’s behalf, upon the question of his prudence or recklessness. We cannot say that the plaintiff’s testimony, and the inferences to be drawn therefrom, disclosed that the danger from the defect in the lining of the shaft was so imminent that none but a reckless person, utterly careless of his safety, would have continued in the employment, and that by so continuing in the service, relying upon the promise of the master, the plaintiff was guilty of such contributory negligence as would, as a matter of law, prevent recovery. No authority has been cited, and we have found none to the effect, that mere knowledge of the defect itself, as matter of law, is conclusive of want of due care upon the part of the servant. Having arrived at the conclusion that the undisputed evidence did not warrant the court in ruling as matter of law that the danger arising from the defect was so great, continuous, and imminent as to preclude a recovery by plaintiff, it follows, under all the authorities, that the master would have a reasonable time after complaint within which to remedy the defect, and during such time the plaintiff, relying upon the promise, did not assume the risk.

The plaintiff testified that he made complaint of the defect to the superintendent two days before the accident occurred; that he continued in the employment with the expectation that the promise made by the superintendent to remedy the defect would be complied with. The time intervening the promise and the accident was not unreasonable, and it sufficiently appears that the promise induced the plaintiff to continue in the employment. It is unnecessary that the servant notify the master, at the time he makes complaint, that he would leave the employment if the defect is not remedied. *Rothberger v. N. W. Con. Mill Co.*, 57 Minn. 461, 59 N. W. 531. It is sufficient if it appears from the evidence that the promise of the master induced the servant to continue in the employment. *Hough v. Railway Co.*, supra. *Indianapolis, etc., Ry. Co. v. Watson*, supra. It is said that there was an entire absence of proof as to the cause of the injury. Plaintiff testified that a short time previous to receiving the injury he had cleaned up the loose rock and debris on the floor of the drift; that while his right hand was on the rim of the bucket a falling rock struck it, and caused the injury; that he did not see the rock; that no work was done in the drift after the injury was received until the next shift. A witness called by plaintiff testified, that he worked at the mine in question when plaintiff was hurt, but on the opposite shift; that he went to work on the first shift

after plaintiff was hurt, the following morning, and made a search for the rock which was supposed to have hurt plaintiff's hand, and found right close to the shaft some small rock, gravel, and one rock about two or three inches thick and six or eight inches long. This was sufficient proof of the cause of the injury, to submit the question to the jury under proper instructions, and did not invite the jury to invade the realm of conjecture, as contended by plaintiff in error. *D. & R. G. Co. v. McComus*, 7 Colo. App. 121, 42 Pac. 676, cited in support of this proposition by plaintiff in error, owing to a dissimilarity of facts, is not in point.

We have very carefully examined the very large number of authorities cited by counsel for plaintiff in error. Many of them are clearly distinguishable from the case under consideration. A review of the authorities cited would unnecessarily prolong this opinion and accomplish no commensurate benefit. The court did not err in refusing to direct a verdict.

The judgment will be affirmed.

Affirmed.

The CHIEF JUSTICE and GUNTER, J., concur.

#### On Petition for Rehearing.

MAXWELL, J. Plaintiff in error contends that the opinion contains an incomplete and imperfect statement of its contention, and that the conclusion based on such imperfect statement is unsound and ill-considered and cannot be supported by the authority of a single case. The statement as contained in the original brief is: "The cause of the injury to the plaintiff is not disclosed by the evidence. Such injury is not shown to have been caused by the rock which 'fell out of the sides of the shaft.'" Now the statement is: "Our contention, plainly stated as it was, is (1) that the allegation that the rock which injured plaintiff, 'fell out of the sides of the shaft' which defendant had negligently left untimbered was a material and ultimate fact upon which plaintiff's alleged cause of action rested; and (2) that in the absence of specific evidence showing that the object which injured him did fall out of the sides of the shaft, and could not and did not come from any other place, the defendant in error has failed to prove his case."

In the original brief two cases were cited from the courts of this state. *D. & R. G. Co. v. McComas*, 7 Colo. App. 121, 42 Pac. 676, was an action by a brakeman to recover damages for injuries sustained by reason of an accident occasioned by the engine upon which he was riding running into a rock which had fallen upon the track. We quote from the opinion, supplying some portions of it omitted from plaintiff in error's brief, which we italicize. "The plaintiff proved the general circumstances of the accident,

and offered testimony tending to show the size of the rock, its presence on the track, and indicated as near as might be the place from which the rock came. He showed the widening of the gauge and the blasting. *The jury was then left to infer the company was negligent and careless in providing a safe way.* The rock was three to four feet in dimensions in every direction, and a hole was said to be visible on the bluff, some twelve or fifteen feet from the roadbed, about the size of the rock. Nobody saw the rock fall, nor was there any satisfactory evidence produced to establish the place from which it came. Nobody took the trouble to go up and examine the hole, or make any measurements of it, or any examination wherefrom they could testify concerning the probable condition and situation of the rock prior to the time it fell on the track. \* \* \* Manifestly if the hole had been examined and measured, it would have been a relatively easy matter to determine with reasonable certainty whether the rock came from that hole or from further up the mountain. This was a very important matter in its bearing on the question of the negligence of the company. \* \* \* It is thus apparent the only thing which the plaintiff did was to show there was a rock on the track and a hole in the bluff from which it might have come. *All these things might easily be true, and yet the company be guilty of no negligence in providing a safe way.* \* \* \* *The plaintiff wholly failed to establish the negligence which fastened a liability on the company.* \* \* \* *This statement very clearly demonstrates both the failure of the plaintiff to prove the company was negligent and the successful effort of the company to establish the use of the requisite care in the management and maintenance of a dangerous portion of their road. We are therefore compelled to conclude the company was not shown to be negligent."*

Thus it is seen that the question under consideration, and ruled in that case, was not the failure to *prove the cause* of the accident, but the failure to prove the *negligence of defendant*; and the court held that there was not only no proof of negligence, but the absence of proof of facts from which negligence might be inferred. In *Murray v. Railroad Co.*, 11 Colo. 124, 17 Pac. 484, plaintiff with other laborers was repairing a roadbed in a narrow cut. A car loaded with stone became in some way detached from a construction train of the defendant, distant about one-half a mile from the cut. It ran down the track through the cut, coming into collision with a push car, jumped the track, and the plaintiff received an injury. This paragraph in the statement preceding the opinion is omitted from the statement of the case in plaintiff in error's brief. "Plaintiff was injured more or less seriously either by jumping against the walls of the cut, or by

certain stones thrown from the car in passing; it does not clearly appear which." The opinion is: "The plaintiff at the time of the injury complained of, was an employé of the defendant company. The evidence showed the accident and the injury to the plaintiff, but left the cause of the accident entirely unexplained. This was not sufficient to raise a presumption of negligence upon the part of the company. In actions of this character the presumption is that the employer has discharged his duty to the employé. It was for the plaintiff to overcome this presumption by showing negligence upon the part of the company (citing authorities). This the plaintiff failed to do. The evidence does not fix liability upon any one. The cause of the accident is uncertain. It may have been the result of a defect, either latent or patent, in the machinery or appliances used, and the defendant company may or may not have had notice of the defect; it may have resulted from the neglect of an incompetent fellow servant, of whose incompetency the company had full knowledge or no knowledge whatever; or it may have resulted from some other cause possible in the field of conjecture. Upon this point the jury would have been left to speculation had the cause been submitted to them. There was a defect of proof which precluded the application by the court of any known rule of recovery. The plaintiff failed to 'prove a sufficient case for the jury,' and this is a statutory ground of nonsuit. Code Civ. Proc. p. 48. The judgment of the court below is affirmed." In its final analysis this case held, that the presumption is, that the employer has discharged his duty to the employé and that the employé must overcome this presumption by showing the negligence of the employer.

We have carefully read the authorities, some 50 in number, cited by plaintiff in error in its brief in support of its petition for a rehearing, and are of the opinion that they are not in point. They all go to the principle, that negligence, when relied upon, must be proved, or it may be inferred from facts proved, but never from conjecture. It would be useless to review all of the authorities cited, but to sustain the conclusion we have arrived at, and to establish from, the authorities cited, the existence of the rule, that it is within the province of the jury to infer the existence of a fact from proof of the existence of other facts, we here give pertinent excerpts from a few only of the cases cited in the brief in support of the petition for a rehearing, and dismiss the others with the statement, that they do not support the contention of plaintiff in error. "Everything relating to the cause and manner of the death of plaintiff's intestate is matter of pure speculation. Of course, the inference is warranted that he fell from the train, and was run over; but no inference is deducible that the accident was attributable to any neglect

or to any omission on the defendant's part with respect to that duty and care which the law requires of it. All that is positively known is the fact of the violent death of the intestate, and that is not enough to authorize an inference of defendant's negligence." *Borden v. D. L. & E. R. Co.*, 131 N. Y. 671, 30 N. E. 586. "The burden of showing negligence rests on the plaintiff; and before he can be entitled to a recovery, he must prove a state of facts that warrants the inference of negligence; he cannot rest his case upon facts as consistent with due care as with negligence." *Kincaid v. Oregon S. L. R. Co.*, 22 Or. 35, 29 Pac. 3. In *Douglass v. Mitchell's Ex'rs*, 35 Pa. 440, the court approved an instruction containing this language: "That as proof of a fact, the law permits inferences from other facts proved, but does not allow presumptions of facts from presumptions. A fact being established, other facts may be, and often are, ascertained by just inferences." "Evidence furnishing a reasonable basis for satisfying the minds of the jury that the clogging of the netting, through the negligence of the engineer in the management of the engine, was the proximate and operating cause of plaintiff's injury would have been sufficient." In the absence of such evidence, the court in this case held the plaintiff not entitled to recover. *Orth v. St. Paul M. & M. Ry. Co.*, 47 Minn. 384, 50 N. W. 363. "A jury are not warranted in finding a fact established by a greater probability unless, also, the evidence satisfies them that the fact exists. The conclusion that it exists may be drawn from a preponderance of probabilities in its favor, but the probabilities must be such that the conclusion may be drawn or it is not proved." *Dunbar v. McGill*, 64 Mich. 676, 31 N. W. 578. "If all the circumstances attending the accident were in evidence, the mere absence of evidence of fault on the part of the person injured might justify an inference of due care. But where, as in this case, there is an entire absence of evidence as to what Dolan was doing at the time of the accident, it is not enough to show that one conjecture is more probable than another. There must be some evidence to show that he was in the exercise of due care." *Tyndale v. O. C. R. Co.*, 156 Mass. 503, 31 N. E. 655.

Plaintiff in error introduced no testimony at the trial; the statement of the testimony upon the point under consideration, contained in the original opinion, stands uncontradicted. The gravamen of the complaint is, the failure of the employer to provide a reasonably safe place for the employé to work in. This constituted the negligence of the employer. The following facts were proved: The negligence of the employer; the unsafe and dangerous condition of the lower 20 feet of the shaft; the liability of rock to fall therefrom; the properly timbered condition of the remainder of the shaft; the injury to plaintiff by the falling of a rock down the

shaft; the nature of the injury; the rock which fell and size thereof. From which facts, the jury, under proper instructions, given at the request of plaintiff in error, drew the just, reasonable, and legitimate inference or conclusion, that the rock which injured plaintiff, fell out of the side of the untimbered portion of the shaft; indeed, it seems to us that no other conclusion could have been drawn from such facts, and that such conclusion is indisputable. No one saw the accident, hence it was impossible to produce direct testimony to the effect that the rock fell from the untimbered portion of the shaft. The very nature of the case made it necessary for plaintiff to rely upon circumstantial evidence to prove the cause of the injury—to prove facts from which a legitimate inference of the cause of the injury might be drawn by the jury. This was done. The inference drawn by the jury was legitimate, and warranted by the facts proved.

The petition for rehearing will be denied. Denied.

#### JACKSON v. McFALL.

(Supreme Court of Colorado. April 2, 1903.)

#### 1. MINES AND MINERALS — LOCATION OF CLAIMS—PATENTS—ADVERSE CLAIM.

Mills' Ann. Code, § 267, in relation to actions on adverse claims against applications for patents to mining claims, provides that if plaintiff claims the legal right to occupy and possess the premises under the local laws and rules of any mining district, or of the United States, or the state, the complaint shall contain a brief statement of such possessory claim and whether the right claimed is by pre-emption or purchase, or by actual prior possession on the public federal domain. *Held*, that a complaint alleging that plaintiff claimed the legal right to occupy and possess the premises, and that he was entitled to the possession thereof by virtue of a full compliance with the local laws and rules of miners in the mining district in question, the laws of the United States, and the laws of the state, by pre-emption, and by actual prior possession as a lode mining claim located on the public domain of the United States, was sufficient.

#### 2. APPEAL—FAILURE TO PRESENT QUESTION BELOW VERDICT.

An objection to the form of a verdict cannot be raised for the first time on appeal.

#### 3. SAME—HARMLESS ERROR—VERDICT—FORM.

In an action on an adverse against an application for a patent to a mining claim, the fact that the judgment recited that plaintiff was entitled to possession by "purchase," whereas the verdict based the right on "location," within Mills' Ann. Code, § 78, providing that errors not affecting the substantial rights of a party must be disregarded.

Appeal from District Court, Boulder County; James C. Garrigues, Judge.

Action by J. B. McFall against P. B. Jackson on an adverse against an application for a patent for a mining claim. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

George S. Adams, for appellant. J. T. Atwood, for appellee.

MAXWELL, J. This action was in support of an adverse claim against an application for patent for two lode mining claims. The allegations of the complaint pertinent to this opinion, in substance are: That since May 3, 1875. Plaintiff was and is the owner and in the actual occupation of the Mt. Sterling lode mining claim, 1,500 feet in length by 150 feet in width, situated in Gold Hill mining district, Boulder county; that he is and at all times mentioned in the complaint, has been a citizen of the United States. The third paragraph of the complaint is: "That he has and claims the legal right to occupy and possess said premises, and is entitled to the possession thereof by virtue of a full compliance with the local laws and rules of miners in said mining district, the laws of the United States, and the state of Colorado, by pre-emption, and by actual prior possession as a lode mining claim, located on the public domain of the United States." The other allegations are those usually found in complaints in actions of this character. The answer is a general denial. A cross-complaint alleged ownership and title by possession, discovery, location, and record, by the defendant, of three lode mining claims, alleged to have been discovered and located in 1897. The reply joined issue upon the allegations of the cross-complaint. At the close of the evidence, upon motion of plaintiff, the court instructed the jury to return a verdict in favor of plaintiff, which was done, and judgment entered thereon.

The contention of appellant is that the complaint did not state facts sufficient to constitute a cause of action, and therefore the court erred in overruling his objection to the introduction of any testimony. The position of appellant is thus stated in the brief of his counsel: "The second assignment of error is the admitting of evidence on the part of the plaintiff tending to prove the following proposition, viz.: (1) There had been discovered a mineral-bearing lode or vein within the boundaries of the Mt. Sterling claim. (2) That there had been erected on the Mt. Sterling claim a discovery stake or notice. (3) There had been sunk on the said Mt. Sterling claim a discovery shaft. (4) That the boundaries of the said Mt. Sterling claim had been marked. (5) That a location certificate of said Mt. Sterling claim had been filed and recorded in the county clerk's office, Boulder county, Colorado. The above are essential facts, without proof of which the plaintiff was not entitled to a verdict or judgment, as was recognized by the plaintiff and so held by the trial court. And yet, not one of them was averred in the complaint herein filed." Section 267, Mills' Ann. Code, *inter alia*, provides: "If such plaintiff claims the legal right to occupy and possess the premises under the local laws and rules of any mining district, or of the United States, the state of Colorado, or otherwise, the complaint shall contain a

brief statement of such possessory claim, and whether the right claimed is by pre-emption, or purchase, or by right of actual prior possession on the public domain of the United States." The third paragraph of the complaint above quoted, is framed pursuant to the above provisions of the Code, and contains all the necessary allegations therein specified. The whole complaint follows very closely the form given by Mr. Morrison in his *Mining Rights*, (10th Ed.), 419, a form which has been in use in this state many years and has been approved by this court in *Lebanon M. Co. v. Cons. Rep. M. Co.*, 6 Colo. 371; *Bushnell v. Crooke M. & S. Co.* 12 Colo. 247, 12 Pac. 931. There was no error in the ruling complained of.

Objection is made for the first time in this court to the form of the verdict. Objection to the form of the verdict cannot be raised for the first time in this court. *Quimby v. Boyd*, 8 Colo. 194, 6 Pac. 462.

It is objected that the judgment does not follow the verdict, in that the judgment recites "that the plaintiff is the owner of and entitled to the possession and occupancy by purchase and location." The word "purchase" is objected to. The use of this word, being at most an error or defect in the judgment, which does not affect the substantial rights of appellant, under the mandate of section 78, *Mills' Ann. Code*, must be disregarded.

There being no error in the record, the judgment will be affirmed.

Affirmed.

The CHIEF JUSTICE and GUNTER, J., concur.

## JACKSON v. WHITE CLOUD GOLD MIN. & MILL CO. et al.

(Supreme Court of Colorado. April 2, 1906.)

**MINES AND MINERALS — PATENTS — ADVERSE CLAIM — ACTION.**

Rev. St. U. S. § 2321 [U. S. Comp. St. 1901, p. 1425], in relation to mineral lands and patents thereto, provides that proof of citizenship under the statute may consist, in the case of a corporation, by the filing of a certified copy of the charter or certificate of incorporation. *Held*, that where, in an action on an adverse by a corporation against an application for a patent to a mining claim, the complaint alleged that plaintiff was a corporation organized under the laws of the state, and the answer admitted the allegation, it was not necessary to prove the citizenship of plaintiff's stockholders.

Appeal from District Court, Boulder County; James C. Garrigues, Judge.

Action by the White Cloud Gold Mining & Milling Company and others against P. B. Jackson on an adverse against an application for a patent to a mining claim. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

George S. Adams, for appellant. J. T. Atwood, for appellees.

MAXWELL, J. This was an action by the White Cloud Gold Mining & Milling Company and others, appellees, as owners of the Clarence No. 2 lode mining claim, situated in Boulder county, in support of an adverse claim filed by them against the application for patent of the Octavia, Clara, and Sabe Jackson lode mining claims, owned by appellant Jackson. At the conclusion of the evidence the court directed a verdict in favor of plaintiffs, which was returned by the jury and judgment rendered thereon against defendant, from which this appeal. With one exception the errors assigned, which find support in the record, have been ruled adversely to appellant in *Jackson v. McFall*, (No. 4760, decided at this term of court) 85 Pac. 638.

It is contended by appellant that the citizenship of the members of plaintiff corporation was neither alleged or proven. This is urged as an additional reason why his motion for a nonsuit should have been granted, and plaintiff's motion for a directed verdict should have been denied. It is alleged in the complaint and admitted by the answer that the plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the state of Colorado. Section 2321 U. S. Rev. St. [U. S. Comp. St. 1901, p. 1425], provides: "Proof of citizenship under this chapter may consist \* \* \* in the case of a corporation organized under the laws of the United States or any sale or territory thereof, by the filing of a certified copy of their charter or certificate of incorporation." In construing this section in *Doe v. Waterloo Mining Co.*, 70 Fed. 455, 462, 17 C. C. A. 190, 198, the Circuit Court of Appeals of the Ninth Circuit said: "The question might arise, why would the certificate of incorporation establish the citizenship of the stockholders? In considering the question of jurisdiction in the federal courts, it is an established rule that, when a corporation organized under state laws is a party, it is conclusively presumed that the stockholders thereof are all citizens of that state. *Muller v. Dows*, 94 U. S. 445, 24 L. Ed. 207. Congress was familiar with this rule, and it seems probable that it intended to establish a similar rule under the mineral land act of 1872. The practice in the United States Land Office has been, I think, universal not to require of a corporation, seeking to patent mining ground, proof of the citizenship of its stockholders, other than by the production of a certified copy of articles of incorporation. \* \* \* It would have been a great hardship on a corporation to have had to prove that all of its stockholders were citizens of the United States. The practice in the land department of the United States under this statute should have great weight in construing it. *Hahn v. U. S.*, 107 U. S. 402, 2 Sup. Ct. 492, 27 L. Ed. 527; *U. S. v. Moore*, 95 U. S. 760, 24 L. Ed. 588; *Brown v. U. S.*, 113 U. S. 568, 5 Sup. Ct. 648, 28 L.

Ed. 1079. Considering the statute and the practice thereunder, I think the citizenship of the stockholders of the Waterloo Mining Company was sufficiently established. It was not necessary to allege in the answer what was conclusively presumed from the facts alleged. Hence, it was not necessary to have alleged in the answer that the stockholders of appellee were citizens of the United States." In the case at bar, it was admitted by the answer that plaintiff was a corporation organized and existing under the laws of the state of Colorado. Under the above authority it was not necessary to allege the citizenship of the stockholders, such fact being conclusively presumed from the allegation of the incorporation of the plaintiff. It being unnecessary to allege the citizenship of the stockholders of the corporation, it follows that no proof of such citizenship was required under the admissions of the answer. The contention of appellant in this behalf is untenable.

Upon the record presented, for the reasons here stated, and upon the views expressed in *Jackson v. McFall*, supra, it follows that the judgment must be affirmed.

Affirmed.

The CHIEF JUSTICE and GUNTER, J., concur.

#### PERKINS v. MORGAN.

(Supreme Court of Colorado. April 2, 1906.)

##### 1. HUSBAND AND WIFE—LIABILITIES OF WIFE—FAMILY EXPENSES—SERVANTS.

Under Mills' Ann. St. Rev. Supp. § 3021a, declaring that the expenses of a family are chargeable upon the property of both husband and wife, domestic servants employed in the family are a part thereof, and both husband and wife are liable for supplies used in part for such servants.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 134.]

##### 2. SAME—USE OF SUPPLIES—BURDEN OF PROOF.

In an action against husband and wife for supplies furnished for use in the family, the burden of proving that any part of the supplies was used for servants or laborers boarding elsewhere than in the household, so as not to be a part of the family, was on defendants.

##### 3. LIMITATION OF ACTIONS—PLEADING.

In an action against husband and wife to recover for supplies used in the family, a denial in the answer that any of the goods sold or delivered after a date more than six years prior to the commencement of the action was used in the family was insufficient as a plea of limitations.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 683, 684.]

##### 4. SAME.

The defense of the statute of limitations is affirmative and must be specially pleaded.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 678-681.]

Appeal from District Court, Weed County; Christian A. Bennett, Judge.

Action by J. S. Morgan against H. J. Per-

kins and another. From a judgment for plaintiff, defendant Mary M. Perkins appeals. Affirmed.

Herbert M. Munroe, for appellant. Garrigues & Smith, for appellee.

MAXWELL, J. Action against H. J. and Mary M. Perkins for balance due upon an account for goods, wares, and merchandise sold and delivered by plaintiff to defendant H. J. Perkins, at his request, on and between January 29, 1891, and November 20, 1893. The answer of defendant Mary M. Perkins, and plaintiff's reply thereto, presented this question: What portion of the goods sold and delivered were for expenses of the family? The defendant H. J. did not answer.

This allegation of the amended complaint was admitted: "That the defendants H. J. and Mary M. Perkins are and were husband and wife, living together as such during the running of said account, and together with their children and servants constituted a family, and that said indebtedness was contracted by the said husband, H. J. Perkins, for the expense of said family, whereby, by force of the statute in said case made and provided, the same became chargeable upon the property of both husband and wife, or either of them." The statute invoked by plaintiff is: "The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." 3 Mills' Ann. St. Rev. Supp. § 3021a. In construing this statute in *Gilman v. Matthews* (Colo. App.) 77 Pac. 366, it is said: "What should be included in the term 'family expenses' must be determined by the facts and circumstances of each case, subject to the limitation that the article or articles must have been purchased for and used in or by the family, or some member thereof." In *Kelly v. Canon*, 6 Colo. App. 465, 41 Pac. 833, it is said: "The wife, under the statute, could only be held for the original consideration on proof that the goods were furnished for the family." And in *Straight v. McKay*, 15 Colo. App. 60, 60 Pac. 1106: "A right of action is given against her [the wife] for debts which she may have no hand in creating, but those debts must be clearly within the purview of the statute. Either husband or wife may incur indebtedness for the family expenses, and for such indebtedness either or both will be liable. But, outside of the expenses of the family and the education of the children, neither can impose an obligation upon the other. Food and clothing are family expenses, and so are luxuries purchased for the use of the family. Such expenses are not confined to necessities, but to be family expenses they must be for things received by the family, or some member of the family."

In the case at bar the court instructed the jury: "The court instructs the jury in this

case that the family included the parents, children, domestics, and servants, if any, who formed the household of said H. J. Perkins; and all of said goods as were got and used in said household for the members thereof, were for the expense of the family, and are chargeable alike against the property of both husband and wife." The giving of this instruction is assigned as error. Appellant is insistent that the word "family," as used in the statute, does not include servants—farm laborers in this case. The authorities define "family" thus: "A collective body of persons who live in one house under one head or manager. A household, including parents, children, and servants." Webster. "A collection of persons forming a domestic household, including parents, children, servants." Standard. "Father, mother and children; all the individuals who live under the authority of another, including the servants of the family." Bouvier. "A collective body of persons who form one household, under one head and one domestic government, including parents, children, and servants." 12 A. & E. Ency. § 866. Under a statute of Alabama, subjecting the statutory separate estate of the wife to payment "for articles of comfort and support of the household," in *Pippin v. Jones*, 52 Ala. 161, 165, it is said: "Some articles in the account seem to have been purchased for servants in the family. These, it is insisted, are not properly chargeable to the wife's statutory estate. Servants necessarily employed and residing in the family \* \* \* are part of the 'household' within the meaning of the statute. Necessaries supplied them can be charged on the wife's estate." Under the above authorities, servants and domestics, who, with the parents and children, form one household, must be held to be a part of the "family," within the meaning of that term as used in the statute under consideration. If any of the servants or farm laborers were not a part of the household, or were lodged and boarded elsewhere than in the family or household of appellant, and any portion of the goods included in the account sued on, was used by or for such servants or farm laborers, it was incumbent upon appellant to show those facts by competent evidence, to escape the liability imposed by the statute. There is no such evidence in the record. We do not hold that farm laborers, employed by the husband, for the purpose of conducting his business as a farmer, lodged and boarded by him in quarters separate and apart from the family and household, are a part of the family, and that the expenses of maintaining and boarding such servants and laborers, are "family expenses" within the meaning of the statute. Such a state of facts is not in the case. There was no error in the instruction given by the court.

At the request of appellant, the court instructed the jury that the burden of proof rested upon plaintiff to establish by a pre-

ponderance of the evidence that the goods were used in the family of defendant H. J. Perkins. The evidence of plaintiff was to the effect that all of the goods were such as enter into the ordinary family store account; that they were ordered by and delivered to the defendant personally, about two-thirds being purchased by the wife; that the goods were delivered from the store of plaintiff and put into a spring wagon, driven by one or the other of defendants, and by them taken home. No evidence was offered upon behalf of appellant to prove that any part of the goods was not used in the family of appellant, or that any portion was used elsewhere than in the family or household of appellant. The uncontradicted evidence of plaintiff was sufficient to support the verdict rendered.

Appellant requested an instruction to the effect that the statute of limitations had run against the entire account. This the court refused, and error is assigned on such refusal. The last item of the account was of date November 20, 1893. This suit was commenced November 11, 1899. Appellant contends that the plea of the statute of limitations was interposed by the fourth defense, which is: "For a fourth defense, said defendant denies that any of that portion of said goods, wares, and merchandise which was sold or delivered to the defendants, or either of them, after the 9th day of November, 1893, was used in said family, or was a family expense of said family." The answer does not deny the correctness of the account, and therefore admits that the last item of the account was procured by the husband November 20, 1893, as alleged in the complaint. As we read it, this defense did not interpose the statute of limitations to the cause of action alleged in the complaint. It in effect denied the liability of the defendant wife for any portion of the goods sold after November 9, 1893, for the reason that the same were not used in the family and were not a "family expense." This defense in no wise informed the plaintiff or the trial court that the statute of limitations would be relied on as a defense. The defense of the statute of limitations is affirmative and must be specially pleaded. *Adams v. Tucker*, 6 Colo. App. 393, 40 Pac. 783; *Cuenin v. Halbouer*, 32 Colo. 51, 56, 74 Pac. 885; *Blakely v. Ft. Lyon Canal Co.*, 31 Colo. 224, 243, 73 Pac. 249. There was no error in refusing the requested instruction, because the answer did not present the question or issue to which the instruction was addressed.

All issues presented by the pleadings were submitted to the jury under correct instructions as to the law, and resolved in favor of plaintiff. The judgment will be affirmed.

Affirmed.

The CHIEF JUSTICE and GUNTER, J., concur.

(36 Colo. 65)

**ADAMS et al. v. CLARK.**

(Supreme Court of Colorado. April 2, 1906.)

**1. ATTACHMENT—ACTIONS—CONTRACT LIABILITY—BANKS—LIABILITY OF STOCKHOLDERS.**

1 Mills' Ann. St. § 533, provides that shareholders in banks shall be individually responsible for debts, contracts and engagements thereof in an amount double the par value of the stock respectively owned by them. *Held*, that an action to enforce such liability was an action on contract, in which plaintiff was entitled to sue out an attachment.

**2. BANKS AND BANKING—INSOLVENCY—STOCKHOLDERS—STATUTORY LIABILITY—ENFORCEMENT—FORM OF ACTION.**

The proper procedure to enforce the liability of stockholders in an insolvent bank for debts of the corporation imposed by 1 Mills' Ann. St. § 553, is by suit in equity by a creditor or creditors for the benefit of all the creditors and against all the stockholders.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 71.]

**3. ATTACHMENT—EQUITABLE PROCEEDINGS.**

Under Mills' Ann. Code, § 59, permitting defendant to plead legal and equitable defenses, and section 70 authorizing the granting of equitable relief in all cases, an attachment may issue as authorized in an action on contract express or implied to recover a definite sum of money, notwithstanding the proceeding is equitable in its nature.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, §§ 38, 39.]

**4. BANKS AND BANKING—INSOLVENCY—STOCKHOLDERS' LIABILITY—PLEDGES—TRANSFER—FAILURE TO REPORT.**

1 Mills' Ann. St. § 495, provides that no person holding stock in any corporation as collateral security shall be personally subject to any liability as a stockholder of such corporation, but the person pledging the stock shall be considered as holding the same. *Held*, that where certain stock of an insolvent bank stood in the name of another bank as owner, and there was nothing on the stockbooks to show that the stock was held as collateral security or otherwise than as the absolute owner, the bank holding such stock could not escape double liability imposed by 1 Mills' Ann. St. § 533, on the ground that it held the stock as collateral security.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 70.]

**5. STATUTES—PASSAGE—JOURNAL ENTRIES.**

Const. art. 5, § 26, provides that the presiding officer of each house of the Legislature shall in the presence of the house over which he presides, sign all bills, and joint resolutions passed by the general assembly after their title shall have been publicly read, immediately before signing, and the fact of signing shall be entered on the record. *Held*, that the mere fact that a bill or joint resolution was signed by the presiding officer of the House or Senate, is the only matter which is required to be made a matter of journal record and that the journal need not show that the bill was signed in the presence of the House and Senate immediately after its title had been publicly read.

**6. SAME—PRESUMPTIONS.**

Where the Senate Journal was silent as to whether the title of a bill was publicly read immediately before it was signed in the presence of the Senate by the Lieutenant Governor, as required by Const. art. 5, § 26, it would be presumed that such constitutional requirement was complied with.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 382.]

**7. PLEADING—DEFECT OF PARTIES—WAIVER BY PLEADING OVER.**

Where defendants' demurrer to a complaint on the ground of defect of parties, was overruled, whereupon defendants answered, they thereby waived the right to raise such question on appeal.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1405.]

**8. PARTIES—SUIT BY ONE FOR THE BENEFIT OF OTHERS—LEAVE OF COURT.**

Mills' Ann. Code, § 12, provides that when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all, and the court may make an order that the action be so prosecuted or defended. *Held*, that the provision as to leave of court was directory only, and that an order denying a motion to strike the complaint from the files because no order was granted permitting plaintiff to sue on behalf of himself and others, operated to permit the action to be continued in the form it was begun.

**9. PLEADING—DENIAL—INFORMATION AND BELIEF.**

Mills' Ann. Code, § 56, authorizes the denial of any allegation not presumptively within the knowledge of the party making the denial by an allegation that the party has not and cannot obtain sufficient knowledge or information on which to base a belief. *Held*, that where defendants pleaded that a certain statute relied on never was the law of the state, because it was never enacted and signed in the manner prescribed by the Constitution, such allegation did not raise matters which were presumptively within plaintiff's knowledge and hence a denial of information, etc., constituted a sufficient reply thereto.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 248.]

**10. SAME—AFFIRMATIVE MATTER—FAILURE TO REPLY—MATTERS ADMITTED—VALIDITY OF STATUTES.**

The invalidity of a statute on the ground that it was not passed in the manner required by the Constitution, is not a matter which plaintiff can admit by failing to deny in a reply the invalidity thereof alleged in defendant's answer.

**11. BANKS AND BANKING—STOCKHOLDERS—STATUTORY LIABILITY—EVIDENCE—STOCK LEDGER.**

In an action against alleged stockholders of an insolvent bank to recover their statutory liability, the bank's stock ledger identified and supported by the evidence of the ex-cashier of the bank, was competent and sufficient to prove that defendants appearing by the book to be stockholders, were such in fact.

**12. SAME—EXTENT OF LIABILITY—INTEREST.**

Under 1 Mills' Ann. St. § 533, providing that stockholders in banks shall be individually responsible for debts in double the amount of the par value of the stock owned by them, the maximum liability to which such stockholders are liable to creditors, is double the amount of the par value of their stock without interest.

En Banc. Appeal from District Court, Mesa County; Theron Stevens, Judge.

Action by D. T. Clark, on behalf of himself and all other creditors of the Colorado State Bank, similarly situated, against Alva Adams and others. From a judgment for plaintiff, defendants appeal. Modified.

C. F. Caswell, S. G. McMullin, Guy V. Sternberg, S. N. Wheeler, S. M. Logan, and S. D. Walling, for appellants. J. S. Carnahan and Tolles & Cobby, for appellees.

MAXWELL, J. This is an equitable action brought by D. T. Clark on behalf of himself and all other creditors of the Colorado State Bank of Grand Junction, similarly situated, against appellants as stockholders of said bank, to enforce the statutory liability imposed by 1 Mills' Ann. St. § 533; Laws 1885, p. 264. § 1. "Shareholders in banks, savings banks, trust, deposit, and security associations shall be held individually responsible for debts, contracts and engagements of said associations, in double the amount of the par value of the stock owned by them respectively." The insolvent bank was incorporated under the laws of Colorado October 1, 1897, and immediately thereafter opened for business as a banking corporation and continued in such business until on or about January 4, 1902, at which time it made an assignment of all its assets to W. T. Dowrey, who subsequently resigned as assignee, and was succeeded by W. C. McCurdy, who was acting as assignee at the time of the commencement of this suit. The case was tried to the court, and judgment rendered against appellants for double the amount of the par value of stock owned by each respectively, and interest thereon.

The original complaint, filed July 26, 1902, alleged in substance, that plaintiff Clark was a creditor of the insolvent bank; that he brings this action in behalf of himself and all other creditors of the bank similarly situated; the incorporation of the bank; that the bank having become insolvent made an assignment to Dowrey; the resignation of Dowrey and the succession of McCurdy in the assigneeship; that plaintiff had filed his claim with the assignee which had been duly allowed, and that about 25 per cent. thereof had been paid; that the indebtedness from the bank arose by virtue of deposits in the bank made by plaintiff at the time defendants were stockholders thereof; that the amount of his deposits remaining in the bank at the date of its failure was \$19.50; the statute under which the liability of defendants accrued, a list of the stockholders and the number of shares held by each; that the capital stock of the bank was \$30,000, divided into 300 shares of the par value of \$100 each; that the aggregate liabilities of the bank were about \$225,000; that the defendants are all the stockholders. The list of stockholders set forth in the complaint and the holdings thereof, totaled 300 shares. Subsequently the complaint was amended by interlineation, by inserting the words and figures "\$1.948.66" in lieu of "\$19.50." August 9, 1902, a supplemental complaint was filed, in and by which other creditors of the bank, holding claims to the amount of about \$25,000, were brought in and made parties plaintiff. August 15, 1902, the following affidavit in attachment was filed: "Thomas D. Cobbey, of said county, being duly sworn, doth depose and say that he is one of the attorneys for plaintiffs, and that the Bank

of Commerce of Salt Lake City, against whom the said plaintiffs are about to sue out an attachment are indebted to them in a sum not exceeding five thousand (\$5,000.00) dollars, and is upon a contractual obligation, the said Bank of Commerce being the owner of two thousand five hundred dollar's worth, face value, of the capital stock of the Colorado State Bank of Grand Junction, said bank having failed and gone into the hands of an assignee about the 5th day of January, 1902. That the liability of said Bank of Commerce is five thousand dollars, as provided by the statutes of Colorado (Laws 1885, p. 264). And affiant further alleges that the defendant is a corporation whose chief office or place of business is out of the state." A writ of attachment was thereupon issued, against the property of the Bank of Commerce of the city of Salt Lake, appellant, a garnishee summons served on the First National Bank, of Denver, which answered that it was indebted to the Bank of Commerce in the sum of \$6,000.

The appellant Bank of Commerce moved to quash the writ of attachment upon six grounds, which may be summarized as follows: (1) That the action is not upon a contract express or implied. (2) That the action, if any exists, is in equity and not at law. It becomes necessary, therefore, to determine the nature and character of the superadded statutory liability of stockholders imposed by virtue of the statute above quoted.

The authorities are not in accord upon this proposition. The greater weight, however, hold that every person who becomes a stockholder in a corporation, designated in the statute under consideration, becomes such stockholder subject to the terms of the statute, which is a part of the charter of the corporation; that he thereby contracts with reference thereto, and with the creditors of the corporation, that he will be liable for its debts to the limit fixed by the statute. This liability, unlike the liability imposed by the statute upon directors or officers of a corporation for its debts, because of their fraud or negligence in the management of the affairs of the corporation, is not penal in its nature, to be regarded as a purely statutory liability, it is a liability voluntarily assumed by the act of becoming a stockholder, and an obligation thus assumed is purely contractual, contains all the elements of a contract, and is to be enforced as such. In *Hill v. Graham*, 11 Colo. App. 536, 544, 53 Pac. 1060, 1062, in discussing the liability of National Bank stockholders it is said: "We may therefore take it as thoroughly well established that this stock liability is one of contract; that it has its inception at the time the insolvent corporation contracts the debts; that an assessment may be levied or an action may be brought and payment coerced out of the fund resulting from the levy or in the suit to enforce the stock liability. There is no apparent difference in

the two cases." A few of the authorities supporting this position are cited. *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Norris v. Wenschall*, 34 Md. 492; *Brown v. Hitchcock*, 36 Ohio St. 667; *Hawthorne v. Calef*, 2 Wall. (U. S.) 10, 17 L. Ed. 776. Having arrived at the conclusion, that the stockholders liability sought to be enforced in this action is upon contract, it follows that the first ground of the motion to quash the writ of attachment is not well taken. It is settled in this jurisdiction, by *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145, that the proper procedure to enforce the liability of stockholders in an insolvent bank, for debts of the corporation under the statute here under consideration, is by a suit in equity by a creditor or creditors for the benefit of all the creditors and against all the stockholders.

In support of the second ground of the motion to quash the writ of attachment the argument of counsel for appellant is, that although section 1, Mills' Ann. Code, abolished the distinction between legal and equitable actions, and substituted therefor the one action by complaint, nevertheless the distinctions, rules, and principles applicable to legal rights and remedies and equitable rights and remedies, as theretofore distinguished, are unaffected by such abolishment of forms, and therefore, attachment, being a purely legal remedy cannot be invoked in an equitable proceeding. With this contention we do not agree. Under our Code, the same court possesses both law and equity jurisdiction, and hence is competent to take cognizance alike of legal and equitable rights, and to administer legal remedies, or grant equitable relief, or do both, as the nature of the case may require, and as may be permitted by the Code. This is manifest from section 59, which permits the defendant to plead legal and equitable defenses, and section 70, which provides that in all cases equitable relief may be granted. While it is true, that the proceeding by attachment is not the proper remedy for the ascertainment and determination of a purely equitable right, nevertheless, it does not necessarily follow, that in a proceeding in its nature equitable, for the recovery of a definite sum of money upon a contract, an attachment will not lie. To so hold would be to limit the right to the writ of attachment to one form of action. There is no such limitation in the Code, which provides in general terms, that an attachment may issue "in an action on contract express or implied," so that it would seem to follow without question, that in an action, whether legal or equitable, upon a contract, for recovery of a definite, fixed and certain amount of money, the plaintiff will be entitled to a writ of attachment, in aid thereof, upon compliance with the terms imposed by the Code with reference to the issuing of such writ. Otherwise, the statutory right of credi-

tors to proceed against all the stockholders of an insolvent bank, would be limited to the resident stockholders, and those whose property and person were within the jurisdiction of the court of the domicile of the corporation, who would be required to respond to their liability to the utmost farthing, while the nonresident stockholders, although owning property within the jurisdiction of the court, having enjoyed all the benefits arising from the relation of stockholder, would escape the liability imposed by the statute. The following cases with Code provisions similar to those of this state, have sustained the right to a writ or attachment in proceedings to enforce the statutory liability of stockholders. *Kennedy v. Cal. Savings Bank*, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254. The appellant Bank of Commerce, defended upon the ground *inter alia* that it held its stock as collateral security and therefore was not liable as a stockholder.

It is uncontradicted, that a certificate for 25 shares of the capital stock of the insolvent bank was issued and delivered to appellant at its request in the name, "Bank of Commerce, Salt Lake City"; that it receipted for such certificate in that name; that its name, as above, appears on the stock ledger of the insolvent bank as the owner of such stock; that it voted by proxy at one or more meetings of the stockholders of the bank; that there is nothing upon the face of the certificate or the books of the bank in anywise qualifying this ownership of the stock, or indicating that it held the same as collateral security. Thus the question is squarely presented, may a person hold stock in a corporation under the laws of this state, as collateral security, with nothing upon the face of the certificate or the books of the corporation to indicate that he holds it in such capacity or character, and escape the liability of a stockholder? The statute involved is 1 Mills' Ann. St. § 495. "No person holding stock in any corporation as executor, administrator, conservator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholders of such corporation, but the person pledging such stock shall be considered as holding the same, and funds in the hands of such executor, administrator, conservator, guardian or trustee, shall be liable in like manner, and to the same extent, as the testator or intestate, or the ward or person interested in such trust funds, would have been if he had been living and had been competent to act, and held the stock in his own name." The general rule as to the liability of a pledgee of corporate stock is thus stated by Cook in his work on *Stock and Stockholders*, vol. 1, § 247: "A pledgee of stock, that is, one to whom the stock has been transferred in pledge or as collateral security, and who has had the stock

transferred into his own name on the books of the company, is liable to the creditors of the corporation as though he were the absolute owner of the stock. This rule has frequently been enforced in the case of the pledge of shares of stock in a national bank. If, however, the stock has been entered on the corporate books not in the name of the pledgee but in the name of a "dummy" the pledgee is not liable thereon. The statute frequently relieves the pledgee." And, in *Clark & Marshall on Corporations*, vol. 3, page 2548: "In the absence of statutory provision to the contrary, a person who appears on the books of a corporation as a stockholder is liable as such to creditors, although the stock may have been transferred to him merely as collateral security." And, in 2 *Morawetz on Private Corporations*, § 852: "It has accordingly been held, that the creditors of a corporation are entitled to hold every legal owner of shares liable as a shareholder, without regard to equities existing between him and third persons, and may enforce not only the liability of such shareholder to contribute the portion of the capital subscribed by him to the company, but also any further liability to creditors imposed by statute. This rule has been enforced against trustees holding shares for the benefit of others, and against persons to whom shares have been transferred as collateral security for a claim against the prior holder." The authors above quoted cite numerous authorities in support of the principles announced to which reference is made, without citation here.

The argument of counsel for appellant is based upon statements made by the authors above quoted, to the following effect: "A statute frequently relieves the pledgee." *Cook*, § 247. "Statutes have been passed in some of the states making the equitable owner of shares liable in place of the legal holders." *Morawetz*, § 854. "In some jurisdictions it is expressly provided by statute that persons holding stock merely as collateral security shall not be liable as stockholders, but that the pledgor shall be liable, and under such a provision it has been held that a person who has taken a transfer of stock, absolute on its face, may escape liability to creditors by showing that the transfer was in fact as collateral security merely." 3 *Clark & Marshall, Private Corporations*, p. 2550. The authorities cited by the above authors in support of the doctrine announced in the last quotations, are those relied upon by counsel for appellant, and are decisions in cases arising under the statutes of New York, Maryland, and Missouri. The statutes of Missouri, Maryland, and New York are substantially the same as the statute of Colorado. 1 *Mills' Ann. St.* § 495, *supra*. Counsel concede that the general rule is as stated by the above authors, but contend that the general rule and the authorities cited in support thereof, are inapplicable to a case arising

under the Colorado statute, and that the only authorities which are applicable to the case under consideration, are those arising under similar statutes, to wit, the statutes of New York, Missouri, and Maryland.

Counsel for appellant thus state their position in their printed brief, after quoting the exception to the general rule as stated by *Clark & Marshall* in the last above quotation from that author: "This draws the distinction, and shows that where statutes exempt the holder of stock as collateral security from liability, he may show that he does hold it as collateral security, and when he has shown that he so holds it, he presents a complete defense to an action instituted by a creditor against him to recover upon the basis of his being a stockholder. The doctrine has been announced in Maryland, the doctrine has been announced in New York, the doctrine has been announced in Missouri. The statutes in these states are to all intents and purposes identical with the statute now under consideration. The Supreme Court of the United States has construed the statute of Missouri to mean what it says, and to be effectual to exempt from liability an individual who owns stock as collateral. Colorado has a statute which is now before the court for consideration and construction, and it is not unreasonable for us to expect that this court will give to that statute the same construction which has been given to statutes of the same import in Maryland, New York and Missouri by the courts of those states, and by the Supreme Court of the United States." An examination of the authorities cited by the authors in support of the exception, and by counsel in support of their argument, leads us to the conclusion that the cases cited from the United States Supreme Court, Maryland and Missouri do not support the principle announced. *Burgess v. Sellman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, upon which much reliance is placed, was an action by a creditor of an insolvent railroad corporation, incorporated under the laws of Missouri, to enforce the statutory liability imposed upon stockholders. The pertinent facts found by the court were: That the defendants held stock by direct issue from the corporation under a trust as security for money advanced to the corporation; that the stock transfer book of the corporation showed that the stock was "held in escrow;" that plaintiff had actual notice and knowledge of the manner in which, and the purposes for which, the defendants held the stock; and that plaintiff had derived a benefit from the transaction between the defendants and the corporation. Under the above state of facts, the court decided that one who "held in escrow" the stock of a corporation, that fact appearing upon the books of the corporation, such stock being issued directly to the stockholder, in trust, to secure the debt of the corporation, was not a stockholder, and could not be held as a stockholder

under the Missouri statute. The facts clearly distinguish this case from the case at bar. *Union Savings Association v. Seligman*, 92 Mo. 635, 15 S. W. 630, 1 Am. St. Rep. 776 (overruling *Griswold v. Seligman*, 72 Mo. 110 and cases following it) was a case growing out of practically the same transaction involved and decided in *Burgess v. Seligman*, supra, and for the reasons above stated, must be held to be entirely inapplicable to the case under consideration. The Maryland case relied on is *Matthews v. Albert*, 24 Md. 527. It appears from the opinion, that Tiernan, who claimed exemption from the liability of a stockholder, had loaned money to the company, taking as security for the payment of the loan, a certificate of stock of the company issued directly to him by the company, upon which certificate an indorsement was made by the president of the corporation, to the effect, that it had been issued to Tiernan as collateral security for the loan. Thus, it plainly appears from this statement of facts, that Tiernan was a creditor of the corporation on account of money loaned to it, and that he held the stock upon which he was sought to be made liable as a stockholder, as collateral security for a loan, which fact appeared upon the face of the certificate. Upon this point the opinion says: The claim of W. H. Tiernan is for \$2,000, money alleged to be loaned to the company on the 8th of January, 1859, and is proved by James C. Berry; but it is insisted by the appellees that Tiernan, instead of being a nonstockholder creditor, is, according to the evidence, a stockholder, and as much liable as the Alberts. We do not concur in this view of the relation of Tiernan to the company. In our opinion his claim is for money loaned, and the stock transferred to him was held by him as collateral security for his loan, and so holding it, he is not personally subject to any liability as a stockholder, but is protected by the provision of the twelfth section of the act of 1852, chapter 338." Thus it is seen the fact in the last case clearly distinguish it from the case under consideration, so that the authorities cited by the authors from the United States Supreme Court, Maryland and Missouri in support of the exception stated and relied upon by appellants, are not in point.

The only case cited by counsel under a statute similar to the statute of this state, which appears to support their contention is *McMahon v. Macy*, 51 N. Y. 153, where it is said: "Section 11 of the general railroad act of 1850 [Laws 1850, p. 215, c. 140] provides that no person holding stock in a railroad company as collateral security shall be personally liable as a stockholder, but the person, pledging the stock shall have the liability as stockholder. Under this law the evidence that the stock in question was assigned to the defendant as collateral security, should have been received and considered, and should have secured to the defendant ex-

emption from liability on account of the stock." No authorities are cited in support of this conclusion, which might be classed as obiter dictum, and it is certainly against the overwhelming weight of authority in this country. Judge Thompson in his work on Corporations, at section 2937, thus criticizes the above case: "But the late Commission of Appeals of New York held that a person who received a transfer of the stock of another as collateral security for a debt due by the latter could not be held liable as a shareholder to a creditor, in a direct action given by a statute to the creditor against the shareholder, although his name appeared on the books of the company as absolute owner. The opinion of Commissioner Earl proceeds on the analogy of the rule that it is competent to show that an assignment or conveyance, absolute in form, was intended only as a security. He adds that, 'there is nothing in any statute which makes the books of the company the incontrovertible evidence of ownership of stock.' It is doubtful whether this is to be regarded as more than an expression of opinion by a single judge. But however it is to be viewed, it is a plain judicial aberration. Nothing is better settled in the law of corporations than that the stockholder whose name appears on the books of the corporation with his own consent is absolutely bound in the character which he thus assumes, both to the company and to its creditors." We believe that counsel have entirely misconceived the intention and purpose of the statute of this state, and of New York, Maryland and Missouri, now under consideration.

The general rule of law is that the members of a corporation are not liable for its debts or torts except to make good the amount due to the corporation for its shares, unless made so by constitutional or statutory enactment. The members of a corporation are its shareholders, its stockholders, those who appear upon the books of the corporation in such character or capacity. "The trustee of stock who is recorded on the corporation books as a stockholder is by common law liable on such stock as though he were the absolute owner of the same. This is the rule even though he is recorded on the corporation books not as the absolute owner but as a trustee of stock." Cook on Stock, § 245. The same rule as that last quoted would apply to the other classes of holders of stock designated in the statute under consideration. The earlier statutes imposed a liability upon all stockholders or shareholders, without regard to the capacity in which they might be holders of stock or shares. In this regard they follow the rule at common law, as above stated by Cook. The intention of the statutes under consideration, was to relieve persons holding stock in a fiduciary capacity from personal liability imposed by the common law and the earlier statutes in this country, and place

such liability upon the owner of the legal and not the equitable title to the stock, that is, upon the cestui que trust or the estate of the testator, intestate, ward or pledgor, as the case may be. Section 533, 1 Mills' Ann. St., supra, having imposed the liability upon shareholders or holders of shares as distinguished from the owners of shares, those who hold as trustees, etc., or as pledgees, to avail themselves of the exemption provided by 1 Mills' Ann. St. § 495, must comply with the statute as enacted. This being true, according to the terms of the statute the stock must be held as trustee or as collateral security, that is in the character of trustee or pledgee, and unless the stock is so held and that fact appears upon the books of the company, the holder will not be exempt from the liability imposed by the statute.

In those jurisdictions where statutes have been enacted providing that persons holding shares as executors, administrators, conservators, guardians or trustees shall not be subject to liability as stockholders, it is held that to protect such persons from personal liability is must appear on the books of the corporation that the holding is in such capacity. *Davis v. First Baptist Society*, 44 Conn. 582, Fed. Cas. No. 3,633; *Sherwood v. Illinois Trust & Savings Bank*, 195 Ill. 112, 62 N. E. 835, 88 Am. St. Rep. 183; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818. In *Davis v. First Baptist Society*, it is said: "Creditors have a right to know who have pledged their individual liability. If trusteeship does not appear upon the books of the bank, they have a right to infer that the stockholder is personally liable. If a trustee wishes to disclose his trusteeship, there is no difficulty in giving notice upon the books of the bank. If he does not disclose his trusteeship, he is guilty of laches, for which others should not suffer. The settlement of the affairs of an insolvent bank would be rendered a matter of great labor, expense and delay, if persons who appeared upon the books of the bank as individual stockholders were permitted to relieve themselves by proving that they held the stock as executors, or guardians, or trustees. Citing *Adderly v. Storm*, 6 Hill (N. Y.) 628; *Stover v. Flack*, 30 N. Y. 64; *Crease v. Babcock*, 10 Mete. (Mass.) 525; *Hale v. Walker*, 31 Iowa, 344, 7 Am. Rep. 137. The statute of this state and like statutes merely add the pledgee of stock to the other classes of persons, mentioned in the federal statutes, and the statutes of all the states of like import. It follows, that the general rule announced by the text-writers above quoted, and the federal and state courts, to which we have found no exception, that a person whose name rightfully appears on the books of a corporation is a shareholder, and must respond as such to all the statutory liabilities imposed upon shareholders, applies with full force to those holding stock as collateral security, unless

it appears on the books of the corporation, that the stock is so held.

This conclusion is supported by the United States Supreme Court in *Pauly v. State Loan & Trust Co.*, 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844, a case cited by counsel for appellant bank, which was an action to recover an assessment made on the shareholders of a national banking association and therefore involved a construction of the federal statutes. It appeared that the defendant trust company, was a holder, as pledgee, of shares of stock of the California National Bank of San Diego. The opinion, written by Mr. Justice Harlan, is an exhaustive and learned review and analysis of all the authorities, federal and state, bearing upon the question under consideration. The conclusion arrived at by the court is: "That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder within the meaning of section 5151 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3465] and therefore liable upon the basis prescribed by that section for the contracts, debts and engagements of the association." After a discussion of the relations existing between pledgor and pledgee the opinion proceeds: "Does the statute in letter or spirit, require that the word 'pledgee' appended to the name of the party to whom certificates 308 and 309 were issued, should be entirely ignored? Is the holder of such certificates in no better condition, in respect of liability as a shareholder, than if such list had imported absolute ownership in the transferee?" The conclusion of the court is stated as follows: "Our conclusion is that the defendant in error cannot be regarded otherwise than as a pledgee of the stock in question, is not a shareholder within the meaning of section 5151 of the Revised Statutes, and is not, therefore, subject to the liability imposed upon the shareholders of national banking associations by that section." In *Rankin v. Fidelity Trust Company*, 189 U. S. 242, 23 Sup. Ct. 553, 27 L. Ed. 792, which was an action by the receiver of a national bank to recover an assessment upon the shareholders of a bank, pursuant to United States Rev. St. § 5151, it was held, that a mere pledgee who receives from his debtor a transfer of shares, surrenders the certificate of the bank and takes out new ones in his own name in which he is described as pledgee, and holds them as collateral security for the payment of his debt, is not subject to personal liability as a shareholder but it is otherwise if he allows his name to appear on the books as owner.

*Hurlburt v. Arthur*, 140 Cal. 103, 73 Pac.

734, 98 Am. St. Rep. 17, decided September 4, 1903, under a statute substantially the same as the statute here under consideration, was a case by creditors to enforce statutory liability of stockholders. The court says: "The only question presented on this appeal is, whether in this state one who, upon the books of a banking corporation, appears as a stockholder, may show, to escape his statutory liability to its creditors, depositors in this instance, that he was not in fact the owner of the stock, but held it merely as collateral security." Its conclusion is: "And the general rule upon this subject is, that in the absence of an express statute to the contrary, the liability to pay calls and to respond to creditors in the event of insolvency of the corporation, attaches to the holder of the legal title to the stock, and the courts will not look beyond the registered shareholder nor inquire under what equity he holds, and so one who takes stock as collateral security and has it transferred to himself and so registered on the books of the company, will be liable to the creditors. (Citing a large number of authorities.) Some of these cases cited have reference to claims of nonliability by persons who were in fact trustees, although they did not so appear upon the books of the company. They were, nevertheless, held liable, and the same reasoning which would apply in such cases, is equally applicable to persons claiming exemption from liability as pledgees under our section of the Code, because any immunity from liability which is there given to trustees is equally extended to pledgees; they both stand upon the same legal plane in this respect." Counsel for appellant criticize this case, saying, that the expressions above quoted are purely obiter, and that the court failed to discriminate between the two classes of cases which they have presented to this court. In other language, that the California court fails to make the distinction, which counsel so earnestly and ably insist, exists. In both positions counsel are in error. As shown by the quotation, the expressions of the court were upon the only point in the case, and further, it is apparent from the opinion, that the same distinction urged by learned counsel here, was presented to the Supreme Court of California, by that court considered, and the conclusion reached, that no such distinction exists, in which conclusion we concur, from which it follows that, under the uncontradicted facts in this case, briefly stated above, although the appellant held the stock as collateral security, nevertheless, it must suffer the penalty which the law imposes upon a pledgee who fails to show upon the books of a corporation what the real transaction was.

It is contended by all appellants:

1. That section 533, 1 Mills' Ann. St., supra, was not passed in conformity with the constitutional requirements, and is therefore void. The statute in question was passed by the General Assembly of 1885, and was

known as "House Bill No. 243." "A bill for an act to fix and define the liability of shareholders in banks, trust, deposit and security associations." Approved March 25, 1885, Sess. Laws 1885, p. 264. The printed journal of the Senate for the session of the General Assembly of 1885, of date, March 23, 1885, at page 1136, contains the following, as appears by the abstract of record in this case: "H. B. No. 243. A bill for an act to fix and define the liability of shareholders in banks, savings banks, trust, deposit or security associations. Was read the third time. The question being, shall the bill pass? The roll was called with the following result: Yeas, 21 senators. Nays, none. Absent and excused, 2. Absent and not voting, 3. So the bill passed. The title was read and agreed to." At page 1174 of the Senate Journal, under date March 25, 1885, as follows: "The Lieutenant Governor announced that he had signed House Bill No. 243, an act to fix and define the liability of shareholders in banks, savings banks, trust, deposit or security associations." Section 26, art. 5, of the Constitution of Colorado, invoked by counsel in support of their position, that the act in question was not passed according to the requirements of the Constitution is: "The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the General Assembly after their title shall have been publicly read, immediately before signing; and the fact of signing shall be entered on the journal."

It is contended that it conclusively and affirmatively appears from the above extract from the journal of the Senate that, the signature of the Lieutenant Governor to the above bill was not affixed thereto by him in the presence of the house over which he presided, after the title of the bill had been publicly read, immediately before the signing. In *Re Roberts*, 5 Colo. 525, 535, this court said: "The requirement of section 26, art., that the fact of the signing of a bill by the presiding officer in the presence of the house over which he presides 'shall be entered on the journal' is directory, and, in the silence of the journal, it will be presumed that the bill was so signed." Counsel contended that the above is dictum and that subsequent decisions of this court have either overruled or disregarded the ruling in the *Roberts Case*. No decision of this court has been cited and we know of none, wherein the decision of the court in the *Roberts Case* upon this point has been overruled, disregarded, or in any wise criticised. However, we do not agree with counsel in their contention, that section 26, art. 5, supra, requires that the fact of signing in the presence of each house, immediately after the title of the bill has been read, is required by the mandatory provisions of the Constitution to be made a matter of journal record. In other words, the mere

fact that the bill or joint resolution was signed by the presiding officer of the House or Senate is the only matter which is required to be made a matter of journal record. The section of the Constitution under consideration does not require that the journal should show that the bill was signed in the presence of the House and Senate immediately after its title had been publicly read. In *Insurance Co. v. Loan Co.* 20 Colo. 1, 5, 36 Pac. 793, in discussing the effect of a failure of the journal to show that the bill had been read at length on three different days (section 22, art. 5) this court said: "Although the journal does not show affirmatively that the bill was read at length upon three different days in the senate it does show that it was read a first and third time. It could not have been read a third time unless there had been a second reading. Aside from this, merely negative evidence is not sufficient to impeach the enrolled act duly signed and authenticated by the proper officers and lodged in the office of the Secretary of State. Judge Cooley in his work on Constitutional Limitations, page 167, says, in speaking of a similar provision, 'The journals which each house keeps of its proceedings ought to show whether this rule is complied with or not; but in case they do not, the passage in the manner provided by the Constitution must be presumed, in accordance with the general rule which presumes the proper discharge of official duty.' See, also, *In re Roberts*, 5 Colo. 525, and cases cited. The above from Mr. Cooley is a clear statement of the law applicable in the absence of a mandatory provision of the Constitution requiring the fact to be made a matter of journal record." In *Re Roberts*, 5 Colo. 534, this court said: "If the records are silent touching the compliance with the constitutional requirement, there is a presumption of right action in favor of a body acting under oath to support the Constitution," citing cases. And in *Andrews v. The People*, 33 Colo. 193, 199, 79 Pac. 1031, 1034, "In determining whether the constitutional requirements with respect to the passage of bills have been complied with, resort can be had to the legislature journals. If it affirmatively appears therefrom, either expressly or by necessary implication, that the provisions of the Constitution were not observed, then the bill is not valid. If, however, they are merely silent on this question, it must be presumed that the fundamental law on the subject of the passage of bills was in all respects followed. *Insurance Co. v. Loan Co.*, 20 Colo. 1, 36 Pac. 793; *In re Roberts*, 5 Colo. 525; *State ex rel. v. Frances*, 26 Kan. 724." Under the above rules, we conclude that, the record being silent as to whether the title of the bill was publicly read immediately before it was signed in the presence of the Senate, by the Lieutenant Governor, section 26, art. 5 not requiring that the journal record should so state, the presumption is that the constitutional requirement was com-

plied with, and the contention of counsel that section 533, 1 Mills' Ann. St. is invalid and void, is untenable.

2. It is said by appellants that the complaint is insufficient in that it does not allege the insolvency of the bank; that it does not appear therefrom that the defendants are all of the stockholders of the bank, nor that the assets of the bank are insufficient to meet its liabilities. While the complaint is not a model, we do not think that the objection is well taken. The complaint herein is framed along the lines of the complaint in *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145, which was there held sufficient.

3. It is insisted that the assignee of the insolvent bank, should have been made a party defendant. Defendants' demurrer to the complaint was upon the ground, *inter alia*, defect of parties. This demurrer was overruled. Defendants answered over, and thereby waived the right to raise this question on appeal. *Zang v. Wyant*, *supra*.

4. The court overruled the motion of appellants to strike the complaint from the files, upon the ground, that no order of court had been made permitting an action to be brought by plaintiff on behalf of himself and others similarly situated. Section 12, Hills' Ann. Code provides: "When the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all and the court may make an order that the action be so prosecuted or defend." The Code provision, as to an order by the court, above recited, is not mandatory. It is not jurisdictional. The effect of the order denying the motion to strike the complaint from the files was to permit the action to be prosecuted in the form in which it had been commenced. There was no error in the ruling.

5. Appellants in their third defense averred that section 533, Mills' Ann. St. approved March 25, 1885, "is not and never was a law of the state of Colorado nor was the same ever enacted and signed in the manner prescribed by the Constitution of the state of Colorado for the following reasons, to wit:" Then follow allegations specifying wherein the mandatory requirements of the Constitution had not been complied with in the passage of the law referred to. The reply to this defense was: "For a reply to the third alleged defense of said defendants, plaintiffs say, that as to the matters and things therein set forth they have not and cannot obtain sufficient knowledge or information upon which to base a belief." The motion of appellants for judgment on the pleadings upon the ground that there was no reply to this defense was overruled. Error is assigned upon this ruling. The contention of appellants is that the reply being in the form provided by section 56, Mills' Ann. Code, of matters which were presumptively within the knowledge of plaintiff was no re-

ply. It cannot be held, that the matters alleged in the third defense were presumptively within the knowledge of plaintiff, and therefore, the reply was good, under section 56, Mills' Ann. Code. Aside from this, the failure to reply to the affirmative material allegations of the answer is an admission of such allegations. This is the basis upon which the motion for judgment on the pleadings was predicated. "In *Peckham v. The People*, 32 Colo. 140, 75 Pac. 422, it was expressly said, that it is not within the power of counsel to enter into a stipulation, the effect of which will render the law void, and the court will not consider admissions of parties or their counsel that the law has not been passed in accordance with the mandatory requirements of the Constitution, or admissions of facts as to the contents of the legislative journal." *Anderson v. Grand Valley Irr. District* (decided by this court Jan. 8, 1906). 85 Pac. 313. See, also, *Marean v. Stanley*, 21 Colo. 43, 39 Pac. 1086. The rule announced in the above cases applies with equal force to admissions of parties or counsel by pleading, and as said in the *Anderson Case*, supra: "This is the sort of question which the court will sua sponte raise." There was no error in the ruling.

6. It is said that the court erred in allowing the stock ledger of the insolvent bank to be introduced in evidence to prove that appellants were stockholders of the bank, in that the stock ledger was not such a book as is required to be kept by the officers of a corporation, by 1 Mills' Ann. St. § 508. The stock ledger has been certified to this court, and we have examined it. It seems to be in all respects similar to the stock ledger passed upon by the court in *Zang v. Wyant*, supra. It was identified and supported by the testimony of the ex-cashier of the bank, to the same effect as the book passed upon in *Zang v. Wyant*, was identified and supported by Mr. Root. We think the book with the testimony supporting it, was competent and sufficient evidence to prove that appellants were stockholders of the insolvent bank.

7. The court found that appellants were liable to the limit of the liability imposed by the statute, to wit, "double the amount of the par value of the stock," and in its decree awarded judgment against each appellant for that amount with interest thereon from January 6, 1902, to the date of the rendition of the decree. The maximum liability imposed by the statute is "double the amount of the par value of the stock." This is the limit of recovery by creditors. *Zang v. Wyant*, supra. *Clark & Marshal*, vol. 3, page 2515; *Richmond v. Irons*, 121 U. S. 27, 64; 7 Sup. Ct. 788, 30 L. Ed. 864. The allowance of interest was error. This error will not necessitate a reversal of the judgment.

The order will be that the judgment be modified as to all appellants, limiting the

amount of the judgment against each appellant to an amount equal to "double the amount of the par value of the stock" held by each appellant respectively, as found by the trial court. That the cause be remanded with directions to the trial court to modify the judgment as herein indicated, *nunc pro tunc*, and that the judgment in all other respects, be affirmed.

Modified and affirmed.

CAMPBELL, J., not sitting.

#### FITZPATRICK v. PEOPLE.

(Supreme Court of Colorado. April 2, 1906.)

##### 1. CRIMINAL LAW—APPEAL—REVIEW OF EVIDENCE.

Only written evidence having been considered by the district court in a proceeding to hold to bail to keep the peace, it may be examined and weighed on appeal uninfluenced by the finding of that court.

##### 2. COSTS—IN CRIMINAL CASE—TAXATION AGAINST PROSECUTOR.

Under Mills' Ann. St. § 1454, providing that when one is bound by recognizance to keep the peace, and on the hearing in the district court it shall appear that the prosecution was commenced maliciously without reasonable or proper cause, the court may give judgment against the prosecutor for costs, the costs may not be taxed against the prosecuting witness where the evidence does not justify a finding that the prosecution was malicious.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 1141, 1142.]

Appeal from District Court, Gunnison County; Theron Stevens, Judge.

Proceeding by the people to place one Flohr under bond to keep the peace. From a judgment taxing the costs against the prosecuting witness, Peter Fitzpatrick, he appeals. Reversed.

Brown and Nourse, for appellant. N. C. Miller, Atty. Gen., for the People.

GUNTER, J. This was a proceeding under section 1482, 1 Mills' Ann. St., to have one Flohr placed under bond to keep the peace. A hearing was had before the justice, and Flohr was placed under bond returnable to the next term of the district court. The evidence was written down and transmitted, together with the other papers in the case, to the district court in accordance with section 2782, 2 Mills' Ann. St. Section 2783, 2 Mills' Ann. St., provides: "When the clerk receives such papers from the justice, he shall docket the case, thereafter the case shall stand for argument at the following term of court. The judge shall examine the record and evidence, and if, upon such record and evidence the judge shall be of the opinion that the defendant was improperly bound over, he shall discharge the defendant and tax the costs against the county, or the prosecuting witness as in his judgment is proper. It shall be the duty of the court to examine and pass upon the record and evidence, even though

the prosecuting witness does not appear to prosecute. If the judgment of the justice shall be affirmed, the judge may require the defendant to renew his bond, or may discharge the defendant therefrom; in such cases the costs shall be taxed against the defendant." Section 1454, 1 Mills' Ann. St., provides: "When any person or persons have been or shall be bound by recognizance to keep the peace, or for their good behavior, and for the appearance in (the) district court or before any justice of the peace, if the prosecutor shall fail to appear and prosecute, or if upon the hearing it shall appear that the prosecution was commenced maliciously without reasonable or proper cause, the court may, in its discretion, give judgment against the prosecutor for costs of prosecution and defense." The cause came on for hearing before the district court. The people and Flohr, respectively, being represented by counsel. The court considered the case solely upon the evidence returned in writing by the justice, and, after a consideration thereof, dismissed the case at the cost of the prosecuting witness, appellant herein, Peter Fitzpatrick. Fitzpatrick brings the judgment against him for costs here by appeal for review.

The sole question argued, and the only one we consider, is, whether it was error in the lower court to tax the costs of the prosecution to the prosecuting witness, appellant. Section 1454, supra, authorized the taxation of costs to the prosecuting witness provided the prosecution was commenced maliciously. As only written evidence was considered by the district court when it dismissed the case, and taxed the costs against the prosecuting witness, and, as this evidence is before us, we are as favorably situated for considering the evidence as was the district court, and if necessary are authorized to examine and weigh it uninfluenced by the finding of that court upon the facts. The situation is as if the case had been tried below upon depositions or affidavits. *Stock-Growers' Bank v. Newton*, 13 Colo. 246, 22 Pac. 444; *Rittmaster v. Brisbane*, 19 Colo. 371, 35 Pac. 736; *Heller v. People*, 22 Colo. 11, 43 Pac. 124.

There was evidence before the court which, if credited, brought the case within section 1482, supra; that is, there was evidence which, if credited, showed that Flohr had used threats to do bodily harm to the prosecuting witness, and while there was a conflict upon such issue, there was an absence of evidence tending to show that the prosecution was malicious. This is substantially conceded by the Attorney General, who appears here in behalf of the people. It would serve no useful purpose to recite the evidence in detail. We conclude from its examination that it does not show that the prosecution "was commenced maliciously without reasonable or proper cause." If so, the evidence did not satisfy the requirements of the statute and justify taxing the costs to

the prosecuting witness. *State v. Green*, 30 Tenn. (2 Head) 358, in announcing the principle which control in the taxation of costs for malicious prosecution says: "The prosecution should be very clearly without foundation and that known to the prosecutor so as to show that his motives were malicious, and not for the promotion of public justice in instituting the prosecution in order to subject him to the costs. It may and does often happen that sufficient apparent cause exists when, upon investigation, it turns out to be entirely groundless. This law was intended only for strong and clear cases of malicious prosecution, unmingled with the proper motive, which is to bring offenders to justice for the public good. In such a case the law is right, and ought to be enforced, as the process and forms of the law ought not to be used solely to gratify the personal animosity, nor recklessly, where there is no ground for the charge." The evidence did not justify holding that the prosecution was malicious.

The judgment will be reversed as to the taxation of costs to the prosecuting witness, and the same be ordered taxed against the county.

Judgment reversed.

The CHIEF JUSTICE and MAXWELL, J., concur.

# TERRITORY v. MUNROE.

(Supreme Court of Arizona. March 30, 1906.)

## 1. EMBEZZLEMENT—BAILEES—STATUTORY OFFENSE—INDICTMENT.

Pen. Code, § 461, declares that every person intrusted with any property as bailee, who fraudulently converts the same or the proceeds thereof to his own use, with a fraudulent intent to convert it to his own use, is guilty of embezzlement. *Held* that, where an indictment under such section alleged facts showing that accused was a bailee, the indictment was not defective for failure to designate the accused as a bailee in terms.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, §§ 47, 50.]

## 2. SAME—NECESSITY OF DEMAND.

In a prosecution of an alleged bailee for embezzlement, in violation of Pen. Code, § 461, declaring that every person intrusted with any property as bailee who fraudulently converts the same or the proceeds thereof to his own use, with a fraudulent intent to convert it to his own use, is guilty of embezzlement, it was not necessary for the state to allege a demand for the return of the property, and a failure to comply therewith under section 463, declaring that no person shall be adjudged guilty of embezzlement until a demand for return of the property converted and misappropriated shall have been made, etc.; the offense described by section 461 being complete when the property was fraudulently and feloniously converted.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, §§ 9, 51.]

Appeal from District Court, Graham County; before Justice Tucker.

James L. Munroe was indicted for embezzlement, and, a demurrer having been sus-

tained to the indictment, the territory appeals. Judgment held error.

E. S. Clark, Atty. Gen., and C. L. Rawlins, Dist. Atty., for the Territory.

CAMPBELL, J. The defendant was indicted for the crime of embezzlement. A general demurrer to the indictment was sustained, and the Attorney General being of the opinion that error was committed to the prejudice of the territory, and that it is important to a correct and uniform administration of the criminal law that this court should decide the point of law involved, has brought this appeal under the provisions of section 1038 of the Penal Code. The indictment was drawn to charge an offense under section 461 of the Penal Code, which is as follows: "Every person entrusted with any property as bailee, tenant, or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert it to his own use, is guilty of embezzlement." It was urged upon the hearing upon the demurrer that the indictment is defective for the reason that it does not designate in terms the accused as bailee, tenant, or lodger; but it sets out at length facts which made the accused a bailee, and while the pleader might safely have charged the offense in the language of the statute, the fact that he has used other words conveying the same meaning does not render the indictment bad. *Hinds v. Territory* (Ariz.) 76 Pac. 469.

It was further urged that the indictment is defective for the reason that it does not allege that a demand was made for the return of the property alleged to have been embezzled, and that the defendant failed to return it. Section 463 of the Penal Code, as it was in force at the time the offense is alleged to have been committed, read as follows: "A distinct act of taking is not necessary to constitute embezzlement; but no one shall be adjudged guilty of embezzlement until a demand for the return of the property converted or misappropriated shall have been made, on the one alleged to have converted or misappropriated it, and shall fail to return the same on such demand being made. But no such demand shall be necessary if the defendant abscond or absent himself from the place where such embezzlement is alleged to have been committed, or secrete himself so that he cannot be found at such place." The court below evidently entertained the opinion that the offense is not complete until the bailee fails or refuses to return the property upon demand, and therefore that this element of the offense should be alleged in the indictment. In our view, the offense, which is purely statutory, is complete when the property is fraudulently and feloniously converted. Refusal to return the property upon de-

mand has always been held to be evidence, and in some cases indispensable evidence, of intentional conversion. That the Legislature intended only to provide that evidence of a demand for and refusal to return the property should be indispensable to a conviction in all cases embraced within the statute, is clear. The demurrer to the indictment, in our opinion, should have been overruled. The judgment entered was, therefore, erroneous.

By the statute under which the territory has prosecuted this appeal it is provided that the "Supreme Court shall not reverse a judgment in favor of a defendant which operates as a bar to future prosecutions for the offense." By section 873 of the Penal Code it is provided that "if the demurrer [to an indictment] be allowed, the judgment shall be final upon the indictment demurred to." Therefore this judgment is not reversed.

KENT, C. J., and SLOAN, NAVE, and DOAN, JJ., concur.

TERRITORY v. VAIL et al., County Sup'rs. (Supreme Court of Arizona. March 30, 1906.)  
COUNTIES—BONDS—VALIDITY—ESTOPPEL.

Where a county issued bonds under a statute requiring such issue, it could not defeat them on the ground that they were issued under a mandatory statute, irrespective of the will of the county.

Application by the territory for mandamus to compel E. L. Vail and others, as supervisors of Pima county, to make certain tax levies and assessments. Writ issued.

This is an original application for a writ of mandamus to compel the respondents to make certain levies and assessments upon the taxable property in Pima county for the purpose of paying the interest on certain territorial fundings bonds issued in exchange for certain bonds of the county of Pima, known and designated as "Arizona Narrow Gauge Subsidy Bonds." The respondents having filed a plea in bar and an answer to the petition, the matter is before the court upon the application of the petitioner for judgment on the pleadings.

E. S. Clark, Atty. Gen., for the Territory. Benton Dick and Kingan & Wright, for respondents.

PER CURIAM. As the matter comes before us, there are no disputed questions of fact to be determined. The facts are that in 1883 the Legislature of this territory passed an act making it the duty of the board of supervisors of Pima county to issue \$200,000 of county bonds, and to deliver the same to the Arizona Narrow Gauge Railroad Company. One hundred and fifty thousand dollars of these bonds were issued by the county, delivered to the company, and sold by it. In 1894 the Supreme Court

of the United States, in the case of *Lewis v. Pima County*, 155 U. S. 54, 15 Sup. Ct. 22, 39 L. Ed. 67, held these bonds void, by reason of the fact that the act of the Legislature was in excess of its powers as limited by acts of Congress. In that case Pima county presented, not only the contention thus upheld by the court, but also the contention that these bonds were void for the additional reason that they were issued by the county under an act of the Legislature directing, commanding, and compelling the issue thereof, irrespective of the will or interests of the county. The Supreme Court of the United States did not express an opinion on the latter point, because, as stated by them, it was not necessary to the determination reached. In 1896 Congress passed an act affirming, approving, and validating "all bonds and other evidences of indebtedness heretofore issued under the authority of the Legislature" of Arizona Territory, "as heretofore authorized to be funded." In suits to which Pima county was not a party the Supreme Court of the United States held that this act applied to the bonds in question, and cured the defect under which they were held to be void in *Lewis v. Pima county*, *supra*. *Utter v. Franklin*, 172 U. S. 416, 19 Sup. Ct. 183, 43 L. Ed. 498; *Murphy v. Utter*, 186 U. S. 95, 22 Sup. Ct. 776, 46 L. Ed. 1070.

The respondents maintain that the bonds in question are void by reason of the fact that the act of the Legislature commanded the county to issue the bonds, and hence the writ should not issue, and that, as this question has not been determined by the Supreme Court of the United States, this court may properly pass upon it. Even if it be that the question is an open one, and the validity of these bonds has not been conclusively determined by the Supreme Court of the United States, still we think the contention of the respondents is not well taken. It is conceded that Congress could validate these bonds by subsequent legislation, if it had the power to pass the act in question in the first instance; but it is contended that Congress could not have compelled the county to issue the bonds, and therefore cannot give life to bonds issued under compulsion of such an act as that passed by the territorial Legislature. Without deciding the point, if it be conceded that neither under such an act of the Legislature nor under a like act passed by Congress could the county have been compelled to issue or deliver these bonds, and that its officers could with impunity have successfully defeated the act by refusing compliance therewith, the fact is, nevertheless, that the county did avail itself of the act, and issued and delivered the bonds. In the absence of legislative authority, a municipality may not issue such bonds. It may issue them if so authorized. Assuming that the act of the Legislature became in effect the act of Congress by virtue of the retro-

active effect of the remedial act of Congress, it cannot successfully be maintained that the county acted without legislative authority, because in its language the act was mandatory, and not merely permissive. So far as the act commanded the issuance of the bonds, it might not have been enforceable, had the county chosen to disregard it; but in this case the county did issue the bonds, and thus complied with the requirement, and we think the act of the Legislature constituted adequate permissive legislation to support the action of the county in issuing the bonds.

Upon all the other points raised by counsel, by virtue of the decisions of the Supreme Court of the United States, the rule of stare decisis must apply.

Let the writ issue as prayed for.

KENT, C. J., and SLOAN, DOAN, CAMPBELL, and NAVE, JJ., concur.

# In re BLACK DIAMOND COPPER MIN. CO.

Appeal of SOTO BROS. & RENAUD.

(Supreme Court of Arizona. March 30, 1906.)

## 1. BANKRUPTCY — SETTLEMENT OF CLAIMS — RIGHT OF CREDITORS SUBSEQUENTLY APPEARING.

An arrangement made between a debtor and creditors in a petition in involuntary bankruptcy, whereby claims of the creditors are compromised, is subject to the rights of any creditor who may appear and present his claim.

## 2. SAME—INVOLUNTARY BANKRUPTCY — PETITIONING CREDITORS.

Under the express provisions of Bankr. Act July 1, 1898, c. 541, § 59f, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], creditors other than the original petitioners may join in the original petition in involuntary bankruptcy.

## 3. SAME—ADJUDICATION—DUTY OF COURT.

Bankr. Act § 18b, as amended (Act Feb. 5, 1903, c. 487, 32 Stat. 798 [U. S. Comp. St. Supp. 1905, p. 685]), provides that the bankrupt may appear to plead to the petition in involuntary bankruptcy within five days after the return day. Section 18e (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), provides that if, on the last day within which pleadings may be filed, none are filed, the judge shall on the next day make the adjudication or dismiss the proceeding. Section 18f provides that, if the judge be absent on the next day after the last day on which pleadings may be filed and none have been filed, the clerk shall refer the case to a referee. A petition in involuntary bankruptcy set forth acts of bankruptcy. No pleadings were filed by the bankrupt within the time fixed by law, nor within further time granted by the court. *Held*, that it was the duty of the court to adjudicate the debtor a bankrupt.

## 4. SAME—DISMISSAL OF PROCEEDINGS—CONSENT OF CREDITORS.

A creditor, who joins in a petition in involuntary bankruptcy and allows the same to be filed, may not effect a settlement with the bankrupt and then withdraw and destroy the jurisdiction of the court.

## 5. SAME—NOTICE OF DISMISSAL OF PROCEEDINGS—NECESSITY.

An order dismissing a petition in involuntary bankruptcy, without giving the notice to creditors required by Bankr. Act July 1, 1898,

c. 541, §§ 58a, 59g, 30 Stat. pp. 561, 562 [U. S. Comp. St. 1901, pp. 3443, 3445], is invalid.

6. SAME—ATTORNEY'S FEES—ALLOWANCE—AUTHORITY OF COURT.

Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], determining the priority of debts and providing for the payment of the cost of administration, including one reasonable attorney's fee to the petitioning creditors in involuntary cases, does not authorize the court to allow an attorney's fee for the attorney for creditors in a petition in involuntary bankruptcy where no adjudication of bankruptcy is made.

Appeal from District Court, Cochise County; before Justice Fletcher M. Doan.

Proceedings in involuntary bankruptcy of the Black Diamond Copper Mining Company. From an order refusing to adjudicate the company a bankrupt, and from an order making an allowance of attorney's fees, Soto Bros. & Renaud, petitioning creditors, appeal. Reversed.

James Relley, for appellants.

CAMPBELL, J. On November 25, 1904, the California Vigorit Powder Company, Harper & Reynolds Company, and F. W. Braun Company, filed a petition in bankruptcy against the Black Diamond Copper Mining Company, a corporation. Several acts of bankruptcy were alleged. Summons was duly issued and served, and December 10, 1904, fixed as the return day. On the return day counsel entered appearance for the company and secured from the court an order granting 30 days extension of time in which to plead. No answer having been filed within this extended time, the court, on January 23, 1905, further extended the time to plead until March 1, 1905. No answer was filed within the extended time, nor has any answer ever been filed. It appears in the minute entries in the record that on April 3, 1905, counsel for the petitioners and for the bankrupt appeared before the court, and the court heard argument upon some matter, the nature of which is not disclosed, and continued the matter for the term. On May 9, 1905, it similarly appears that testimony of two witnesses was taken. The record does not disclose the nature of the testimony taken. The matter was then continued to May 11th. No action was taken on May 11th, and on May 18th the minutes recite that the case was continued by consent for a further hearing on May 31, 1905. On June 1, 1905, the appellants, Soto Bros. & Renaud, copartners, filed a petition setting forth the same acts of bankruptcy contained in the original petition, that they are creditors, and prayed leave to join in the original petition, and that the respondent company be adjudged a bankrupt. On June 2, 1905, the Copper Company filed what is denominated a "demurrer" to this request and petition, setting forth that the original petitioners have been settled with and their claims paid. It is further alleged that "the records of this court

also show that the claim of petitioners for \$2,150 and the claim of N. O. Bagge have been paid, and that they are not any longer creditors of the corporation." No answer is made to the allegations of the petition alleging the commission of acts of bankruptcy. So far as the record discloses, no ruling was made on the demurrer. On June 5, 1905, the appellants filed an amended petition, to which no answer has been made by the Copper Company. On July 28, 1905, the court entered the following order: "It is by the court ordered that the counsel for the petitioning creditors, W. J. Kirkpatrick, be allowed a fee of two thousand dollars. It is further ordered, upon the payment by the defendant company herein of the counsel fee, that this proceeding be dismissed." On July 31, 1905, the court extended the order of July 28th to include the petition of appellants. Appellants have appealed from the order of the court refusing to adjudicate the Copper Company a bankrupt and the allowance of the attorney's fee. The attorney's fee mentioned in the order as a condition precedent to dismissal is for the attorney who represented the original petitioners.

The question first presented is whether the court erred in refusing to adjudicate the Copper Company a bankrupt and in dismissing the petitions. We are not aided in this investigation by any brief on behalf of the appellee. It is alleged by appellant, and it also appears from certain papers accompanying the very imperfect record in this case, that instead of filing an answer to the original petition the Copper Company confined itself to compromising the claims of the creditors, and that the various extensions of time within which to plead were secured with that end in view; that among those with whom settlements were effected were the original petitioning creditors. The action which the appellee attempted is what is sometimes termed an "informal composition." Such compositions are subject to the rights of any creditor who may appear and present his claim. In *re Lockwood* (D. C.) 104 Fed. 794.

It is first to be observed that by the plain provision of the bankruptcy act appellants had a right to join in the original petition. Section 59f reads: "Creditors, other than original petitioners, may at any time enter their appearance and join in the petition or file an answer and be heard in opposition to the prayer of the petition." Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. What, then, was the duty of the court; the original petition showing acts of bankruptcy and there being no answer denying them? Section 18b of the bankruptcy act, as amended (Act Feb. 5, 1903, c. 487, 32 Stat. 798 [U. S. Comp. St. Supp. 1905, p. 685]), provides that "the bankrupt or any creditor may appear to plead to the petition within five days after the return day, or within such further time as the court may allow." Sec-

tion 18e provides: "If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall, on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition." Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]. Section 18f provides that, "if the judge be absent from the district on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or his creditors, the clerk shall forthwith refer the case to the referee." No pleadings were filed by the bankrupt within the time fixed by law, nor within the further time granted by the court. There is no question but that the original petition set forth acts of bankruptcy. It therefore became the duty of the court to adjudicate the Copper Company a bankrupt. *Bray v. Cobb* (D. C.) 91 Fed. 102. See *Brandenburg on Bankruptcy*, § 489; *Collier on Bankruptcy*, 221.

The record does not disclose upon what point testimony was taken, but we cannot perceive how any testimony could be pertinent, as no issue whatever was raised by the pleadings. While no formal request to withdraw or to dismiss on behalf of the original petitioners is found in the record, it is apparent that such a request was made verbally to the court, and that the court was of the opinion that they had that right, and that, there being but one other creditor left in court and no allegation that the creditors were less than twelve in number, it was compelled to make the order of dismissal. We are of opinion that the trial court was mistaken in this view of the law. Under the authorities it is probably the duty of the court to dismiss a petition upon the application of all of the petitioners, after notice given as required by law; but a creditor who has joined in a petition may not effect a settlement with a bankrupt and then withdraw, and thus destroy the jurisdiction of the court. As was said by Judge Newman in *Re Bedingfield* (D. C.) 96 Fed. 190: "Where a creditor joins in a proceeding in involuntary bankruptcy and allows a petition to be filed and afterwards obtains a settlement in some way, it is too late to withdraw from the proceeding in the way attempted here. On the face of the papers this is a clear preference of one creditor." Judge Lowell, in *Re Cronin* (D. C.) 98 Fed. 584, says: "This was an involuntary petition which the respondents moved to dismiss. Two of the three petitioning creditors assented to this motion, and I am satisfied that it would be for the best interest of the creditors that the petition should be dismissed and the respondent permitted to settle with his creditors by way of compromise, which he is prepared to do fairly and equally. The other petitioning creditor objected to the dismissal of the petition and desired to proceed to an adjudication. It was not shown that any of the parties were acting in bad faith.

If a respondent has committed an act of bankruptcy and the statutory number of his creditors has duly petitioned for his adjudication as a bankrupt, this court must make the adjudication, even though it is satisfied that a compromise offered by the respondent would be for the best interest of the creditors. Bankruptcy is not a remedy, like an injunction or the appointment of a receiver, granted in the discretion of a court of equity. A distribution of a debtor's assets is to be made in bankruptcy, if he has committed an act of bankruptcy and the other statutory requisites have been complied with. Fraud, oppression, or even mistake, may in some cases be sufficient ground for the dismissal of a petition, but none of these grounds exist here. Lowell, *Bankr.* p. 39; *King v. Henderson* [1898] App. Cas. 720. Is the condition altered by the fact that the majority of the petitioners come to desire a dismissal of the petition, which dismissal is resisted by the minority? Will the assent of the majority of the petitioners enable the court to act for the interest of the creditors by dismissing the petition, or has the minority the right to insist upon an adjudication if an act of bankruptcy has been committed? I think that in this case the right of the minority is absolute. After the petitioners have joined in a petition they cannot ordinarily withdraw against the wishes of their fellow petitioners." Furthermore, the mandatory provisions of the bankruptcy act, in sections 58a and 59g (Act July 1, 1898, c. 541, 30 Stat. pp. 561, 562 [U. S. Comp. St. 1901, pp. 3443, 3445]), requiring that at least ten days' notice shall be given all creditors before an involuntary petition shall be dismissed, by the petitioners, or for want of prosecution, or by consent of the parties, were not complied with. The order dismissing the petition without the notice required by the statute is invalid and must be set aside. In *re Plymouth Cordage Company*, 135 Fed. 1000, 68 C. C. A. 434.

Appellants also complain of the order made allowing a fee to the attorney for the petitioning creditors, the objection being that since they did not secure an adjudication there is no reason why the bankrupt's estate should be depleted at the expense of the creditors who do desire an adjudication. The authority of the court to allow an attorney's fee to the petitioning creditors is found in section 64b, which provides: "The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be \* \* \* (3) The cost of administration, including \* \* \* One reasonable attorney's fee for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases." Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]. We have found no case in which a fee was allowed an attorney for the petitioning creditors prior to adjudication. The provision of law for a fee

to the attorney presupposes a prior adjudication, as it is included as a cost of administration of the bankrupt's estate. It seems too clear for argument that a court may not administer the estate until an adjudication of bankruptcy is made.

The orders complained of are set aside, and the case remanded to the court below, with directions to adjudicate the Copper Company a bankrupt, and to proceed with the administration of its estate.

KENT, C. J., and SLOAN and NAVE, JJ., concur.

### In re BLACK DIAMOND COPPER MIN. CO.

(Supreme Court of Arizona. March 30, 1906.)

#### BANKRUPTCY—APPEAL—BOND—APPROVAL.

Under General Orders in Bankruptcy No. 36 (89 Fed. xiv, 32 C. C. A. xxxvi), providing that appeals from a court of bankruptcy shall be allowed by the judge of the court appealed from or the court appealed to, an appeal from an order in bankruptcy must be allowed by the judge of the court appealed from or by the court appealed to, and the bond on appeal must be approved by the judge, and authority to approve it may not be delegated to the clerk of the court.

Appeal from District Court, Cochise County; before Justice Fletcher M. Doan.

Proceedings in involuntary bankruptcy of the Black Diamond Copper Mining Company. Heard on appeal from an order made in the district court sitting in bankruptcy. Dismissed.

Ben Goodrich, for appellant. Francis M. Hartman, for appellee.

CAMPBELL, J. This is an appeal from an order made by the district court sitting in bankruptcy. Appellee moves to dismiss on the ground that it was not properly perfected. The order complained of was made on July 28th. On July 31st, appellant asked a rehearing. It was denied, and thereupon, following the territorial practice, he gave notice of appeal in open court. The court fixed the amount of the bond on appeal at \$500, and directed that the same be approved by

the clerk. The bond was filed, and approved by the clerk, August 28th. Appellee contends that the order appealed from comes within those enumerated in section 25a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), and that the appeal must be perfected by the filing of a bond within 10 days; that, even if the order is such as to be appealable under section 24, the appeal should be dismissed for the reason that the bond has not been approved by the judge.

It is not necessary to determine under which section of the act the appeal should have been brought. Pursuant to the authority conferred upon it, the Supreme Court of the United States has, by order, provided: "Appeals from a court of bankruptcy to a Circuit Court of Appeals or to the Supreme Court of a territory shall be allowed by the judge of the court appealed from, or the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States." General Order No. 36 (89 Fed. xiv, 32 C. C. A. xxxvi). The appeal must be allowed by the judge of the court appealed from or of the court appealed to, and the bond on appeal must be approved by the judge, and authority to approve it may not be delegated to the clerk. *O'Reilly v. Edrington*, 96 U. S. 724, 24 L. Ed. 659; *National Bank v. Omaha*, 96 U. S. 737, 24 L. Ed. 881; *Brown v. McConnell*, 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495. Conceding that, by fixing the amount of the bond on appeal in this case, the judge of the trial court thereby allowed the appeal, it has not been perfected, as the bond was not approved by him. In proper cases appellants, it seems, should be afforded an opportunity by this court to furnish the requisite security; but in this case the order complained of has been reversed upon an appeal brought by certain petitioning creditors. (*Appeal of Soto Bros. & Renaud, Copartners*, 85 Pac. 653), and nothing would be accomplished by permitting appellant to furnish the proper security.

The appeal is dismissed.

KENT, C. J., and SLOAN and NAVE, JJ., concur.

3 Cal. App. 371

## PEASE v. FINK.

(Court of Appeal, First District, California.  
April 4, 1906.)1. APPEAL AND ERROR—EFFECT OF APPEAL—  
JURISDICTION OF LOWER COURT—AMEND-  
MENT OF PROCEEDINGS.

The superior court has authority to correct a misprision of its clerk in entering an order on a motion for a new trial, and to make the record state the facts, though an appeal has been taken.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 2198-2201.]

2. NEW TRIAL—BILL OF EXCEPTIONS—STATE-  
MENT OF CASE.

The only difference between a bill of exceptions and a statement of a case, within Code Civ. Proc. § 659, requiring a party intending to move for a new trial to serve a notice of his intention, designating the ground on which the motion will be made, and whether the same will be made on affidavits or by a bill of exceptions or a statement of the case, is that in a statement of the case the moving party, in addition to setting forth in the body of the document the exceptions which were taken at the trial, must also specify the particular ones upon which he relies in support of his motion, and, if the insufficiency of the evidence is the ground of an exception, or is stated in a notice of a motion for a new trial, the particulars in which the evidence is claimed to be insufficient must be specified in either document.

## 3. APPEAL—RECORD—SCOPE.

A notice of intention to move for a new trial stated that it would be made on a bill of exceptions thereafter to be prepared. The document set forth in the transcript was entitled "Statement of the Case." The statement contained all the matters essential to a bill of exceptions, stated in the same manner as would be appropriate therein. *Held*, that the document must be treated as a part of the record on appeal from the order denying a new trial; the errors relied on being sufficiently indicated.

## 4. SAME.

Code Civ. Proc. §§ 939, 950, require appellant to furnish a copy of a bill of exceptions or a statement in the case, and at the hearing the statement is available for considering the objection that the evidence is insufficient, if the appeal is taken within 60 days after the rendition of the judgment. A judgment was rendered December 7th. The appeal therefrom was taken January 13th following. Appellant set forth in the transcript a document entitled "Statement of the Case," which set forth all the matters essential to a bill of exceptions. *Held*, that the document was a part of the record, not only for a review of the errors of law therein specified, but also for determining whether the evidence was sufficient.

5. PRINCIPAL AND AGENT—PROOF OF AGENCY  
—DECLARATION BY AN AGENT.

Under Civ. Code § 2319, declaring that an agent has authority to make representations not including the terms of his authority, the declaration of a person claiming to be the agent of another is insufficient to establish the agency or the terms of his authority.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 40, 416-419.]

## 6. SAME—RIGHTS OF THIRD PERSONS.

One dealing with another, on his mere statement that he is the agent of a third person, takes on himself the risk of being able to show the existence of the agency, and, if he accepts such statement and is deceived, he has no relief against the third person.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 391-401.]

85 P.—42

Cal. Rep. 85-88 P.—5

7. SAME—EXISTENCE OF RELATION—EVI-  
DENCE.

On the issue whether a third person was the agent of defendant in entering into a contract for the exchange of land, whereby defendant was to convey to plaintiff certain land in consideration of plaintiff conveying land to defendant, evidence that a certificate of title to the land which defendant was to convey was made by a searcher of records and in the form of a report addressed to defendant, which was delivered to the third person, was inadmissible to show that the third person was defendant's agent, in the absence of evidence showing the report was delivered to or sent by defendant.

## 8. SAME.

The evidence was inadmissible to show that plaintiff was justified in believing that the third person was defendant's agent.

## 9. SAME.

The possession by a third person of a deed does not show that he is the agent of the grantor for any other purpose than to deliver the deed and to receive the purchase price named therein.

## 10. SAME—RATIFICATION.

Plaintiff entered into a contract with a third person, representing himself as the agent of defendant for the exchange of land. Subsequently a purchaser was negotiating for the purchase of the property which the contract required defendant to convey to plaintiff. At that time, plaintiff held a deed on the premises, and it was agreed that the purchaser could receive a satisfactory deed from defendant by the destruction of plaintiff's deed. Plaintiff's deed was destroyed, and defendant made a conveyance to the purchaser. Defendant had no knowledge at the time of any representations of the third person. *Held*, that defendant did not ratify the acts of the third person.

11. SAME—EVIDENCE OF EXISTENCE OF RELA-  
TION—ADMISSIBILITY.

On the issue whether a third person was the agent of defendant, in a transaction whereby the third person entered into a contract with reference to certain land belonging to defendant, evidence of transactions between defendant and the third person, in reference to other property, was inadmissible especially where the party dealing with the agent had no knowledge of such transactions.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 409.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by W. R. Pease against A. A. Fink. From a judgment for plaintiff, defendant appeals. Reversed.

W. F. Williamson, for appellant. J. S. Reid, for respondent.

HARRISON, P. J. Action to recover damages for breach of contract. In the complaint herein the plaintiff shows that, in pursuance of an agreement between him and the defendant for an exchange of properties owned by them respectively, they each executed a deed of conveyance to the other; that at the time of such conveyances there was an incumbrance upon his land which had been placed there by himself, amounting to \$4,000; that one of the terms of their agreement was that the defendant would assume and pay the said indebtedness and hold the plaintiff harmless therefrom; that the conveyance to the defendant contained a clause

by which he assumed such obligation; that the defendant failed and neglected to comply with his said agreement or to discharge said incumbrance; that by reason of such failure the plaintiff was compelled to and did pay the sum of \$1,342, and sustained other damage amounting to \$570. He therefore asks judgment against the defendant for these amounts of money. The evidence at the trial disclosed the following facts: In December, 1899, the plaintiff was the owner of a parcel of real estate in Oakland, situated at the northwest corner of Fourth and Jackson streets, which was incumbered by a deed of trust executed by the plaintiff to the Union Savings Bank to secure his promissory note for \$4,000, and he was desirous of selling the same or exchanging it for some unincumbered real property. Being occupied with his business, he intrusted the matter to his father, Edwin B. Pease. The latter having been informed that the defendant owned some land in Berkeley, and that Phillip Munroe was his agent, visited the office of Munroe in San Francisco, and being told by him that he was the agent of Mr. Fink, the defendant herein, and had the handling of the Berkeley property, went with him to Berkeley and examined the same. Upon reporting to the plaintiff the result of his visit and examination, the latter expressed his willingness to exchange the Oakland property for it, and thereupon his father had a further conference with Munroe, at which they agreed upon an exchange of the Oakland property for 10 lots in the Berkeley tract which had been selected by him. Accordingly, on December 28, 1899, the plaintiff signed and acknowledged a deed of conveyance of the Oakland property, but without having the name of any grantee inserted therein, reciting, however, that "this deed is made subject to a mortgage for \$4,000 now on said property, together with the accrued interest thereon." He placed this instrument in the hands of his father, and it was by him delivered to Munroe, who at the same time delivered to the father a deed from the defendant to the plaintiff for the aforesaid 10 lots in the Berkeley tract. Neither of these deeds was ever placed upon record. The deed made by the plaintiff was retained by Munroe in his possession until it was produced at the trial herein upon the demand of the plaintiff, and the one delivered to the plaintiff was destroyed about a year later as hereinafter stated. The lots described in the deed from the defendant to the plaintiff are subdivisions of a block of land in Berkeley, and with other subdivisions of the same block, at the time of these negotiations, stood of record in the name of the defendant. Munroe was a dealer in real estate, and some months prior thereto had agreed with the defendant for the purchase of the block from him at any time within a year at the rate of \$75 a lot, with the privilege of taking one or more lots at any time whenever he might dispose of them. After the aforesaid

exchange of properties had been agreed upon, Munroe requested the defendant to make a deed of the Berkeley lots, leaving the name of the grantee blank, and thereupon the defendant signed and acknowledged a deed therefor without inserting the name of a grantee, and delivered it to Munroe, who delivered it to the plaintiff. The deed itself had been destroyed prior to the trial herein without having been placed of record, and there was a conflict of testimony as to whether it contained the name of any grantee at the time of its delivery to the plaintiff, but under the findings of the court it must be assumed that before its delivery to the plaintiff his name had been written therein as grantee. In November, 1900, a third person was negotiating for the purchase of some Berkeley property, including the lots described in the deed delivered to the plaintiff, and certain others of which the title still stood of record in the name of the defendant, and, for the purpose of consummating the negotiation, the plaintiff and the defendant, together with the purchaser, met at the office of Munroe. It was then agreed between them that, as the deed for the 10 lots then held by the plaintiff had never been recorded, the purchaser could receive a satisfactory deed by the destruction of that deed and a conveyance to him from the defendant of the entire tract. Accordingly, the deed to the plaintiff was destroyed, and the defendant made a conveyance to the purchaser of all of the property, and received from him his check for the entire purchase price of the land embraced in the conveyance, and gave to the plaintiff his own check for \$600, the price for which the plaintiff had agreed to sell his 10 lots. In April, 1901, the Union Savings Bank caused the Oakland property to be sold under the power contained in the aforesaid deed of trust, and its proceeds applied upon the obligation held by it against the plaintiff. There being a deficiency of such proceeds, it afterwards commenced an action against the plaintiff for the recovery of such deficiency, and the plaintiff was compelled to pay \$1,342 in settlement of this action. Upon the trial the court found in accordance with the allegations in the complaint, except as to the consequential damage therein claimed, and rendered judgment in favor of the plaintiff. From this judgment, and from an order denying a new trial, the defendant has appealed.

1. In the transcript which was originally filed herein the order denying a new trial has the following recital: "In this cause defendant's motion for a new trial came on regularly this day to be heard, J. S. Reid, Esq., appearing as attorney for the plaintiff, the defendant's attorney failing to appear. Whereupon it is ordered by the court that said motion for a new trial be and the same is hereby denied." In the brief of respondent, thereafter filed, one of the points made in his behalf was that, as it thus appeared that the defendant had abandoned his motion

in the superior court, he could not now be heard to allege error in denying it. The appellant thereupon procured an amendment of this entry to be made by the superior court, so that it now reads: "In this cause defendant's motion for a new trial came on regularly this day to be heard, J. S. Reid appearing as attorney for plaintiff, and A. E. Cooley, Esq., appearing for W. F. Williamson, Esq., as attorney for defendant. Whereupon it is ordered by the court that said motion for a new trial be and the same is hereby denied." And upon application therefor, and suggestion to this court of a diminution of the record, he was allowed to file a certified copy of such minute entry as a part of the record herein. The respondent, however, contends that this amended entry cannot be considered, for the reason that by virtue of the previous appeal the superior court had lost jurisdiction to make any amendment of its original entry. The principle upon which it is held that, after an appeal from its judgment, a superior court is divested of authority to make any change in the judgment, is inapplicable here. The amendment was not sought for the purpose of making a change in the judicial action of the court, nor did it have the effect to change in any respect the order from which the appeal was taken. It was made to correct a misprision of the clerk in entering the order, and to make the record correctly state the circumstances under which it was made. The judicial action of the court—the order denying a new trial—is in identical language in both the original and the amended entry thereof. The authority of a court to correct its records at any time so that they may speak the truth is well settled. *Kaufman v. Shain*, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139.

2. It is further urged by the respondent that the appeal from the order denying a new trial cannot be considered for the reason that in the notice of intention therefor the defendant stated that it would be made upon affidavits and a bill of exceptions thereafter to be prepared and settled; whereas, the document set forth in the transcript is entitled, "Engrossed Statement of the Case," and was settled and allowed as such by the judge before whom the cause was tried. The procedure for obtaining a new trial, authorized by section 659 (2) of the Code of Civil Procedure, implies that a bill of exceptions may have been settled before notice of the motion shall have been given, and that in such case the bill shall be used on that motion. If, however, no bill has been settled, the same procedure is prescribed for its settlement as for the settlement of a statement of the case. There is no substantial difference between the two documents when settled; the only difference being that in a statement of the case the moving party, in addition to setting forth in the body of the document the exceptions which were taken at the trial, must also specify the particular

ones upon which he relies in support of his motion. If the insufficiency of the evidence is the ground of an exception to the decision, or is stated in the notice of a motion for a new trial, the particulars in which the evidence is claimed to be insufficient must be specified in either document. The legal effect of a document is to be determined upon a consideration of the matter which it contains, rather than by the name which is given to it, and the document is not to be disregarded merely upon the ground that it is erroneously entitled, or is without any title. Although the document set forth in the transcript herein is entitled "Statement of the Case," it may also be treated as a bill of exceptions. All of the matters which would be essential to a bill of exceptions are contained therein, and are stated in the same manner as would be appropriate in such bill. The fact that, in addition thereto, the exceptions taken at the trial are grouped together, and specified as errors of law committed by the court, does not impair its force as a bill of exceptions, and may be disregarded. It must be held, therefore, that the document may be considered as a part of the record upon the appeal from the order denying a new trial. The appellant sufficiently indicated the errors of law upon which he relied by so characterizing the exceptions taken by him at the trial which he enumerated. There is no statutory requirement that either document shall specify the purpose for which it is prepared or settled, and the document when settled is therefore available for any purpose authorized by the Code. Section 950 of the Code of Civil Procedure provides that, on an appeal from a final judgment, appellant shall furnish the court with a copy of any bill of exceptions or statement in the case on which he relies, and at the hearing of such appeal, if it is taken within 60 days after the rendition of the judgment, the statement of the case is available for considering the objection that the evidence is insufficient to sustain the decision. Code Civ. Proc. § 939 (1); *Wall v. Mines*, 128 Cal. 136, 60 Pac. 682. The judgment herein in favor of the plaintiff was rendered December 7, 1903, and the appeal therefrom was taken January 13, 1904. Whether the document be regarded as a statement of the case or as a bill of exceptions, it forms a part of the record to be considered on the appeal from the judgment, not only for a review of the errors of law therein specified, but also for determining whether the evidence is sufficient to sustain the decision.

3. Counsel for the respective parties have presented in their briefs an able and elaborate discussion of several principles of law claimed to be pertinent to a decision of the appeal, but from the conclusion that we have reached upon one of the alleged errors of the superior court it becomes unnecessary, as well as inappropriate, to determine the other propositions. The basis of the plain-

plaintiff's cause of action is the agreement of the defendant to assume the payment of the obligation secured by the deed of trust, and, accordingly, the court has found that the defendant made such agreement, and that the deed from the plaintiff of the Oakland property of December 23, 1899, was made in pursuance of an agreement between the plaintiff and the defendant. There is, however, no evidence in the record upon which these findings can be sustained. It is very clearly shown therein that the defendant was not present at any interview or negotiation in which the transaction or execution of the deeds was discussed, and that he never knew or heard of any negotiations for an exchange of the properties, or the execution of the deed of the Oakland property, until after the commencement of this action, and that neither the plaintiff nor his father ever met the defendant, or exchanged any verbal or other communication with him until nearly a year after the date of the said deed. The ground upon which the respondent relies in support of the findings is that, in the negotiations between the plaintiff's father and Munroe for the exchange of the properties, Munroe was the agent of the defendant for that purpose, and that the defendant is bound by all of the acts and representations of Munroe as his agent. There is, however, no evidence in the record tending to establish the fact of such agency, or that Munroe had any authority from the defendant, except the testimony of the plaintiff's father that Munroe stated to him that he was such agent; and the rule is of long standing that the declarations of a person claiming to be the agent of another are insufficient to establish such agency or the terms of his authority. Civ. Code, § 2319 (2); *S. & L. Soc. v. Gerichten*, 64 Cal. 520, 2 Pac. 405; *Smith v. Liverpool, etc., Ins. Co.*, 107 Cal. 432, 40 Pac. 540. On the other hand, the defendant testified that Munroe was not his agent, and that he had never employed or authorized him to act as his agent for the sale of any property; that he never had any dealings with any one in connection with the Oakland property or any conversation with any one about its purchase or sale, or the payment of any incumbrance thereon, and had never had in his possession any paper or instrument referring to it, or known anything about the property until the commencement of this suit, and Munroe himself testified that he had never acted as the agent of the defendant, and did not act as his agent in the transaction of December, 1899, and did not at that time state to the plaintiff's father that he was his agent. One who deals with another, upon his mere statement that he is the agent of a third person, takes upon himself the risk of being able to show that such agency existed. *McDonald v. Cool*, 134 Cal. 502, 66 Pac. 727. If, instead of satisfying himself thereof by independent investigation, he accepts such statement and is deceived, he is the victim

of his own credulity. The testimony of these declarations was inadmissible for the purpose of proving such agency, and should have been excluded by the court upon the defendant's objection thereto, and when received should not have been considered.

During the trial the plaintiff offered in evidence a certificate of title to the Berkeley lots made by a searcher of records December 23, 1899, in the form of a report addressed to the defendant, which the witness testified had been given to him by Munroe, and at the time of introducing the same his counsel stated that it was for the purpose of showing that the plaintiff was warranted in believing that Munroe was the agent of the defendant. The defendant objected to its introduction, unless the plaintiff should in some way connect the defendant with it. The court overruled the objection and allowed the certificate in evidence, without any evidence that it had been made at the instance of or with the knowledge of the defendant, or that it had been delivered to or seen by him. The evidence so offered not only had no tendency to show that Munroe was the agent of the defendant, or to justify the plaintiff in believing that he was such agent, but the objections of the defendant were well taken, and the court erred in overruling them. The possession by Munroe of the deed from the defendant to the plaintiff of the Berkeley lots had no tendency to show that Munroe was the agent of the defendant for any other purpose than to deliver the deed, and, if the purchase price was named therein, to receive the same; nor did it have any tendency to show, or authorize the plaintiff to believe, that his previous negotiations with Munroe had been authorized or approved by the defendant. If no purchase price was named in the deed, the defendant, in the absence of any showing of fraud, or of bona fides on the part of the plaintiff, might be estopped from disputing the title thereby transferred; but its delivery to the plaintiff would not authorize him to believe that Munroe had authority to deliver it to him as a gratuity, nor did the possession of the deed by Munroe have any tendency to show, or give any ground to the plaintiff for believing, that the defendant had authorized Munroe to purchase any property for him, or to accept any property in exchange for the Berkeley lots, or to fix the terms upon which an exchange should be made, or to enter into an executory contract which should be binding upon the defendant for the payment of an obligation of the plaintiff.

The contention of the respondent that the act of the defendant in November, 1900, was a repurchase of the Berkeley lots by him from the plaintiff, and thereby a ratification of the act of Munroe in exchanging the property, is not sustained by any evidence in the record. There is no testimony that it was a purchase, and the plaintiff himself testified that the defendant said nothing to him in regard to

purchasing the lots. It, moreover, clearly appears from the evidence that at that time the defendant had no knowledge of any of the acts or representations of Munroe in reference to the Oakland property, and without such knowledge there could be no implied ratification. The evidence of transactions between defendant and Munroe in reference to other property was unavailing for establishing any agency in this transaction, or to authorize the plaintiff to believe that Munroe was acting in this transaction as the agent of the defendant, since both the plaintiff and his father testified that they had neither of them met the defendant until about a year after the transaction, and there is no evidence that they had any knowledge of the other transactions to which they referred in their testimony.

The judgment and order denying a new trial are reversed.

We concur: HALL, J.; COOPER, J.

3 Cal. App. 396

ALPER et al. v. TORMEY et al.

(Court of Appeal, Third District, California.  
April 6, 1906.)

REPLEVIN—OWNERSHIP OF PROPERTY—LIEN—FINDINGS—EVIDENCE.

In an action to recover possession of steel rails, evidence held to sustain findings that the rails belonged to an insolvent corporation of which intervener was assignee, and that defendant, who held the same as bailee, had no lien thereon for storage.

Appeal from Superior Court, Contra Costa County; William S. Wells, Judge.

Action by A. Alper and another against Patrick Tormey, and L. N. Buttner, as assignee of the Union Stockyard Company of San Francisco, intervener. From a judgment in favor of intervener, and from an order denying defendant Tormey's motion for a new trial, he appeals. Affirmed.

R. H. Lattimer and L. F. Tormey, for appellants. Louis H. Brownstone, for respondents. M. R. Jones, for intervener.

CHIPMAN, P. J. Action to recover from defendant Tormey the possession or the value of certain 60 tons of steel rails. L. C. Wittenmyer, as assignee of the Union Stockyard Company, an insolvent debtor, filed a complaint in intervention, claiming that the property belonged to said insolvent debtor. Defendant Tormey answered the plaintiff's complaint, claiming that said rails were delivered to him as bailee by one A. S. Garretson for safekeeping and that he, defendant, has a lien on the rails as security for services in "safely and securely keeping the said steel rails," which services he alleged to be of the value of \$1,500. He further alleged that one E. J. Randall is the owner of the rails as successor to said Garretson. Plaintiffs answered the complaint in intervention de-

nying the ownership and right of possession of the stockyard company, and alleged that prior to the commencement of the action said company sold and transferred to plaintiffs the said rails and that plaintiffs are now the owners thereof and entitled to possession. Defendant Tormey also answered the complaint in intervention specifically denying its allegations and averring a lien as set forth in his answer to the plaintiffs' complaint. Judgment passed for the intervener and this appeal is by defendant Tormey from the judgment and from the order denying his motion for a new trial. The cause was here on the appeal of plaintiffs, and as to them the judgment was affirmed. 82 Pac. 1063.

The only question now here is whether the evidence was sufficient to support the findings that the Union Stockyard Company is the owner of the rails as alleged in its complaint and that defendant Tormey agreed to store them without compensation. In his brief appellant does not claim ownership in Randall, and we shall assume that the allegation of such ownership, alleged in his answer, is waived. He now claims that the evidence fails to show ownership in the Union Stockyard Company, and that if ownership in anybody is shown, it is in Garretson, which, if true, defeats the action. It appears from the testimony of appellant Tormey that a quantity of steel rails, among them the rails in question, was, in the year 1890, deposited on his land, near the property of the company, by Garretson; that Garretson was a stockholder in the company, as was appellant, who was also president of the company from 1892 to 1895; that the company used a large quantity of the rails as they were needed, which were taken from the place where stored on appellant's land and with his knowledge and without objection, many being so used by appellant's direction while he was president of the company and for its purposes; that appellants supposed at the time they were so stored on his land that the rails belonged to the company and were to be used for the improvement of its property and that appellant never claimed to own any of the rails and now makes no claim of ownership to them; that appellant never made any claim for storage until this action was commenced; that he "never gave any attention to the protection of these rails" as he "thought they would protect themselves"; that when they were delivered on his property it was understood that Garretson "could have the rails at any time he wanted them." He testified further: "I knew the Union Stockyard Company helped themselves to these rails so I presumed it was understood at the time that the agreement was to deliver these rails to the Union Stockyard Company." As to his claim for storage appellant testified: "I base my claim to the \$1,500 storage on the interest that the money would have fetched me for the land which they promised to take from me." The land referred to did not include

the land on which the rails were stored. We think there was sufficient evidence to support the findings.

The officers and stockholders of the company seem to have been the only persons who assumed or exercised any ownership of the rails and this was done for the company alone; no other persons had any use for the rails or showed by evidence that they had or made claim of ownership. The evidence justified the inference that the rails belonged to the company. When the rails were stored on appellant's land it was with his consent and without any understanding that he was to charge for storage and no claim for storage was made by appellant at any time either before, or after, or while he was president of the company. Under his direction as president as well as by the direction of the vice president and manager of the company with appellant's consent, the company made use of the rails as required, and as we have seen it was not until this action was brought that appellant asserted any claim for storage. And his claim then was not for storage services rendered, but, as he testified, it was for interest on the money he expected to receive for the sale of certain land to the company, but which it failed to purchase.

The judgment and order are affirmed.

We concur: BUCKLES, J.; McLAUGH-  
LIN, J.

3 Cal. App. 443

GATES v. QUONG et al.

(Court of Appeal, Third District, California.  
April 18, 1906.)

1. CHATTEL MORTGAGES—MORTGAGE OF CROP  
—LOSS OF LIEN.

Under Civ. Code, § 2972, providing that the lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as it remains on the land of the mortgagor the lien ceases on the removal of the crop from the land on which the crop grew, unless the removal is tortious.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 221.]

2. ESTOPPEL—EQUITABLE ESTOPPEL—PREJUDICE TO PERSON SETTING UP ESTOPPEL.

An estoppel in pais cannot be claimed by a corporation as to transactions with its agent where nothing said or done therein misled the agent to the injury of the corporation.

3. CHATTEL MORTGAGES—MORTGAGE OF CROP  
—LOSS OF LIEN.

The removal of a crop from the land on which it was grown is not tortious as to a mortgagee of the crop where the removal is by virtue of a sale of the crop by the landlord of the mortgagor pursuant to a provision of the lease between the landlord and tenant giving the landlord the exclusive right to sell the crop, which was also made a part of the crop mortgage, and the removal did not fall within the exception to Civ. Code, § 2972, that the lien of a crop mortgage is not lost by a tortious removal of the crop, irrespective of the question of notice of the mortgage.

4. SAME—PRIORITY AS BETWEEN MORTGAGEE  
AND GARNISHING CREDITOR.

As between a garnishing creditor of the owner of a crop who served his garnishment on

the holder of the surplus arising from the proceeds of a sale of the crop, and the mortgagee of the crop after the mortgage lien on the crop had been lost by removal of the crop from the premises on which it was grown, the mortgagee was not entitled to priority.

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Interpleader by T. L. Gates against Tom Quong and the Earl Fruit Company. From a judgment in favor of Quong, the fruit company appeals. Affirmed.

Chauncey H. Dunn, for appellant. E. E. McFarland, for respondent Gates. Gregory & Gregory, for respondent Tom Quong.

CHIPMAN, P. J. Action in interpleader to determine the right to certain moneys in the hands of plaintiff as the purchase price of certain prunes sold to him. Defendant Earl Fruit Company claimed the money under a crop mortgage executed to it by one Lee Toy. Defendant Tom Quong claimed under a garnishment served on plaintiff, issued in a suit against said Toy. It appears that Toy entered into possession of an orchard tract under an agreement with the owner, one Frank Buck. Toy executed a chattel mortgage on the growing crop to defendant company. One of the questions arising out of the controversy was whether Toy had any mortgageable interest in the prunes. Much attention is given in the briefs to this question; appellant claiming that the agreement possessed all the elements necessary to constitute a leasehold interest in Toy, such as made his share of the prunes grown on the leased premises the subject of chattel mortgage. The court found against the defendant company on this issue, which finding is challenged as unsupported by the evidence. We do not find it necessary to pass upon this question.

The court found "that by the terms of said lease said Buck had the right and was exclusively empowered to sell and deliver to any person or persons he might direct any and all fruit raised upon said demised premises. \* \* \* That said prunes were sold by said Buck to said Gates 'and' were removed from said leased premise and were delivered to plaintiff. That said Earl Fruit Company did not know of said sale until said delivery was nearly completed. That it then notified said Lee Toy and said T. L. Gates that the proceeds of said sale must be paid to said Earl Fruit Company by virtue of said crop mortgage, but neither said Lee Toy nor said T. L. Gates agreed thereto. That no lien \* \* \* existed upon said prunes or the proceeds of the sale thereof \* \* \* after their removal from said leased premises in favor of said Earl Fruit Company." The court further found "that no person representing the Earl Fruit Company was present at said sale of prunes, and that said Earl Fruit Company had no part nor voice therein and neither consented nor objected thereto upon condition that the proceeds should be paid to said company, or by reason of any

conditions whatever"; and that neither Buck, nor Toy, nor Gates at any time agreed with one another or with said company "that the purchase price of said lot of prunes should be paid by plaintiff to said Earl Fruit Company, for the purpose of being applied upon said attempted crop mortgage, or for any purpose whatever." Appellant attacks part of these findings as unsupported by the evidence. The court gave judgment for defendant Tom Quong, from which the Earl Fruit Company appeals on bill of exceptions.

Section 2972 of the Civil Code provides as follows: "The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of mortgagor." Without deciding that the mortgage in this case created any lien on the crop attempted to be mortgaged, but conceding that it did, the lien ceased upon the removal of the crop from the land on which the crop grew. Civ. Code, § 2972; Horgan v. Zanetta, 107 Cal. 27, 40 Pac. 22. The evidence was that the prunes were sold at \$17.50 per ton taken from the tree, i. e., undried, and that "nearly all" were picked and delivered to plaintiff at a point away from the demised premises "in town," but what town does not appear. Just what proportion remained undelivered when the agent of the defendant company saw Toy and Gates, does not appear. No point is made, however, on this state of the evidence and both parties seem to treat all the prunes as having been delivered to plaintiff, and that the money involved represents the proceeds of all the prunes in question. Appellant's objection to the findings is aimed particularly at that clause to the effect that neither Toy nor Gates agreed, at the time when the delivery of the prunes was nearly completed, "that the proceeds must be paid to the Earl Fruit Company on its crop mortgage." Upon this point the evidence was sufficient to support the findings. Nor do we think that the evidence shows such a state of facts as would give rise to the principle of estoppel in pais, for we cannot see that the agent of the company was misled to its injury by anything said or done by either Toy or Gates. There was not only no agreement or consent on their part, according to their testimony, that the proceeds should be applied on the mortgage indebtedness, but there was nothing said or done by them from which the agent of the company could reasonably infer such consent or agreement. As there was no agreement of this kind there was no evidence supporting appellant's theory that a novation was established; that is, that in lieu of the mortgage lien a new contract was entered into between Toy, Gates and the company's agent. The case of McIntyre v. Hauser, 131 Cal. 11, 63 Pac. 69, does not seem to us to apply here, for the reason that the court, on sufficient evi-

dence, found that there was no agreement such as appellant relies upon.

Recurring to the assumed lien of the crop mortgage; although it was lost by the severance of the crop and its removal from the demised land, the cases recognize an exception to the rule of the Code where there is a tortious removal of the crops. Appellant claims that there was such removal here and cites in support of the exception to the rule, *Wilson v. Prouty*, 70 Cal. 196, 11 Pac. 608; *Chittenden v. Pratt*, 89 Cal. 178, 26 Pac. 626; *Bank of Woodland v. Duncan*, 117 Cal. 416, 49 Pac. 414. Aside from the fact that the company never objected to the removal or sale of the prunes, we think the evidence clearly shows authority in Buck to make the sale and a rightful exercise of that authority. Whatever view may be taken of the agreement between him and Toy, as to the mortgageable interest of Toy, the agreement specifically provided: "That all produce shall be sold by lessor [Buck], or by persons indicated by him, and all returns from sales shall come to lessor and be retained by him until he shall be paid the said rent; \* \* \* the balance, if any, to be paid over to lessee." Appellant made this agreement a part of its crop mortgage and of course had knowledge of its provisions. Buck did not have actual notice of the mortgage until after the prunes were delivered and even with such notice it would not have affected his right to sell the prunes. Constructive notice of the mortgage by Gates would not make the purchase by him tortious for the mortgage showed on its face that Buck had the right to sell the fruit. Gates' first actual notice of the mortgage was when the prunes were about all delivered and no attempt was then made by the company, or at any other time, to stop delivery. Appellant's agent seems to have assumed either that the mortgage lien followed and attached to the proceeds of the prunes, or that there was a binding agreement between Gates, Toy, and this agent, apart from the mortgage lien, to pay the proceeds to the company. There was evidence supporting the findings of the court which in effect were that the lien was lost, and that there was no such agreement.

Appellant contends that even if Buck was given the right to sell the crop, the fact did not amount to a consent on the part of the company that the sale should release its lien; that Buck's right was nothing more than that of a first mortgagee and as he is making no claim to the fund, the company, as second mortgagee, is entitled to the surplus remaining after Buck was paid. But this view does not meet the claim of Tom Quong, the attaching creditor, who served his garnishment after the company had lost its lien. When the attachment was served the defendant company had no more claim upon the fruit than any general creditor.

Taking, then, the most favorable view of the Buck-Toy agreement, that appellant had

a lien by virtue of its mortgage, the findings that the lien was lost before the attachment was levied, support the judgment, and it is therefore affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

3 Cal. App. 158

WORTH v. EMERSON et al.

(Court of Appeal, First District, California. Feb. 24, 1906. Rehearing Denied by Supreme Court June 4, 1906.)

1. JUDGMENT—MOTION TO VACATE—ERROR.

Where it appeared from the judgment roll that the judgment was rendered on motion of plaintiff and after the court had heard evidence offered and after due deliberation, any error committed therein not shown on the face of the record could not be corrected by motion to vacate, but only by appeal or through a motion for a new trial.

2. APPEAL—MATTERS NOT APPARENT OF RECORD—AFFIDAVITS.

A judgment cannot be impeached for error committed on the trial or in the rendition of the judgment, by affidavits outside the record, but only by bill of exceptions made a part of the record.

3. APPEAL — RIGHT TO ALLEGE ERROR — STRANGERS TO THE ACTION.

Error in rendering a judgment against one of the defendants to an action to enforce the lien of a street assessment, after the dismissal of the action against the other defendants, was available only to the person against whom the judgment was rendered, and not to a stranger to the action.

4. SAME—NOTICE—SERVICE.

In an action to foreclose a street assessment on land belonging to several defendants, wherein judgment was rendered for plaintiff, nonappealing defendants were not adverse parties, and no notice of appeal was required to be served on them.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by E. Worth against Esther B. Emerson and others. From an order vacating a judgment in favor of plaintiff and granting defendant Emerson a right to redeem, plaintiff appeals. Reversed.

Ralph L. Hathorn and Brooks Palmer, for appellant. J. C. Bates, for respondent.

HARRISON, P. J. Action to enforce the lien of a street assessment. Appeal from an order setting aside a judgment previously rendered in favor of plaintiff.

The action was commenced November 4, 1898, against Esther B. Emerson, John Doe, Robert Doe, and Jane Doe; the plaintiff alleging in his complaint that "the defendants on November 5, 1896 (the day the assessment became a lien) were, and still continue to be, the owners" of the lot of land described in the complaint, and that the said defendants John Doe, Robert Doe, and Jane Doe are sued by fictitious names because their true names are unknown to plaintiff. Summons was served upon the defendant Emerson, and her default for want of an appearance was entered

October 19, 1901. No service was made on either of the other defendants. February 17, 1904, an answer to the complaint was filed by John H. Grady, stating that he is "sued herein as John Doe, one of the defendants in the above-entitled action." After this answer was filed, but on the same day, the court, on the motion of the plaintiff, dismissed the action "as to the defendants therein sued by the fictitious names of John Doe, Robert Doe and Jane Doe, and John H. Grady, appearing herein as John Doe," and after hearing the evidence on the part of the plaintiff entered its judgment, declaring the amount of the assessment to be a lien upon the land described in the complaint, and directing a sale of the land in satisfaction thereof. February 25th Grady gave notice of a motion to vacate and set aside the judgment, and in support thereof filed an affidavit, in which he stated that he had succeeded to the right, title, and interest of the defendant Emerson in said lot of land, and her right to redeem the same from a sale to the state of California by a deed from her bearing date February 13, 1904, and had thereafter paid certain money for the purpose of redeeming the land from a sale thereof made to the state of California for delinquent taxes. The motion came on for hearing March 18th, and on May 27th was granted by the court. The only evidence presented in support of the motion was the judgment roll in the action and the above affidavit and notice of motion. From the order thus made the present appeal has been taken.

The order appealed from was not made upon the ground or claim that the judgment was rendered by reason of any mistake or inadvertence, or that there was any misprision of the clerk in entering it. It was not void upon its face, and it appears from the judgment roll itself that it was rendered upon the motion of the plaintiff, and after the court had heard the evidence offered on his behalf, and after due deliberation thereon. If any error was committed therein, it was a judicial error, which could be corrected only upon an appeal, or through a motion for a new trial. *Egan v. Egan*, 90 Cal. 15, 27 Pac. 22; *First National Bank of Fresno v. Dusy*, 110 Cal. 69, 42 Pac. 476. And any error committed by the court upon the trial, or in the rendition of the judgment, in order to be available for the purpose of vacating or setting the judgment aside, must be manifested by a bill of exceptions and made a part of the record. The validity of a judgment cannot be impeached by affidavits outside of the record.

The grounds upon which Grady asked that the judgment be set aside were that the court had no power or authority, in a street assessment case, to dismiss the action as to a portion of the defendants alleged to be the owners of the land, and render judgment against only one of the owners sued; and that, as he was sued as John Doe, a fictitious

defendant, and had filed an answer alleging that he is the owner of the land, the court had no power, authority, or jurisdiction to dismiss the action as to him, sued as John Doe, and render judgment against the defendant Emerson. To say that, in an action or proceeding which is within its jurisdiction, a court has no power or authority to make a certain order, or render a certain judgment therein, is merely to say that the court has no jurisdiction to commit error, which is equivalent to saying that it is erroneous to commit error. It may be conceded that the court erred in rendering judgment against the defendant Emerson after dismissing the action against the other defendants (Clark v. Porter, 53 Cal. 409); but such error was available to Mrs. Emerson alone, and not to a stranger to the action, or one not a party thereto. The judgment so rendered was voidable thereafter at her instance, but was not void. *Chase v. Christiansen*, 41 Cal. 253. It was competent for her to waive the error, as she has done by not appealing from the judgment, and submit to a sale of her interest in the land in satisfaction of the lien. Such error, however, is not available to either of the defendants so dismissed from the action. Upon a dismissal as to them, their rights in the land were unaffected by the judgment as if the action had been originally brought against Mrs. Emerson alone. Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278.

Grady is not named in the complaint, nor was he served with any process in the action. His claim in his answer that he is "one of the defendants in the action, sued herein as John Doe," is refuted by the affidavit which he presented in support of his motion. The John Doe who is named in the complaint as a defendant in the action is designated therein as a person who was one of the owners of the land at the date of the assessment, and thence continuously until the commencement of the action; whereas Grady, in his affidavit, claims to have acquired his interest in the land on February 13, 1904, the day before he filed his answer, and does not claim to have had any interest therein prior thereto; and the only interest which he claims to have then acquired was derived from the defendant Emerson, whose default in the action had been previously entered. He does not claim to have been at any time a co-owner with Emerson, and therefore was not one of the defendants in the action or entitled to be made a defendant therein; and his filing an answer to the complaint was unauthorized.

The proposition on the part of the respondent that the appeal should be dismissed for want of a service of the notice of appeal on Mrs. Emerson is overruled, upon the authority of *Foley v. Bullard*, 97 Cal. 517, 32 Pac. 574.

The order appealed from is reversed.

We concur: HALL, J.; COOPER, J.

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SIERRA LAND & CATTLE CO. v.  
BRICKER et al.

(Court of Appeal, Second District, California.  
Feb. 28, 1906. Rehearing Denied by  
Supreme Court June 4, 1906.)

1. CORPORATIONS—INCORPORATION—EVIDENCE.  
The articles of incorporation of plaintiff with the filing marks thereon are evidence of the proper filing of such articles, and of plaintiff's due incorporation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 113-118.]

2. SAME.

A receipt showing that defendants contracted with plaintiff in its corporate name was competent evidence as to plaintiff's incorporation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 109-111.]

3. DEPOSITARIES—DEPOSITARY FOR HIRE.

Under the direct provision of Civ. Code, § 1503, where defendant contracted to receive back property sold to plaintiff and repay the purchase money if the same should prove unsatisfactory, when defendants refused to receive the property on offer to return the same became the property of the defendants and plaintiff thereafter held it as a depositary for hire.

4. CONTRACTS — ACTION FOR BREACH — EVIDENCE.

In an action to recover the purchase price of a team sold under a contract that it would be taken back and the purchase money refunded if unsatisfactory, evidence as to the unsoundness of one of the horses was admissible as indicating the reasonable character of plaintiff's claim that the team was unsatisfactory.

5. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Even though it was unnecessary to show such fact, the admission of such evidence was harmless.

6. CONTRACTS—OFFER OF PERFORMANCE.

Under Civ. Code, § 1496, providing that the thing to be delivered need not in any case be actually produced upon an offer of performance unless the offer is accepted, an agreement to return property bought if unsatisfactory is satisfied when an offer is made and refused.

7. SAME—ACTION FOR BREACH—CONDITIONS PRECEDENT.

Under Civ. Code, § 1440, providing that if a party to an obligation gives notice to another before the latter is in default that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party, the cause of action on a contract to receive back property and return the purchase money accrued when the seller refused to receive back the property and return the purchase money.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by the Sierra Land & Cattle Company against W. J. Bricker and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Will D. Gould and E. C. Oggel, for appellants. B. W. Hahn and Hahn & Hahn, for respondent.

ALLEN, J. Action for money. Verdict and judgment for plaintiff, from which judg-

ment, and an order denying a new trial, defendant appeals.

Plaintiff avers in its complaint that it purchased a span of horses from defendants upon an agreement that if, after trial, the same should prove unsatisfactory, such horses should be returned and defendants would repay the purchase money, together with expenses of shipping to the place of trial, and expenses incident to such trial. Further, that the team, upon trial, was found to be unsatisfactory, and plaintiff immediately notified defendants of such fact, offered to return said horses, and demanded the repayment of the money, all of which defendants refused. Defendants deny all of the allegations. The evidence in the record is sufficient to support the verdict. No question of rescission is involved. The action is based upon a contract, the breach of which is clearly shown. The articles of incorporation of the plaintiff, with the filing marks thereon, were evidence of the proper filing of such articles and the due incorporation of the plaintiff, even were such proof necessary, when we consider the written receipt in evidence from which it appears that the defendants contracted with the plaintiff in its corporate name and received money admitted thereby to have been money of the plaintiff. This written receipt was competent evidence in the regard just mentioned, as well as tending to prove the actual receipt of the money, which was denied. Under the contract established, when defendants refused to receive the property upon the offer to return, the same became the property of the defendants, and plaintiff thereafter held that same as a depositary for hire. Civ. Code, § 1503. There is no issue pending in the case involving any counterclaim or demand growing out of a violation of the plaintiff's duty as such depositary, and all testimony received with reference to the use or retention of the horses under the pleadings was immaterial. Plaintiff is the real party in interest, as shown by the receipt and other competent testimony. The evidence with reference to the unsoundness of one of the horses was not improper, as indicating the reasonable character of the claim of the plaintiff that the team was unsatisfactory; even when that fact is unnecessary to be shown, no prejudice could result to defendants by such proof. An agreement to return if unsatisfactory is satisfied when an offer is made and refused. "The thing to be delivered need not in any case be actually produced upon an offer of performance unless the offer is accepted." Civ. Code, § 1496. The cause of action accrued when defendants refused to perform their part of the contract. Civ. Code, § 1440.

We discover no merit in the many other specifications of error in anywise prejudicial to defendants, or worthy of notice.

Judgment and order affirmed.

We concur: GRAY, P. J.; SMITH, J.

STATE ex rel. HARRIS et al. v. SUPERIOR COURT OF THURSTON COUNTY et al.

(Supreme Court of Washington. June 9, 1906.)

EMINENT DOMAIN—EXTENT OF POWER—USES—SUPPLY OF ELECTRICITY.

Under Const. art. 1, § 16, prohibiting the taking of private property for private use, a corporation cannot condemn property to further not only the operation of a municipal light plant and electric car system, but also the business of selling electricity generally.

Certiorari by the state, on the relation of Henry Harris and others, to review the proceeding of the superior court of Thurston county, O. V. Linn, as resident judge thereof, and others, in proceedings by the Olympia Light & Power Company for a condemnation of land. Judgment of condemnation reversed.

Jas. M. Ashton and Vance & Mitchell, for relators. T. N. Allen and Troy & Falknor, for respondents.

DUNBAR, J. Respondent, a domestic corporation, with its principal place of business at Olympia, filed its notice and petition in the superior court of Thurston county, Wash., for the condemnation and appropriation of certain real property situate in Thurston county, Wash., belonging to the relators. The respondent is a light and power company, and under certain charter provisions is employed to furnish light to the cities of Olympia and Tumwater, and to run electric cars in and between the cities of Olympia and Tumwater for hire. The electricity which is used by the company is generated by water power from water which flows down the Des Chutes river. It is alleged in the petition that there is not sufficient water to furnish power for the company to carry out the provisions of its charter in furnishing electricity to the cities of Olympia and Tumwater, and in operating their electric cars, and for the purpose of furnishing such power as it has been furnishing at reasonable and uniform rates to the public generally. The petition, among other things, is as follows: "That your petitioner has not been, nor does it intend to engage in any other corporate purposes except as herein set out, except it admits it has been engaged in furnishing electric power at reasonable and uniform rates to the public generally and without discrimination between persons substantially similarly situated, and is bound to continue to so furnish electrical power to the general public at reasonable and uniform prices and without discrimination between persons substantially similarly situated." The testimony in the case is also to effect that the condemnation is sought for the purpose of obtaining additional power not only for use in operating the light plant and the electric car system, but for the purpose of selling power to the different manufactories and for different purposes. So that the question pre-

sented is whether or not the furnishing of power outside of the power necessary to operate its electric cars and lighting system is a public use. This question was raised by the pleadings, and the court found that such use was a public use, that the respondent had the right and power to condemn, that there was a necessity for the condemnation, ordered the question of the compensation to be paid the relator to be submitted for the determination of a jury. This proceeding was brought to review that order.

The land sought to be condemned was land which would be overflowed by raising a dam in the Des Chutes river creating a reservoir for the purpose of storing the waters of the Des Chutes river and using the same in times of low water. We held, in the State of Washington, on the relation of Marian E. Harlan, plaintiff, v. Centralia-Chehalis Electric Railway Power Company, respondent, 85 Pac. 344, that the operation of an electric car was a public use, and the right of condemnation existed for the purpose of obtaining power necessary for the prosecution of such business. It is also, we think, without question, now admitted that the furnishing of electric lights to a municipality is a public use which warrants condemnation of private property. In the case last mentioned it was said that, if a private use is combined with a public one in such a way that the two cannot be separated, then unquestionably the right of eminent domain could not be invoked to aid the enterprise. And many cases were cited to the effect that the statute authorizing the condemnation of property for uses, a part of which only are of a public nature, is in violation of the rule that private property cannot be taken for private use, and hence cannot be enforced. And that the courts are not confined to, and it is not to be tested exclusively by, the description of those objects and purposes as set forth in the articles of association, but evidence allunde, showing the actual business proposed to be conducted, may be considered. And in that case, where under the articles of incorporation the company was entitled to engage in private enterprises, it was held that inasmuch as the application to condemn was made for a public use only, namely, to obtain power to prosecute the business of running electric cars, that the right to condemn would not be withheld. In this case it will be observed that under both the application and the proof the power of condemnation was sought for the purpose of obtaining power to furnish to other enterprises in addition to the charter uses of the respondent. And while this question was not directly decided in the case last referred to, it has been it seems to us directly decided adversely to respondent's contention by this court in *State ex rel. Tacoma I. Co. v. White River Power Company*, 39 Wash. 648, 82 Pac. 150, where it was held that the right of eminent domain cannot be exercised in

favor of an electric light and power corporation organized for the purpose of diverting water for power purposes for the generation of electricity to be sold commercially to manufactories, railways, and cities, in the absence of statutory regulation and guarantees of the public use and enjoyment of the property. Since the same is not a public service corporation, and the use is not a public use, in this case, of course, the respondent is only a public service corporation for the purpose of furnishing light and operating cars as above mentioned, and evidently is not a public service corporation for the purpose of engaging in the business which the White River Power Company was engaged in, and in the exercise of which it was held not to be a public service corporation, and therefore it is seeking to take private property for a private use, in violation of section 16, art. 1, of the state Constitution. In the White River Power Company Case many decisions were cited to sustain the doctrine that such uses as we are discussing were not public uses, and it was there said that: "The question is not a new one in this court. It was fully considered, in relation to another statute, in the case of *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964"—and citations from *Lewis*, *Eminent Domain*, and many other cases were cited to sustain the doctrine announced in the *Healy Lumber Co. Case*, in which case we decided that the public use authorizing the exercise of the right of eminent domain contemplated by the Constitution is not synonymous with public benefit, and a use of private enterprises does not authorize the exercise of the right, however much public policy demands it, or whatever the public benefit therefrom may be, but it must be a use by the public or by some agency that is quasi public. And the authorities pro and con on this question were set out at length in that case.

In view of the elaborate discussion and multifarious authorities cited in the two cases just mentioned, we do not deem it necessary to again go into a discussion of the question on its merits, but refer to those cases, and the case of *Brown v. Gerald et al. (Me.)* 61 Atl. 785, 70 L. R. A. 472, an exhaustive and instructive case where the authorities are marshaled, and the conclusion reached that manufacturing, generating, selling, distributing, and supplying electricity for power for manufacturing or mechanical purposes, is not a public use for which private property may be taken against the will of the owner. That a public use, such as justifies the taking of private property against the will of the owner, cannot rest merely upon public benefit, or public interest, or great public utility. In the course of the opinion in that case, it was said: "We think that the ultimate use of the power is an important consideration. If that use is essentially a pri-

vate use, in a private business, will it become a public use by merely multiplying the number of persons who may have occasion to use the power? If it would not be a public use to supply power for one mill, would it be such to supply for two mills, or for six, or for twelve? We think not. In each individual case, it would be supplying the power for a private use. If the state cannot take the property of one and give the use of it to another for private use, can it give the use to that other, in order that in the form of electric power he may distribute the use to a dozen others for their private business purposes? We think not. There is no underlying necessity or peculiarity in the business of distributing electric power which requires any such enlargement of the power of eminent domain. There seems to be such a necessity in the cases of all the quasi public corporations which we have mentioned. Railroads and telegraph, telephone, and water companies cannot be built and maintained by individuals for their several use, each one for himself. There is an 'impossibility,' to use Judge Cooley's words, 'of making provisions for them otherwise' than through the power of eminent domain. But every man can, if he wishes, have a mechanical power of his own, either steam, or water, or electric. He can serve himself, without the intervention of the state—not so conveniently or advantageously, perhaps, as it would be to be served by others. But mere convenience and advantage in private business must yield to the property rights of citizens sacredly guarded by the Constitution." It must be admitted that many things are considered a public use now that were not so considered a half or even a quarter of a century ago, and it may be, and it is probable, that in the not distant future many things which are now considered a private use, by the changing conditions and evolution of business, will of necessity become a public use, but, until such change is made manifest, private property must be protected from condemnation in that behalf.

The judgment of the lower court will be reversed, but the respondent, if it desires, may amend its complaint asking for condemnation of land sufficient for the purpose which we have indicated were of public use, and the proof must be confined to the necessity of such use.

MOUNT, C. J., and ROOT, CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

#### STATE v. LEWIS.

(Supreme Court of Washington. June 11, 1906.)

#### INDICTMENT AND INFORMATION—ALTERNATIVE ALLEGATIONS—BURGLARY.

Under Ballinger's Ann. Codes & St. § 7104, defining burglary as the unlawful entry in the nighttime, or the unlawful breaking and entry

in the daytime, of any building in which valuable things are kept, with intent to commit a misdemeanor or felony; section 7105, providing that any person who makes such an unlawful entry shall be deemed to have committed the same in an attempt to commit a misdemeanor or felony, unless the entry is explained; and sections 6844 and 6851, providing that, when a crime may be committed by different means, the indictment may be in the alternative, and that no indictment shall be held insufficient for any nonprejudicial defect—an information for burglary, alleging in the alternative that defendant entered the building with intent to commit "a misdemeanor or felony," is sufficient.

[Ed. Note.—For cases in point, see vol. S, Cent. Dig. Burglary, § 40.]

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

George Lewis was convicted of burglary, and appeals. Affirmed.

Austin M. Wade, for appellant. E. E. Boner, for the State.

FULLERTON, J. The appellant was informed against for the crime of burglary, the charging part of the information being as follows: "The said George Lewis, on the 8th day of December, A. D. 1905, in the county of Chehalis, in the state aforesaid, then and there being, did then and there, in the nighttime of said day, feloniously and unlawfully break and unlawfully enter the warehouse of the Northern Pacific Railway Company, a corporation doing business in the state of Washington, said warehouse then and there being a building in which goods, merchandise, and valuable things were kept on deposit, and situated in the city of Montesano, in the county and state aforesaid, with the intent then and there to commit a misdemeanor or felony therein." To this information the appellant demurred on the ground that it was not direct and certain as to the crime charged, and after trial and conviction moved in arrest of judgment on the same ground, contending that the information was fatally defective because it charged the intent with which the building was entered in the alternative.

The general rule undoubtedly is that, where a statute enumerates in the alternative several acts the doing of which constitutes a crime, or where the intent or purpose necessary to constitute the offense is set out in several aspects disjunctively, it is necessary, if the several acts or several intents or purposes are to be joined in one indictment or information, to state them conjunctively, using the copulative "and," where the statute uses the disjunctive "or." But this rule, in so far as it relates to the intent in an indictment or information for burglary, has been changed by statute in this state. Burglary, as defined by section 7104 of the Code (Ballinger's Ann. Codes & St.), consists of the unlawful entry in the nighttime, or the unlawful breaking and entry in the daytime, of any building in which goods and merchandise or valuable things are kept for

use, sale, or deposit, with intent to commit a misdemeanor or felony. By section 7105, Ballinger's Ann. Codes & St., it is provided that any person who makes such unlawful entry, or breaking and entry, as defined in the preceding section, shall be deemed to have made the same with intent to commit a misdemeanor or felony, unless the entry is explained by testimony satisfactory to the jury trying the case to have been made for some purpose without criminal intent. Construing this statute, we have held that the state is not required to prove the specific intent with which a defendant unlawfully enters the building, but, on the contrary, have held that, when it shows that there was an unlawful entry in the nighttime, or an unlawful breaking and entry in the daytime, it makes a prima facie case to the effect that the entry was made with intent to commit either a misdemeanor or a felony, and casts the burden of showing that the entry was for a purpose without criminal intent on the defendant. *State v. Wilson*, 9 Wash. 218, 37 Pac. 424; *State v. Anderson*, 5 Wash. 350, 31 Pac. 969; *Linbeck v. State*, 1 Wash. St. 336, 25 Pac. 452.

This construction of the statute is tenable only on the principle that the Legislature, in defining the crime of burglary, used the words "misdemeanor or felony" in the sense of "crime," intending to make it burglary to unlawfully enter a building under the circumstances defined with intent to commit any form of crime whatsoever. We think now that this is its proper construction, and, giving it that construction, the crime of burglary is correctly charged by using the language of the statute. Informations for burglary, charging the intent in the form of the one now in question, were before this court in the cases of *State v. Garbe*, 34 Wash. 395, 75 Pac. 993, and *State v. Randall*, 36 Wash. 438, 78 Pac. 998. In the first case the information was upheld, and in the second, although the information was held insufficient on another ground, its sufficiency was not questioned on the ground here urged. Moreover, the statute expressly provides that, when the crime may be committed by the use of different means, the indictment or information may allege the means in the alternative, and, further, that no indictment or information shall be held insufficient for any matter which was formerly deemed a defect, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits. Ballinger's Ann. Codes & St. §§ 6844, 6851. While perhaps these cases and this statute are not directly in point on the question now urged, they sustain the general judgment of the court below to the effect that this defect in the information, if a defect at all, is not material.

The judgment is affirmed.

MOUNT, C. J., and HADLEY, RUDKIN, DUNBAR, CROW, and ROOT, JJ., concur.

STATE ex rel. AMI CO. v. SUPERIOR COURT OF PIERCE COUNTY et al.  
(Supreme Court of Washington. June 13, 1906.)

1. CORPORATIONS—PAYMENT OF ANNUAL LICENSE FEE.

Under Laws 1897, p. 135, c. 70, § 5, providing for the payment of an annual license fee by corporations, with a penalty for not paying it by a certain time, the payment of the fee is a matter exclusively between the state and a corporation, and failure to pay it does not affect the powers of the corporation as against third persons.

2. EMINENT DOMAIN—REVIEW OF CONDEMNATION PROCEEDINGS—CERTIORARI—ESTOPPEL.

The averment, in the application for writ of review to review the order in condemnation proceedings by a railroad company, that it is authorized to do business as a foreign corporation in the state, shows compliance with Laws 1897, p. 134, c. 70, § 1, providing that every corporation must pay a fee to the Secretary of State on the filing of its articles of incorporation in his office, and shall have no corporate powers, and do no business in the state till such fee is paid, so that petitioner may not claim that the corporation had not complied therewith and therefore was without power in the state.

3. APPEAL — PRESUMPTION — COMPLIANCE OF OFFICERS WITH DUTY.

It will be presumed on appeal that the Secretary of State complied with his duty under Laws 1897, p. 134, c. 70, § 1, and did not file articles of incorporation till the corporation had paid the prescribed fee, so as to authorize it to do business in the state.

4. EMINENT DOMAIN — CONDEMNATION PROCEEDINGS—ANSWER.

An answer not being necessary in condemnation proceedings, the striking out of one filed therein is not error.

5. SAME—PUBLIC NECESSITY.

The facts of public use and public necessity are sufficiently shown in condemnation proceedings for a right of way for a branch railroad through a section particularly adapted to manufacturing enterprises, though but one plant has yet been built.

Application on the relation of the Ami Company for writ of review to review the order of the superior court of Pierce county in condemnation proceedings by the Northern Pacific Railway Company and others. Affirmed.

Herbert S. Griggs, for relator. B. S. Grosscup, for respondents.

RUDKIN, J. On the 4th day of May, 1906, the Northern Pacific Railway Company filed its petition in the court below by which it sought to appropriate certain real property therein described for railway purposes. On the 19th day of May, 1906, a hearing was had on this petition, after notice to all parties in interest, and upon such hearing the court entered an order, adjudging the contemplated use a public one, and that the public interest required the prosecution of the enterprise, and directing the impaneling of a jury to assess the damages. The Ami Company, one of the defendants in the condemnation proceeding, thereupon applied to this court for a writ of review, to review the order of the court below on the questions of public

use and public necessity. The writ was allowed, return made, and the entire record is now before us.

The first assignment of error is that the respondent failed to show a compliance with the requirements of the act of March 13, 1897, Laws 1897, p. 134, c. 70. Section 1 of that act provides that every corporation incorporated under the laws of this state, or any other state or territory of the United States, having a capital stock divided into shares, must pay to the Secretary of State, for use of the state, a fee of \$10 upon the filing of the articles of incorporation in the office of the Secretary of State, and that no such corporation shall have or exercise any corporate powers or be permitted to do any business in this state until such fee shall have been paid; and that the Secretary of State shall not file articles of incorporation or their equivalent or give any certificate therefor until such fee shall have been paid. Section 5 (page 135) provides for an annual license fee of \$10 payable on or before the 1st day of July of each year, and if not paid until after that date a penalty of \$2.50 is added until the 1st day of January following, after which the penalty is \$5 per day for each day's delinquency. As to the last provision it is only necessary to say that the payment of the annual license fee is exclusively a matter between the state and the corporation, and a failure to pay such fee does not in any manner affect the powers or rights of the corporation as against third persons. Assuming that it is incumbent upon a corporation seeking to condemn to show a compliance with section 1, *supra*, the objection of the petitioner is untenable for several reasons: First, in its application for the writ of review the petitioner avers that the Northern Pacific Railway Company is a corporation organized and existing under the law of the state of Wisconsin and is authorized to do business as a foreign corporation in the state of Washington. This of itself shows a compliance with the statute; second, the articles of incorporation of the Northern Pacific Railroad Company were filed in the office of the Secretary of State long prior to the passage of the act of 1897; and, third, this court will presume, in any event, that the Secretary of State performed his duty and did not file the articles of incorporation until the necessary fee was paid.

The next assignment is that the court erred in striking the answer filed in the condemnation proceeding. This court held in *Seattle & Mont. Ry. Co. v. Murphine*, 4 Wash. 448, 30 Pac. 720, that no answer is contemplated or required in such a proceeding. The defendant may offer any competent proof or establish any defense without answer, and therefore no error can be predicated on the ruling complained of.

The next assignment is that the testimony fails to show that the public interest requires the prosecution of the enterprise set forth in the

petition for condemnation. The enterprise in aid of which the appropriation of the petitioner's land is sought is the construction of what is known as the "Tacoma Tide Flat Branch" extending a distance of about three miles from the main line of the Northern Pacific Railway Company at or near Tacoma to a point on Puget Sound. The territory to be served by this branch is about two or three miles in width and from five to six miles in length, and the testimony shows that this entire section is particularly adapted to manufacturing enterprises of various kinds. The petitioner apparently concedes that this branch, when constructed, will be a commercial railway, subject to all the provisions of the Constitution and laws of this state governing railway and transportation companies, and that the use is a public one, and this is manifestly true. It is contended, however, that there is at present time but one manufacturing plant in the territory to be served, and that this is not sufficient to show a necessity for the appropriation or that the public interest will be subserved thereby. We do not think this objection tenable. It clearly appears from the testimony that the territory along this branch is well adapted to manufacturing and perhaps to no other purpose. It is a fact of which we may take judicial notice that manufacturing plants do not, and cannot, locate at a distance from railroad or transportation facilities. No manufacturing plant of any moment would locate on the Tacoma Tide Flats at a distance of three miles from a railroad, as it would be impossible, or at least impracticable, to get material or supplies to its plant or its products to market; and to hold that the manufacturer must precede the railroad would be in effect to deprive the territory in question of both. The entire history of railroad building shows that the railroad comes first, and the persons or industries to be served follow after. The question of the right to condemn is determined by the right of the public to use the railroad when constructed, rather than by the extent to which the right will be exercised. As said by the court in *B. V. L. Co. v. Johnson*, 30 Or. 205, 46 Pac. 790, 34 L. R. A. 348, 60 Am. St. Rep. 818. "The fact that it [the railroad] has not been fully completed between the termini indicated in its articles of incorporation, or that there is at present no town, city, or settlement, or other railroad at its proposed southeastern terminus, or that its proposed route is through a rough, mountainous, and sparsely settled country, or that the plaintiff has not yet fully equipped the road, or supplied itself with complete and perfect terminal facilities, or that it has not charged the passengers upon its railroad any fare, does not affect its right to exercise the power of eminent domain. The question of public use is not determined, as a matter of law, by any of these things, but by the fact that the proposed road is intended as a highway

for the use of the public in the transportation of freight and passengers. And it can make no difference that its use may be limited by circumstances to a small part of the community. Its character is determined by the right of the public to use it, and not by the extent to which that right is exercised. *De Camp v. Hibernia Railroad Co.*, 47 N. J. Law, 43; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659; *Ross v. Davis*, 97 Ind. 79. If every one having occasion to use the road as a passenger or for transportation of freight may do so, and of right may require the plaintiff to serve him in that respect, it is a public way, although the number actually exercising the right is very small. The findings of the court show that the enterprise in which the plaintiff is engaged, and for which it requires the land in question, is of this character, and therefore we have no alternative but to affirm the judgment." In *Butte, etc., Ry. Co. v. Mont., etc., Ry. Co.*, 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508, the court said: "It is well established that if, in point of law, a use is public, the fact that not very many persons will enjoy the use is not material. *Talbot v. Hudson*, 16 Gray (Mass.) 417. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public highway although the number who have occasion to exercise the right is very small." We are therefore satisfied that the fact of public use and public necessity was sufficiently established by the testimony.

The last assignment is that the petition for condemnation was insufficient, and that the demurrer thereto should have been sustained. We think the petition was clearly sufficient, at least as against a general demurrer.

Finding no error in the record, the judgment is affirmed; and, to the end that the jury trial pending in the court below may not be further delayed, an order will be entered, and certified to the court below forthwith, vacating the supersedeas heretofore granted.

MOUNT, C. J., and FULLERTON, HADLEY, CROW, ROOT, and DUNBAR, JJ., concur.

#### **PUGET SOUND MACHINERY DEPOT v. BROWN ALASKA CO. et al.**

(Supreme Court of Washington. June 15, 1906.)

#### **CONTINUANCE — SUCCESSIVE CONTINUANCES — DISCRETION OF COURT.**

In an action for the price of certain machinery in which defendant admitted the purchase, but claimed defect in quality and delay in delivery, two continuances were granted upon defendant's motion, because of the sickness of the president of the defendant corporation, whom it was alleged was more familiar with

the facts than any one else. The president was not so ill as to prevent the taking of his deposition, and at the granting of the last continuance, the court announced that the cause must be tried upon the date to which it was then continued. *Held*, that the refusal to grant further continuance because of the sickness of defendant's president was not an abuse of discretion.

[Ed. Note. For cases in point, see vol. 10, Cent. Dig. Continuance, § 147.]

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by the Puget Sound Machinery Depot against the Brown Alaska Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Brown, Leehey & Kane, for appellants. Ira Bronson and D. B. Trefethen, for respondent.

ROOT, J. Respondent brought an action against appellant Brown Alaska Company and the John A. Mead Mfg. Company, and another action against the appellant New York Alaska Development Company. By stipulation these actions were consolidated. They were brought to recover a balance due on account of machinery furnished. Subsequently the defendant John A. Mead Mfg. Company was dismissed from the action, and is not before this court on appeal. The Brown Alaska Company denied that it had purchased any goods from respondent, but alleged that any purchases from respondent were for the New York Alaska Development Company. The latter company by answer and cross-complaint alleged that respondent had failed to furnish the character of machinery called for by the contract of purchase, and had neglected to supply the same within the required time, and alleged damages in the sum of \$10,000 as an offset and counterclaim. Upon the trial it was stipulated that if judgment went against either, it might go against both of said appellants. The trial resulted in a judgment in favor of respondent, from which this appeal was taken.

The only error assigned is that upon the action of the trial court in refusing a further continuance to appellants as requested at the time of the trial. The action was commenced in June, 1904. On January 7, 1905, the case was set for trial for February 24, 1905. On the latter day, at the request of appellant, the cause was continued until February 28, 1905. It was again continued until April 17, 1905. At this time appellants urged a further continuance which was granted until May 1, 1905. The trial court at the time of granting this last continuance informed the appellants that the cause must certainly be tried upon the date to which it was then continued. The grounds upon which appellants were given the continuances mentioned, and upon which they sought a further extension, were that one Brown, who was the president and the principal stockholder in the appellant companies,

and who had conducted the transaction with reference to the purchase of machinery, and who resided in New York City, was then confined to his home city by illness and unable to come to Seattle for the trial. Appellants urged that his advice and counsel were needed in the conduct of the trial, and that his testimony was essential, although less stress seems to be laid upon the necessity for his evidence than upon the importance of his knowledge and assistance in the conduct of the trial. It does not appear that he was too ill to give a deposition. In fact, we think it was practically conceded that his condition was such that his evidence by means of a deposition could have been taken. It was urged by appellants that his deposition could not have been taken advantageously for the reason that they did not know, and he did not know what the evidence of respondent would be. Under the issues as presented by the pleadings and stipulation at the time of the trial, the sale and delivery of the goods was admitted, and the controversy was principally as to the offset and counterclaim. This would be an affirmative matter for the defense to establish, and to support this it would seem that the deposition of Brown could have been taken and used advantageously if capable of supporting the allegations of said defense. It is always well for trial courts to be liberal in the matter of granting continuances, where a party or a material witness on account of sickness or other unavoidable reason is unable to be present at the time set for the trial of the cause; proper terms being imposed in order to save the opposing party harmless. But there must of necessity be some limitation on the extension of this courtesy and consideration. Ordinarily the action of the trial court in passing upon a request for a continuance is a matter of discretion and will not be reviewed by an appellate court in the absence of a showing that said discretion was abused. In view of the fact that this action had been pending for many months, that two or more continuances had been granted on the request of appellants, and that they had been notified by the trial court that the hearing would certainly be proceeded with at the date to which it was last continued; and in the light of all the facts shown by the record before us we are unable to say that the trial court abused its discretion.

The judgment is therefore affirmed.

MOUNT, C. J., and DUNBAR, CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

#### SMITH v. JANSEN.

(Supreme Court of Washington. June 21, 1906.)

#### TAXATION—TAX TITLE—VALIDITY—COLLATERAL ATTACK.

Under Revenue Act, § 114 (Laws 1897, p. 190, c. 71), providing that deeds executed by

the county treasurer shall be prima facie evidence in suits in relation to the right of the purchaser of facts that the taxes were not paid before the issuance of the deed, etc., an owner who paid the taxes on his premises may, in a suit to quiet title as against a grantee in a tax deed executed about five years after the payment of the taxes pursuant to a default tax judgment on constructive notice, show that the taxes were paid, and thereby defeat the tax judgment and deed.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1555, 1569.]

Appeal from Superior Court, King County; H. B. Rigg, Judge.

Action by Lundy B. Smith against E. C. Jansen. From a judgment for plaintiff, defendant appeals. Affirmed.

E. P. Moran, for appellant. Frank M. Egan, for respondent.

RUDKIN, J. This is an action to quiet title. It is admitted that the plaintiff was the owner of the premises in controversy prior to the 12th day of December, 1902, and is still the owner unless his title was divested by a tax sale of that date. It is also admitted that the defendant received a tax deed for the premises from the county treasurer of King county on the 12th day of December, 1902, and that such deed was executed and delivered by virtue of a general county tax foreclosure and sale whereby the premises were sold for delinquent taxes for the year 1889. It is further admitted that the taxes for which the premises were sold were in fact paid to the county treasurer by the plaintiff's grantor on the 31st day of January, 1898, almost five years before the tax foreclosure and sale, and that the premises are vacant and unoccupied. On these facts, which are agreed to by the parties, the court below granted the prayer of the complaint. From this judgment the defendant appeals.

The appellant contends that the payment of the taxes was a defense to be interposed in the tax foreclosure proceeding, that the prior payment of the taxes did not defeat the jurisdiction of the court in that proceeding, and that this is a collateral attack on the tax judgment. Questions relating to the conclusiveness of judgments in general, or to collateral attacks upon such judgments, are not involved in this case and we will not discuss them. Tax judgments and tax deeds are creatures of the law, and have only such force and effect as the law accords to them. Section 114 of the revenue act of March 15, 1897 (Laws 1897, p. 190, c. 71), provides as follows: "Deeds executed by the county treasurer, as aforesaid, shall be prima facie evidence in all controversies and suits in relation to the right of the purchaser, his heirs and assigns, to the real estate thereby conveyed of the following facts; \* \* \* second, that the taxes or assessments were not paid at any time before the issuance of deed. \* \* \* And any judgment for the deed to real estate sold for delinquent taxes rendered after the passage of this act, except as other-

wise provided in this section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered, and as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or assessments have been paid, or the real estate was not liable to the tax or assessment." The prima facie presumption arising from the production of the tax deed was overcome by the admission that the tax had been paid, and the statute by clear and unmistakable implication permits the property owner to show in a collateral proceeding that "the tax or assessments have been paid, or the real estate was not liable to the tax or assessment." And when either of these facts is shown, the implication that the tax judgment and tax deed must give way, is equally explicit. This may not be true in all cases. For example, should the property owner appear in the foreclosure proceeding and litigate the question of payment there is no good reason why the tax judgment should not preclude him from again litigating the same question in a subsequent proceeding; and if the property owner is personally served with notice and makes default the same result might follow, but these questions are not now before us, and we express no opinion in regard thereto. We do hold, however, that where the tax judgment is taken by default, on constructive service alone, the property owner may defeat the tax judgment and tax deed in a collateral proceeding by showing that "the tax or assessments have been paid, or the real estate was not liable to the tax or assessment." This is the rule prescribed by the statute, and it is needless to add, the rule is eminently just and proper. The foreclosure of a tax lien by constructive service, especially against a resident of the state, is a harsh remedy at best. This court has often held that the procedure is justified, because the public revenues must be paid, and because the property owner is chargeable with notice that taxes are levied against his property annually, and that the property will be sold in regular course of law, if the taxes are not paid. The foreclosure cannot take place for a number of years after the tax is levied, and if the property owner neglects the payment of his taxes for so long a time, he is in no position to complain of the forfeiture. None of these reasons apply in this case. The property owner has paid his taxes and discharged his obligations to the state. He had no reason to expect that proceedings would be taken against him or his property, and he was not required to be ever on the lookout lest some negligent or corrupt official should cause or suffer his property to be sold for a tax that had long since been paid.

Such were the views of the court below, and its judgment is affirmed.

MOUNT, C. J., and FULLERTON, HADLEY, CROW, ROOT, and DUNBAR, JJ., concur.

STATE ex rel. ALEXANDER v. SUPERIOR COURT OF PIERCE COUNTY et al.

(Supreme Court of Washington. June 15, 1906.)

EMINENT DOMAIN—REVIEW OF CONDEMNATION PROCEEDINGS—CERTIORARI—TIME FOR COMMENCEMENT.

Under Ballinger's Ann. Codes & St. § 5645, requiring appeals from the award of damages in condemnation proceedings to be taken within 30 days, certiorari to review an order adjudging a public use in condemnation proceedings must by analogy be commenced within 30 days after the order.

Fullerton, J., dissenting.

Petition for certiorari by Hubbard F. Alexander against the superior court of Pierce county and others to review an order of respondent declaring a public use in condemnation proceedings commenced by the Chicago, Milwaukee & St. Paul Railway Company of Washington against petitioner. Petition dismissed. Judgment below affirmed.

Hudson & Holt, for relator. Reynolds & Griggs and H. H. Field, for respondents.

CROW, J. On February 15, 1906, the Chicago, Milwaukee & St. Paul Railway Company of Washington filed in the superior court of Pierce county its amended petition to appropriate real estate of Hubbard F. Alexander in said county for a right of way. On February 26, 1906, the judge of said court found the contemplated use for which said real estate is sought to be taken is public, and ordered said cause to be continued to April 2, 1906, for the determination of damages and compensation to be paid to the persons entitled thereto. By subsequent continuances the matter of the assessment of damages and compensation was finally set for June 14, 1906. On May 28, 1906, the said Hubbard F. Alexander as relator herein applied to this court for a writ of certiorari to review the said proceedings and order of the superior court. Upon this application a show cause order was issued. In response to said order the respondents have brought up a complete record of the proceedings in the superior court, including all the evidence, and have also made a motion in this court to dismiss this proceeding for the reasons that the writ of certiorari herein was not applied for or issued within the time allowed by law, and that the relator has failed to exercise due and reasonable diligence in applying for the same. The hearing in this court has been had not only on said motion to dismiss but also upon the merits. The order declaring a public use was entered February 26, 1906, and relator's application was made

to this court on May 28, 1906. Our Code fails to designate any time within which an application for a writ of certiorari must be presented, and the respondent contends that where no such time is fixed by statute, a writ of certiorari to review an order cannot be issued after the expiration of the time within which such order might be reviewed upon appeal if an appeal were allowed. In *Spooner v. Seattle*, 6 Wash. 371, 33 Pac. 963, this court said: "The writ of certiorari is in the nature of an appeal, and, while the statute does not fix the time within which the writ should be applied for, it should be applied for within a reasonable time after the act complained of has been done. \* \* \*

In the recent case of *State ex rel. Lowary* (Wash.) 83 Pac. 726, we said: "The statute does not fix the time within which such application must be made, but the courts by analogy apply the limitation fixed by law for the prosecution of an appeal. Ordinarily this court will not entertain jurisdiction of an application of this kind after the time limited by law for prosecuting an appeal has expired." In that case, however, we issued the writ by reason of special facts appearing therein. This rule of practice as stated in the *Lowary Case* is in perfect harmony with the current of authority as announced in many well-considered cases. See *People v. Supervisors*, 15 Wend. (N. Y.) 198; *Elmendorf v. Mayor of New York*, 25 Wend. (N. Y.) 693; *People v. Mayor of New York*, 2 Hill (N. Y.) 10; *Long v. Ohio River Ry. Co.*, 35 W. Va. 333, 13 S. E. 1010; *Burgett v. Apperson*, 52 Ark. 222, 12 S. W. 559; *Reynolds v. Superior Court*, 64 Cal. 372, 28 Pac. 121; *State ex rel. v. Milwaukee County*, 58 Wis. 4, 16 N. W. 21; *Crosby v. Probate Court* (Utah) 5 Pac. 552.

No showing has been made by the relator herein to explain his lack of diligence, nor do any extenuating circumstances appear from the record sufficient to justify his delay or call upon us to exercise our discretion in awarding him additional time beyond the period above mentioned. The respondent contends that the ruling or decision of the superior court sought to be reviewed herein is not a final judgment, but that it is a preliminary order, and that as appeals from any order other than a final judgment must under the provisions of the general appeal act (Ballinger's Ann. Codes & St. § 6502), be taken within 15 days after the entry of such order, an application for a writ of certiorari to review the order here involved should in the absence of special circumstances authorizing a later application be made within such period of 15 days. We do not think this contention can be sustained, as the order here sought to be reviewed is not one of those enumerated in subdivisions 2 to 6 of section 6500, Ballinger's Ann. Codes & St., to which the 15-day limit is applied by section 6502, nor do we think the 90-day

period mentioned in said section 6502 is applicable here. A writ of certiorari to review an order adjudging a public use in a condemnation proceeding is authorized by reason of the fact that the appeal awarded by the eminent domain act (Ballinger's Ann. Codes & St. § 5645), only affects the propriety and justice of the amount of damages awarded. *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158. The appeal, however, that has been provided by said section 5645, must be taken within 30 days after the entry of the judgment for damages, and we think this period should be adopted by us as the one within which a writ of certiorari to review an order of the character here involved should issue; said period to run from the date of the entry of said order adjudging a public use. The eminent domain act is a law designed to secure a speedy hearing and determination of the right to condemn and damages to be awarded for the taking of private property. Public interests are involved, which fact in all probability controlled the Legislature in fixing the time for appeal at 30 days instead of 90 days as in most other actions. It would be inconsistent for us to hold that the usual 90-day period for appeal fixed by section 6502, Ballinger's Ann. Codes & St., should apply by analogy in limiting the period of time in which a writ of certiorari should issue to review an order of this character, while the eminent domain act itself by section 5645, Ballinger's Ann. Codes & St., directs that the only appeal for which it provides must be taken within 30 days after the entry of the final judgment for damages. It would be an anomaly if the landowner had 90 days within which to apply for a writ to review the preliminary order adjudging a public use, while, if the cause proceeded to a judgment for damages, he would have only 30 days within which to appeal from such final judgment. Trial courts usually proceed promptly to ascertain the damages after said preliminary order has been made, and under such a holding a chain of circumstances might arise whereby a timely application for a writ to review the preliminary order might be made, after the time for the taking of an appeal from the final judgment in the same condemnation proceeding had expired. We therefore hold that in the absence of any unusual circumstances calling for a less stringent rule, we should limit the time within which an application for a writ of certiorari may be made to review an order in condemnation proceedings such as the one here involved, to the period of 30 days from and after the entry of such order. The relator having failed to make his application within such time has not proceeded with due diligence, and his application should be dismissed. Although we shall not discuss the merits, we will, nevertheless, state that after a careful examination of the entire

record we fail to find that any error has been committed by the honorable superior court.

It is ordered that the relator's application be dismissed, and that the judgment of the superior court be affirmed.

MOUNT, C. J., and DUNBAR, ROOT, HADLEY, and RUDKIN, JJ., concur.

FULLERTON, J. (dissenting). I am unable to concur in either the reasoning or the conclusion of the foregoing opinion. Had the court followed the intimation given in the case of *State ex rel. Lowary v. Superior Court* (Wash.) 83 Pac. 726, and held that writs of review must be applied for within the time in which an appeal might be taken under the general statutes relating to appeals, no serious objection could be urged against the rule, as it would then have been certain, easily understood, and applicable in all cases. But the court has seen fit to select the limitation prescribed by a special statute for an appeal from a judgment in a special proceeding, and make it applicable to judgments of the character of the one before us. It is true that the judgment sought to be reviewed and the judgment the time to appeal from which is held to be controlling, are both judgments in condemnation proceedings had under the statute of eminent domain; and that it is this fact that persuaded the court that there was such an analogy between the two judgments that the time limited for an appeal from the one ought to control the time within which to review the other, but it seems to me that this as a reason is inconclusive, and, as a policy, is harmful. That the judgments are separate and distinct was determined by this court in the case of *Western American Co. v. St. Ann Co.*, 22 Wash. 158; and that the right to review the present judgment by a writ of review rests in the fact that there is no right of appeal from it was determined in the case of *Seattle & M. R. R. Co. v. Bellingham Bay & E. R. R. Co.*, 29 Wash. 495, 69 Pac. 1107, 92 Am. St. Rep. 907. It being true, therefore, that there is no connection between the judgments, I am unable to see why the rights relating to the one should in any manner be allowed to affect the other. Since they are separate and distinct, each should stand on its own bottom in so far as the right to review it is concerned, and the right should be determined by the general law rather than from any analogy between them.

I think the rule adopted harmful as a policy, because it adds another element of uncertainty to the procedure by which causes are brought to this court for review. This uncertainty arises from the fact that there are many judgments that cannot be reviewed but by this writ, and the precedent of this case establishes the principle that special limitations on the right of appeal con-

tained in special statutes are applicable when the right to review any of such judgments are called in question. The result is that instead of having one general limitation applicable to all judgments alike, we have different limitations applicable to different judgments, with no rule to determine with certainty when they are applicable. It seems to me that only the positive mandate of the statute ought to drive the court to the adoption of such a procedure. I dissent, therefore, from the judgment of dismissal.

REILLY et al. v. GOTTLIEB et ux.  
(Supreme Court of Washington. June 22, 1906.)

1. DEEDS — CANCELLATION — FRAUD—SUFFICIENCY OF EVIDENCE.

The testimony of defendant alone in a suit to set aside a conveyance as having been obtained by fraudulent representations is insufficient to overcome the testimony of plaintiff and two disinterested witnesses as to such representations having been made.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 644; vol. 8, Cent. Dig. Cancellation of Instruments, § 102.]

2. VENDOR AND PURCHASER—MISREPRESENTATION BY VENDOR—QUALITY OR VALUE—MATTERS OF FACT OR OPINIONS.

The representations made in the sale of land that it was in a valley and was good bottom land; whereas it was on an arid ridge, that it was but three miles from a town, when it was 50 miles from it, and that it was good farming land, when it was poor grazing land, are not expressions of opinion, but statement of fact, authorizing the setting aside of the conveyance given in exchange.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 52, 53.]

Appeal from Superior Court, Pierce County; Thad. Huston, Judge.

Action by M. E. Reilly and another against Peter Gottlieb and wife. Judgment for defendants. Plaintiffs appeal. Reversed, with instructions.

Boyle & Warburton, for appellants. Ellis & Fletcher, for respondents.

DUNBAR, J. This action was brought to set aside a conveyance of certain lots in the city of Tacoma which appellants allege were secured by fraudulent representation on the part of the respondents. The court refused to grant the relief prayed for. According to the allegations of the complaint and the testimony of the respondent, in January, 1905, the appellant and respondent met in El Paso, Tex., at the office of a real estate firm where appellant had gone to inquire for purchasable land in Texas, and where the respondent had gone to list his property for sale or exchange. The respondent was introduced to the appellant by the manager of the real estate firm, and during the conversation which ensued it was ascertained that the respondent had 158 acres of land in Texas, and that the appellant owned certain lots in the city of Tacoma. An exchange was

effected; the appellant receiving a deed to the Texas land and the respondent a deed to the lots in Tacoma.

The appellant testified that the respondent represented to him that the land which he owned was in the Pecos Valley, the very best land in the country, and within three miles of Ft. Stockton; that it was good for farming and for anything; that he could stand on the land and see right up the main street in Ft. Stockton; that there was a good traveled road right by his land and running into and up the main street in Ft. Stockton; that there was plenty of water, and a person could dig a well and get water, and plenty of it, within 20 feet of the top; that the respondent asked the appellant at different times if the land was upon top of the ridge, and he said no; that it was the very best river bottom land; that the land was worth \$30 per acre, but being hard pressed for money he would make the price \$15 per acre, considering that he was not a farmer; that he was acquainted with the land having made two trips to it, and, in addition to its being good farm land, it was fine land for vineyards and fruits, and that it was within three miles of Ft. Stockton; that relying upon these representations the appellant traded his lots in Tacoma for said land and conveyed the said Tacoma lots to the respondent; that after he closed the transaction he investigated the land which he had traded for, and found that instead of being within three miles of Ft. Stockton it was about 50 miles from that place; that instead of being in the Pecos Valley it was on an arid ridge; that there was no water on it, and that water could not be obtained without going to a depth of from 300 to 400 feet; that it was not farming land at all, but a poor class of arid grazing land; and that instead of being worth from \$15 to \$30 an acre, the highest price that it could be sold for, if sold at all, was about 60 cents per acre. Appellant testified that the Tacoma property which he had deeded to respondent was worth \$1,000. He executed a deed to the respondent for the Texas land and tendered it in court for his benefit.

The respondent testified, in substance, that he met the appellant substantially as testified to by appellant; that he had bought this Texas land some time before, giving therefor two horses, a carriage, and harness, without having seen it, but that he afterwards had seen it once or had seen what was represented to be his land; that the real estate man in El Paso, Mr. Millican, had told him that the land ought to be worth \$1,500. This was the man that had introduced appellant and respondent to each other. Denies that he made the representations to the appellant as alleged by appellant, but on the other hand that he gave appellant \$30 to go down and look at the land for himself, and if it were not satisfactory to him he need not pay him back, but if it were and they made

the trade then appellant was to stand half of that expense; that appellant said all right and took the \$30; that about 10 days after this he met appellant in the park and asked him if he had been down to see the land; that appellant said no, but that he had found out all about it from a man who lived near it, and who knew more about it than respondent did, and that after some further talk the trade was made and the deeds executed; and that appellant relied upon information which he had obtained outside of respondent's representations, which information appellant claimed to be satisfied with. If the testimony of the respondent could be believed it is evident that the judgment of the court should be affirmed, and that the appellant failed to substantiate the allegations of the complaint; that the sale was made through fraud and misrepresentation. But in view of the other testimony in this case from disinterested witnesses we are not able to adopt the statement of the respondent as the truth of the matter.

R. L. Mellon, who was employed in the real estate office, testified that he was present at the time the alleged representations were made and when the respondent came to the office to list the Texas property that the respondent described his property as 158 acres of good farming land in Pecos Valley, about three miles from Ft. Stockton, with water within 30 feet of the surface for irrigating, all good rich valley farm land; that he had heard several conversations between respondent and appellant when the respondent had told appellant that it was all good land, all in the valley, no waste land, no rocks nor rough land, water supply abundant for irrigating, about 2½ to 3 miles from Ft. Stockton; that adjoining lands raised good crops, a vineyard near by, and that there was a public road running into Ft. Stockton; that he had seen the land, had gone over it, and also testified that the appellant made the trade on respondent's representations.

W. O. Millican, who was the proprietor of the real estate office, testified that he was present during the conversations above alluded to, and introduced the appellant and the respondent; that respondent described his property as being in Pecos Valley and about three miles from Ft. Stockton, and that its value was \$15 per acre.

W. A. Hadden, county and district clerk of Pecos county, testified that his records described the land as dry grazing land, and that the official county map shows the land to be 50 miles from Ft. Stockton, not situated near any village or market place, and that it could not be seen from Ft. Stockton.

J. W. Thornberry, the state quarantine inspector at Ft. Stockton, testified that it was not agricultural land, but grazing land, and not the best grazing land; that the nearest settlement was Longfellow, a railroad station 10 miles away, at which there was a station house, section house and two resi-

dences; that the nearest town was Sander-son, of about 700 inhabitants, and 20 miles away; that there was no surface water on this land, or a large body of adjacent land uniform in character, and that you had to go down some 300 or 400 feet to get water, and that the land was worth about 50 cents an acre.

The testimony of all of the appellant's witnesses was taken in the form of depositions, and it does not appear that the claim of the respondent that he furnished the appellant money to defray the expenses of an examination of the land as testified to by the respondent was brought to the attention of the appellant when his deposition was taken, and he was not notified by the answer that any such claim would be made. The respondent's testimony was given orally, of course, after the testimony of the appellant had been offered, and when there was no opportunity to deny the statements made by the respondent in regard to this alleged transaction; and in consideration of this fact, and of the further fact that the testimony of the witnesses Millican and Mellon both disinterested witnesses supported all the material averments and testimony of the appellant, we are satisfied that the representations as alleged by the appellant were actually made, and that the trade was made by the appellant in reliance upon such representation. It is true that this court, in common with other courts, has frequently decided that representations which are mere matters of opinion are not sufficient to establish fraud or furnish ground for equitable relief. But the representations made in this case, if the testimony of the appellant and his witnesses is to be believed, were not confined to matters of opinion, but were positive statements of fact upon which the appellant relied, and, inasmuch as the land was situated 250 miles away, the respondent having seen it, and the appellant never having seen it, it cannot be said that they were standing upon an equal footing when the trade was made. The representation that the land was in the Pecos Valley and that it was good bottom land, when, in fact, it was not in the Pecos Valley or in any valley at all, was not the representation of an opinion, but the statement of an alleged fact. It cannot be said that the statement that the land was but 3 miles from Ft. Stockton, and that the main street of Ft. Stockton could be seen from the land when Ft. Stockton was actually 50 miles away, and could not be seen from the land at all was the expression of an opinion, but it was plain that it was a perversion of a fact and a fraudulent misrepresentation. The respondent knew that there were no farms around this land which were raising good crops, and that there were no vineyards close to it, and that no stage line passed by it. These statements were simply untruths which the

respondent was guilty of announcing for the fraudulent purpose of deceiving and overreaching the appellant, and, having had that effect, vitiates the transactions. A good many cases are cited by respondent to sustain the judgment of this case, but without especially reviewing them they will be found to be cases where the facts were so at variance with the facts in this case that they cannot be said to have any bearing upon it. We think that no case can be found decided by this or any other court where so flagrant a fraud has been practiced where relief has been denied. It is contended by respondent that he has been put to some expense in repairing buildings on the Tacoma property, but we think, inasmuch as he has had the benefit of the rent of the property from the time he purchased, that that is a sufficient compensation for all the expenses he has been to.

The judgment will be reversed, with instructions to the lower court to grant the petition of the plaintiff.

MOUNT, C. J., and CROW, ROOT, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

#### SEATTLE LUMBER CO. v. SWEENEY et al.

(Supreme Court of Washington, June 19, 1906.)

#### 1. MECHANICS' LIENS — FORECLOSURE — PROOF — SUFFICIENCY.

Evidence in a suit to foreclose a lien for materials furnished in the construction of a building examined, and *held* to support a finding that the materials were furnished and actually used in the construction of the building authorizing a lien therefor within 2 Ballinger's Ann. Codes & St. § 5900, providing that every person furnishing material to be used in the construction of a building shall have a lien therefor, though the statute be so construed that a lien can only be had where the material furnished to be used in a building was actually delivered and used.

#### 2. SAME — CONSENT OF OWNER — AUTHORITY OF AGENT.

The original order for materials for the construction of a building was given by one of the architects for the building before the contract was let and after the letting of the contract the materials were furnished to the contractor, and the original order was paid for by the owner. Other material called extras, was furnished in part, while the original contractor was in charge of the construction work and in part after he had absconded, and while the owner and his employes were in charge. The employes were authorized to construct the building. *Held*, that the materials were furnished to the owner's agents authorized to purchase material on his account within the statutes giving a mechanics' lien.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, §§ 86, 128.]

#### 3. APPEAL — DENIAL OF NEW TRIAL — RECORD — SUFFICIENCY.

Where the showing, on which a motion for a new trial on the ground of newly discovered evidence, does not appear in the record, the

court on appeal cannot consider the ruling of the court denying the motion.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2944-2947.]

#### 4. NEW TRIAL — NEWLY DISCOVERED EVIDENCE—IMPEACHING EVIDENCE.

Ordinarily a new trial will not be granted on the ground of newly discovered evidence, the purpose of which is to impeach a witness of the successful party.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 221-223.]

Appeal from Superior Court, King County; John B. Yakey, Judge.

Action by the Seattle Lumber Company against Bo Sweeney and others. From a judgment for plaintiff, defendant Bo Sweeney and another appeal. Modified and affirmed.

Alfred Battle and Sweeney & Steiner, for appellants. Harold Preston, for respondent.

RUDKIN, J. This action was brought to recover a balance due on account of the purchase price of material furnished to be used in the construction of certain buildings belonging to the defendants Sweeney and wife, and to foreclose a lien for the amount thereof. The plaintiff had judgment below, and the defendants Sweeney and wife appeal.

The appellants state in their brief that the most important question presented by the appeal is the construction of section 5900, 2 Ballinger's Ann. Codes & St. which provides that "Every person performing labor upon or furnishing material to be used in the construction \* \* \* of any \* \* \* building," etc., shall have a lien for the same. It is further stated that the respondent contended throughout the trial that it was only necessary for it to show that the material was furnished to be used in the buildings; whereas, the appellants contended that it must show not only that the material was furnished to be used in the buildings, but that the same was actually delivered and used. The court below found, however, that the material was furnished to be used in the construction of the buildings, and was actually so used, and if this finding is sustained by the testimony the question suggested by the appellants does not arise in this case. While the testimony as to the delivery of the material and its use in the buildings is not as clear and satisfactory as it might be, yet there was competent evidence tending to show these facts and in the absence of any testimony to the contrary we would not be warranted in disturbing the findings of the court below. The books of the respondent, kept in the usual course of its business, showed that all the material alleged to have been furnished was actually furnished to be used in the construction of the buildings in question. Upon the delivery of material it was the custom of the respondent to have the foreman or other person in charge of the buildings receipt to the teamsters for all material delivered, but it sometimes happened

that there was no person about the buildings to sign the receipt, and in such cases the teamster returned the receipt unsigned. A number of the receipts offered in evidence in his case were returned in this condition. The architect, who was in charge of the buildings for at least a portion of the time during their construction, testified to the delivery and use of a portion of the material, and that all the material for which the lien was claimed was actually necessary for the completion of the buildings. It was conceded that substantially all the material used in the buildings came from the respondent's yards, and we think this made a prima facie case in its behalf. On the other hand, one of the appellants testified that he did not know whether all of the material for which the lien was claimed was actually used in the buildings or not, but that he was reasonably sure that it was not, and was proceeding to state the reasons for his belief; namely, an estimate made by his architect, when stopped by the court. He further testified that he was informed that the contractor for the buildings was engaged in the construction of another building in some other portion of the city, but there was no evidence that any material furnished for these buildings was delivered elsewhere. It was further shown that the first delivery of material was made on the wrong corner of the block, but this material was afterwards brought back and used in the buildings. Long after the last delivery of material this same appellant wrote the respondent that his architect had reported to him that he was charged up with several thousand feet of lumber that had never been used in the buildings, that he had directed the architect to go over his figures again, and that he would take the matter up with the respondent as soon as the architect made his report. No attempt was made to prove by this architect or any other employé or servant of the appellants that all the material for which the lien was claimed was not actually used in the buildings. We allude to this fact, not because the burden was on the appellants to prove that the material was not in fact used in the buildings, but for the purpose of showing that the appellants offered no testimony to defeat the prima facie case made by the respondent, although such testimony was necessarily within their reach. As said by Mr. Justice Brewer in *Rice v. Hodge*, 26 Kan. 164: "It is undoubtedly true, that it is not affirmatively and specifically shown that each separate article charged in these bills actually went into such buildings. It does appear, however, that each one of the three separate claimants made contracts for furnishing materials for said buildings; that in pursuance of said contracts they furnished materials, and supposed that they were to be used in the construction of said buildings; and as to a few articles, that they did in fact go into said buildings. To this there is no contradictory testimony, nothing tend-

ing to show that any of the materials so delivered were in fact taken away by the builder and used elsewhere; nothing even tending to raise a suspicion that there was any deviation of materials from their intended and contracted use. Under these circumstances, it would not be justice to refuse the lien. To require direct and positive testimony, that as to each specific article delivered, that it was in fact used in the buildings, would make the mechanic's lien law more of a burden and a trap than a blessing and a help. When materials are contracted for use in a proposed building, when they are delivered in pursuance of such a contract, and when the building is in fact completed, and there is no testimony tending to raise even a suspicion that the materials therefor were elsewhere obtained, or that those contracted for were not used therein, and especially when some of the materials are shown to have actually entered into its construction, it is fair to conclude and say that such materials did in fact go into the building, and that the seller has a mechanic's lien therefor."

It is further contended that the persons to whom the material was furnished were not the appellants' agents and were not authorized to purchase the material on their account. The original order was given by one of the architects for the buildings before the contract was let, but after the letting of the contract the material was furnished to the contractor, and this original order was paid for by the appellants with the exception of a few dollars. The other material, called extras, was furnished in part while the original contractor was in charge of the construction work and in part after he had absconded, and while the appellants and their servants and employes were in charge. These persons in charge were authorized to construct the building, and must have been authorized to obtain material therefor, as the appellants made no provision for material from any other source or at all. Under these circumstances we think that agency either actual or statutory was clearly proved. The motion for a new trial was properly denied in so far as it was based on the record before us, and in so far as it was based on newly discovered evidence, the showing upon which the motion was made does not appear in the record. We therefore cannot consider it. In any event, the only purpose of the newly discovered evidence was to impeach one of the respondent's witnesses as to the date of the dissolution of a certain partnership, and ordinarily a new trial will not be granted for any such purpose. Furthermore no showing was made that the date of dissolution, if material, could not have been proved at the trial by other testimony.

We find no error in the record except in the allowance of interest. Through inadvertence interest was computed on the balance due from the 6th day of May, 1901, instead of

from the 6th day of May, 1902. It is apparent that this error was not called to the attention of the court below, but the respondent confesses the error and the item amounting to the sum of \$17.32 will be deducted from the judgment.

As thus modified, the judgment is affirmed, and the respondent will recover its costs on appeal.

MOUNT, C. J., and FULLERTON, HADLEY, CROW, and DUNBAR, JJ., concur.

## O'BROPHY et al. v. ERA GOLD MINING CO.

(Supreme Court of Colorado. Feb. 5, 1906.)

### 1. APPEAL—RECORD.

After rendering judgment making a temporary injunction perpetual, the court was adjourned, but on the following day the judge instructed the clerk to modify the judgment in a certain particular, and thereafter plaintiff moved to restrain the clerk from entering the order as modified by the judge's direction, which motion was denied and complainant excepted and sued out a writ of error to review the judgment, assigning as error the failure to restrain the clerk from entering the judgment, and that the order for modification of the judgment was void because not rendered in open court. *Held*, that the record on appeal, having contained all the proceedings and orders made in the case, including the judgment as originally rendered and as modified, presented for review the validity of a final judgment, to wit, the judgment as modified.

### 2. JUDGMENT—CORRECTION IN SAME COURT DURING TERM.

The court has power not only to correct, but to change, its judgment during the term.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 582.]

### 3. JUDGES—ACTING OUTSIDE OF COURT.

A judge has no authority acting outside the court to alter a judgment previously duly rendered in open court.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, § 109; vol. 30, Cent. Dig. Judgment, §§ 389, 583-585.]

Error to District Court, Teller County; William P. Seeds, Judge.

Action by the Era Gold Mining Company against Thomas O'Brophy and another. Judgment in favor of complainant, and defendants bring error. Reversed, with directions to sustain defendants' motion to restrain the entry of a modification of the judgment.

On September 25, 1899, the Era Gold Mining Company instituted this action in the district court of Teller county against the defendants to enjoin them from using a certain ditch, and from carrying water through the same across certain mining property belonging to the plaintiff. On the same day a temporary injunction was granted in accordance with the prayer of the complaint. On the 14th day of October, 1899, defendants filed their answer and a motion to dissolve the injunction. Upon the hearing of the motion, the court made the following order: "It is

therefore ordered by the court that the injunction heretofore issued in this cause on September 25, A. D. 1899, be and the same is hereby modified in this, to wit, that said defendants, their agents, employes and assigns, be enjoined and restrained from using the said ditch, to wit, the O'Brophy Ditch, or allowing the water of Wilson creek to be conveyed through and along said ditch to the place where said water is to be used by said defendants, in any such manner as to interfere with the mining operations of the plaintiff."

On November 13, 1900, the cause was tried to the court and taken under advisement, and afterwards, and on January 4, 1901, the court made the following order: "At this day in open court come said defendants by J. J. McFeely, Esq., their attorney. Thereupon, this cause having been heretofore submitted to the court upon the trial of the issue herein joined, and the court being now sufficiently advised in the premises, doth find and order that the temporary injunction heretofore issued herein, and as thereafter modified by order of this court, be, and the same is hereby, made perpetual, and that said plaintiff have judgment for its costs in this behalf expended, and that judgment be entered herein in accordance with such finding, and that the same be recorded in the Judgment Book."

After the making of said order, Hon. E. C. Stimson, the trial judge, adjourned the court and returned to Colorado Springs on the evening of that day. On the following day, by telephone, he instructed the clerk to modify the judgment rendered on the 4th to read as follows: "Thereupon, this cause having been heretofore submitted to the court upon the trial of the issues herein joined, and the court being now sufficiently advised in the premises, doth find the issues herein joined in favor of said plaintiff and against said defendants. And orders that said defendants, their agents, servants and employes, be, and each of them is hereby enjoined and restrained from in any manner conducting water through their ditches or conduits over and across the Era lode mining claim, the property of plaintiff, or any part thereof, and that judgment in accordance with such finding be entered herein and for costs of suit, and the same be recorded in the Judgment Book."

On February 4, 1901, the defendants, by permission of the court, filed as of January 8, 1901, the following motion: "Come now the defendants by their attorney J. J. McFeely and move the court to make an order to prevent the clerk of this court from inserting in the records of this case a pretended order received by the clerk of this court, by telephone from Colorado Springs, El Paso county, Colorado, from the Honorable E. C. Stimson, who at the time was one of the judges of the district court of this judicial district, for the following reasons, to wit: That heretofore, to wit, on January 4th, A. D.

1901, in the district court of Teller county, Colorado, the said Hon. E. C. Stimson, who at the time was one of the judges of this district, did in open court on said date render his final judgment in said cause, the said cause having been tried before the said Judge Stimson at a former day of this term of court, to wit, November, 1900, which judgment was by the clerk of this court then and there entered into the minute book of said court, as he was required to do under the rules of this court, which minute book and order is hereby referred to and made a part of this motion. That said order above referred to which the clerk of this court is about to insert in the records of this case and which was received by him by telephone as aforesaid on the evening of January 5th, 1901, and while the district court of Teller county was not in session, and neither of the judges of this district were in the county of Teller and without the knowledge of defendants or their attorney and without notice to them, which order so received, if allowed to be entered in the records, makes a distinct and different judgment from that rendered by this court on January 4th, 1901, for the following reasons, to wit: That said pretended order so received by telephone is absolutely void and is not the judgment of this court; (2) because said order or judgment was not rendered in open court; (3) because the Honorable E. C. Stimson had no authority whatever, while in El Paso county, Colorado, to render a judgment in the district court of Teller county; (4) because said order is void and of no force or effect whatever. J. J. McFeely, Attorney for Defendants."

In support of their said motion, defendants filed the following affidavits:

"James J. McFeely, being sworn on oath, says: That he is now and was on the dates hereinafter mentioned attorney for the abovenamed defendants, and further says that on January 4th, 1901, he was present in the district court of Teller county, at the courthouse, when said court was in session with the Honorable E. C. Stimson then and there presiding, when, among other things, the Honorable E. C. Stimson, the presiding judge in said court, rendered the following judgment in above cause; said judgment being in substance as follows: 'That the injunction as modified heretofore be made perpetual, and the plaintiff to recover its costs from defendants in this behalf expended.' That thereupon this affiant asked said court if the defendants under that order would be permitted to use said ditch to run the water, providing he did not interfere with the mining operations of said plaintiff company, whereupon said court in answer to said question responded thus, 'Certainly.' Affiant further says that the entry of said judgment was at the time of the rendition of the same by said court made by the clerk of this court in the minute book kept for that purpose and so remains in said book, and which entry so made by the

clerk is hereby referred to and made part of this affidavit. Affiant further says that in the afternoon of January 7th, 1901, while in the clerk's office of said court, his attention was called to a memorandum pinned on the minute book of said court and over the judgment on said book, which memorandum is as follows: 'Defendant perpetually enjoined conducting water through the ditch across the Era Claim.' This affiant was then and there informed by Mr. Gaylord, deputy clerk of this court, that said memorandum was received by him by telephone from Colorado Springs, El Paso county, Colorado, from the Honorable E. C. Stimson, and that said order was received the evening of January 5th, 1901. Affiant further sayeth not. J. J. McFeely.

"Subscribed and sworn to before me this 8th day of January, 1901. A. W. Grant, Clerk Dist. Court, by W. E. Foley, Deputy. [Seal.]"

"E. K. Gaylord, of lawful age being first duly sworn, on his oath deposes and says: 'That he is and was on the 4th and 5th days of January, A. D. 1901, the duly authorized, appointed and acting deputy clerk of the Fourth judicial district of the state of Colorado, within and for the county of Teller. That on the said 4th day of January, A. D. 1901, in open court, a certain judgment was rendered in cause No. 233, The Era Gold Mining Company, plaintiff, vs. Thomas O'Brophy and The Victor Gold Mining Company, defendants, which is shown in abbreviated minutes as they appear upon page 119 of the minute book used by the clerk in making memoranda of orders and judgments rendered by the court. Affiant further says that the memoranda appearing upon said page in said cause No. 233 is correct memoranda of the order and judgment as then made and ordered to be entered by the court. Affiant further states that on the following day at three or four o'clock in the afternoon of January 5th, A. D. 1901, said affiant received a telephone message from Hon. Edward C. Stimson, who was then at Colorado Springs, Colorado, and in the course of the conversation had between said judge and affiant on said day, said judge ordered said affiant to change and alter the judgment theretofore rendered in open court in said cause No. 233 so that the memorandum thereof read as appears upon the slip pinned to the minute book opposite the memorandum made the previous day in open court in said cause No. 233. E. K. Gaylord.

"Subscribed and sworn to before me this 8th day of January, A. D. 1901. Kate C. Gustin, Notary Public. [Notarial Seal.]"

And thereupon, the plaintiff, on the ruling of the court on the above motion, presented a counter motion, asking that the court make a nunc pro tunc order as of January 4, 1901, which motion is in words and figures as follows, to wit: "Now comes the plaintiff by T. J. O'Donnell and Milton Smith and S. D.

Crump, its attorneys, and moves the court that the record entry of the judgment and decree of this court made and entered in the above-entitled cause on, to wit, the 4th day of January, A. D. 1901, be corrected so that the same will speak the truth and correctly state the judgment and decree made in said cause on said date by said court, and as grounds for said motion says that the entry of judgment is not the judgment ordered to be entered by the judge of said court, but the same as entered was entered through mistake and inadvertence of the clerk and judge of said court. This motion is based upon the records and files of said court and cause and upon the affidavit of Edward C. Stimson filed herewith. Milton Smith, Attorney for Plaintiff."

Thereupon the plaintiff offered in evidence the affidavit of Hon. E. C. Stimson, which is as follows, to wit:

"Edward C. Stimson being duly sworn, deposes and says: That he was one of the duly acting judges of the district court within and for said county of Teller, in the state aforesaid, and that as such judge he presided at the September term of said court held at Cripple Creek, in said county during the month of September, 1900, other months, and January, 1901, which said term of court adjourned sine die on the second (2d) day of February, A. D. 1901. That as the judge of said court on the 4th day of January, 1901, he rendered a judgment in the above-entitled cause in favor of the plaintiff and directed that said judgment be entered by the clerk of said court. That in directing the entry of said judgment deponent did not have in mind the fact that the injunction issued in said cause had been modified so as to permit the defendant to use the ditch across the plaintiff's property during the pendency of the action and through mistake and inadvertence directed the clerk to enter a judgment making perpetual the temporary injunction issued in said cause and thereafter modified. That on the next day, to wit, on the 5th day of January, 1901, this deponent while at Colorado Springs, Colorado, became aware that said judgment as entered upon the clerk's minutes was not the proper judgment in said cause and was not the judgment which he had actually intended to render in said cause, and thereafter on said day telephoned the clerk of said court instructing him to enter the judgment as the same had been rendered, perpetually restraining the defendant from using the ditch across the plaintiff's property, which was the subject-matter of said suit, and deponent says that the record of the judgment in said cause made by the clerk of said court under date of January 5th, 1901, is the judgment which deponent as judge of said court rendered in said cause on January 4, A. D. 1901; and further deponent saith not. Edward C. Stimson.

"Subscribed and sworn to before me this

23d day of February, A. D. 1901. My commission expires ——. A. W. Grant, Clerk, by W. E. Foley, Deputy. [Seal.]”

Thereupon the court made the following order: “At this day in open court come said parties by their attorneys respectively. Thereupon this cause comes on to be heard upon the motion of said defendants herein to prevent the clerk of this court from entering in the records a certain order as modified on January 5, 1901, by a telephone message from the Honorable Edward C. Stimson, at that time one of the judges of this court. The same is argued by counsel and submitted to the court, and the court being sufficiently advised in the premises doth deny said motion, to which ruling of the court said defendant duly excepts.”

On the 1st day of March, 1901, the following proceedings were had: “At this day in open court come said plaintiff by its attorney S. D. Crump, Esq., and said defendants by their attorney, J. J. McFeely, Esq., and thereupon this cause coming on to be heard upon the motion of the plaintiff herein to have judgment entered as modified on January 5th, 1901, nunc pro tunc as of January 4th, 1901, the same is argued by counsel and submitted to the court, and the court being fully advised in the premises doth deny said motion, to which ruling of the court said plaintiff duly excepts. And it is ordered that time and until forty days from and after this day be and the same is hereby allowed said defendant within which to prepare and tender to the Honorable William P. Seeds, judge of said court, his bill of exceptions by him reserved herein, and when signed and sealed by said judge shall be filed herein as of this day.”

All the matters aforesaid occurring subsequent to the judgments are preserved by bill of exceptions and made a part of the record. The plaintiffs in error present the following assignment of errors: “(1) The court erred in not restraining the clerk from entering the order received by telephone on January 5th; (2) the court erred in permitting the affidavit of former Judge E. C. Stimson to be read on the hearing of this motion to explain his judgment or the judgment of the court of January 4th; (3) the so-called order of January 5th received by telephone from Colorado Springs is void and of no force, and should be expunged from the records in this case; (4) the court erred in overruling the motion to restrain the clerk from entering the telephone order of January 5th in the records of this case; (5) because said order of January 5th was not rendered in open court; (6) because the Honorable E. C. Stimson had no authority whatever while in El Paso county, Colo., to render a judgment or order in the case that had been tried, and judgment rendered and entered in the district court of Teller county, Colo.; (7) because the telephone order of January 5th, if allowed to remain in the record of this case, is in direct contra-

diction to the judgment rendered in open court on January 4th; (8) because the judgment rendered in open court on January 4, A. D. 1901, should stand as the final judgment in this cause, until the same is reversed or modified according to law.”

James J. McFeely, for plaintiffs in error.  
T. J. O'Donnell and Milton Smith, for defendant in error.

GODDARD, J. (after stating the facts). It is insisted by counsel for defendant in error that this record does not present for review any of the rulings complained of by counsel for plaintiff in error for the reason, as it is claimed, that the writ of error does not run to a final judgment; and, assuming this to be true, the decision in *Schmidt v. Dreyer*, 21 Colo. 100, 39 Pac. 1086, is relied on as conclusive of this proposition. That case was an action in replevin. A final judgment was rendered in favor of Dreyer at the November term, 1891, of the county court of Arapahoe county, which, by mistake of the clerk, was incorrectly entered. On January 12, 1895, upon discovery of this mistake, he applied for an order to amend and correct the entry so as to make the record express the judgment which was, in fact, pronounced by the court. The court heard the testimony and made an order directing such correction to be made. This court held that from the record presented it appeared that the writ of error was taken to review this order, and not to the final judgment theretofore rendered, and, for the reason that this essential statutory requirement had not been complied with, dismissed the writ of error. It will be observed that the record before us is not objectionable for the reasons given in that case, but contains all the proceedings had and all orders made in the case, including the judgments of the 4th and 5th of January, 1901, and all the proceedings had in relation to the latter judgment subsequent thereto, and by the errors assigned the validity of the latter judgment is directly challenged, and the correctness of the ruling of the trial court in denying the motion to restrain the clerk from entering the same of record. We think, therefore, the validity of what purports to be a final judgment, to wit, that of January 5, 1901, is properly presented for our consideration and determination.

Counsel for defendant in error devote considerable space to the discussion of the power of a court to amend or correct a judgment during the term at which it was rendered. We concede the rule to be well settled that a court has power to not only correct, but also to change, its judgment during the term, and has power at any time to correct the record to make it speak the truth. Suffice it to say that the exercise of such a power is not involved in this case; but the question presented is whether a judge is vested with authority, acting outside the court, to change or alter a judgment theretofore duly rendered in open

court. In other words, has he authority, by telephone or otherwise, to render a judgment when not present in court? As was said in *Cooper v. Amer. Central Ins. Co.*, 3 Colo. 318: "A judgment is the sentence of the law pronounced by a court of competent jurisdiction, as the result of proceedings instituted. It is a judicial act, and to be valid must be pronounced by the court, at a time and place appointed by law, and in the form it requires." It is clearly shown by the affidavits of Mr. McFeely and Mr. Gaylord, and also Judge Stimson admits in his affidavit, that, as a matter of fact, the judgment was pronounced in open court on the 4th day of January, A. D. 1901, as shown in the minutes of the clerk, to wit, "That the injunction as modified heretofore be made perpetual." Judge Stimson further states that he did not at the time he rendered the judgment have in mind the fact that the injunction, as originally issued, had been modified, and through an inadvertence he directed the clerk to enter the judgment making the temporary injunction as modified perpetual. That on the next day, to wit, the 5th day of January, 1901, while at Colorado Springs, he became aware that said judgment as entered upon the clerk's minutes was not the proper judgment in said cause, and was not the judgment which he had actually intended to render in said cause. But nevertheless he did pronounce the judgment so entered, and it became then and there the judgment of the court. As was said in *Schuster v. Rader*, 13 Colo. 320, 334, 22 Pac. 505, 506: "The judgment having been so pronounced in open court, the act of entering the same in the record by the clerk was purely ministerial, and was not essential to the existence of the judgment so rendered, though the entry was necessary to preserve it, and, as a matter of proof, was the best evidence of its existence. The judgment derived its force and effect from the fact that it had been so considered, adjudged, and decreed by the court, and it became effective from the time of such adjudication and promulgation in open court, though the ministerial act of entering the same in the records of the court might be delayed." The judge was therefore without authority, while the court was not in session, to direct the clerk to enter another or different judgment in conformity with an unexpressed intention he may have had in mind at the time the former judgment was rendered. The judgment, therefore, as entered on the 5th of January, 1901, is void, and may be vacated at the same or subsequent term. 1 Black on Judgments, §§ 318, 326; Current Law, vol. 4, p. 300, and cases cited in notes 96 and 97. "The court will always, upon motion, strike from its record a judgment void for irregularity." *Williamson v. Hartman*, 92 N. C. 236. And in this state such a judgment may be reviewed on error. *Hoehne v. Trugillo*, 1 Colo. 161, 91 Am. Dec. 703; *Skinner v. Beshear*, 2 Colo. 383; *Cooper et al. v. Am. Cent. Ins. Co.*, 3 Colo. 318; *Bean v. People*, 6 Colo. 98.

The plaintiffs in error were entitled to the relief sought, and the court below erred in denying their motion to restrain the clerk from entering the judgment of January 5, 1901, and its ruling thereon is reversed, and it is ordered that the court below sustain said motion, and, in case said order shall have been entered, that the same be declared void, and expunged from the records.

Reversed.

GABBERT, C. J., and BAILEY, J., concur.

# COLORADO & S. RY. CO. v. WEBB.

(Supreme Court of Colorado. Feb. 5, 1906.)

## 1. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action against a railroad for the killing of a horse there was no prejudicial error in permitting a witness, without qualifying himself as an expert concerning the market value of horses in that vicinity, to testify as to the quality of plaintiff's horse where other competent witnesses on the subject of value showed the horse to be worth as much or more than the amount of the verdict for plaintiff.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4162-4165.]

## 2. RAILROADS—INJURIES TO ANIMALS—ACTION—EVIDENCE.

In an action against a railroad for the killing of a horse, the negligence relied on being the failure of defendant's servants to make any effort to stop the train before colliding with the horse as it was claimed they might have done by reasonable care, evidence that the train was late and that it was running at the rate of 25 miles an hour was admissible; the jury having been properly instructed that such facts were not proof of negligence.

## 3. EVIDENCE—OPINION EVIDENCE—SPEED OF TRAIN.

In an action against a railroad for the killing of a horse, a person of ordinary experience familiar with trains and possessed of a knowledge of time and distance was a competent witness as to the speed of the train.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2202.]

## 4. RAILROADS—INJURIES TO ANIMALS—ACTION—EVIDENCE—SUFFICIENCY.

In an action against a railroad for the killing of a horse, evidence held sufficient to justify a finding that the trainmen made no effort to stop the train, and that such negligence was the proximate cause of the injury.

## 5. TRIAL—INSTRUCTIONS—FAILURE TO REQUEST.

In an action against a railroad for the killing of a horse, at plaintiff's request the jury were instructed that if defendant through its negligence killed the horse they should find for plaintiff, and by an instruction given at defendant's request the jury were told what duty the law imposed upon defendant under the circumstances. Held that, in view of the latter instruction and in view of the fact that defendant made no request for an instruction defining negligence, the former instruction was not erroneous for failing to give such definition.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 627, 628.]

## 6. SAME—ERROR CURED BY OTHER INSTRUCTIONS.

In an action against a railroad for the killing of a horse, any error in an instruction for failing to require defendant's negligence to

have been the proximate cause of the injury was cured by such a requirement in a subsequent instruction.

**7. APPEAL—FAILURE TO PRESENT QUESTION ON TRIAL—INSTRUCTION.**

In an action against a railroad for the killing of a horse, the fact that an instruction that the verdict should be for plaintiff if the horse was killed through defendant's negligence did not require the negligence to have been the proximate cause was not reversible error, when objected to for the first time on appeal, as it was mere nondirection.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1309-1314.]

**8. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.**

In an action against a railroad for the killing of a horse, it was proper not to charge on contributory negligence where there was no evidence thereon.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 601-603.]

**9. NEGLIGENCE—DEGREES OF NEGLIGENCE.**

Degrees of negligence, such as slight and gross, are not recognized.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 15.]

**10. RAILROADS—INJURIES TO ANIMALS—ACTION—INSTRUCTIONS.**

Where, in an action against a railroad for the killing of a horse, it appeared that the horse, when it started to run toward the tracks, was upon a lot belonging to one other than the owner of the animal, but it did not appear that it was running at large, either with or without the owner's permission, or that it had become a public nuisance, the fact that there was an ordinance making it a public nuisance to permit a horse to run at large did not warrant an instruction applying the rule that where animals are by ordinance prohibited from running at large, a railroad company is not liable for an injury thereto in the absence of a showing of willful negligence or indifference.

Appeal from Summit County Court; William Thomas, Judge.

Action by George D. Webb against the Colorado & Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Blues & Whitted and J. G. McMurry, for appellant. James T. Hogan, for appellee.

CAMPBELL, J. Action for damages to recover the value of plaintiff's horse which was run over and killed by defendant's railway train, as he says, through negligent operation thereof by its servants. From a judgment for plaintiff, defendant appeals.

1. There is no merit in the assignments of error based upon the rulings on evidence. That plaintiff's witness, without qualifying himself as an expert concerning the market value of horses in that vicinity, testified as to the quality, and not the money value, of plaintiff's horse, was not prejudicial error. Other competent witnesses on the subject of value showed the horse to be worth as much as, or more than, that returned by the jury. Plaintiff's testimony as to the lateness, and rate of speed, of the train at the time of the accident was properly admitted. It is true that the mere fact that the train

was late, or that it was at the time running at the rate of 25 miles an hour, or both together, are not proof of negligence, and the jury were so instructed at defendant's request; yet this testimony was admissible as throwing light, in connection with other evidence in the case, upon the particular acts of negligence on which, it seems, plaintiff relied. This was the failure by defendant's servants to make any effort to stop the train before colliding with the horse, which might have been avoided had reasonable care been used. This we gather from an examination of the proceedings of the trial, for there were no written pleadings, the action having originated in the court of a justice of the peace. Neither did the court err in permitting a witness, who was not an expert, to testify as to the speed of the train. That he was not an expert goes to the weight of his testimony. But one of ordinary experience, familiar with trains, and possessed of a knowledge of time and distance, without being skilled in handling trains, is a competent witness as to the velocity of their movement. *D. & M. R. R. Co. v. Van Steinburg*, 17 Mich. 99; *Chipman v. U. P. R. Co.*, 12 Utah, 68, 41 Pac. 562; *C. B. & Q. R. R. Co. v. Gunderson*, 14 Ill. 495, 51 N. E. 708.

2. The most serious question in the case concerns the legal sufficiency of the evidence to establish negligence. Briefly, the facts are that plaintiff's horse was standing in a lot, in the town of Breckenridge, belonging to Mrs. Louage, which was adjoining, or close to, defendant's railroad track, when one of its passenger trains was approaching. Shortly before reaching this lot, and before the train began to round a curve, the whistle of the engine, according to the usual custom, was blown, which frightened the horse. The animal at once started toward the track, and, while attempting to cross it, or to run down the track, was struck by the engine, thrown upon the cow catcher, and carried for several hundred feet before the train was stopped. There was testimony by plaintiff's witnesses that after the whistle was sounded as the train began to round the curve, and after the engineer saw, or by the exercise of ordinary diligence might have seen, the horse running towards or down the track, no effort whatever was made by the trainmen to stop the train before the horse was struck, which might have been accomplished had the usual and ordinary means been resorted to. It is true that the fireman and engineer say that as soon as the horse was visible from the engine, the engineer, though he did not have time to blow the whistle, reversed the engine and applied the air brakes, and thus sought by every means within his power to avoid striking the horse, which he could not prevent. The question with us, however, is not as to the weight of the evidence, or whether the facts are detailed correctly by the trainmen or by plaintiff's witnesses. The credibility of the witnesses and

weight of evidence were for the jury. It is sufficient to say that there was evidence tending to show that the trainmen made no effort to stop the train, and because of such neglect the injury occurred. In other words, the evidence before the jury was legally sufficient to sustain the verdict, though were we the triers of fact, we might not agree with their decision. If, therefore, there was no error of the court in its instructions, or in the admission of testimony, this verdict must stand. As already stated, we find no prejudicial error in the ruling of the court upon the evidence.

3. Defendant, however, insists that there was prejudicial error of the trial court in the giving of certain instructions for plaintiff, and in refusing to give others requested by it. In the first instruction, given at plaintiff's instance, the jury were told that if the defendant, through its negligence or that of its servants, killed plaintiff's horse, they should find for plaintiff. The defendant's sole objection to this instruction at the time was that the meaning of "negligence" was not stated. That objection is now renewed. There was no definition of negligence in this, or any other, instruction. Although defendant made request for other instructions, it tendered none on this point. In view of its own failure in this respect, and the additional fact that in an instruction, given by the court at its request, the jury were told that the burden was on the plaintiff to establish by a preponderance of evidence that the death of plaintiff's horse resulted from the failure of defendant's employes after they saw, or by the exercise of reasonable care might have seen, that the horse was in danger, to exercise ordinary care to stop the train and to take all other proper means to prevent injuring or killing the horse, certainly defendant was not prejudiced by the omission noted. While negligence was not defined, the jury were instructed what duty the law imposed upon a defendant in the circumstances of the case. The antithesis of negligence, which is care, the jury were thus told the defendant was bound to exercise, and that such care was ordinary care.

4. An additional ground now urged against this instruction is that it did not tell the jury that, if the negligence was established, it must have been the proximate cause of the injury. The omission of this necessary element, which the court might well have supplied in the instruction which it tendered at plaintiff's request, was nevertheless inserted in the instruction which was given on defendant's motion which we have above summarized; hence the alleged error, for the first time here assigned, was cured. At most, the alleged error consisted of nondirection, not misdirection. 11 Am. & Eng. Enc. Law (1st Ed.) 258 et seq., and cases cited; Mut. Life Ins. Co. v. Snyder, 93 U. S. 393, 23 L. Ed. 887; Denver Tramway Co. v. Lassasso, 22 Colo. 444, 45 Pac. 409; Ruby Chief M. &

M. Co. v. Prentice, 25 Colo. 4, 52 Pac 210; City of Denver v. Moewes, 15 Colo. App. 28, 60 Pac. 986.

5. There was no error in failing to charge the jury that, if plaintiff's negligence contributed to the injury, it defeated his recovery. There was no evidence of his contributory negligence, and an instruction thereupon would have been inapplicable.

6. A number of instructions, varying in form, were tendered by defendant in which the jury were told to find in its favor because no case had been made out. These were properly refused. In other instructions tendered by defendant, and refused by the court, an effort was made to have the jury instructed that unless the evidence showed that defendant had been guilty of gross negligence, in no event could plaintiff recover. Such instructions were based upon an ordinance of the town of Breckenridge, introduced in evidence, one section of which provided that whoever shall permit any horse owned by him to run at large and become a nuisance within the limits of the town shall, upon conviction, be fined in a sum not exceeding \$100. In the first place, this court, by repeated decisions, has held that the doctrine of degrees of negligence, such as slight and gross, does not prevail in this jurisdiction; hence the instruction with respect to gross negligence was for this reason alone properly denied. If, however, the defendant had sought to have applied the rule that where animals are, by statute or ordinance, prohibited from running at large within a municipality, a railway company cannot be held liable for injury thereto in the operation of its trains within such limits, except under a state of facts which show that its servants are guilty of willful negligence, or are unmindful of, or utterly indifferent to, the consequences of their acts, the instruction should have been refused, because there is no evidence that the horse was allowed or permitted by its owner to run at large, or that it was, in fact, at the time running at large, or had become a public nuisance within the meaning of the ordinance. The horse, it is true, was upon a lot, whether inclosed or not the record fails to show, belonging to one other than the owner of the animal, but there is not a particle of evidence that the horse was running at large either with, or without, the owner's permission, or that it had become a public nuisance. For aught the evidence discloses to the contrary, it was lawfully on the premises of Mrs. Louage, and was not running at large.

Considering the entire record, we cannot, under the doctrine prevailing in this jurisdiction, reverse this judgment on any of the grounds urged upon us. The judgment is affirmed.

Affirmed.

GABBERT, C. J., and STEELE, J., concur.

**SNYDER v. COLORADO SPRINGS & C.  
C. D. RY. CO.**

(Supreme Court of Colorado, March 5, 1906.  
Rehearing Denied April 2, 1906.)

**1. CARRIERS—PASSENGERS—PERSONAL INJURIES—NEGLIGENCE—PROXIMATE CAUSE.**

A passenger on a crowded car stood near the door with his hand resting on the door jamb. There were people between him and the door and some on the steps. The conductor in pushing his way through the crowd pressed the passenger against a third person sitting in a seat who gave the passenger a push, throwing him from the car. *Held*, that the proximate cause of the injury was, as a matter of law, the action of the third person, for which the carrier was not liable.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1125.]

**2. TRIAL—DIRECTING VERDICT.**

Where, on all the evidence in an action for personal injuries, the court is able to see that the negligence complained of was not the proximate, but the remote, cause of the injury, the court must direct a verdict for defendant.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 292; vol. 46, Cent. Dig. Trial, §§ 381-383.]

**3. SAME.**

The court must direct a verdict for one party where it would be its duty to set aside a verdict for the adverse party.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 383.]

Error to District Court, Teller County; Wm. P. Seeds, Judge.

Action by William W. Snyder against the Colorado Springs & Cripple Creek District Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. J. McFeeley, for plaintiff in error. E. E. Whitted, P. H. Holme, and Lunt, Brooks & Wilcox, for defendant in error.

**BAILEY, J.** This is an action by plaintiff against defendant to recover for injuries received by plaintiff while traveling on defendant's cars as a regular passenger, going from the city of Cripple Creek to a station known as Midway. At the close of plaintiff's testimony the court upon motion of defendant instructed the jury to return a verdict in favor of the defendant, which was done. The case comes here upon error, and the error assigned is this instruction and verdict.

There is no dispute as to the facts, which appear to be that on the night of December 20, 1900, plaintiff was a passenger on defendant's car, going from Cripple Creek to Midway. He had paid his fare, the car was crowded and, after leaving Fairview, plaintiff was standing near the door with his hand resting on the door jamb. There were people between plaintiff and the door, some upon the steps. The head of the man upon the lower step reached to about the thigh of the plaintiff. The conductor, in pushing his way through the crowd, pressed plaintiff against a party who was sitting in a seat on the side of the car. This man became angry, said

that he was "getting tired of playing cushion for the electric line," and raised up against the plaintiff and gave a "surge" by the force of which plaintiff was thrown from the car, passing over the head of the man who stood upon the lower step. In plaintiff's brief it is said, in effect, that the court below in passing on the motion for nonsuit dwelt at considerable length upon the question as to what was the proximate cause of this accident. The court came to the conclusion that the proximate cause was the action of the passenger, and therefore the company was not liable. So the question for us to determine is as to what was the proximate cause of the accident.

Proximate cause is: "That cause which, in natural and continued sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred." *D. & R. G. R. R. Co. v. Sipes*, 26 Colo. 17, 55 Pac. 1093. It was defined by the Court of Appeals as being "that cause which immediately precedes and directly produces an effect as distinguished from a remote, mediate or predisposing cause." *Burlington, etc., R. R. Co. v. Budin*, 6 Colo. App. 275, 40 Pac. 503. "An act is the proximate cause of an event, when, in the natural order of things, and under the particular circumstances surrounding it, such an act would necessarily produce that event." *Id.* "The law will not look back from the injurious consequence, beyond the last sufficient cause, and especially that, where an intelligent and responsible human being has intervened between the original cause and the resulting damage." *Stone v. Boston & A. R. Co.* (Mass.) 51 N. E. 1, 41 L. R. A. 794. "The nature of the intervening cause which will render an original cause for which the author is sought to be held liable in damages too remote for recovery, must be simply such as interrupts the usual and ordinary and experienced sequence of events, and produces consequences at variance therewith." *Watson on Damages for Personal Injuries*, § 7. "If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." *Cooley on Torts*, § 70. "The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening or contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen." *Lane v. Atlantic Works*, 111 Mass. 136. "One is bound to anticipate and provide against what usually happens, and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard

against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable." *Stone v. Boston & A. R. Co.*, supra; *Burlington, etc., R. R. Co. v. Budin*, supra.

Tried by these tests, the defendant is not responsible for the consequences of the passenger's act. There is nothing to show that such a consequence as happened was liable to occur. It was of course possible that some extremely nervous or irritable person would become angry because of his being inconvenienced on account of the crowded condition of the car; but it is not in accordance with the usual and ordinary course of events to anticipate that a seated passenger would so far lose control of himself on account of having a standing passenger crowded against him that he would eject the standing passenger from the car with such force as to throw him over the head of one who was standing upon the step below the party so ejected. It is apparent from the record in this case that the proximate cause of the injury to plaintiff was the action of the irritated passenger, and that this cause could not be anticipated by defendant or its agents. The plaintiff, however, contends that this question should have been submitted to the jury. This course would have been necessary if material facts had been in dispute but where, upon all the evidence, the court is able to see that the resulting injury was not proximate, but remote, the plaintiff fails to make out his case, and the court should so rule. *Stone v. Boston & A. R. Co.*, supra. If the matter had been submitted to the jury and the verdict had been rendered in favor of plaintiff, it would have been the duty of the court to set it aside. Consequently, it was his duty to direct the verdict. *Chivington v. Colo. Sprgs. Co.*, 9 Colo. 597, 14 Pac. 212.

The court having committed no error in sustaining the motion and directing the verdict, the judgment of the district court will be affirmed.

Affirmed.

GABBERT, C. J., and GODDARD, J., concur.

# LONGMONT FARMERS' MILLING & ELEVATOR CO. v. ALDRIDGE.

(Supreme Court of Colorado. March 5, 1906.  
Rehearing Denied April 2, 1906.)

## APPEAL—HARMLESS ERROR—FINDINGS OF COURT—CONFORMITY TO PLEADINGS.

In an action against a corporation to recover commissions on flour sold by plaintiff under a written contract with the corporation's manager, the evidence showed that shortly before the execution of the contract the board of directors accepted a proposition from plaintiff substantially in the terms of the contract, and the court found that, the directors having authorized the making of the contract, it was immaterial whether the manager had authority or whether it was formally adopted by the board, and also found that plaintiff had rendered

services for which he was entitled to commissions. *Held*, that plaintiff having performed the services and defendant received the benefit it could not complain of a judgment against it merely because the trial court based its judgment upon reasoning not in harmony with the complaint.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4234.]

Appeal from District Court, City and County of Denver; John I. Mullins, Judge.

Action by Washington Aldridge against the Longmont Farmers' Milling & Elevator Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Hodges & Wilson, for appellant. John A. Perry and H. E. Kelly, for appellee.

BAILEY, J. This action is brought to recover commissions for the sale of flour according to the terms of a written contract set out in the complaint, dated October 31, 1894, signed "Longmont Farmers' M. & E. Co., S. Butler, Mgr.," and by the plaintiff. Among other things, the contract provides that defendant should pay the plaintiff the sum of 3½ cents per 98-pound sack, on all orders received direct by the party of the second part, or otherwise received from the territory mentioned therein. Defendant filed a general denial and counterclaim. The proof shows that upon September 1, 1894, the board of directors of defendant company held a meeting, and in the minutes of proceedings the following appears: "W. Aldridge appeared and expressed a desire that the present arrangement of paying him a commission be changed so that he would have a commission of 3½ cents on all sales made in what is known as his territory, for the space of one year. The secretary was instructed, to inform him that his proposition would be accepted, except that the time be left open." On May 12, 1894, in the records of the defendant, the following appears: "Mr. Aldridge appeared to apply for agency, but not exclusive, for selling P. of R. [a brand of flour] in state instead of Denver. This was granted on the following conditions." The conditions are not material to this controversy, and this excerpt from the proceedings of May 12th is mentioned for the purpose of determining the meaning of the phrase "his territory," contained in the proceedings of September 1st. It appears from the testimony that plaintiff, among other sales, sold large quantities of flour to the Colorado Trading & Transfer Company, at Cripple Creek, and that said sales commenced shortly after the employment of plaintiff by defendant, and continued until his discharge. The defendant paid the commissions on these sales for a considerable period, and then ceased doing so. The action was tried in the district court of Arapahoe county, and judgment rendered for plaintiff for the amount of commissions said to be due upon the sales made to the Colorado Trading & Transfer Company, less the amount of defendant's

counterclaim. The court made special findings, wherein it finds that on the 12th of May a contract was made and entered into by and between the plaintiff and defendant, wherein the plaintiff should have the agency for the sale of defendant's flour; that on the 1st of September a second contract was made between plaintiff and defendant, modifying the one made on the 12th of May; that the board of directors of defendant had no knowledge that the contract pleaded had been made by its general manager; and that the contract of September 1st and the one of October 31st were practically identical. In the conclusions of law found by the court it is said: "In view of the contract of September 1st, it is unnecessary for the court to pass on the question raised as to the authority of the manager to make the contract of October 31st, or of its modification subsequently by the board of directors of defendant company."

The contention of the defendant is that the findings of the court are not based upon the pleadings, and that, in so far as they are based upon the evidence, there is a variance between the evidence and the pleadings. We do not believe that the findings of the court and the facts in the record warrant this construction. The fair intendment to be drawn from the findings is that the board of directors on the 1st of September made or authorized the making of the contract, which was subsequently reduced to writing, and that it is immaterial as to whether or not this contract, after having been reduced to writing and signed, was formally adopted by the board. The proof shows that from the time of the making of the contract the plaintiff devoted himself to the service of the defendant. The services were accepted and paid for, in accordance with the terms and provisions of the agreement, for about eight years, with the exception of the sales made to the Colorado Trading & Transfer Company. As to that transaction, it is conclusively shown that the sales were made by plaintiff; that defendant's board of directors knew of it; that the orders were filled and the commissions were paid for something more than two years when the defendant ceased giving plaintiff credit on account of such sales. This fact did not come to the knowledge of the plaintiff for some time, and when it did come to his knowledge he, acting under the advice and counsel of the then manager of the defendant, failed to protest. Upon plaintiff's resignation or discharge, a demand was made for these commissions, was refused, and plaintiff brought this action. If there is any variance between the findings of the trial court and the pleadings, they in no wise prejudice the rights of the defendant. Under the testimony, the court might well have found that the pleaded contract was the formal reduction to writing of the memorandum of agreement entered in the company's books upon September 1st, and that the same

was ratified and adopted by the board of directors. Plaintiff having in good faith acted under the contract and performed the services, defendant, having received the benefit of the services and having partially paid for the same, cannot be heard to complain of a judgment against it for the value of so much of the services as has not been paid for, because the trial court based its judgment upon reasoning not in harmony with the complaint, but upon evidence which supports the essential allegations of the complaint.

The other alleged errors are necessarily disposed of by this ruling. The testimony of the conversations with the manager of the Colorado Trading & Transfer Company was admissible for the purpose of showing that the sales of defendant's flour were made to the company by plaintiff. The substantial rights of the parties not being affected by any error which the trial court may have committed in the phraseology of its findings, the judgment will be affirmed.

Affirmed.

GABBERT, C. J., and GODDARD, J., concur.

#### In re SHAPTER'S ESTATE.

(Supreme Court of Colorado. Dec. 4, 1905.  
Rehearing Denied April 2, 1906.)

#### 1. WILLS—TESTAMENTARY CAPACITY—EVIDENCE.

In determining whether a testator possessed testamentary capacity, it is proper to consider, not only the direct proof, but all collateral and relative facts and surrounding circumstances from which inferences may be drawn, and also whether the disposition made of the property is consistent with testator's situation, in accordance with previously expressed wishes and such as he would naturally make under the circumstances.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 112, 129, 133.]

#### 2. SAME—READING OF WILL BY TESTATOR—EVIDENCE—PRESUMPTION.

Where a will was prepared at the testator's express request and left with him several hours before it was alleged to have been executed, and he signed it in the presence of attesting witnesses, present at his request for that purpose, it was presumable that he had read it, or that its contents had in some way been made known to him.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 655.]

#### 3. SIGNATURE—ATTESTATION.

The fact that a subscribing witness to a will signed it before the testator signed it does not invalidate the will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 325.]

#### 4. SAME—PROBATE—ADVERSE TESTIMONY BY ATTESTING WITNESS.

On application for the probate of a will, testimony by one of the attesting witnesses that he believed testator was not conscious of what he was doing when he made the will did not impair the efficacy of the witness' attestation.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 711, 713.]

**5. SAME—DUE EXECUTION—PROOF.**

The proponent of a will is not required to prove all the facts constituting due execution by the concurring testimony of the two subscribing witnesses, but, while both of these witnesses must be examined, the will may be established even in opposition to the testimony of both.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 715-720.]

**6. STATUTES—ADOPTION FROM ANOTHER STATE—PREVIOUS CONSTRUCTION.**

Where a statute is adopted from another state, the construction previously given by the courts of that state will be regarded as adopted also.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 307.]

**7. WITNESSES — COMPETENCY — PARTIES TO WILL CONTEST.**

Under 2 Mills' Ann. St. § 4816, declaring that no party to any civil action or person directly interested in the event thereof shall testify when any adverse party sues or defends as executor or administrator, parties to a will contest are not competent witnesses.

**8. SAME—PRIVILEGED COMMUNICATIONS—ATTORNEYS AND PHYSICIANS—WHO MAY OBJECT.**

Under 2 Mills' Ann. St. § 4824, subds. 2, 4, declaring that an attorney shall not, without the consent of his client, be examined as to any communication made by the client, and that a physician shall not, without the consent of his patient, be examined as to information acquired in attending the patient, objections to the competency of an attorney or physician can be raised only by the client or patient.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 780.]

**9. SAME—ACTIONS BY OR AGAINST REPRESENTATIVES OF DECEDENTS—BENEFICIARIES UNDER WILL.**

Where a legacy was to compensate the legatee for services and reimburse him for expense in administering a trust as executor, he was not a beneficiary under the will so as to render him, in a contest thereof, incompetent as a witness, under 2 Mills' Ann. St. § 4816, declaring that no person interested in an action shall testify when any adverse party sues or defends as executor, administrator, or heir.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 603.]

**10. SAME—EXECUTORS.**

Under 2 Mills' Ann. St. § 4816, declaring that no party to any civil action or person directly interested in the event thereof shall testify when any adverse party sues or defends as executor or administrator, the executor of a will is a party to a will contest and not a competent witness.

Appeal from District Court, Arapahoe County; John I. Mullins, Judge.

Proceedings for the probate of the will of Edward Shapter, deceased. From a judgment denying probate, proponents appeal. Reversed and remanded.

On March 1, A. D. 1901, an instrument purporting to be the last will and testament of Edward Shapter, deceased, was presented to the county court of Arapahoe county for probate. A caveat was filed by several of his heirs objecting to its probate. On the 30th of July, A. D. 1901, after hearing the testimony of the attesting witnesses and the family physician, the court admitted the will

to probate and record. An appeal from this judgment was taken by the contestants to the district court of Arapahoe county. On the 26th day of May, 1902, the cause came on for trial before a jury. After the evidence was introduced, the jury, by direction of the court, rendered a verdict for contestants. On June 6th motion for new trial was overruled and judgment entered upon the verdict denying the probate of the will. Proponents bring the case here on appeal.

Thomas, Bryant & Lee and Edwin W. Parks, for appellants. S. E. Robinson and Andrew W. Gillette, for appellees.

GODDARD, J. (after stating the facts). The most important objection to the validity of the judgment presented by the assignment of errors is predicated upon the action of the trial court in directing a verdict. From an examination of the testimony introduced, we are of the opinion that there was evidence upon which the jury should have been permitted to pass, and which, if accepted by them as true, was sufficient to sustain the conclusion that the instrument presented was executed in conformity with the requirements of the statute, and with sufficient knowledge and understanding on the part of the testator to constitute a valid testamentary disposition of his property. In the circumstances of this case, it was peculiarly within the province of the jury to determine whether the testator, notwithstanding his enfeebled condition at the time the paper was signed, realized what he was doing. This essential fact could only be ascertained by taking into consideration not only the direct proof, but as well all collateral and relative facts and surrounding circumstances that tended to throw light upon the mental capacity of the testator at that time, and from which inferences might be drawn and presumptions raised as to whether or not he was mentally capable of making a will, and whether the disposition made of his property was consistent with his situation and in accordance with his previously expressed wishes and intentions, and such as he would naturally make under the circumstances, or adopt, or acquiesce in, if not wholly deprived of consciousness. In *Brogden v. Brown*, 2 Addams, Eccl. Rep. 449, the will under consideration was prepared by Mr. Brogden in pursuance of instructions which, it was pleaded, the testatrix gave him in an interview at which they alone were present, and which, it was claimed, was signed by her while delirious and incapable. Brogden, being a party in the cause, was incompetent to testify as to the instructions; hence they were incapable of direct proof. Sir John Nicholl, in speaking of the presumptions that prevail in such circumstances, used this language: "The rule that, where capacity is at all doubtful, there must be direct proof of instructions,

\* \* \* has really no application to a will prepared by an agent, \* \* \* and of which at the same time, the dispositive part is so just, and so proper, so consonant to the deceased's natural affections, and moral duties, that it speaks for itself, and carries, upon the face of it, its own recommendation. Such an alleged will, if suggested, the court may readily presume that the alleged testator would acquiesce in, and adopt, if not wholly deprived of consciousness; and mere acquiescence and adoption, in such a case, would so compensate for any want of direct evidence of instructions given, a priori, that proof of these alone, in conjunction with proof of almost any, whatever, glimmering of capacity at the time of the execution, would be good to support the will, and would sufficiently indicate mind and volition to justify a court of probate in pronouncing for it as a genuine and valid will." As said by Senator Verplanck in *Stewart's Executor v. Lisperdard*, 26 Wend. (N. Y.) 313: "If the testamentary disposition be in itself consistent with the situation of the testator, and in congruity with his affections and previous declarations; if it be such as might have been naturally expected from one so situated, this is itself rational and legal evidence of no small weight to testamentary capacity. \* \* \* The rationality of the act goes to show the reason of the person. This rule has been repeatedly applied in English courts in cases of doubtful capacity, from age or deathbed disease."

The instrument under consideration possesses all these characteristics. The disposition of the property therein provided is consistent with, and such as would naturally be expected from, a man in the situation of the testator. He had lived in this country for many years, was unmarried, and it in no way appears that the contestants, although his relatives and heirs, ever concerned themselves about his welfare and condition. On the other hand, some of those remembered in the will had shown him kindness and attention when sorely needed. And others are of a class whose care and comfort would naturally appeal to the sympathy of an old man who was desirous of devoting his property to a worthy charity. From the fact that the will was prepared at the testator's express request, that the instrument so prepared was left with him and was in his possession several hours before it was alleged to have been executed, and that he signed it in the presence of attesting witnesses who were present at his request for that purpose, in the absence of any showing to the contrary, it will be presumed that he had read it, or that its contents had, in some way, been made known to him. "The onus of proving the contrary is thrown upon him who alleges it." *Hemphill v. Hemphill*, 2 Dev. (N. C.) 291, 21 Am. Dec. 331. "Generally speaking, the law presumes testamentary capacity, due execution, and that the will contains the unre-

strained wishes of the testator. Hence it is usually held that the burden upon the whole evidence is on the party attacking it on the ground of improper execution, lack of capacity, or undue influence, to prove the facts which he alleges." Current Law, vol. 4, p. 1892, and cases cited in note.

But it is insisted that, if the instrument was, in fact, written at the direction of Shapter and embodied his instructions, it should be refused probate for the reason that it was not executed or attested in the manner required by our statute. In support of this contention, counsel for contestants cite excerpts from the testimony of the attesting witnesses, which they claim show that Shapter was not conscious of what he was doing at the time his name was affixed to the instrument, and that the signatures of attesting witnesses were subscribed to the will before the signature of Mr. Shapter was made. We think, from the entire testimony introduced upon the trial, the jury might have found that the deceased was aware of what he was doing, and assented to the manner in which his signature was made, and that the question as to whether he was conscious and possessed of testamentary capacity should have been left to them to determine from the facts and circumstances surrounding the transaction. The fact—if it be a fact—that the subscribing witnesses signed the will before the testator signed it, does not invalidate the will. *Gibson v. Nelson*, 181 Ill. 122, 54 N. E. 901, 72 Am. St. Rep. 254; *O'Brien v. Gallagher*, 25 Conn. 229. They did attest the will in the presence of the testator, and thereby impliedly stated that the testator was of sound mind and competent to make a will. *Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446. And the statement of Mr. Young in the latter trial to the effect that he was of the opinion that Shapter was not in a condition to make a will, and was too far gone to be conscious of what he was doing, did not impair the efficacy of his attestation, and should be taken only for what it is worth as an attempt tending to weaken the force of such attestation as evidence of the mental soundness of the testator, and the weight to be given to it for that purpose was entirely within the province of the jury. In *Stevens v. Leonard*, supra, Dowling, J., speaking on the subject, said: "It cannot be thought possible that an honest man, of ordinary intelligence, would subscribe his name as a witness to an instrument executed by a person whom he believed to be of unsound mind, or under coercion or constraint. The fact that such a man voluntarily identifies himself with the transaction as a witness is an indication that in his opinion the person executing the instrument is competent to do so. The witness must be understood to attest not merely the act of signing, but also the mental capacity of the testator to sign. A subscribing witness may, it is true, be heard to impeach

the will; but, if he assumes that attitude toward it, he does so at the peril of his reputation for candor and veracity. \* \* \* The credibility of the witness becomes at once a matter of serious inquiry, and his desertion of his position as a sustaining witness is an important fact for the consideration of the jury." It is not incumbent upon the proponent to prove all the facts constituting due execution of a will by the concurring testimony of the two subscribing witnesses. Both of these witnesses must be examined, but the will may be established even in opposition to the testimony of both of them. *Trustees of Auburn Seminary v. Calhoun*, 25 N. Y. 422; *Tarran v. Ware* (note) *Id.* 425; *Orser v. Orser*, 24 N. Y. 51. In the latter case, the only surviving witness testified that the will was not signed, or the signature of the testator acknowledged, in his presence. A verdict against the will was set aside, and a new trial granted, because the circumstances from which a due execution might be inferred had not been properly left to the jury.

It is further urged that the court erred in excluding the testimony of Mrs. Corbett on the ground that she was an interested party and incompetent to testify under the provisions of section 4816, 2 Mills' Ann. St. Perhaps the weight of authority is in favor of appellants' contention that the probating of a will is a proceeding in rem and ex parte, and in which heirs and devisees are competent to testify, notwithstanding the inhibition of the statute as to parties in interest, but those decisions are predicated upon statutes materially different from our own, which was taken from Illinois, and is identical with the statute of that state. The rule is well settled that in adopting the statute of another state we adopt the construction given it by the courts of that state. In several cases decided in the appellate courts of Illinois before and since our adoption of the statute, the competency of interested parties to testify in an action to contest, and in proceedings to probate, wills, has been considered, and it has been uniformly held that the provisions of the statute under consideration render them incompetent to testify. *Holloway v. Gallo-way*, 51 Ill. 159; *Crowley v. Crowley*, 80 Ill. 471; *Brace v. Black*, 125 Ill. 33, 17 N. E. 60; *Taylor v. Pegram*, 151 Ill. 100, 37 N. E. 837; *Volbracht v. White*, 197 Ill. 298, 64 N. E. 324. While most of those cases were actions to contest the will after probate, we can see no reason why the same rule should not apply in proceedings to contest the probate of a will. The purpose of the proceeding is the same in each instance, to wit, to divest the legatees and devisees of all right in the estate of the testator, and vest the property in his heirs at law. In *Crowley v. Crowley*, supra, the contest, as in the case at bar, originated in the county court, and was tried on appeal to the circuit court before a jury, and the testimony of a witness who was a devisee under

the will was held inadmissible. Under the construction, therefore, that we are compelled to give this statute, the action of the trial court in excluding the testimony of Mrs. Corbett must be upheld.

Counsel for contestants contend that the testimony of Dr. Burnham and Dr. Grant was improperly admitted, for the reason that they acquired their information as to the condition of Shapter while attending him as his physicians, and such information was, therefore, privileged, under subdivision 4 of section 4824, and that Mr. McNeal was disqualified by subdivision 2 of said section to testify to communications made to him by Shapter, because received by him in his capacity as attorney, and for the further reason that he was a beneficiary under the will. The purpose of the statute in regard to privileged communications made to an attorney or physician is to protect the client or patient. *O'Brien v. Spaulding*, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202; *Doherty v. O'Callaghan*, 157 Mass. 90, 31 N. E. 726, 17 L. R. A. 188, 34 Am. St. Rep. 258; *Glover v. Patten*, 165 U. S. 394, 17 Sup. Ct. 411, 41 L. Ed. 760; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552. In *Doherty v. O'Callaghan*, supra, it is said: "Undoubtedly, while the testator lives, the attorney drawing his will would not be allowed, without the consent of the testator, to testify to communications made to him concerning it, or to the contents of the will itself; but after his death, and when the will is presented for probate, we see no reason why, as matter of public policy, the attorney should not be allowed to testify as to directions given to him by the testator, so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator." In *Thompson v. Ish*, supra, in which the competency of a physician to testify under a statute similar to ours was under consideration, *Black, J.*, after citing and commenting on several cases, used this language: "We conclude \* \* \* that when the dispute is between the devisee and heirs at law, all claiming under the deceased, either the devisee or heirs, may call the attending physician as a witness." The objection that Mr. McNeal was rendered incompetent because an alleged beneficiary under the will is equally untenable. The provision in his favor is to compensate him for his services, and to reimburse him for his expense in administering the trust as executor, and does not make him a beneficiary under the will. *Reeve v. Crosby*, 3 Redf. Sur. (N. Y.) 74; *Meyer v. Fogg*, 7 Fla. 292, 68 Am. Dec. 441.

The further objection that Mr. McNeal was rendered incompetent to testify by the express terms of section 4816, 2 Mills' Ann. St., because a party to the proceeding, is supported by the Illinois decisions construing the statute in like cases. *Smith v. Smith*, 168 Ill. 488, 494, 48 N. E. 96; *Bardell v. Brady*, 172

Ill. 420, 50 N. E. 124. We are therefore compelled to hold that he is not a competent witness while a party to the proceeding; but, with his testimony eliminated from the record, we think there still remains evidence tending to uphold the will which should have been submitted to the jury.

Our conclusion is that the proponents are entitled to have the question in issue submitted to the jury, under proper instructions as to the law governing the testamentary disposition of property. The judgment is reversed, and the cause remanded.

Reversed.

GABBERT, C. J., and BAILEY, J., concur.

### AMERICAN BONDING & TRUST CO. OF BALTIMORE, MD., v. BURKE et al.

(Supreme Court of Colorado. March 5, 1906. Rehearing Denied April 2, 1906.)

#### 1. INSURANCE—FIDELITY INSURANCE—CONSTRUCTION OF CONTRACT—WARRANTIES—REPRESENTATIONS.

An instrument executed by a surety company indemnifying an employer against larceny or embezzlement by an employé, though denominated a bond is in legal effect analogous to a policy of insurance and therefore the rules applicable to insurance policies should be applied in construing it so that it will be construed in favor of the insured and statements or declarations by the insured will be regarded as representations, and not warranties, unless the contract makes them so.

#### 2. SAME—MATERIALITY OF MISREPRESENTATIONS.

Where a bond indemnifying an employer from loss through embezzlement or larceny of the employé was procured through misrepresentations by the employer material to the risk and made in response to a specific inquiry, the bond was void.

#### 3. SAME.

Where a surety before issuing a bond indemnifying an employer against loss through embezzlement or larceny by the employé required a statement from the employer as to when the employé's accounts were last examined, whether they were correct, whether there was any shortage and whether the employé was indebted to the employer at the time, answers to these questions were material to the risk and false answers rendered the bond void.

#### 4. APPEAL—ASSIGNMENTS OF ERROR—CROSS-ASSIGNMENTS.

Appellee cannot complain of errors where no cross-assignment of errors is filed.

#### 5. INSURANCE—FIDELITY INSURANCE—REPRESENTATIONS AS BASIS FOR POLICY—TIME OF REPRESENTATIONS.

Where a surety company issued a bond to a local agent with instructions not to deliver it until the employer of the persons whose fidelity was insured had made a certain written statement, and the employer with knowledge of the instructions procured the bond and afterwards furnished the statement, this statement was properly regarded as the foundation for issuance of the bond.

#### 6. SAME—REPRESENTATIONS AFTER ISSUANCE OF POLICY—MATERIALITY.

Where, after the execution and delivery of a bond securing the faithfulness of an employé, the employer signed a written statement containing an agreement that it should be taken and deemed as the basis of the bond, the statement was material to the execution of the bond.

Appeal from District Court, Teller County; William P. Seeds, Judge.

Action by P. E. C. Burke and another against the American Bonding & Trust Company of Baltimore, Maryland. From a judgment for plaintiffs, defendant appeals. Reversed and remanded with instructions to dismiss the action.

A. M. Stevenson and Daniel Prescott (Ralph W. Smith and John M. Waldron, of counsel), for appellant. V. O. Temple and S. D. Crump, for appellees.

CAMPBELL, J. This is an action on a bond of indemnity issued by the appellant bonding company, a corporation, to the S. T. Miller Investment Company, a corporation, obligee, to save the latter harmless against loss occasioned by the larceny or embezzlement of its general manager, S. T. Miller. The action is brought by the plaintiffs Burke and Fry, as the assignees of the original obligee's alleged cause of action upon the bond. The indemnity was applied for by S. T. Miller, the employé. According to the custom, what is called in the record an "Employer's Statement" was required of the obligee. This statement consists of a list of printed questions to which the obligor deemed it material to have the answers of the employer before issuing the policy. To the questions embodied in the statement first sent out, answers were made by Burke, the president of the investment company, and one of the plaintiffs, and returned to the obligor. These answers were unsatisfactory to the obligor, which declined to take the risk upon them as a basis, but sent an executed bond, as applied for, to its local agents at Cripple Creek with directions not to deliver the same until a satisfactory employer's statement was returned. At about the same time the obligor sent to the obligee a second statement or printed list, like the first one, with the information that it desired to have answered the questions therein propounded, and that such answers would be taken as the basis of the bond, if issued.

There is no question but that Burke, as president of the investment company, had full authority to make these answers, and the bond was accepted by that company which paid the premium upon it. The second statement was made by Burke and delivered to the company on May 29, 1901. The bond was dated May 14, 1901, and about May 20th, delivered to the obligee, though contrary to the instructions of the obligor; but that feature is not important here. When Burke made the answers contained in the second statement, he knew that it was the intention of the obligor not to issue the bond until a satisfactory statement was made by him, and when he did make and return it he knew that the bond of May 14th had been delivered, and then expressly agreed that the statement should be a condition precedent to the binding force of the contract of indemnity. In-

deed, Burke was the only officer of the company in Colorado during the time of the various transactions who was authorized to act for the company, Miller, the employé, being the only other official in the state. Included in the second statement were the following questions and answers: "Q. When were his accounts last examined? A. April. Q. Were they at that time in every respect correct, and proper securities, funds and values on hand to balance? A. Yes. Q. Is there now, to your knowledge, any shortage due you by applicant? A. No. Q. Has he ever been short with you? A. No. Q. Is he now in debt to you? A. No." At the end of these questions and answers was the following statement, and immediately before the signature of the investment company: "It is agreed that the above answers are to be taken as conditions precedent, and as the basis of the said bond applied for, or any renewal or continuation of the same, that may be issued by the American Bonding & Trust Company of Baltimore City to the undersigned, upon the person above named." The bond expressly recited that it was made, issued, and accepted upon the condition, *inter alia*, that all the representations made by the employer, his or its officers, to the surety company are warranted by the employer to be true. Before a court and jury there was a verdict for the plaintiff, and the defendant company has appealed and made numerous assignments of error.

1. The objections that the complaint does not state facts sufficient to constitute a cause of action, and that the plaintiffs have not the legal capacity to sue for the breach of this bond because there was no valid assignment of the obligee's cause of action thereunder, are not discussed. A correct disposition of these and some other assignments of error to which we shall give no further attention might require a reversal of the judgment and a remanding of the cause for a new trial; but in the view we take of the case it is important to consider only one or two propositions, the determination of which makes the bond unenforceable, and compels a dismissal of the action.

2. Learned counsel for both parties are in accord that this instrument, for a breach of whose conditions the action was brought, though denominated a bond, is, in legal effect, analogous to a policy of insurance. Speaking, generally, the same rules of interpretation and construction, therefore, that apply to fire and life insurance policies are applicable to it. If its language is uncertain or ambiguous, the interpretation must be in favor of the insured; and if any of its clauses is susceptible of two constructions, one in favor of the insurer and the other in favor of the insured, the latter will prevail if it is consistent with the general object for which the bond is given. Statements or declarations by the insured are to be taken as representa-

tions merely and not warranties unless the written contract of indemnity itself expressly, or by appropriate reference, makes them warranties. Under the conceded facts of this case, it is immaterial whether the answers set out in the foregoing statement be considered warranties or representations, as a review of some of the authorities demonstrates. A case quite in point in many respects to the one in hand is *Rice v. Fidelity & Deposit Company*, 103 Fed. 427, 43 C. C. A. 270. It was there held that since the bond under consideration rested upon the faith of the employer's statement, and because in the latter there was an express agreement that the statement should be taken as a condition precedent and as the basis of the bond, the answers to the questions propounded were to be deemed warranties and not representations. It was said in the opinion that the crucial distinction between a representation and a warranty is that one is not, and the other is, a part of the contract between the parties, and that the truth of the one is not, and the truth of the other is, a condition precedent to a recovery upon the policy or bond to which they relate. But suppose the declarations of the employer are mere representations. In *Ostrander on Fire Insurance* (2d Ed.) § 135, the learned author says that the difference between a warranty and a representation lies in the fact that in the former the question of materiality is closed; in the latter it is left open. If untrue in the former case, the policy is voidable at the option of the obligor; if untrue in the latter, and also material, the same result follows. The same author at section 139 says that warranties and conditions precedent are essentially the same, and if they are untrue, the policy issued upon the basis of them is voidable.

In *State Ins. Co. v. Du Bois*, 7 Colo. App. 214, 224, 44 Pac. 756, the court referred with approval to 1st Wood on Insurance, § 236, where it is said that, in order to avoid a policy on the ground of misrepresentation on the part of the insured, it is not necessary that a fraudulent purpose or intention his part should be established. It is enough if the representation was, in fact, false and was material to the risk.

In *Travelers' Ins. Co. v. Lampkin*, 5 Colo. App. 177, 38 Pac. 335, the same doctrine is announced. In *American Credit Co. v. Carrollton Fur. Mfg. Co.*, 95 Fed. 111, 36 C. C. A. 671, the same doctrine is laid down. In the *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 73, 22 Am. Dec. 567, the court says that a false representation is no breach of the contract unless made a warranty, but if material the representation avoids the policy on the ground of fraud, or because the underwriter has been misled by it. In the leading case of *Pawson v. Watson*, 2 Cowper, 785, Lord Mansfield, with great clearness, presents the point that "if there is fraud in a representation, it will avoid the

policy, as a fraud, but not as a part of the agreement." And in speaking of a representation made by the applicant as to his own knowledge concerning which he knows nothing, though acting in good faith, the great jurist said: "It is equally false to undertake to say that which he knows nothing at all of, as to say that is true, which he knows is not true." The better and great weight of authority is that a false representation, even though not a warranty, if it be of a fact material to the risk, avoids the policy irrespective of the good faith of the one who makes it. *Carpenter v. Am. Ins. Co.*, 1 Story, 57, Fed. Cas. No. 2,428; *Carrollton Fur. Co. v. American Credit Indem. Co.*, 124 Fed. 25, 50 C. C. A. 545.

In the latter case Judge Wallace quotes with approval the language of the court in *Campbell v. N. E. M. Life I. Co.*, 98 Mass. 402. One of the points there ruled was that where the question of the materiality of the representation depends upon circumstances, and not upon the construction of any writing, it is a question of fact to be determined by the jury; but where the representations are in writing, their interpretation, like that of any other instrument, belongs to the court.

In *Hoover v. Royal Neighbors*, 65 Kan. 616, 70 Pac. 595, the court, in a case quite similar to the one we are considering, held that answers made in response to specific inquiries of the obligor, independent of the stipulations and warranties made in the application and certificate, were material to the risk assumed; and, being material and untrue, there could be no recovery by the obligee.

In *Warren Dep. Bank v. Fidelity Co.*, 116 Ky. 38, 74 S. W. 1111, it was held that where misrepresentations are material to the risk and are unquestionably false, whether they are fraudulent or not is immaterial, the policy may be avoided by the obligor where he has relied upon the truthfulness of the statements and has been deceived thereby. The same court in *U. S. Fid. & G. Co. v. Blackly et al.*, 77 S. W. 700, affirms the Warren Case.

In *Guarantee Co. v. Nat. Bank*, 95 Va. 480, 28 S. E. 909, the court said that where representations were of existing facts and were material and presumably within the peculiar knowledge of the applicant and constituted an inducement to the obligor on which it had a right to rely, and in relying upon which executed the bond, if the representations were untrue, it is immaterial whether plaintiff knew that they were false or honestly believed them to be true. For it was said that if a party innocently misrepresents a fact by mistake, the effect is the same on the party who is misled thereby as if he who made the misrepresentation knew it to be positively false. The real question in such a case is not what the party making the representation knew or believed,

but was the representation false and the other party misled by it.

In *Carrollton Fur. Co. v. American Cr. I. Co.*, 115 Fed. 77, 52 C. C. A. 671, the language of Judge Story in *Carpenter v. Am. Ins. Co.*, supra, was quoted with approval. The late case of *Guarantee Co. v. Mechanic's Co.*, 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253, is in line with these cases. *Bankers' Life Ins. Co. v. Miller (Md.)* 59 Atl. 116, says that a material representation, substantially false, made by an applicant for life insurance, in reliance upon which a policy is issued to him, avoids the policy, whether it be made intentionally or in good faith. See, also, 16 Am. & Eng. Enc. Law (2d Ed.) 933. To the same point are cases in our own reports.

In *Stimson v. Helps*, 9 Colo. 33, 10 Pac. 290, the court says that a contracting party is liable for fraud upon his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other party, where the representations were false and the other party, relying upon them, has been misled to his injury; and it was said that it is not necessary in order to constitute the fraud that the party who makes a false representation should know it to be false. If he makes it as of his own knowledge, not knowing whether it be true or false, and it is in fact untrue, he is guilty of fraud as much as if he knew it to be untrue. In such a case he acts to his own knowledge falsely, and the law imputes a fraudulent intent.

In *Lahay v. City Nat. Bank of Denver*, 15 Colo. 339, 25 Pac. 704, 22 Am. St. Rep. 407, and in *Connell v. El Paso, G. M. & M. Co.*, 33 Colo. 30, 78 Pac. 677, this doctrine is approved.

Our conclusion, therefore, is that a misrepresentation material to the risk, made in response to a specific inquiry, upon which an obligor relies to his injury, avoids the policy at the option of the latter. So that, applying the principle to the facts of this case, whether Burke's answers given to the questions propounded by the obligor were warranties or representations merely, they avoid the policy if, in fact, untrue, irrespective of his good faith in making them. That they were material to the risk is without question, and it was the duty of the court below so to declare from the written language itself. That the answers were untrue is conceded, and that the facts were presumably within the knowledge of that officer is beyond question. The employé was indebted to the investment company obligee at the time, and was, and for several weeks had been, a defaulter. No examination whatever was made of the books of the company in April, or at any other time, by any of its officers, or by any other person, and if such examination had been made the

books upon their face would have shown that the answers which the president made in response to the specific inquiries were absolutely untrue. The court below admitted the second employer's statement over the objection of the plaintiff, though it was not made or delivered until after the bond was issued. Not having assigned cross-error, the plaintiffs are not in position to question this action, even if it was wrong. But the court was right in its ruling, and the second employer's statement must be considered as the basis of the bond, upon the strength of which the same was issued. At the time the answers of the obligee's president were made and the statement sent to the obligor, this officer knew that a satisfactory statement was a condition precedent to the issuance and delivery of the bond, and the rights of the parties are, therefore, to be measured the same as though the statement preceded it, or was contemporaneous therewith. For another reason, also, the plaintiffs are bound by this statement. Even if the bond was issued without a preliminary employer's statement, it was as competent for the parties to make a new agreement or modify the old as it was for them to enter into the original contract. By the express terms of the second employer's statement there was an agreement of the parties that it should be taken and deemed as the basis of the bond. In *Rice v. Fid. & Dep. Co.*, *supra*, this question is so ruled. The trial court in its various rulings upon the evidence and in its instructions to the jury proceeded upon an erroneous theory. It declared not only that there were no warranties by the employer of the truthfulness of its statements, but that, even though the answers which have been quoted were false, the plaintiffs' recovery was not defeated unless they were fraudulently made and with the knowledge upon the part of the president of the obligee company that they were false at the time they were made. Upon the uncontradicted facts in this record the trial court should have directed the jury to find for the defendant since the representations of the obligee were in response to the obligor's specific inquiries, they were material to the risk, and were false and fraudulent in fact and in law. The obligor expressly advised the obligee that the answers were deemed material. We think they were material to the risk as matter of law. They were untrue in their entirety. The obligor relied upon them, and had the right to rely upon them, and would not have issued the policy had the obligee made true answers.

The judgment is reversed, and the cause remanded, with instructions to dismiss the action.

Reversed.

GABBERT, C. J., and STEELE, J., concur.

ALLEN et al. v. WHITE, Public Trustee, et al.

(Supreme Court of Colorado. April 2, 1906.)

TRUSTS—PREMATURE SUIT TO ESTABLISH.

Persons claiming that defendant holds land subject to a trust, in favor of such of plaintiffs as survive a certain person, may not maintain a suit to have such a trust declared, and to have the rents impounded for their benefit, as it cannot be known that any of them will survive, so as to be interested.

Appeal from District Court, Pueblo County; N. Walter Dixon, Judge.

Action by S. Allen and others against S. Harrison White, public trustee of Pueblo county, and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

J. Ed. Rizer and M. G. Saunders, for appellants. Chas. E. Gast and S. H. White, for appellees.

GODDARD, J. On the 25th day of November, 1876, Stephen Wally executed a deed conveying lot No. 6, in block No. 58, in the town of South Pueblo, to Alfred Allen, trustee, for his heirs at the death of his wife Mary H. Allen. On the 30th day of July, A. D. 1884, Alfred Allen conveyed the property to Andrew Ruddy, and, through divers mesne conveyances, the appellee White, defendant below, became possessed of the property on the 20th day of March, 1900. On the 20th day of May, A. D. 1896, Alfred Allen died. Mary H. Allen, his wife, is still living. The appellants, who were all the living children of Alfred Allen, deceased, instituted this action for the purpose of obtaining an adjudication that the above property is impressed with a trust in favor of the children of the said Alfred Allen who may be living at the time of the death of the said Mary H. Allen, and that White holds the title to the property subject to this trust, for an accounting by the said White, and the appointment of a receiver to take possession and hold said property in trust for the children of Alfred Allen that may be living at the time of the death of said Mary H. Allen, and directing said receiver to hold and manage said property and hold the rents and proceeds thereof under the direction of the court. A demurrer was sustained to the complaint, on the ground that it failed to state facts sufficient to constitute a cause of action, and the action was dismissed. From this judgment, this appeal is prosecuted.

It is apparent from the foregoing statement that, if the deed to Allen created a trust, it continues until the death of Mary H. Allen, and cannot be terminated until that event occurs. 22 Perry on Trusts [4th Ed.] § 920; *Schaffer v. Wadsworth*, 106 Mass. 19; *Prentice v. Hall*, 106 Mass. 597; and that said trust will inure to the benefit of such of the cestuis que trust only as may be living at the time this contingency shall hap-

pen. It is clear that it cannot now be determined whether any of them will be living at that time. This furnishes a conclusive reason why we should not now determine the question as to the existence or nonexistence of the trust. It is also evident that in these circumstances the plaintiffs are not now entitled to receive the rents and profits of the property or to have them impounded for their benefit.

The judgment dismissing the action will therefore be affirmed.

Affirmed.

GABBERT, C. J., and BAILEY, J., concur.

**SCHOOL DIST. NO. 13 IN GARFIELD COUNTY et al. v. COUNTY SUPERINTENDENT OF PUBLIC SCHOOLS OF GARFIELD COUNTY et al.**

(Supreme Court of Colorado. April 2, 1906.)

**SCHOOLS AND SCHOOL DISTRICTS—CLOSING BY BOARD—APPEAL TO SUPERINTENDENT—INTERFERENCE BY COURT.**

The county superintendent being authorized by Mills' Ann. St. § 4049, to entertain an appeal from the action of the school board in closing a school, and clothed with jurisdiction to hear and determine the matter, and appeal from the decision of the county superintendent to the state board of education, the decision of the board to be final, being provided by section 4055, the court cannot prevent the superintendent from proceeding in the matter.

Appeal from District Court, Garfield County; John T. Shumate, Judge.

Prohibition proceedings by school district No. 13 in Garfield county, and others, against the county superintendent of public schools of Garfield county and others. From a judgment of dismissal, petitioners appeal. Affirmed.

C. W. Darrow, for appellants.

GODDARD, J. This is an appeal from a judgment of the district court of Garfield county quashing an alternative writ of prohibition theretofore issued in a cause entitled "School District No. 13 in Garfield County, Colorado, et al. v. The county Superintendent of Public Schools of Garfield County, Colorado, et al.," as above. The facts in brief are as follows: The school board of district No. 13 in Garfield county closed the public school in that district on March 20, 1902—2½ months earlier than was customary in that district. From this action of the board, C. C. Miller, on the behalf of the patrons of the school, prosecuted an appeal to the respondent, who was then superintendent of public schools in this county. Appellant moved to dismiss the appeal, which was overruled by respondent. Thereupon they instituted this proceeding, and an alternative writ was issued commanding the respondent to desist and refrain from further proceeding in the matter until further order of the court.

In response to the rule to show cause, the respondent filed a demurrer to the petition assigning, among other grounds therefor, "that the court was without jurisdiction to interfere by writ of prohibition with the county superintendent of public schools in the matter pending before her on the appeal." The demurrer was sustained and the alternative writ of prohibition was quashed and the action dismissed at the costs of petitioners.

The judgment of the district court was correct. The county superintendent was authorized to entertain the appeal in question and clothed with jurisdiction to hear and determine the matter in controversy. Section 4049, Mills' Ann. St. Section 4055 provides for an appeal from the decision of the county superintendent to the state board of education, and that the decision of that board shall be final. The procedure for reviewing the decisions and orders of the district board in matters of law or fact being provided, and the officer and tribunal to hear and determine such matters having been thus designated by the statute, the courts have no right to interfere with them in the proper discharge of such duties.

The judgment will therefore be affirmed.

Affirmed.

GABBERT, C. J., and BAILEY, J., concur.

**RIDER v. THOMAS CROW MACHINERY CO. et al.**

(Supreme Court of Colorado. April 2, 1906.)

**ATTACHMENT—FORTHCOMING BOND—TENDER OF PROPERTY—EFFECT.**

Where defendant in attachment gave a bond as provided by Mills' Ann. St. § 2715, conditioned that on recovery of judgment by plaintiff he would redeliver the attached property or pay the full value of the same, and one of the sureties, who had possession of the property, offered after judgment to redeliver it, but the redelivery was declined, liability on the bond was discharged.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, § 1191.]

Appeal from Arapahoe County Court; Ben B. Lindsey, Judge.

Action by the Thomas Crow Machinery Company and another against Hiram C. Rider. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

McGintie & Andrews, for appellant.

BAILEY, J. This was an action originally commenced before a justice of the peace to recover upon a forthcoming bond given to release personal property theretofore taken under attachment. The bond was conditioned as follows: "In case the plaintiff recover judgment in said action and said attachment is not dissolved, then the said defendant will on demand redeliver to the proper officer such attached property, or in default of such redelivery, that the said defendant, and we as their sureties will pay

or cause to be paid to the said plaintiff the full value of the property so released." This is the statutory bond provided for such occasions. Section 2715, Mills' Ann. St.

Defendant, who was surety on the bond, offered to prove in the trial court: "That after the obtaining of the judgment that he went to the officer who had levied the writ of attachment and being in possession of the property, offered to return the property levied upon, and asked him to go with him to receive the property, as it was at the same place as at the time it was levied upon; that the officer refused to receive the property or to go with him, and told him at the time, that he knew when the attachment was levied that it was of no value, for the reason that the property was more than covered in its value by a mortgage, and that the parties could not have recovered anything whatever if he had not signed the bond." This proof was rejected. In this the court erred. In *Murray v. Ginsberg*, 10 Colo. App. 63, 48 Pac. 968, it was held that before a cause of action will accrue against the sureties, there must be a demand made upon the principal for the goods, and this demand must not have been complied with. If the attachment defendant had offered to surrender the property, there could be no liability on the bond, and the fact that the property was offered to be redelivered by the surety in whose possession it then was, instead of the principal, can make no difference. Under the conditions of the bond, the first thing that the attachment creditor was entitled to was the delivery of this property, in the event of his obtaining judgment and the attachment not having been dissolved. He could not avoid the taking of the property simply because the tender was made by the surety instead of the principal.

The court having erred in the rejection of this testimony, the cause will be reversed and remanded.

Reversed.

GABBERT, C. J., and GODDARD, J., concur.

#### ASHTON v. EDWARD THOMPSON CO.

(Supreme Court of Colorado. April 2, 1906.)

##### 1. SALE—ACTIONS FOR PURCHASE PRICE—BURDEN OF PROVING SALE AND DELIVERY.

One suing for the purchase price of goods has the burden of proving a sale and delivery. [Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1044-1046.]

##### 2. SAME—PROOF OF SALE AND DELIVERY.

The mere presentation of a bill for merchandise is no proof of the sale and delivery thereof.

Appeal from Teller County Court; A. S. Frost, Judge.

Action by the Edward Thompson Company against Scott Ashton. Judgment for plaintiff, and defendant appeals. Reversed.

Frank J. Hangs, for appellant.

BAILEY, J. Appellee, who was plaintiff below, brought this action against appellant for books alleged to have been sold and delivered in April, 1900, to appellant, for an agreed sum of \$142, and claiming that there was a balance due of \$117. The answer was a general denial, and for a second defense payment was alleged. But one witness testified. This witness stated that he presented the bill for the books to defendant and that defendant refused to pay it, stating that plaintiff had not treated him right. The witness stated that he did not know whether or not the books had ever been sold or delivered to defendant. Aside from this testimony, the only other evidence introduced was a statement of account, from which it appeared that plaintiff charged defendant, on account of lawbooks, \$142 and gave credit by cash received for \$25, leaving a balance of \$117. The jury rendered a verdict in favor of plaintiff for \$117 and interest. Defendant appeals.

The sale and delivery of the books by plaintiff to defendant was the gist of the action. The burden was upon the plaintiff to prove such sale and delivery. This the plaintiff did not do. There is no evidence upon which the verdict can be sustained. The mere presentation of a bill for merchandise is no proof of the sale and delivery of the articles. There being no evidence upon which the verdict of the jury can stand, the trial court should have set it aside. For the reasons stated, the judgment will be reversed.

Reversed.

GABBERT, C. J., and GODDARD, J., concur.

#### CITY OF ENID v. WIGGER.

(Supreme Court of Oklahoma. Sept. 5, 1905.)

##### 1. APPEAL—SETTLING AND SIGNING CASE.

A case for the Supreme Court must be settled and signed by the judge trying the same, but need not be settled and signed in the district where the case is tried. A case settled and signed by the judge out of the district where the same was tried, but within the territory, and within a district where he is then exercising judicial powers, is properly signed and settled.

##### 2. SAME—ERROR—WAIVER.

Failure to except to the overruling of a motion for a new trial is a waiver of error as to such ruling, and all alleged errors of law occurring at the trial for which a new trial might be granted. *Vaughn Lumber Co. v. Missouri Mining & Lumber Co.*, 41 Pac. 81, 3 Okl. 174; *City of Atchison v. Byrnes*, 22 Kan. 65, followed.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1759-1763.]

(Syllabus by the Court.)

Error from District Court, Garfield County; before Justice C. F. Irwin.

Action by Clara Wigger against the city of Enid. Judgment for plaintiff. Defendant brings error. Dismissed.

W. H. Hills, City Atty., and Houston James, for plaintiff in error. Wittinghill & Hubbell, for defendant in error.

GILLETTE, J. A motion to dismiss the proceedings in error herein has been filed in this court, which motion is in the following words: "In the Supreme Court of the Territory of Oklahoma. The City of Enid, Plaintiff in Error, v. Clara Wigger, Defendant in Error. Motion to Dismiss Petition in Error. Comes now the said defendant in error, Clara Wigger, and moves the court to dismiss the said petition in error, filed in this case for the reasons: First. The case-made filed in this cause was settled, certified and signed by the Honorable Clinton F. Irwin, the judge who tried the cause at a place outside of the fifth judicial district, in which said cause was tried, to wit, the city of El Reno, in the Second judicial district, of said Territory. Second. That the plaintiff in error did not except to the overruling of its motion for a new trial which was filed and presented to the court below, and hence there is nothing before the court for review."

In support of the first ground of this motion said defendant files affidavit marked "Exhibit A." In support of the second ground of this motion said defendant in error submits the journal entry of the order overruling said motion for a new trial, as same appears on page 153 of the case-made herein, which order reads as follows: "And now on this 5th day of December, 1903, the same being one of the judicial days of this term of this court, the above-entitled cause comes on to be heard upon defendant's motion for new trial, and the plaintiff appearing by her attorneys, Whittinghill & Hubbell, and the defendant by its attorneys, H. G. McKeever, city attorney, and Houston James, the said motion is submitted to the court who upon consideration thereof overrules the same. And it is by the court ordered that the plaintiff have judgment in conformity to the verdict returned herein. It is therefore considered and adjudged by the court that said plaintiff, Clara Wigger, have and recover of the said defendant, city of Enid, the sum of one thousand dollars together with the costs of this case, for the payment of which it is hereby ordered that the defendant, city of Enid, shall through its proper authorities levy a sufficient tax upon the taxable property of said city provided that all proceedings to enforce such levy are stayed for ninety days to allow petition in error to be filed, and in case a petition in error is filed within ninety days then all further proceedings are stayed until the same is heard in the Supreme Court. To which judgment defendant excepts and is by the court given sixty days in which to make and serve a case-made for the Supreme Court, and plaintiff is given ten days to suggest amendments, the case to be signed and settled upon five days' notice. C. F. Irwin, Judge. O. K. Whittinghill & Hubbell, Attys. for Pltff. McKeever & James, Attys. for Deft."

It must be conceded that the settling and signing of a case-made, by the judge trying

the cause, is the exercise of a judicial power, and a judicial function, and one which the law has conferred upon the judge trying the cause, and upon no one else. Another judge, while acting as judge of the district, may extend the time within which it is to be done, but the judge who tried the case must pass upon a motion for a new trial, and must settle and sign the case when prepared for the Supreme Court. It appears from the record in this case that the judge of the Second judicial district was specially directed and empowered to exercise the powers and functions of the judge of the Fifth judicial district in the county of Garfield. For the time being, and as to the special business by him transacted, he was the judge of the Fifth judicial district. As to that business his judicial power and authority to hear and determine the cause was limited to that district, and must be exercised within the district. In making and settling a case-made for the Supreme Court by the judge who tried the case, is it necessary that he should act in that behalf within the district in which the case was tried? It must be conceded that the power to act in settling and signing a case-made is not bound by the same rules with reference to jurisdiction as are questions which arise upon a trial of a cause, for there the jurisdiction is limited to the county, while in settling a case-made the jurisdiction of the judge is at chambers, and may be exercised any where in the district. This is the rule in the states where the judicial jurisdiction can only be exercised in the district where they arise, and where a judge elected for a district may only act, but in this territory the judges are territorial judges appointed to seats upon the supreme bench of the territory. Districts are assigned to each, it is true, by the Supreme Court, but the district may be changed at the will of the Supreme Court, and the judge of any district may, at any time, be assigned to preside over some other district. This presents quite a different status from that found in the states, especially the state of Kansas, the authority of which is relied on in presenting this motion. To hold here that a judge must travel over the territory in the exercise of his jurisdiction at chambers in each matter that might rightfully come before him as judge in such county would be to fix a rule that not only would work hardship, but, because of the loss of time, would be of great detriment to the public business. We hold that, under the peculiar provisions of the law in Oklahoma, a judge may settle and sign a case-made at any place in the territory of Oklahoma where the judge, at the time, may be in the discharge of official duty under the laws of the territory. This holding is not in conflict with the case of Sigman v. Poole, 5 Okl. 677, 49 Pac. 944, for in that case the judge acted outside of the territory. In this case, Mr. Justice Irwin, presiding judge of the Second judicial district, was lawfully

assigned to try the case in question, to the Fifth judicial district, and finally settled the case-made at El Reno in the Second judicial district. This, we think, he had a right to do; and the motion, for the reasons here stated, will be denied.

From the record it also appears that no exception was saved to the order of the court overruling the motion for a new trial, and as all the errors alleged and set out in the petition in error, are errors occurring on the trial of the cause, it follows there is nothing before the court with which the plaintiff in error was not satisfied in the court below. At all events there is nothing before this court calling for affirmation or reversal. *City of Atchison v. Ryones*, 22 Kan. 65; *Vaughn Lumber Co. v. Mo. Mining & Lumber Co.*, 3 Okl. 174, 41 Pac. 81; *Longfellow v. Smith* (Kan. App.) 61 Pac. 875. The opinion in this case (14 Okl. 176, 77 Pac. 190) is modified to conform to the views herein expressed.

The motion in this court, to dismiss the appeal upon the ground that no exception was taken to the order of the trial court overruling the motion for a new trial, must, therefore, be granted, and the appeal dismissed at the cost of the plaintiff in error. All the Justices concurring, except IRWIN, J., who presided in the court below, not sitting.

#### BERRY et al. v. GEISER MFG. CO.

(Supreme Court of Oklahoma. Sept. 5, 1905.)

##### 1. PLEADING—PETITION—STRIKING OUT.

It is error for the court to sustain a motion to strike out certain portions of a petition, unless such parts are statements of matter foreign to the cause and raise no issue proper to be raised in the case, and unless such motion is made by the party prejudiced thereby.

##### 2. SAME—GENERAL DEMURRER.

Where the language of the petition is sufficiently explicit to raise an issue of fact upon which the pleader would be entitled to recover in the case, it is error to sustain a general demurrer to the petition.

(Syllabus by the Court.)

Error from District Court, Kay County; before Justice Bayard T. Halner.

Action by W. E. Berry and J. H. McDonald against the Geiser Manufacturing Company. Judgment for defendant, and plaintiffs bring error. Reversed and remanded.

This was an action for damages for the conversion of certain personal property by the defendant in error belonging to the plaintiffs in error, which said property is fully set forth and described in the petition, which is as follows: "In the District Court of Kay County, Oklahoma Territory. W. E. Berry, and J. H. McDonald, Plaintiffs, v. The Geiser Manufacturing Company, a Corporation, Defendant. Amended Petition. Come now the plaintiffs above named, and by leave of court first had and obtained file this their amended petition, and for cause of action against said

defendant allege and say: That on and prior to the 26th day of August, 1899, the plaintiffs were the owners, and in the quiet and peaceable possession, and entitled to the quiet and peaceable possession, of the following described personal property, of the value of \$3,000, and of the usable value of \$50 per day, to wit: One Peerless engine, class F, No. 5,822; one Peerless separator, class A, No. 10,350; one wind stacker, No. 778; one Peerless feeder, No. 236; one boss weigher, No. 3,371; Gandy drive belt, tank, pump, and hose; one automatic weigher; and one self-feeder. That heretofore, to wit, on the 3d day of July, 1898, J. H. McDonald, one of the parties plaintiff herein, together with Charles Smith and Frank Smith, purchased of the said defendant a certain threshing machine outfit, consisting of separator and traction engine, together with the necessary equipments belonging thereto, and forming a complete threshing machine outfit, for the consideration of \$2,250, being the same property as above described, with the exception of the weigher and self-feeder, and at said time made, executed, and delivered to said defendant their promissory notes in writing for such amount, secured by chattel mortgages upon said threshing machine outfit. That on or about the 15th day of July, 1899, the said Charles Smith and Frank Smith, for a valuable consideration, sold and delivered to W. E. Berry, plaintiff above named, all their right, title, and interest in and to said property and threshing outfit, excepting said weigher and self-feeder last above named, which was at that time not a part of nor attached to said threshing outfit. That thereafter, and prior to the 26th day of September, 1899, the plaintiffs purchased and attached said weigher and self-feeder to said threshing outfit, which said weigher and feeder was, and is, of the value of \$275. Plaintiffs further say that there has been paid on the said purchase price of said property, the sum of \$1,451.50, leaving a balance of \$748.50 coming due and payable to the defendant from the plaintiffs above named, and that such payment was made on and before the said 26th day of August, 1899. That on or about the 26th day of August, 1899, while plaintiffs as aforesaid were in the full and complete control, possession and ownership, and while they were entitled to the possession of said property and while it was of the said value of \$3,000, and of the usable value of \$50 per day, the said defendant unlawfully and wrongfully took possession of all of the said property under a writ issued in a suit in replevin against J. H. McDonald, Charles Smith, and Frank Smith. Prior to taking possession of said property as aforesaid, and prior to obtaining said writ of replevin, the defendant, well knowing that these plaintiffs were the owners of all of said property, and that the said Smiths had sold and delivered their interest therein to the plaintiff W. E.

Berry, and that the said plaintiffs were able, ready and willing to pay said defendant the remainder of the purchase price, amounting to about \$750. That on or about the 29th day of August, 1899, the defendant contracted with the plaintiffs to release the said Smith and McDonald from the payment of said sum, and accept, and did accept, the plaintiff W. E. Berry as the payer of said sum, in consideration of his executing and delivering to said company, his notes therefor for the amount then due, secured by mortgage on one hundred and sixty acres of land in the state of Kansas, which said contract the said W. E. Berry fully carried out upon his part, and made, executed and tendered to said defendant the said notes and mortgage, which, however, the defendant refused, without excuse or reasonable cause, and refused to carry out his part of said contract. That afterwards, and on or about the 1st day of September, 1899, and while said defendant was in possession of said property under said writ of replevin, and at a time when the plaintiff had no control over said property by reason of the wrongful acts of the defendant, and at a time when defendant had become responsible to plaintiff for the value thereof, the said separator, with the attachments and improvements made by these plaintiffs, of the aggregate value of \$1,025, was by said defendant carelessly and negligently permitted to burn, and was then and there destroyed; and plaintiffs were thereby damaged in the sum of \$1,500. Plaintiffs further say that the defendant still retains possession of said engine and attachments of the value of \$1,500, and still retains plaintiff's property of the aggregate value of \$3,000, and of the usable value of \$50 per day. That in the case of the Gelser Manufacturing Company, the defendant above named, against J. H. McDonald and Charles Smith and Frank Smith, above mentioned, in the probate court of Kay county, Oklahoma territory, wherein the said writ of replevin above referred to was wrongfully obtained, the defendants appeared and filed their demurrer to the petition upon the grounds and for the reasons therein set forth, a copy of which is hereto attached, marked Exhibit A. That afterwards, and on the 26th day of September, 1899, said cause came on to be heard by said probate court on said demurrer; and the court being fully advised, sustained said demurrer, and then and there rendered a judgment dismissing said cause, a copy of which said judgment is herewith filed, marked Exhibit B. That no appeal nor other proceedings were had relative to said property in said cause, and the said judgment became and was and remains final, and in full force and effect; and the said defendant became, and is, liable for the return of said property, or in lieu thereof the value of the same, together with damages for its unlawful detention at the sum of \$50 per day. That notwithstanding the fact

that the said defendant had so taken possession of all of said property, and the same had been so delivered to said defendant under and by virtue of said writ of replevin; and notwithstanding the fact that the court had sustained the demurrer to their said pretended cause of action, and that no appeal or other steps were taken by said defendant in said cause, that the said defendant has wholly failed to return said property or any part thereof to these plaintiffs, and has wholly failed and neglected to account to or pay to plaintiffs the value of said property, or any part thereof, and have kept the same, and still keep the same, and the possession of the same from the plaintiffs, whereby plaintiffs have been damaged in the sum of \$2,475, the value of said property; and the further sum of \$3,000 in damages which is due and unpaid. Wherefore, plaintiffs demand judgment against said defendant in the sum of \$5,475 and costs of this action, and all other proper and equitable relief. W. B. Herod and Fulton & Bush, Attorneys for Plaintiffs." To this petition defendant in error filed its motion to strike out certain parts thereof. This motion was sustained by the court, to which plaintiffs excepted. Thereafter defendant filed its demurrer to the petition, for the reason that certain causes of action were improperly joined therein, and for the further reason that the said petition did not state a cause of action, which demurrer was sustained by the court, to which exceptions were saved. Thereupon the said plaintiff elected to stand upon the said petition and the ruling of the court, and refused to plead further, and the court rendered judgment dismissing the action at the costs of the plaintiff, to all of which rulings exceptions were taken, and the case is brought here for review.

W. B. Herod, for plaintiff in error. J. F. King, for defendant in error.

IRWIN, J. (after stating the facts). The first assignment of error is the sustaining of the motion to strike out certain parts of the petition. Wilson's Rev. & Ann. St. 1903, § 4323, provides: "If redundant or irrelevant matter be inserted in any pleading, it may be stricken out on the motion of the party prejudiced thereby." The ruling of the court striking out certain parts of the petition, must depend for its correctness upon two propositions: First, Was the matter stricken out redundant or irrelevant? Judge Black, in his Law Dictionary (page 1009) defines redundancy to be "the insertion in a pleading of matters foreign, extraneous, and irrelevant to that which it is intended to answer; the fault of introducing superfluous matters into a legal instrument." The term "irrelevant" is by the same learned author, at page 644, defined to be "not relevant, not relating or applicable to the matter in issue, not supporting the issue." Bouvier's Law Dic-

tionary, vol. 2, p. 433, defines the term "redundancy" as "matter introduced in an answer, or pleading, which is foreign to the bill of articles." Now in the case at bar the question is, were the matters stricken out foreign to the case? Were they immaterial or extraneous to the issue involved? If so, the decision of the trial court was right; if not, it was wrong. It must be borne in mind that the record discloses that this was an action for conversion, following an action of replevin in the probate court. The action in replevin had proceeded to a final decision, so far as the issues joined in the probate court were concerned. The demurrer to the petition filed in that court having been sustained, and this decision of the probate court not having been appealed from, and no further pleadings having been had in the probate court, the replevin action was dismissed. We take it that the decision of the probate court in sustaining the demurrer, and dismissing the action, amounted, in law, to an order for the return of the property covered by the replevin writ, by the plaintiff in the original action to the defendant, and that, by the terms of the replevin bond in that case, it was the duty of the plaintiff to return said property to the defendant under the decision of the probate court, and from the time of the rendering of this decision, or at the expiration of the time for an appeal therefrom, that the holding of the possession of said property by the plaintiff in replevin, under and by virtue of the replevin writ, was wrongful, and no demand was necessary on the part of the defendant in replevin for the return of the property described in the writ. Now the portion of the petition which was stricken out by order of the court on the motion of the defendant in error was: First, that portion of the petition which alleged usable value of the property which it is claimed was converted by the defendant in error. If the allegation of the petition that the taking of the property was wrongful was sustained by the proof, then the defendant in error would be liable to the plaintiff in error for any and all damages occasioned by such taking and such conversion, and, up to the time that this property was destroyed by fire, it must have had a usable value, and this allegation of usable value was a necessary and proper allegation in the petition where the plaintiff seeks to recover damages sustained by a wrongful and unlawful conversion. Independent of the question as to whether, under a wrongful taking and unlawful conversion, the defendant in error would be liable for the usable value subsequent to the time the same was destroyed by fire, it seems to us that he would certainly be liable for the usable value up to the time of such destruction. Then, from another point of view, we think this allegation was proper as the usable value might be a criterion by which the market value of the property could be determined. The fifth re-

quest contained in the motion to strike out, which was that Exhibits A and B be stricken out, was also sustained, notwithstanding the fact that no exhibits were in fact attached. This, to say the least, was unnecessary. The second and fourth request in the motion to strike out seeks to strike out that portion of the petition which alleges that the plaintiff in error Berry was able, ready, and willing to pay the balance due on the property; that the defendant had expressly agreed to accept him, Berry, as paymaster, and agreed upon the terms and conditions of payment, and the said Berry had performed, as far as it was his duty to perform, such agreement, and had tendered to the defendant all the requirements of the agreement, and that, notwithstanding this subsequent agreement, and performance on the part of Berry, the defendant had unlawfully taken, and wrongfully converted, the personal property described in the petition. This, it seems to us, was a plain, simple statement of fact, and a statement of fact which, if true, would entitle the plaintiff to recover, and we do not think that a party to an action can be prejudiced by a statement of fact upon which the action of the other party rests, and for this reason we think it was error on the part of the district court to strike out these portions of the petition.

The other assignment of error is that the court erred in sustaining the demurrer of the defendant to the petition, and dismissing the cause at the costs of the plaintiffs. The two grounds upon which the demurrer was sustained were, first, because several causes of action are improperly joined, and second, because the petition does not state a cause of action. These can be considered as one. An examination of the amended petition will disclose that the material allegations of the petition are that plaintiffs were the owners, and in the possession of certain property, describing it; that the said property was of the value of \$3,000, and that it was purchased of the defendant; and that to the outfit as described, so purchased of the defendant, was added a weigher and self-feeder which was of the value of \$275; that upon the said purchase price had been paid to the defendant, \$1,451.51; that on the 26th day of August, 1890, while the plaintiffs were the owners, and in the peaceable and quiet possession of said property, the said defendant unlawfully and wrongfully took possession of the same, from the plaintiffs; that the defendant, knowing all the facts, the ability and readiness of the plaintiffs to pay any balance due on account of the purchase price of the said threshing outfit, accepted plaintiff Berry, and released the original purchasers, Smith and McDonald, and did, as a matter of fact, make and enter into a different contract with the plaintiff Berry for said property; that thereafter, and while the said defendant was in the wrongful possession of the said property which was out of and away from the control

of the plaintiff, all of the said property, by reason of the carelessness and negligence of the defendant, was burned and destroyed, with the exception of the engine, which the defendant still keeps, and has and still retains the possession of the same, and that all of said property was of the value of \$3,000. It seems to us that there can be no question but that these allegations in the petition raised an issue which the parties were entitled to have submitted to a jury. There was the issue raised by this allegation as to whether the property was wrongfully taken from the possession of the plaintiffs. There was also the question at issue as raised by this petition, as to whether the defendant, prior to the taking of possession of this property, had not entered into another and different agreement with Berry, and as to whether or not Berry had performed on his part the subsequent or new agreement, and whether the defendant was not in default in not performing its part of the agreement, and as to whether, under the circumstances, the taking of possession of this property by the defendant was wrongful.

But it is contended by counsel for defendant in error that this entire question has been settled in the case of Geiser Mfg. Co. v. Berry et al. (Okla.) 70 Pac. 202, and it is contended that this identical case was before this court and it was there decided by this court that these facts did not entitle the plaintiff to a judgment, and that this decision became the settled law of the case. We have carefully examined the decision in 70 Pac., and we do not think that the contention of the counsel for defendant is correct. All that was there decided was that it was error for the district court to hold that the action of the probate court in sustaining the demurrer to the petition in the original action was res adjudicata as to the right of possession. In that case the jury were instructed that the action of the probate court in sustaining the demurrer to the petition in replevin was conclusive of the right of possession, and the only question remaining was the amount of damages. This court held, and we think properly, that, as the issue raised by the demurrer to the petition in replevin in the probate court could have been decided without deciding the merits of the question of the right of possession, this decision of the probate court on the demurrer was not necessarily conclusive of the right of possession, and for this reason, and this reason alone, the judgment of the district court was reversed. But this decision of the Supreme Court in no way affects the right of these parties to have the question of the right of possession tried in the district court, and the allegations of the petition raise the identical issue of the right of possession, and should have been submitted to a jury under proper instructions of the court.

It is also contended that the allegations of

the petition as to the property having been destroyed by fire through the carelessness and negligence of the defendant in error is not stated with sufficient definiteness; that the manner in which the defendant in error was careless is not stated. Some authorities are cited to sustain this position. But we believe a different rule obtains where parties are shown to be, at the time of the fire, wrongfully in possession, to that which obtains in the class of cases cited in the authorities. But even if this contention is tenable, it would only prove that the petition might be subject to a motion to make more definite and certain. In the absence of such a motion, we think that this petition states the carelessness with sufficient certainty. One of the allegations of the petition is that the machinery and threshing outfit, as it is called, which was taken, was of much greater value than the balance due the defendant from the Smiths, and the allegation is made that Berry, the plaintiff in error, having become the owner and entitled to whatever possession and rights the Smiths held, it was due to Berry that an accounting be had, and any balance which might remain after the payment of the indebtedness to the defendant in error should be paid to him. But, in the most liberal construction that might be made with reference to the conduct of the defendant as plaintiff in the original suit mentioned, it would seem that justice and fair dealing would dictate that they should have proceeded to have taken the property by virtue of their chattel mortgage, and to have disposed of the property as in the mortgage provided, and apply the proceeds to the satisfaction of their debt so that the parties might determine whether any balance remains. This would seem to be in keeping with equity and good conscience. But this petition contained the statement, fairly and squarely, of the conversion of all this property by the defendant, and this was a traversable fact, and a fact which, under proper instructions, should have been submitted to a jury, and we think the action of the court in striking out portions of the petition, and in sustaining a general demurrer to the petition and dismissing the case at the costs of the plaintiff, was such error for which the case will be reversed.

We do not desire at this time to be understood as expressing any opinion as to whether the taking and conversion of the property by the defendant was rightful or wrongful, as, under this decision, this case must again be submitted to the jury, and we only say that the petition, and the allegations therein contained, raised an issue which should be tried by a jury under proper instructions of the court.

For this reason, the judgment of the district court is reversed, at the costs of the defendant in error, and the cause remanded to the district court for further action in

accordance with this opinion. All the Justices concurring, except HAINER, J., who having tried the case below, took no part in this decision.

### THREADGILL v. COLCORD.

(Supreme Court of Oklahoma. Feb. 14, 1906.)

#### 1. RECEIVERS—SALE—HOW CONDUCTED.

Under the laws of this territory, where a receiver is appointed by the court, and at the time fixed for the sale the said receiver is necessarily absent from the place of sale, on application of the receiver, or any party in interest, the court may appoint an agent for the purpose of conducting the sale; and that sale so made, if otherwise regular, will be confirmed, and such agent will not be required to take oath or give bond, unless so directed by the order appointing him.

#### 2. SAME—NOTICE OF SALE.

The statute in relation to the notice to be given in case of sales under execution does not govern in case of receiver's sales. If the court in the decree authorizing the sale orders that notice be given, a compliance with such order is all that is required.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, § 230.]

#### 3. SAME—OBJECTIONS—ESTOPPEL.

A plaintiff who has filed a petition in a court of competent jurisdiction against certain defendants asking to have a receiver appointed, and such receiver is appointed without objection, and the sale is made by said receiver or by some agent appointed by the court for him, and at such sale the plaintiff is a bidder, and the property is sold to him under his bid, such plaintiff is presumed to take notice of all proceedings and orders taken or made in the case, and is estopped from questioning the appointment of the receiver, or the agent to sell said real estate, in a collateral proceeding.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, § 246.]

#### 4. SAME—COLLATERAL ATTACK.

When a purchaser at a master's sale under a decree is himself a party to the suit in which the decree was entered, he cannot, in a collateral proceeding, raise a question as to the irregularity of the decree, but if the decree is irregular so that the purchaser will not get a good title to the premises purchased by him, his remedy is to apply to the court directly to set aside the decree on that ground.

#### 5. SAME—REVERSAL OF DECREE—EFFECT ON SALE.

Though the case in which the receiver was appointed might be subsequently reversed on appeal, such reversal would not affect the sale if the court had jurisdiction to render the decree, and the fact that the plaintiff in the suit in which the receiver was appointed was himself the purchaser at the receiver's sale, would not alter the case. The general rule is that a purchase at a decretal sale made by a court of competent jurisdiction is valid, unless the decree be void, although it may be reversed.

#### 6. SAME—CONFIRMATION.

In a receiver's sale, where a report of sale is made and filed in the court from which the decree issued, and a motion is made to set aside the sale, and the court after hearing argument of counsel and considering the motion to set aside the sale overruled the motion, and thereupon entered an order that the bidder pay into the hands of the clerk of the court the amount of his bid, and that the receiver make, execute, and deliver to the bidder a deed conveying the real estate purchased, this amounts

in law to a confirmation of said sale, although the court does not say in express language, "I hereby confirm the sale." The order made by the court amounts legally to the same thing, and recognizes the validity of the sale.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; before Justice Bayard T. Hainer.

Charles F. Colcord, as receiver of the Oklahoma Woolen Mills, sold certain property at receiver's sale at which John Threadgill became purchaser. On refusal to comply with the bid, the receiver commenced an action for the recovery of the amount of the bid. From a judgment for plaintiff, Colcord brings error. Affirmed.

In this case, the plaintiff in error, John Threadgill, was the purchaser at a receiver's sale of certain property formerly belonging to the Oklahoma Woolen Mills, of which Charles F. Colcord, the defendant in error, had been appointed receiver. The receiver's sale was made under and by virtue of an order of the judge of the district court in and for Oklahoma county, the said order being made on the 18th day of May, 1904. The receiver caused the property ordered by the court to be sold to be advertised for sale in the Daily Oklahoman and the Times-Journal, two daily newspapers of general circulation published in Oklahoma county. The plaintiff in error, Threadgill, was a stockholder in the Oklahoma Woolen Mills, and was the plaintiff in the case in which the receiver was appointed. On the day of the receiver's sale, Messrs. Grant & McAdams, as agents and attorneys for Threadgill, appeared at the sale and bid for the property the sum of \$12,000 and this being the highest and best bid then offered, the master, or auctioneer appointed to conduct such sale, declared said property sold to the plaintiff, and immediately demanded of him the payment of the amount of his bid. The plaintiff asked for further time to examine the records as to the title, which was granted. Subsequently, Threadgill, the plaintiff, refused to perform the condition of his bid, and to take the property, claiming that the appointment of the receiver in the case, and the conduct of the sale was irregular, and not in accordance with the statute. On the 20th day of July, 1904, the plaintiff herein moved the court in the case in which the receiver had been appointed, to set aside the receiver's sale. This motion the court denied, and ordered that Threadgill pay into the hands of the clerk of the court the sum of \$12,000, the amount of his bid for said property, and that upon such payment, the receiver make, execute, and deliver to Threadgill a deed conveying the property purchased by him at said sale. Upon said order being made by the court, the plaintiff, Threadgill, refused to comply with such order, whereupon the court ordered that the receiver of the Oklahoma Woolen Mills, Charles F. Colcord, commence an action

against Threadgill to recover the amount of the bid. On the 12th of September, 1904, in accordance with the order made by the court in the case in which the receiver was appointed, an action was commenced in the district court of Oklahoma county by the receiver of the Oklahoma Woolen Mills against John Threadgill for the recovery of the amount of his bid, and a petition setting up the facts was filed herein, to which petition the defendant filed an answer, after which plaintiff moved for judgment on the pleadings, which motion was granted by the court and judgment rendered in favor of the receiver, and against the plaintiff in error, Threadgill, for the sum of \$12,270.66, being the amount of the bid on said property, together with 7 per cent. interest thereon from the date of the sale. To which finding and judgment, plaintiff in error, Threadgill, excepted, and takes his appeal to this court, and brings the matter here for review.

W. F. Wilson and Grant & McAdams, for plaintiff in error. Flynn & Ames and Hays, Thorp & Thorp, for defendant in error.

IRWIN, J. (after stating the facts). The first assignment of error is that the said Charles F. Colcord was not eligible as receiver of the Oklahoma Woolen Mills, because a stockholder and director of the corporation, and because a party to the action in which the said receiver was appointed; second, that the property was not advertised for sale in accordance with the provisions of the statute of Oklahoma, relative to judicial sales; third, that the sale was made by a master, or auctioneer, instead of the receiver himself, and that such master or auctioneer gave no bond and took no oath before entering into the discharge of his duties; fourth, that the sale to Threadgill had never been confirmed by the court, as charged in the order of sale.

We will take these assignments of error up in their inverse order. The fourth assignment of error, to wit: That the sale to Threadgill had never been confirmed, and that for this reason no case could be brought for the purchase money. In answer to this contention, we refer to the record as shown by the case made at page 14, and by this record we find that on the 20th day of July, 1904, the cause came on to be heard in the district court on the motion of plaintiff in error, John Threadgill, who represented that he was a bidder at the sale of the property in controversy, and moved the court to set aside said sale. The court, after hearing the argument of counsel, and considering said motion, overruled the same, to which ruling the said John Threadgill, by his attorneys, then and there excepted, and it was ordered by the court that the said John Threadgill pay into the hands of the clerk of this court the sum of \$12,000, the amount of his bid for said property, and upon such

payment the said receiver should make, execute, and deliver to the said John Threadgill a deed conveying to the said John Threadgill the real estate purchased by him at said sale. Now we think that this order amounts to an order confirming the sale. It is true, that the court in making the order did not say in express language, "I hereby confirm this sale," but he did say that the motion to set aside the sale should be overruled, and he did say that the bidder should pay the amount of his bid into the clerk of the court and that upon such payment that the receiver should make, execute, and deliver a deed for the property sold at that sale. This, we think, in law, is equivalent to an express declaration confirming the same, because it was an express recognition of the validity of the sale, and an order that the necessary steps should be taken to convey the title. From this order there was no appeal by the plaintiff in error, Threadgill.

The third assignment is that the sale was made by a master or auctioneer. Instead of the receiver himself, and that such master or auctioneer took no oath, and gave no bond before entering into the discharge of his duties. That brings us to the question: Can a receiver's sale be conducted by a master in chancery or auctioneer appointed for that purpose? We find nothing in our statute as to the manner in which a receiver's sale shall be conducted, nor as to who shall have authority to conduct such sale. The record in this case shows that at the time fixed for the sale it became necessary for Colcord to leave the city, thus necessitating a postponement of the sale, or the appointment of an agent to conduct it. Upon motion the court ordered the latter to be done, and J. J. Beall was appointed master in chancery for the sole purpose of conducting that sale and reporting the proceedings to the court. We think that, in the absence of any statutory provision relating to the subject, that the court committed no error in allowing a special master or auctioneer to conduct that sale, and that the court had full authority and ample jurisdiction to make such appointment. In the case of *Swan v. Smith*, 58 Miss. 875, a direct attack was made upon a commissioner's sale, for the reason that it was not made by the commissioner personally, but by an auctioneer during the commissioner's absence from the state, and the court held that if otherwise regular, the sale would be confirmed. In the case of *Chambers v. Jones*, reported in 17 Ill. 275, it was held that the fact that a sale under a decree of court was conducted by an agent of the commissioner authorized by the decree to make it, and, in the absence of the commissioner, is not such an irregularity as impairs the jurisdiction of the court. In the case of *Omaha Loan & Trust Co. v. Bertrand* (Neb.) 70 N. W. 1120, it was there held that the court can appoint a person other than the sheriff, special master to make a sale of real estate under a decree.

But it is contended that the sale is invalid because the master or auctioneer appointed by the court to make the sale of the property gave no bond, and took no oath before entering into the discharge of his duties. Section 4443, Wilson's Rev. & Ann. St. Okl. 1903, provides as follows: "Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court or judge; execute an undertaking to such person, and in such sum as the court or judge shall direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein." This provision of the statute relates solely to the giving of a receiver's bond. And it is nowhere contended in the briefs of counsel, nor does this record show in this case but that such provision was fully complied with; and we have searched the statutes in vain, to find anywhere any provision that a master appointed especially by the court, for the sole purpose of making a sale in the absence of the receiver, and for no other purpose than to make the sale and report the same to the court, should either give bond or take the oath. And, in the absence of some statutory provision regarding it, we think that the court has full jurisdiction and ample power to allow a special master or auctioneer to proceed with the sale, without his taking the oath or giving bond. As a reason for this, we would suggest that a purchaser at a judicial sale, such as was had in this case, would not pay the purchase price to the special agent appointed merely for the purpose of conducting the sale, but would pay it to the receiver and the purchaser in making such payment would be fully protected by the statutory bond which had been given by the receiver. In the case of *Hess v. Rader*, 26 Grat. (Va.) 746, a decree was made appointing a commissioner to sell certain lands at public auction, provided that he should not act under the decree until he had given a bond for the performance of that and future decrees made in the case. Without executing such bond, the commissioner sold the property, and the sale was confirmed by the court. It was held in that case that such sale was binding upon the purchaser. In *Seaman v. Northwestern Mutual Life Insurance Co.*, 86 Fed. 403, 30 C. C. A. 212-215, the court say: "Neither the statute, nor the decree under which the master sold this property, required him to give a bond, and one was not necessary to the legality of his action." So we say in this case, neither the statutes of Oklahoma, nor the decree or any order of the court in the case, required the special master or auctioneer to give bond, and one was not therefore necessary to give validity to the proceedings, and its absence could not be urged by the purchaser as a reason for repudiating his purchase.

The second assignment of error is that said property was not advertised for sale in ac-

cordance with the provisions of the statute of Oklahoma, relating to judicial sales. The contention of the plaintiff in error is that where property is sold at a receiver's sale, such sale should be conducted in the same manner as are sales under execution, and that the failure to follow the statute relative to execution sales, was of itself, such a gross irregularity as should vitiate the sale of the receiver in this case. We can find no requirement of the statute that a receiver's sale should be conducted in any such manner. The statutes are entirely silent as to the manner of the conduct of such sales, and we think that if the sale is conducted in the manner prescribed by the court in its decree, that the proceedings would be sufficient to give the purchaser a good title to the property. There is nothing in this record to show that the notice required by the court in its decree was not given, or that the sale was not conducted strictly in accordance with the orders of the court in such decree contained. It is true that section 4648, Wilson's Rev. & Ann. St. Okl. 1903, relating to execution sales, provides as follows: "Lands and tenements taken on execution shall not be sold until the officer cause public notice of the time and place of sale to be given, for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county, or in case no newspaper be printed in the county, in some newspaper in general circulation therein, and by putting up an advertisement upon the courthouse door, and in five other public places in the county, two of which shall be in the township where such lands and tenements lie. All sales made without such advertisement shall be set aside, on motion, by the court to which the execution is returnable." But, as we have before said in this opinion, we do not think that this provision of the statute necessarily applies to receiver's sales, as the statute seems to confine it entirely to sales of lands and tenements taken on execution. The record in this case shows that the receiver's sale was advertised in two newspapers published in Oklahoma county, daily from the 13th day of June, 1904, to the 15th day of July, 1904, which seems to be the only notice required by the court in the decree. The objection of the plaintiff in error is based upon the failure of the record to show that the advertisements were placed upon the courthouse door, and in five other public places in Oklahoma county, as provided in the latter part of section 4648, but in the case of *McCurdy v. Baker*, 11 Kan. 111, the Supreme Court, speaking through Justice Brewer, held: "That the posting of notices is entirely unnecessary, except when no newspaper is published in the county." But, as we have before said, this being a receiver's sale, and not a sale under execution, we think that a compliance with the decree as to notice was all that was required.

The only remaining assignment of error is that the said Charles F. Colcord was not eligible to be receiver of the Oklahoma Woolen Mills, because a stockholder and director of said corporation, and because a party to the action in which the receiver was appointed. In answer to this, the first thing we desire to consider is: Has the plaintiff in error, Threadgill, estopped himself from attacking the validity of the receiver's sale, or the appointment of the receiver? The plaintiff in error in this case, Threadgill, was the plaintiff in an action against the Oklahoma Woolen Mills, Margaret McKinley, C. F. Colcord, A. H. Classen, C. B. Ames, Frank Harrah, and G. B. Stone, this being the action in which the receiver was appointed, of whom the plaintiff in error purchased the property referred to in the petition and answer in this case. Threadgill, as a stockholder in the Oklahoma Woolen Mills, and as plaintiff in that action, not only applied for, and consented to the appointment of a receiver, but had notice, actual or constructive, of everything that was done in that case, and so far as the record shows, he made no objection whether to the appointment of Colcord as receiver, or to the appointment of Beall as special master or auctioneer. The record is silent as to any objection being made to Beall's giving no bond, or taking no oath, or that the property was not properly advertised, or that the receiver, C. F. Colcord was a party in interest. No appeal was taken by him from any decision or decree of the court in the case appointing a receiver, neither was there an appeal taken from the order of the court overruling his motion to set aside the sale, or the order of the court recognizing and confirming the sale, and ordering him to pay over the amount of his bid. Now it would seem to us that if Threadgill had any objection to make in regard to any of these matters, it was his duty to have urged them at the time the supposed errors were made in the suit in which it was adjudged. He was a party to the action, and as such party had opportunity to object to any and every stage of the proceedings had he so desired, and we think as a matter of law that where a person is a party to an action, that he is bound to take notice of all proceedings had and orders made in the case; and that, by failing to make such objections until after the sale, he waived any right to make objection to the appointment of the receiver, or of the receiver's qualifications to act, or of the appointment of the special agent for the purpose of making that sale; and it is our belief that he cannot, by any collateral proceedings subsequent to the sale, attack the validity of the receiver's appointment, or the sale made by him. It was held by the Court of Appeals of the Indian Territory, in the case of Tait v. Carey (Ind. T.) 49 S. W. 50, that where on attachment an assignee has been appointed receiver by consent of

all parties, contrary to Mansf. Dig. § 5290, prohibiting the appointment of an interested party, and he has executed the trust and sold the property, and the proceeds are subject to the order of the court, and no rights have been prejudiced, his appointment and his acts thereunder will not be disturbed. In that case a direct attack was made on the receiver in the action in which he was appointed, and the court say: "Counsel for appellants insist that the appointment of Primm as receiver, who was the assignee of the property, and the interpleader thereafter in the case, was illegal and void under section 5290 of Mansfield's Digest, which is as follows: 'No party or attorney interested in an action shall be appointed receiver therein.' This section was not called to the attention of the trial court (Judge Kilgore presiding at the time) and no exception taken to the appointment of the assignee as receiver. On the contrary all the parties consented to his appointment as receiver, including the appellants. The appointment ought not to have been made. But the assignee was appointed receiver, and he has wholly executed the trust confided to him. The property has been sold and the proceeds are now subject to the order of court. No one's rights have been prejudiced. What was done was by consent of all parties, and to the interest of all concerned. The maxim, *Fieri non debet sed factum valet*, applies. While an error was committed, a reversal will not cure it, and will not promote the interests of any of the parties concerned."

Having made no timely objection in the case in which the receiver was appointed, to any of the actions of the court, and not having appealed from the judgment in that case, the plaintiff in error, Threadgill, will not now be permitted to collaterally attack any of the proceedings in that case. It may have been improper to have appointed Colcord receiver. It undoubtedly was, he being a party to the action, and a stockholder in the concern, but all the parties consented, and no exception having been taken to his appointment, and no appeal having been taken by the plaintiff in error, he cannot now be permitted to question such matters collaterally, when, having the opportunity at the time of the appointment, he failed to do so directly. A direct attack was made upon the appointment of the receiver in the case of Rumsey v. People's Railway Co., 154 Mo. 215, 55 S. W. 615. This was an action to foreclose under a trust deed, and judgment was rendered for the plaintiff. It was held in that case that the appointment of the receiver, being acquiesced in by all the parties for more than a year, during which time they participated in the suit in which he was appointed, that any irregularity in the appointment of the receiver had been waived by the parties. Counsel for plaintiff in error cite as an authority for their

contention that the plaintiff in error Threadgill has a right in this proceeding to attack the validity of the appointment of the receiver, and receiver's sale, the case of the *St. Louis, K. & S. R. R. Co. et al. v. Wear* (Mo. Sup.) 36 S. W. 357, 33 L. R. A. 341. This is cited as authority on the proposition that the receiver was improperly appointed, but an examination of that case will show that an attack in that case was a direct one by writ of prohibition, and not a collateral attack, such as is attempted by plaintiff in error in this case. In the *Wear Case*, a receiver was appointed for a railroad company, he being, at the time of such appointment, president of a competing line. There was a state constitutional prohibition and a state statute declaring it unlawful for any railroad corporation to in any way exercise control over a parallel or competing line. An examination of that case will show that the court did not pass upon the question as to whether the appointment of the president of a competing line as receiver would be void, because that question was not properly brought up by the record, and hence, as stated by the court, they were not called upon to say whether or not that fact would furnish of itself, a cause to prohibit the execution of the order of appointment. The case, it seems to us, is no authority for the proposition that the plaintiff in error can collaterally attack the appointment of the receiver in this case. Another case relied on, or seemed to be relied on, by counsel for plaintiff in error, is that of *Moss National Bank v. Lakeside Company et al.*, 10 O. C. D. 542; and in that case it seems to us the Ohio Court clearly recognizes the authority that the appointment of an interested party in an action is not absolutely void but only voidable, and in that case the court says that the rule may be departed from by the consent of all parties concerned. Hence, we say that we do not believe, that under the law, an attack can be made collaterally on the appointment of a receiver and sale under such appointment.

So far as we can ascertain, the courts uniformly hold that collateral attacks will not be permitted upon judicial proceedings, unless such proceedings are absolutely void. It is immaterial how irregular, or how erroneous the action of the court may be, if the court had jurisdiction of the subject-matter of the action, and of the parties, the only manner in which such errors and irregularities can be cured, is by direct attack upon the proceedings, by some proper action taken in the case in which the errors are alleged to have been committed. This rule has been applied to irregularities concerning the appointment of receivers, the manner in which receiver's sales have been conducted, the manner in which receiver's sales have been advertised, and errors or irregularities of every conceivable nature. A direction in a judgment of foreclosure, that the sale should

be made by a referee instead of the sheriff, as provided by statute, while in violation of such statute, has been upheld. In *Sproule v. Davies*, 63 N. E. 1106, 171 N. Y. 277; *Id.* (Sup.) 75 N. Y. Supp. 229, it was held that this was a mere irregularity not affecting the title of the purchaser at the sale, nor entitling him to be relieved from his purchase. In *Gaskin v. Anderson*, 55 Barb. (N. Y.) 259, it is held that a purchaser cannot resist the payment of the purchase money on the ground that the officer selling at a judicial sale was a referee, where the parties to the action did not complain. The rule is stated very clearly in the case of *Metropolitan Nat. Bank et al. v. Commercial National Bank* (Iowa) 74 N. W., pages 26 and 27, where the court say: "The first complaint made by the appellant is that the court erred in sustaining a demurrer to the second division of its answer. The defense alleged in that division was in substance as follows: That Bradford is not the receiver of the Buena Vista State Bank, and is not authorized to maintain this action for the reason that, as he was clerk of the district court in and for Buena Vista county at the time the order purporting to appoint him receiver was made, he was disqualified to accept the appointment because he was the only person authorized by law to approve the bonds of receivers appointed by the court and keep possession thereof, and the only person authorized to keep the record and entries of the appointment of such receivers, and to preserve the pleadings, papers, reports, bonds, records, and other proceedings connected therewith, and arising therefrom; that this appointment as receiver was void, and that he is wholly without right or power to maintain this action. It is urged by the appellee that, even if it be true that the duties of clerk and receiver are such that one person should not hold both offices yet that question cannot be considered on its merits in this action, for the reason that the second division of the answer is in the nature of a collateral attack upon proceedings had and an order made in another action, and that, we think, is true. The eligibility of Bradford was necessarily involved in the proceedings which were instituted to close the insolvent bank and distribute its assets through the medium of a receiver. The court had jurisdiction of the subject-matter of the proceedings, and of the parties, and its order appointing Bradford receiver, involved the finding that he was eligible to the office. It may be that if proper objection had been made, the order would have been set aside or reversed on appeal; but, if the bank and its stockholders and other persons interested in the assets are satisfied with the appointment, other persons should not be heard to complain, especially by a collateral attack as attempted in this case. *Van Fleet, Coll. Attack*, § 3; *Whittlesey v. Frantz*, 74 N. Y. 459; *Attorney General v. Insurance Co.*, 77 N. Y. 274; *Banga*

v. Duckinfield, 18 N. Y. 595; Jones v. Blunn (N. Y.) 39 N. E. 954; Davis v. Shearer (Wis.) 62 N. W. 1050; Cadle v. Baker, 20 Wall. 650, 22 L. Ed. 448. See, also, Pursley v. Hayes, 22 Iowa, 11, 92 Am. Dec. 350; McCandless v. Hazen (Iowa) 67 N. W. 256. But it is said, if it be conceded that the appointment of a clerk as receiver cannot be questioned in this action, yet the appellant may show that he never qualified as receiver, for the reason that he could not approve his own bond, and the court was not authorized to approve it. We think this objection is shown to be unsound by what has already been said, and by the fact that the approval by the court of the bond given by the receiver was, in effect, an adjudication in that proceeding that the bond was sufficient. Moreover, Bradford may have been a receiver de facto, although he had not given any bond. Manufacturing Co. v. Sterrett, 94 Iowa, 158, 62 N. W. 675. We conclude that the demurrer to the second division of the answer was properly sustained. In Brande v. Bond, 63 Wis. 140, 23 N. W. 101, the court says: "The same objections are taken to the proceedings of the receiver. It is said he never qualified by giving the requisite bond, and did not make the sale pursuant to the order of the court. But it is very clear that these objections cannot now be considered in this collateral suit." Now it seems to us that if the objection that a receiver had not qualified by giving a requisite bond, could not be raised in a collateral suit, much less could an objection that a mere auctioneer had not given bond, particularly where neither the decree nor the statute required a bond to be given or an oath to be taken. In Hollcraft v. Douglass, 115 Ind. 139, 17 N. E. 275, it is held that where a court has the power to appoint a receiver for the creditors, the exercise of the power, however erroneous, cannot be collaterally attacked.

An act of Congress approved on the 3d day of March, 1879, contained in 20 Stat. 415, c. 183 [U. S. Comp. St. 1901, p. 591] provides as follows: "No clerk of the District or Circuit Court of the United States, or their deputies, shall be appointed a receiver or a master in any case, except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment." In construing this section in connection with the appointment of a receiver of a corporation, and upon appeal from the order of confirmation of sale made under a decree of foreclosure of a mortgage, Sanborn, Circuit Judge, in the case of Seaman v. N. W. Mutual Life Insurance Co., 86 Fed. 493, 30 C. C. A. 212-216, lays down the following rule: "The chief ground of objection to Dundy's authority is, however, that he was ineligible to the position of a standing master in chancery, or of a master to conduct the sale, under the acts of Congress which we have quoted, because he was the clerk of the United States District Court,

and because he was the son of the United States District Judge. But that question is not in this case. He was appointed as standing master in chancery, under equity rule 82, in 1886, by judges in whom was vested the power, and upon whom was imposed the duty of making the selection and appointment. He was appointed the master to make this sale in the decree by the court which had jurisdiction of the parties, and of the subject-matter, and full authority to appoint an officer for that purpose. No motion has ever been made to set aside or modify the order of 1886, by which Dundy was appointed a standing master, or the decree of 1895, by which he was empowered to make this sale. No appeal was ever taken from that decree, and the time for appeal has long since passed. The objection that Dundy was ineligible to this position was first made in a motion to set aside the appraisement on March 18, 1897, and was renewed in objections to the confirmation of the sale on April 21, 1897. It was presented in no other way and these were collateral, and not direct attacks upon the order of 1886, and the decree of 1895. The only question which they presented was whether the court which made that order and that decree had jurisdiction to hear and determine the questions whether or not Dundy was eligible to the position of standing master, and to the position of master to make this sale. The question is not debatable. The United States Circuit Court was the court, and the only court, which had original jurisdiction to hear and decide those questions. Its decision might have been reviewed by an appeal from it. Perhaps it might have been modified or set aside by that court on a direct motion for that purpose, but while it stood unchallenged by a direct attack it was conclusive. The question which the appellant now seeks to raise—the question whether this decision was erroneous—is not open in a collateral attack. Jurisdiction to hear and determine a question is not limited to the power to make correct decisions, and judgments and decisions of courts having jurisdiction are equally conclusive whether right or wrong, unless challenged by writ of error or appeal, or impeached by fraud." Citing Foltz v. Railway Co., 60 Fed. 316, 8 C. C. A. 635-637; Board v. Platt, 79 Fed. 567, 25 C. C. A. 87.

In the case at bar, the only manner in which the appointment of receiver could be attacked, or the sale or the manner in which it was made could be questioned, would be in the court in which the receiver was appointed, and the sale ordered made. In the case of Libby v. Rosekrans, 55 Barb. (N. Y.) 219, it was held that the validity of a judicial sale of the assets of an insolvent corporation, by a receiver, cannot be impeached in a collateral action. In Anderson v. Chicago Title & Trust Co. (Wis.) 77 N. W. 710, it was held where the jurisdiction of the court has attached in proceedings for the sale of property, the purchaser's title is unprejudiced as

against all persons who are made parties, by an error in the proceedings. In *Morrison v. Nellis*, 115 Pa. 41, 7 Atl. 708, it was held that a stockholder who has joined in an application for an order for a receiver to sell the assets of a corporation, is estopped from attacking the validity of the order directing the sale. In *Battershall v. Davis*, 31 Barb. (N. Y.) 323, the court says: "It is alleged by the defendants that the proceedings in the action of Christie against the company for a dissolution thereof, wherein the receiver was appointed, and was afterwards authorized to sell the assets, etc., of the company, were irregular and void, and that the title of the plaintiff to the bond and mortgage in question is therefore nugatory and worthless. Questions of irregularity are to be settled in the action wherein they were raised, unless questions of jurisdiction are involved." In a Nebraska case (*Schaberg's Estate v. McDonald*, 83 N. W. 737, 739, 60 Neb. 403) an action was brought by the receiver of a national bank against a stockholder of the bank for the collection of an assessment which had been ordered to be levied by the comptroller of the currency, and the stockholder attempted to attack the validity of the appointment of a receiver and the sale made by him, but the court held that a sale made by the receiver of the national bank under an order of a court of competent jurisdiction is a judicial sale, and the approval thereof by the court has the force and effect of a judgment, and such proceedings are not subject to collateral attack, and that if such sale be irregular and voidable only then it is to be treated as a valid sale, until by proceedings in the proper tribunal whence the sale emanated the irregularity is corrected. In the case of *Miller v. Brown* (Neb.) 95 N. W. 797, the court say: "It is objected that the appointment of plaintiff as a receiver is void, because no notice was given, but when a court of competent jurisdiction has appointed a receiver in an action where such appointment is authorized, the authority of such receiver is not open to collateral attack." And, in *Hatfield v. Cummings* (Ind. Sup.) 50 N. E. 817-819, the court say: "All objections to such appointment (of a receiver) after the affirmance of that judgment, in the nature of a collateral attack, come from whomsoever, or from whatever quarter they might, are collateral impeachments of the judgment of a court of competent jurisdiction. And such attacks, we have seen, cannot be successfully made, even though the court, in making such appointment, erred and misconstrued the law. In case no appeal had been taken, the effect of the judgment appointing the receiver is the same." In *Conklin v. Hall*, 2 Barb. Ch. (N. Y.) 136, one who had been defendant in a foreclosure proceeding, became purchaser of the property at the sale, and paid a deposit of 10 per cent. of the purchase price upon the property being bid off to him. He subsequently refused to pay the balance of the

purchase price, claiming that the appointment of the guardian ad litem, in the foreclosure action, had been irregularly made, and appealed from an order of the court directing that he pay the balance of such purchase price. It was there held that where a purchaser at a master's sale, under a decree, is himself a party to the suit in which the decree was entered, he cannot, in a collateral proceeding, raise a question as to the regularity of the decree; but if the decree is irregular, so that such purchaser will not get a good title to the premises purchased by him, his remedy is to apply to the court directly to set aside the decree on that ground. At page 136 of the decision, the court say: "Again, the purchaser in this case was himself a party to the suit, and cannot raise the question as to the regularity of the decree, in this collateral way; if the decree was irregular, so that the purchaser at a master's sale would not get a good title to the premises, the appellant might have applied to the court directly, either in behalf of himself, or of his infant children, to set aside the decree on that ground."

Now in the case at bar, no reason is given, or excuse offered so far as the record shows, why Threadgill did not, in the original suit, urge the objections to the validity of the appointment of the receiver, and to the validity of the sale, that he is attempting to raise in this collateral proceeding. Being a party to that suit, it was his duty, if any of the proceedings therein were objectionable, or irregular, to call the attention of the court by timely objections to such matters, and in the event of an adverse ruling, to have appealed from the decision of the court. He made no objections until after the purchase of the property by him, and having failed to do so, he will not now be heard in an action brought by the receiver to collect the amount of the bid, to collaterally raise this question. Upon the question of the right of the plaintiff in error to attack the validity of this sale, or the appointment of the receiver by collateral proceedings, the Supreme Court of the United States has, in unmistakable terms, passed upon the question in a number of cases. In the case of *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054, they state the following to be the rule: " \* \* \* We are of the opinion that, the jurisdiction over the subject-matter having attached, any informalities as to notices, advertisements, etc., in the subsequent proceedings of the court cannot oust that jurisdiction. They are, at most, errors which could be corrected on appeal, or avoided in a direct action of annulment, as expressly provided in the articles of the Code above cited, but cannot be made the grounds on which the decree of the court can be collaterally assailed. Our conclusion on this branch of the case is fully borne out by many decisions of this court, two of which are cited above. In *McNitt v. Turner*, 16 Wall. 368, 21 L. Ed. 341, Mr. Justice Swayne speaking

for the court said: 'Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached whatever errors may subsequently occur in its exercise, the proceedings being *coram iudice* can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error.' *Grignon's Lessee v. Astor*, 2 How. 319, 337, 340, 341, 11 L. Ed. 283, was, like this, a case of a sale by an administrator. The court, in its opinion, said: 'The whole merits of the controversy depend on one single question: Had the county court of Brown county jurisdiction of the subject on which they acted? \* \* \* Nor is it necessary that a full or perfect account should appear in the records of the contents of papers on file, or the judgment of the court on matters preliminary to a final order; it is enough that there be something of record which shows the subject-matter before the court, and their action upon it, that their judicial power arose, and was exercised by a definitive order, sentence, or decree. \* \* \* The granting of the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they exist or not is wholly immaterial, if no appeal is taken. The rule is the same whether the law gives an appeal or not. If none is given from the final decree, it is conclusive on all whom it concerns. \* \* \* The court having power to make the decree it can be impeached only by fraud in the party who obtains it. *U. S. v. Arredondo*, 6 Pet. 729, 8 L. Ed. 547. A purchaser under it is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the court which rendered it, have in the exercise of jurisdiction disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them power to hear and determine the case before them the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error.' And in support of this opinion, they cite *Thompson v. Tolmie*, 2 Pet. 157, 7 L. Ed. 381; *Mohr v. Manierre*, 101 U. S. 417, 25 L. Ed. 1052; *Comstock v. Crawford*, 3 Wall. 396, 18 L. Ed. 34; *Florentine v. Barton*, 2 Wall. 210, 17 L. Ed. 783; *Thaw v. Ritchie*, 136 U. S. 519, 10 Sup. Ct. 1037, 34 L. Ed. 531.

If the district court of Oklahoma county, in the action in which the receiver was appointed, had jurisdiction to appoint a receiver of a corporation, and as to that proposition there can be no question, then every subsequent act which might have been performed by that court, must stand until it is directly attacked in that proceeding, and the plaintiff in error in this case has no right to collaterally attack the proceedings in the receivership case, even though the court in that case might have in numerous instances disregarded, misconstrued, or disobeyed the plain provision of the law. The plaintiff in error seems fearful lest he be compelled to take a

doubtful or unmarketable title, and seems to imagine that any irregularity, either in the appointment of the receiver, or as to the manner in which the sale was conducted, would affect his title, but as we take it, this is not the law. A purchaser, under a deed from a receiver, is not bound to examine all the proceedings in the case in which the receiver is appointed. It is sufficient for him to see that there is a suit in equity, or was one, in which the court appointed a receiver of property, that such receiver was authorized by the court to sell the property, that a sale was made under such authority, that the sale was confirmed by the court, and that the deed given by the receiver accurately recites the property or interests thus sold. A purchaser at a judicial sale is not bound to inquire whether any errors intervened in the action of the court, or irregularities were committed by the receiver in the sale. *Koontz v. Northern Bank*, 16 Wall. 196, 21 L. Ed. 465; *Grignon's Lessee v. Astor*, 2 How. 319, 11 L. Ed. 283; *Voorhees v. Bank of U. S.*, 10 Pet. 449, 9 L. Ed. 490. Even though the case in which the receiver was appointed might be subsequently reversed on appeal, such reversal would not affect the sale if the court had jurisdiction to render the decree, and the fact that the plaintiff in the suit in which the receiver was appointed was himself the purchaser at the receiver's sale, would not alter the case. In the case of *Gossum v. Donaldson*, 18 B. Mon. (Ky.) 230, 68 Am. Dec. 723-725, 726, the court in passing upon the rights of a purchaser at a judicial sale, after a reversal of the case, say: "The ground upon which it is contended that the purchaser at the decretal sale acquired no title, is that the decree under which the sale was made was subsequently reversed by this court; and no other decree was rendered in the case, directing a sale of the land, but the only decree that was rendered merely confirmed the sale made under the previous decree, which act of the court, as argued, was entirely nugatory, and of no avail whatever. The reversal of the decree under which the sale was made did not, however, have the effect attributed to it. It did not vitiate the sale nor divest the purchaser of the title which he had acquired. The fact that the complainant himself was the purchaser, made no difference. It is the policy of the law to sustain judicial sales, and there is the same reason for protecting parties who are purchasers that there is for protecting strangers. *Benningfield v. Reed*, 8 B. Mon. (Ky.) 105. The general rule is, that a purchaser at a decretal sale, made by a court of competent jurisdiction, is valid, unless the decree be void, although it may be reversed. *Bustard v. Gates*, 4 Dana (Ky.) 438; *Lampton v. Usher's Heirs*, 7 B. Mon. (Ky.) 57; *Harrison v. Hord*, 12 B. Mon. (Ky.) 472." "It is well settled that a judicial sale of property of a judgment defendant, when

purchased by a stranger, vests in him absolutely the title of the judgment debtor, and this title is not divested by a subsequent reversal of the judgment. It is contended by appellant that the rule is different where the purchase is made by the judgment plaintiff, and that in such cases a reversal of the erroneous judgment will set aside the sale or render it void ipso facto. We are referred to the cases of *Baker v. Baker*, 87 Ky. 461, 9 S. W. 382, and *Spicer v. Seal* (Ky.) 50 S. W. 47, as sustaining this position. We are referred to other cases supporting the same doctrine, but examination shows that they were cases of void judgments, and sales rather than erroneous." *Blake v. Wolf*, 64 S. W. 910, 23 Ky. Law Rep. 1143.

There would be much force in the arguments of counsel for plaintiff in error in the concluding part of their brief, wherein they say: "The court could not render judgment on the pleadings for defendant in error and against plaintiff in error, for the sum of \$270.00, for employing a watchman to take care of this property, when it was denied under the general denial, and there was no evidence before the court to show that such a watchman had been employed, nor what his compensation was. Neither was there any order of court allowing the receiver to employ such watchman," but unfortunately for plaintiff in error, no such judgment was rendered by the court. The journal entry in the record, page 33, adjudges that the receiver of the Oklahoma Woolen Mills have and recover of the defendant, John Threadgill, the sum of \$12,227.00, being the amount of defendant's bid on said property, together with 7 per cent. interest thereon since the 16th day of July, 1904, the date of said bid. So by referring to the journal entry it will be seen that no such judgment for the fees or salary of a watchman as complained of by plaintiff in error, was rendered by the court.

We have carefully examined the record, and finding no error therein, the judgment of the district court is hereby affirmed, at the costs of plaintiff in error. All the Justices concurring, excepting HAINER, J., who having tried the case below, took no part in this decision.

## BES LINE CONST. CO. v. SCHMIDT.

(Supreme Court of Oklahoma. Feb. 14, 1906.)

### 1. CORPORATIONS — FOREIGN CORPORATIONS — SERVICE OF PROCESS.

Where a foreign corporation, other than a railroad or stage company, has complied with the provisions of article 23, c. 18, Wilson's Ann. St. 1903, and appointed an agent in this territory for service of process, with his office and principal place of business at an accessible point in the territory, service of process must be made upon such agent.

### 2. SAME — SERVICE ON AGENT.

Where a foreign corporation, other than a railroad or stage company, has complied with

the provisions of article 23, c. 18, Wilson's Ann. St. 1903, and has appointed an agent in this territory for service or process, with his office and principal place of business at an accessible point in the territory, service of summons in an action against such corporation is irregular when made upon any other person.

### 3. APPEARANCE — SPECIAL APPEARANCE — MOTION TO QUASH — WAIVER.

Where service of summons is irregular, and a motion to quash and vacate the same has been made, overruled, and exceptions saved, the point is not waived by the defendant afterward pleading to the merits of the case.

(Syllabus by the Court.)

Error from Probate Court, Comanche County; W. H. Hussey, Judge.

Action by William Schmidt against the Bes Line Construction Company. There was judgment for plaintiff, and defendant brings error. Reversed.

Dale & Blerer and Charles C. Black, for plaintiff in error. W. C. Stevens and Sims & Wolverton, for defendant in error.

PANCOAST, J. This was an action brought by the defendant in error against the plaintiff in error, in the probate court of Comanche county, for damages. The plaintiff in error, defendant below, is a foreign corporation, organized under the laws of the state of Missouri.

The first error assigned and argued in the brief of plaintiff in error arises upon a motion to quash the services of summons. Summons was issued on February 5, 1903, and served upon G. A. Lightner, who is designated in the return as a general ticket and freight agent at the town of Frederick, Okl. The evidence seems to be quite conclusive, however, that Lightner was not, at the time of the alleged service, the agent of the Bes Line Construction Company, but was the agent of the Blackwell, Enid & Southwestern Railway Company. The evidence shows that the plaintiff in error was a construction company, and constructed for the Blackwell, Enid & Southwestern Railway Company what is known as the Bes Line of railroad, which was completed and turned over to the railway company by the construction company some time in January, prior to the institution of this action. The evidence also discloses that Ed. L. Peckham had been appointed and designated by the plaintiff in error as its agent for service of process against said corporation, with his residence, office, and principal place of business at Blackwell, in Kay county, Okl. The defendant below made a special appearance, and moved to quash and vacate the service of summons, setting up that the Bes Line Construction Company was a foreign corporation, and that Peckham was its duly appointed and authorized agent for service of process, and that service of summons could only be made upon the agent Peckham, and that the service made upon G. A. Lightner, designated as the general ticket and freight agent of the railway company, was erroneous and void.

The defendant in error insists, first, that if there was error in overruling the motion, to quash and set aside such service, that the same was waived by appearance at the trial upon the merits, after the overruling of the motion; and, second, that the service was regular, legal, and valid. The contention of plaintiff in error is that service of process in actions against foreign corporations can only be made in the manner provided by article 23, c. 18, Wilson's Ann. St. 1903, when an agent has been appointed to receive service as provided in such article. The first section of this article (Section 1225) provides that no corporation created or organized under the laws of any other state or territory shall transact any business within this territory, or acquire, hold, or dispose of property, real, personal, or mixed within this territory, until such corporation shall have filed in the office of the Secretary of the Territory a duly authenticated copy of its charter or articles of incorporation, and shall have complied with the provisions of the article. The third section (Section 1227) provides: "Such corporation shall appoint an agent, who shall reside at some accessible point in this territory, in the county where the principal business of said corporation shall be carried on, or at some place in said territory, if such corporation has no principal place of business herein, duly authorized to accept service of process, and upon whom service of process may be made in any action in which said corporation may be a party; and that any such action may be brought in the county where such agent resides, or in any county in which the business, or any part of it, out of which said action arose, was transacted; and service upon such agent shall be taken and held as due service upon such corporation. A duly authenticated copy of the appointment or commission of such agent shall be filed and recorded in the office of the Secretary of the Territory, and register of deeds of the county where said agent resides, and a certified copy thereof by the secretary or register of deeds shall be conclusive evidence of the appointment and authority of such agent." This last section was passed February 20, 1901, and amended section 1169 of the Statutes of 1893. The defendant in error contends that the method provided for in said section is not exclusive, and that other provisions for service have been made by other sections of the statutes, viz., sections 4270, 4271, 4272, 4273, and 4274, Wilson's Ann. St. 1903. The first three sections referred to provide for service of summons when the action is against a railroad or stage company or corporation, and provide for the appointment and designation of some person to accept and receive service. The third section provides that where service of process cannot be made upon the person designated by such company or corporation personally, service may be made by leaving a copy at the residence. The last section, 4274, provides

that where the defendant is a foreign corporation, having a managing agent in this territory, the service may be made upon such agent. Section 4269 provides for the appointment of some designated person residing in each county in which the railroad or stage line may or does run, or in which its business is transacted. It is contended by the defendant in error that it was the duty, under the law, of the plaintiff in error to appoint and designate some person in each county upon whom service could be made, and that the company having failed to designate any person for Comanche county, service could be made in the manner in which it was made in this case.

It will be noticed that these provisions of law, with reference to service, are those provided for service against railway and stage companies or corporations, and do not include foreign corporations generally. The 1901 law provides specifically the manner in which service shall be made upon foreign corporations, and does not require that such foreign corporations shall appoint more than one agent, but provides that such appointment shall be an agent who shall reside at some accessible point in the territory, and in the county where the principal business of the corporation is carried on. Other states have similar laws, and in the case of *Oland v. Agricultural Insurance Co. (Md.)* 14 Atl. 669, it was held that this provision for service of process was one of the essential and important terms and conditions upon which such companies were allowed to do business there, and that good faith required that the persons so selected and appointed for the purpose should be served, and not the local agent, who would be likely to know little or nothing of the suit. In the case of *Balle v. Equitable Fire Ins. Co.*, 68 Mo. 617, it was held that a similar law providing for the appointment of an attorney for the foreign corporation, upon whom service of process could be made, had superseded the general law, providing for service upon corporations; and in the case of *Stone v. Travellers' Ins. Co.*, 78 Mo. 655, the law was again upheld, the court holding that the mode of suing a foreign insurance company, not domesticated there by reason of having its chief office or principal place of business in the state, as provided by such section of the insurance law, is exclusive of all other modes of service. From a careful investigation of these statutes, it would seem that the legislature by this last act intended to provide that some person should be designated upon whom the service of process could be made in actions against foreign corporations, and that service of process should be made upon such persons. The plaintiff in error in this case is not a railway or stage corporation. It is purely a construction company; and, while it was engaged in the business of constructing a railroad, that did not make it a railway corporation. The evidence abundantly shows that it

was not engaged in the business of a railway corporation, but that when the road was completed, it was turned over to the company for which it was being constructed, which thereafter operated it. The various authorities cited by counsel for defendant in error are not in point here, as they refer to service upon railway corporations, and the question presented in those cases is not the question presented here. We are of the opinion that this statute was not intended to be cumulative, but that it is the only provision for service of process upon foreign corporations, other than that upon railroads, stage lines, etc., mentioned in the general provisions of the statute for service of process. Having arrived at this conclusion, it necessarily follows that the service in this case must be held irregular, and that the motion to quash should have been sustained.

As to the contention that even if the service was erroneous, the question was waived by counsel appearing, filing an answer and going to trial, counsel are also in error. In *Jones v. Chicago Bldg. & Mfg. Co.*, 10 Okl. 628, 64 Pac. 7, it was held that: "Where a court has no jurisdiction over a particular cause or of the person of the defendant, and the defendant appears specially for the purpose of calling the attention of the court to such irregularities, and the court thereupon overruled his motion to such jurisdiction, he may save his exception, file his answer and proceed to trial without waiving such error, and he may take advantage of such error on appeal to the higher court." The same rule was laid down in the case of the *Chicago Bldg. & Mfg. Co., v. Pewthers*, 10 Okl. 724, 63 Pac. 964. This question being decisive of this case, it becomes unnecessary to consider other alleged errors. The court below should have sustained the motion to quash the service.

The judgment of the trial court is therefore reversed, and it is ordered that the case be remanded to the probate court of Comanche county, with direction to vacate the judgment, sustain the motion to quash, and set aside and vacate the service of summons. All the Justices concurring.

#### BES LINE CONST. CO. v. TAYLOR.

(Supreme Court of Oklahoma. Feb. 14, 1906.)

Error from Probate Court, Comanche County; W. H. Hussey, Judge.

Action by Herbert Taylor against the Bes Line Construction Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Dale & Bierer and Charles C. Black, for plaintiff in error. W. C. Stevens and Sims & Wolverton, for defendant in error.

PANCOAST, J. The questions involved in this case are identical with those in the case of the *Bes Line Construction Co. v.*

*William Schmidt* (No. 1557) 85 Pac. 711; and upon the authority of that case the judgment of the court below is reversed, and it is ordered that the case be remanded to the probate court of Comanche county, with direction to vacate the judgment, sustain the motion to quash, and set aside and vacate the service of summons. All the Justices concurring.

#### WILLOUGHBY v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Supreme Court of Oklahoma. Feb. 15, 1906.)

PRINCIPAL AND SURETY—BOND OF BANK PRESIDENT—CONSTRUCTION—ESTOPPEL.

In an action upon contract, the party seeking to recover cannot claim the benefits thereunder, and at the same time repudiate the burden. So in an action against a surety company to recover on the bond of a defaulting bank president, the bond must be construed as a whole, and the plaintiff's right to recover must depend upon such a construction; and where such bond is issued by the surety company and accepted by the bank, upon the faith of certain statements and representations in writing, made by the assistant cashier of the bank, relative to the conduct, duties, employment, and accounts of the defaulting bank president, and such statements so made by the said assistant cashier are, by the terms of said bond, made a part of the bond itself, the bond and statements together form the contract, and they must be construed together, and upon their joint construction, or upon their construction as a whole, must depend the rights and liabilities of the parties thereto; and where the bond is issued by the surety company and accepted by the bank upon the faith of the statements and representations so made by the assistant cashier, the receiver of the bank, later appointed, in an action on the bond, cannot be heard to repudiate or question the authority of the assistant cashier to bind the bank by his statements and representations concerning the conduct, duties, employment, and accounts of the defaulting bank president, and at the same time be allowed to recover on the bond procured on the strength of the statements and representations so made by the said assistant cashier.

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice J. L. Pancoast.

Action by J. A. Willoughby, receiver of the Capitol National Bank, against the Fidelity & Deposit Company of Maryland. Judgment for defendant, and plaintiff brings error. Affirmed.

Flynn & Ames, for plaintiff in error. Lawrence & Huston and Dale & Bierer, for defendant in error.

GILLETTE, J. In this case, the plaintiff, J. A. Willoughby, as receiver of the Capitol National Bank of Guthrie, sues the Fidelity & Deposit Company of Maryland upon the bond of the defendant company, guaranteeing the faithful discharge of the duties of Chas. E. Billingsley, as president of the Capitol National Bank. A copy of the bond with all its indorsements is attached to and made a part of the plaintiff's petition. The

bond provides, among other things: "Amount, \$10,000.00. Annual premium, \$40.00. Baltimore, Md. Whereas Chas. E. Billingsley, Guthrie, Ok., hereafter called the 'employee' has been appointed to the position of president, in the service of the Capitol National Bank, Guthrie, Oklahoma, hereafter called the 'employer' and whereas, the employer has delivered to the Fidelity Deposit Company of Md., a corporation of the state of Maryland, hereafter called the 'Company,' certain statements in writing relative to the employee, his conduct, duties, employment and accounts, the manner of conducting the business of the employer, and other things connected with the issuance of this bond, which, together with any other statements in writing, hereafter made by the employer to the company relating to any such matters, do and shall constitute the basis and form part of this contract, or any continuation thereof, and shall be warranted; and it is hereby agreed, that any such statement, made in writing by the president, cashier, or any officer or director of the employer, shall be considered the statements of the employer within the meaning hereof. Now, therefore, in consideration of the sum of \$40.00 paid as premium for the period from January 1, 1904, to January 1, 1905, at 12 o'clock noon, and upon the faith of said warranties of said employer as aforesaid, it is hereby agreed that, subject to the obligations imposed by this bond, on the employer the performance of which shall be condition precedent to the right on the part of the employer to recover under this bond, the company shall, at the expiration of three months next after proof of a pecuniary loss as hereinafter mentioned, has been given to the company, reimbursed the employer to the extent of the sum of \$10,000.00, and no further for such pecuniary loss of money, securities, or other personal property, as the employer shall have sustained by any dishonest act or acts committed by the employee in the performance of the duties of the office or position in the service of the employer hereinbefore referred to, or of such other office or position as employee may be subsequently appointed to or called upon to fill by the employer, as such duties have been or may hereafter be stated in writing by the employer to the company, and occurring during the continuance of this bond, and discovered at any time within six months after the expiration or cancellation of this bond, or in case of the death, resignation, or removal of the employee, prior to the expiration or cancellation of the bond, within six months after such death, resignation, or removal."

Then follows conditions of the bond that are not material in the consideration of this case. The defendant surety company answered admitting the giving of the bond, but denying liability, because, as it claimed,

the bond was procured by false and fraudulent representations made by the Capitol National Bank to the defendant surety company, concerning the said Chas. E. Billingsley, his conduct, duties, employment, and accounts. A copy of the letter of the defendant surety company, to the Capitol National Bank, asking for information, together with such of the questions, answers, and statements made by R. S. Briggs, the assistant cashier, as are necessary for the consideration of this case, are as follows:

"Baltimore, December 5th, 1903. To the Capitol National Bank, Guthrie, O. T.: An application has been made to this company to issue to you a Fidelity Bond for Mr. C. E. Billingsley, as president in your service at Guthrie, O. T., to the amount of \$——. Before passing on the said application the company must have answers to the following questions: Very respectfully yours, Edwin Warfield, President."

"5. (a) Is he now (C. E. Billingsley) or has been from any cause indebted to the bank or its officers? A. No. (b) If so, give particulars, stating amount, how incurred, and how payment is secured. Not answered. It is agreed that the above answers shall be warranties, and shall constitute the basis and form part of the bond, or any continuation or continuations of the same that may be issued by the Fidelity & Deposit Company of Maryland, to the undersigned upon the person above named, and it is agreed that the duties, powers and remunerations of the employee and obligations of the employer as stated in the above warranty shall remain unchanged during the currency of this bond or any continuation or continuations thereof. Dated at Guthrie this 22d day of December, 1903. Capitol National Bank, by R. S. Briggs, Asst Cashier, Official Capacity."

"This must be returned to the home office, Baltimore, Md., before bond will be issued."

The reply is an unverified general denial, and a special denial of the authority of R. S. Briggs, the assistant cashier, to bind the bank by his answers to said questions, and by the agreement he undertook to make on behalf of the bank. Upon the trial of the cause it was shown by the plaintiff, and by the proper cross-examination of plaintiff's witnesses, that notwithstanding the statements of the said R. S. Briggs, the assistant cashier, in answer to question 5a, that Mr. Billingsley was not indebted to the bank, he was at the time the statement was made indebted to the bank on his own note of \$5.150, and his own overdraft of \$35,693.24. The bond given by the defendant surety company and accepted by the bank expressly provided that the statements in writing relative to C. E. Billingsley, his conduct, duties, employment, and account, and other things connected with the issuance of the bond, should constitute the basis, and

form a part of the contract, and should be warranted; and that any statements made in writing by any officer of the bank should be considered the statements of the bank; and in consideration of the sum of \$40, and upon the faith of such warranties of the said bank the \$10,000 bond sued on herein was given by the surety company, and accepted by the bank. When the plaintiff rested, the defendant surety company demurred to the evidence upon the ground that the plaintiff had failed to prove facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. The demurrer to the evidence was sustained, and the case dismissed at the cost of the plaintiff, and he brings it to this court claiming that the trial court erred in sustaining the demurrer.

In this court the plaintiff contends that whatever his rights might have proved to be upon a full and final hearing, the demurrer to the evidence was not well taken, and should not have been sustained, based as it was on the pleadings and plaintiff's evidence alone. Let us examine for a moment the issues and status of the case when plaintiff rested, and the demurrer was interposed by the defendant, and sustained by the court. A copy of the bond sued on was attached to and made a part of the plaintiff's petition, and was admitted by the defendant in its answer, so it was fully before the court. The questions and answers thereto, as made by the cashier, and the statements attached to them, were attached to and made a part of the defendant's answer, and not being denied under oath under section 3986 of our statutes of 1893, were taken as true, and therefore were fully before the court. By the terms of the bond itself these questions and answers, and the statement attached thereto were made a part of the bond, and constituted the basis of the contract, and were stipulated to be warranties; and upon the faith of such warranties the bond was issued by the surety company, and accepted by the bank. The pleadings and evidence also disclosed that in December, 1903, application was made to the defendant surety company for this bond for C. E. Billingsley, as president of the Capitol National Bank; that the surety company by its letter of December 5th submitted certain questions to the bank to be answered by it; that on December 22, 1903, the questions were answered by R. S. Briggs, the assistant cashier of the bank, and he answered them falsely, knowing at the time that the answers were false; that on December 30, 1903, the defendant surety company issued its bond, and the bank accepted it, upon the express written condition contained in the body of the bond itself, that the statements, answers, and representations so made should constitute the basis, and form a part of the contract; and that the bond was issued by the surety company and accepted by the bank upon the faith of the said warranty

and representations; that during the years covered by the life of the bond the doors of the bank were closed, and it was placed in the hands of a receiver, and later the receiver brought this action to recover from the surety company on the bond in question, claiming that the said C. E. Billingsley, the bonded president, had defaulted in a sum far in excess of the amount of the bond. In this condition of the case we think the question was fairly presented upon the demurrer to the evidence as to whether or not a cause of action had been proved in favor of the plaintiff, and against the defendant. A careful examination of the record has convinced us that the plaintiff did not make out his case, and that the demurrer to the evidence was well taken and properly sustained. We shall base our conclusion upon but one of the grounds urged in the court below.

Fidelity and guaranty insurance is of comparatively modern origin, and has not had the consideration in the books that has been bestowed upon fire and life insurance. But while it is of but comparatively modern origin, it is nevertheless already a thoroughly established and legitimate line of insurance that has come to stay, and indeed is filling a most important part in the modern business world. From reason and analogy, however, it is plain that many of the principles underlying and governing fire and life insurance must apply to fidelity and guaranty insurance. It has long been the settled law in fire and life insurance that where statements and representations have been made by the insured as the basis for the insurances, and by the terms of the policy issued and accepted, said statements are made a part of the policy itself, any material false and fraudulent statement made by the insured will avoid the policy. The reason for this rule is sound. A person unsound in body or mind, who falsely and knowingly represents himself to be sound physically, in order to secure life insurance, and stipulates that his false representations shall be treated as warranties, and as part of the policy itself, should not be allowed to recover. The man seeking fire insurance who falsely and knowingly represents his property to be free from incumbrance when it is incumbered for more than its value, and such false representations are made a part of the policy of insurance, should not be allowed to recover for a loss by fire, for reasons too apparent to admit of consideration here. In the case of *Dwight et al. v. Germania Life Insurance Co.*, 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729, the court says: "Where the assured, in a policy of life insurance, warrants the truth of the answers made by him to questions in his application, compliance with such warranty is a condition of the validity of the contract of insurance, and it must be assumed that any substantial deviation from truth in such answers is material to the risk and renders the policy void."

Also see the following cases, and cases cited therein: *Price v. Phoenix Mutual Life Insurance Co.*, 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166; *Jeffries v. Economic Mutual Life Ins. Co.*, 22 Wall. 47, 22 L. Ed. 833.

We are not entirely without precedent in fidelity guaranty insurance cases. In the case of the *American Credit Indemnity Company v. Carrollton Furniture Manufacturing Co.*, 95 Fed. 111, 36 C. C. A. 671, this language is used: "When there is a definite agreement that the application for insurance is a part of the contract, and the statements in the application are expressly declared to be warranties, they are treated as such, and not merely as representations, and must be strictly construed, or the policy will not take effect." See, also, *Hunt v. Fidelity & Casualty Co.*, 99 Fed. 242, 39 C. C. A. 496, and authorities there cited. In the *Hunt* case, the court says: "The promissory statement, having been made part of the contract between the parties, by the terms both of the policy and the declarations, was, in effect, a warranty, which the assured was bound to fulfill in substance and according to its meaning. *Jeffries v. Insurance Company*, 22 Wall. 53, 22 L. Ed. 833; *Insurance Co. v. France*, 91 U. S. 513, 22 L. Ed. 401; *Brady v. Association*, 9 C. C. A. 252, 60 Fed. 727; *Mo. K. T. Trust Co. v. Herman National Bank*, 23 C. C. A. 65, 77 Fed. 117. It is quite immaterial that the statement is not called warranty. It is a stipulation embodied in the contract by the words of the policy for the performance of future acts, and, as such, is an express warranty." We are aware that many cases may be found in the books where doubts arise as to whether the warranties made by the assured were untrue as made, or were made in good faith, and doubts yet remain of their untruth. In such cases a disputed question of fact arises for the jury to determine. A few courts have gone so far as to hold that the fact that the warranties when made were false is not enough, but that it must be further shown that they were also known to be false by the assured; but the great weight of authority holds that proof of the material falsity of the warranties defeats the right of recovery.

In the case at bar, however, we are not called on to make any fine distinction. The representations of the assistant cashier, which were contracted to be warranties, were that C. E. Billingsley, the defaulting president, was not indebted to the bank in any sum. These warranties were outrageously untrue, and were known to be untrue by the assistant cashier when he made them, as shown by his evidence. At the time he represented that said Billingsley did not owe the bank, he, Billingsley, was indebted to the bank on his own note of \$5,151, and interest, and on his own overdraft in the sum of \$35,693.34. Slight or immaterial errors may be conceded not to avoid the liability of the surety company, but with such glaring misrepresenta-

tions as the above, the court need only to look to the face of the transaction to detect its bad faith, when in connection with the testimony of the assistant cashier, that he knew of the above indebtedness of C. E. Billingsley, when he represented to the surety company that said Billingsley was not indebted to the bank at all. But we are not confined; in the case at bar, to the authorities of life and fire insurance alone, as many cases have arisen and have been passed on, not only by the state courts, but by the Supreme Courts of the United States, two of which will be later considered in the discussion of the second question presented in this case. *The Guarantee Company v. Mechanics, etc., Co.*, 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253; *Fidelity Deposit Company v. Courtney*, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193.

This leads us to the second point necessary to our consideration. It is claimed by the plaintiff in error that even though it be true that willful, false statements made by one seeking fidelity insurance, which are made the basis of and form part of the bond itself, may defeat the plaintiff's rights to recover, yet such a proposition can have no application to the case at bar, and cannot affect the rights of the plaintiff in this action, for the reason that the said Briggs, the assistant cashier, had no authority to make said statements, or to bind the bank in any way, and that, as he was only the assistant cashier, no presumption arises that he acted with authority, and his authority to act was not shown in the trial of the case. This bond was issued by the defendant surety company, and accepted by the bank upon the faith of the correctness of the statements, and said statements were made warranties and became a part of the bond itself, and so became and were a part of the contract sued on by the plaintiff. It is the well-settled law that a party seeking to recover upon a contract cannot claim the benefits arising therefrom, and at the same time repudiate its burdens. To allow the receiver of the bank, while suing on the contract, to question the authority of the assistant cashier to make the statements and misrepresentations which are a part of the contract sued on, would be to allow him to accept its benefits and reject its burdens. To secure the bond on which its receiver sues, the bank, by its assistant cashier, made the representations which form a part of the bond itself, and it does not lie in the mouth of the receiver, while suing on the bond, to repudiate the statements and warranties made by the assistant cashier upon which the bond was secured. The Supreme Court of the United States has said: "The information solicited was such as was proper to be asked of and communicated by the bank, and as the renewal was presumably made upon the faith of the statements contained in the certificate, the bank ought not to be heard, while seeking to obtain the benefits of the stipulation agreed

to be performed by the surety, to deny the authority of its officers to make the representations which induced the surety to again bind itself to be answerable for the faithful performance by McKnight of the duties of his employment." *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193; *Railway Companies v. Keokuk Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157.

The plaintiff in error lays great stress upon the case of the *American Surety Co. v. Pauly*, 170 U. S. 134, 18 Sup. Ct. 552, 42 L. Ed. 977. That was a case wherein Geo. N. O'Brien, as cashier of the California National Bank sought and secured an indemnity bond from the surety company in the sum of \$15,000. In his negotiations for this bond he transmitted to the surety company a strong letter of recommendation from one J. W. Collins, the president of said bank. Collins also secured from said surety company a \$25,000 bond for himself. During the life of these bonds O'Brien and Collins, acting together, wrecked the bank, and its doors were closed. The surety company refused payment, and suit was brought against it. It was contended that the president of the bank had made false representations concerning O'Brien, his conduct, his character, accounts, and integrity, in order to enable O'Brien to secure the bond, and that the receiver of the bank should not be allowed to recover on the bond secured by the fraud of the president; but the court held the surety company liable, and upon the authority in that case the plaintiff in error maintains that the surety company in this case should also be held liable. In that case the court said: "None of the cases cited embrace the present one. In the first place the procuring of a bond for O'Brien in order that he might become qualified to act as cashier, was no part of the business of the bank, nor within the scope of any duty imposed upon Collins as president of the bank. It was the business of O'Brien to obtain and present an acceptable bond. And it was for the bank by its constituted authorities to accept or reject the bond so presented. The bank did not authorize Collins to give nor was it aware he gave, nor was he entitled by virtue of his office as president to sign any certificate as to the efficiency, fidelity, or integrity of O'Brien. No relationship existed between the bank and the surety company until O'Brien presented to the former the bond in suit. What, therefore, Collins assumed in his capacity as president to certify as to O'Brien's fidelity and integrity, was not within the course of the business of the bank nor within any authority he possessed. He could not create such authority by assuming to have it."

It will be noted that the court here decides that the recommendation of the president of the bank was not authorized by the bank itself, and that being outside of the

scope of the duties and authority of the president, the recommendation is held not to be that of the bank, and hence not binding upon the bank. But it will also be noted that the court says that no relationship existed between the bank and the surety company until O'Brien presented to the bank the bond in suit. Under such circumstances we think the conclusion of the court entirely in accord with the great weight of authorities, and were the facts in the case at bar in accord with those in the *Pauley Case*, we would regard it as a case in point and controlling. But in the case now under consideration it is not true that no relations existed between the bank and the surety company until C. E. Billingsley presented his bond to the bank. On the other hand application having been made to the surety company for a bond, the surety company, on December 5, 1903, wrote to the bank the letter of inquiry which we have hereinbefore set forth. The letter of inquiry, it will be noted, was addressed to the bank and not to R. S. Briggs, the assistant cashier. The assistant cashier, on December 22, 1903, answered the questions and falsely stated that C. E. Billingsley was not indebted to the bank in any sum. He also signed the agreement following the questions, and a part of the same document, agreeing that the answers to the questions should be warranties and constitute the basis, and form a part of the bond to be issued by the surety company. All this occurred prior to the issuance of the bond, while in the *Pauley Case* no letter of inquiry was addressed to the bank, and it was not agreed that the statements of the president upon which the bond was obtained should constitute warranties and be the basis for the bond. In short, no relations existed between the bank and the surety company until O'Brien presented his bond to the bank. When the bond of C. E. Billingsley, in the case at bar, was later issued on the 30th day of December, 1903, it expressly provided that in consideration of the sum of \$40, and upon the faith of the warranties of the said bank (referring to the warranty signed by R. S. Briggs, cashier) the bond was issued. Not only, then, was the bond issued on the faith of the correctness of the answers and statements of the assistant cashier, but it was also accepted by the bank upon the faith of the correctness of said statements. We think that these facts take this case entirely outside of the rule laid down in the *Pauley Case*.

Nor are we alone in this conclusion, for the question has been twice before the Supreme Court of the United States in more recent cases than the *Pauley Case*, and in these subsequent cases that case has been distinguished to such an extent that it cannot, as we have heretofore said, fairly be regarded as a case applying here. In the case of the *Guarantee Co. v. Mechanics, etc., Co.*, 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed.

253, Chief Justice Fuller uses this language: "It also results that there can be no recovery at all on the cashier's bond. If the bank had observed the stipulation in the teller's bond, to which we have referred, it is obvious there would have been no cashier's bond, and the question would not have arisen. But this it did not do, and the bond was given. The bond provided that the company covenanted with the bank in reliance on the statement and declaration of the president on behalf of the bank, and on the bank's strict observance of the contract; that any misstatement of a material fact in the declaration should invalidate the bond, etc.; that any written answers or statements made by or on behalf of said employer in regard to or in connection with the conduct, duties, accounts, or methods of supervision of the said employé delivered to the company either prior to the issue of this bond, or to any renewal thereof, or at any time during its currency, should be held to be warranties thereof, and form a basis of this guaranty, or of its continuance. The statements were required to be and were made on behalf of the bank, and the president acted for the bank in doing so; and the bonds were procured by the bank, and the bank paid the premium. There can be no doubt that the bank was responsible for the representations of its cashier in the one instance, and its president in the other, in procuring these contracts of indemnity. The representations made in the declaration on which the cashier's bond was issued were clearly misrepresentations. In Pauley's Case, the president and cashier were confederates in the dishonesty of the cashier, for the purpose of defrauding the bank; and also it was held no part of the duties of the president, under the circumstances there disclosed, to certify the integrity of the cashier, as he did."

In the still later case of *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193, Justice White says: "In *Guaranty Co. v. Mechanics, etc., Co.*, 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253, this court recognize as binding upon the bank a certificate given by one of its officers, embodying replies to questions asked by the guaranty company respecting one of the employes of the bank, although no proof was introduced that special authority had been conferred upon the officer to make the certificate. Nor does the ruling in *American Surety Company v. Pauley*, 170 U. S. 156, 18 Sup. Ct. 552, 42 L. Ed. 977, warrant the claim that it is an authority against the admissibility of the certificate here in question. In the bond considered in the *Pauley* Case it was not agreed that the statements of the president upon which the bond was obtained, should be the basis of the bond. The answers made by the person who was president of the bank to the interrogatories of the surety company were but mere commendation by one individual of another in-

dividual, at a time when, as said by the court, 'no relation existed between the bank and the surety company.' Again, in the *Pauley* Case, no letter of inquiry was addressed to the bank, unlike the practice pursued with respect to the renewal here in controversy, and the letter, whose contents in the *Pauley* Case was claimed to be binding on the bank, was written by one who was not charged with the duties of conducting the correspondence of the bank." Entertaining the views that we do, we think that the plaintiff clearly failed to establish facts sufficient to entitle him to recover, and that the demurrer to the evidence was well taken, and properly sustained. The conclusions here reached make it unnecessary to pass upon other questions presented in briefs of counsel.

The judgment of the court below will be affirmed. All the Justices concurring, except *PANCOAST, J.*, who sat in the trial of cause in the court below, and *BURFORD, C. J.*, who declined to take any part in said cause, for the reason that he is a creditor of said insolvent bank.

#### MORGAN v. TERRITORY.

(Supreme Court of Oklahoma. Feb. 15, 1906.)

##### 1. INDICTMENT—CERTAINTY.

An indictment which charges a design on the part of the accused to affect the death of a "certain person whose name is to the grand jurors unknown," and the subsequent allegations of which refer to "said person," is sufficiently certain and specific in its description of the deceased.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 273.]

##### 2. SAME—INSTRUCTIONS—MANSLAUGHTER.

Where a defendant is charged with murder, and is convicted of manslaughter in the first degree, and there are instructions given properly defining and covering the law of murder and manslaughter, an instruction that if the jury "find from the evidence, beyond a reasonable doubt, that the defendant cut and stabbed the deceased with a knife, and killed him, and that he did so cut and stab, with a premeditated design to affect the death of the deceased," they should then "find the defendant guilty of murder," is not erroneous as excluding the theory of manslaughter in the first degree.

##### 3. SAME—EVIDENCE—ADMISSIBILITY.

Upon a trial for murder, where it appears that the injuries were inflicted by a certain kind of instrument or weapon, evidence that the defendant had such weapon in his possession before the killing is admissible.

##### 4. SAME—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

On a trial of an indictment for murder, where an instruction is given upon the subject of murder, and the verdict of the jury is for manslaughter in the first degree, the instruction cannot prejudice the defendant, and even though erroneous is not such error as will cause a reversal of the case.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 720.]

##### 5. SAME—ACCOMPLICE—CORROBORATION—INSTRUCTION.

Where the evidence in a criminal case, on behalf of the territory, sufficiently corroborates the evidence of an accomplice, and plain-

ly shows the connection of the defendant with the commission of the crime, and where the defendant, when testifying in his own behalf, admits striking the blow with the weapon that caused the death of the deceased, the giving of an instruction defining the rule of corroborating evidence, which is not technically correct, but which is not misleading, does not constitute error.

**6. SAME—INSTRUCTIONS REQUESTED—REFUSAL. NO ERROR.**

Where the trial court in its general instructions, sufficiently covers the propositions of law upon which the jury should be instructed, it is not error to refuse the instructions requested by the defendant, even though they correctly state the law upon the subject included therein.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

(Syllabus by the Court.)

Error from District Court, Grant County; before Justice James K. Beauchamp.

James F. Morgan was convicted of murder, and brings error. Affirmed.

A. M. Mackey and W. S. Denton, for plaintiff in error. F. G. Walling, Co. Atty., for defendant in error.

PANCOAST, J. The plaintiff in error, James F. Morgan, was tried in the district court of Grant county for murder at the March term, 1904, of said court, and was convicted of manslaughter in the first degree, and sentenced to imprisonment in the territorial prison for a period of 15 years, from which judgment of conviction he appeals, assigning numerous errors alleged to have been committed in the trial of said cause.

The first assignment is that the indictment is not sufficiently definite and certain. It seems that the name of the person killed was not known by the grand jurors, and they therefore referred to him as a person whose name was unknown to them. The first reference in the indictment to the deceased is "of a certain man whose name is to the grand jurors unknown," and a similar reference and statement is made in each instance, in which the name of the deceased person is generally used, except in certain instances, in which reference is made to the deceased as "said person." We cannot see but what this language is sufficiently definite and certain. There can be no question as to who is meant by the use of the words "said person," following the first statement that the name of the person killed was unknown to the grand jurors. In fact, we cannot well see how any other language could have been used that would make the language of the indictment more definite and certain in that regard.

The next assignment of error argued in the brief arises out of the fact of the admission of certain evidence that was allowed to be introduced and then taken from the jury. At the trial the court allowed one witness to be interrogated as to his knowledge of the

defendant having carried a knife, and as to its description, and at the time in which he knew of the defendant having owned such a knife; the time being recently before the homicide. After this evidence was allowed to go to the jury it was then by direct instruction from the court withdrawn from their consideration. It is claimed by the plaintiff in error that this evidence was incompetent and prejudicial, and after having been admitted and allowed to go to the jury that the injury could not be cured by the court withdrawing it from the consideration of the jury. First, we are not willing to concede that this testimony was incompetent. In fact, we think it was competent. The evidence shows that the homicide was committed by the use of some sharp instrument, such as a knife, the wound being a stab reaching from the front part of the breast, in to the heart, and there was no dispute but what the wound must have been inflicted by a knife of the size of a good-sized pocketknife. The authorities are numerous to the effect that it is competent and relevant in such cases to show that the accused owned or had weapons in his possession, prior to or shortly after the commission of the crime, and there seems to be no exception to this rule. 12 Cyc. 390, and numerous authorities cited; State v. Rainbarger (Iowa) 37 N. W. 153. But, even if such testimony was not competent, can it be said that by the introduction of incompetent or irrelevant testimony in a criminal case, which is afterwards excluded and taken from the jury by the court, the court has committed such prejudicial error as will warrant a new trial or reversal by an appellate court? Certainly not, unless it was of such a character as would prejudice the defendant. If such be the case, then any error of the court in the trial of a case cannot be corrected; and, as soon as the court has discovered that it has allowed incompetent or irrelevant testimony to be introduced, it would be useless to proceed further with the trial; because, if prejudicial error has been committed, the court might as well at once stop the trial and proceed anew. For the general rule that error in the introduction of incompetent testimony, which is afterwards excluded by the trial court, is not such prejudicial error as will entitle the defendant to a new trial, see 12 Cyc. 565, and cases cited; State v. Barker, 43 Kan. 262, 23 Pac. 575; State v. Furbeck, 29 Kan. 535.

The next assignment of error argued goes to the eleventh instruction of the court, which defines murder. No matter whether this instruction was correct or erroneous, it did not prejudice the rights of the defendant with the jury, because the verdict was for manslaughter in the first degree. If the verdict in this case had been murder, this assignment would have been of sufficient importance to require investigation by us, but, as

the verdict was for manslaughter, the instructions defining murder are not material, and in no way affected the defendant to his prejudice.

The next assignment goes to an instruction given by the court to guide the jury in the consideration of certain testimony of an accomplice. The court as a part of this instruction stated: "It is not necessary, however, that corroborative evidence should go so far as to establish by itself, and without the aid of the testimony of the accomplice, the fact of the commission of the offense by the defendant. If the corroborating evidence tends in some degree to implicate and connect the defendant with any of the material facts which constitute a necessary element in the crime with which he is charged, it is sufficient." It may be conceded for the purposes here that this part of the instruction was not technically correct, and that it would have been better if the court had said: "If the corroborating evidence tends in some degree to connect the defendant with the commission of the crime, it is sufficient"—instead of having stated: "With any of the material facts which constitute a necessary element in the crime, it is sufficient." The evidence of the territory in this case shows that the corroborating evidence was ample, and plainly shows the connection of the defendant with the commission of the crime. Not only this, but the defendant when on the stand admitted striking the blow with the weapon which caused the death of the deceased, so that there could be no such condition arise as where the jury could, under any circumstances, have erroneously considered the evidence of the accomplice. It is in cases where the jury may, in considering the evidence, exclude or disbelieve certain portions of it, and in so doing, the remainder being insufficient to connect the defendant with the commission of the crime, render it necessary for the court to guide them by its instructions upon the rules governing the testimony of an accomplice, or when it may and when it may not be considered by them. If, then, in the case under consideration, there can be no condition arise in which the jury would be warranted in refusing to consider the evidence of the accomplice because of the corroborating evidence being insufficient to connect the defendant with the commission of the crime, the instruction with reference to the evidence of the accomplice would become almost, if not wholly, immaterial, and, even if erroneous, could not prejudice the rights of the defendant. In this case there was no contradiction whatever of any of the territory's witnesses, except by the defendant himself, who, when upon the witness stand, admitted, in substance, everything that had been testified to concerning his connection with the transaction, except that he claimed he struck the blow in self-defense, having after getting into the altercation and being struck at by the deceased with a neckyoke, and believing him-

self to be in imminent danger of great bodily harm, opened his knife and stabbed the deceased.

The next assignment is as to instruction No. 33, defining the law of self-defense. We think this instruction correctly states the law, and counsel do not favor us with any reason why it does not, further than it is said: "It is insisted that this instruction is erroneous and prejudicial to the plaintiff in error." Again, it is claimed that instruction 34, in which the court speaks of the danger or apparent danger which would justify the defendant in killing the deceased in self-defense, is erroneous, but it is not pointed out in what respect this instruction is not good, except that it is claimed the court should have given the defendant's instruction No. 5, which was offered upon this subject. This instruction was only a part of what the court said upon this subject, and, when taken in connection with Nos. 30 and 31, it correctly states the law, and, the subject being fully covered by the court, the instruction No. 5, offered by the defendant, was properly refused.

The defendant at the trial submitted to the court a number of special instructions, from one to eight, inclusive. The court refused to give each and all of them, and upon this refusal error is assigned. Most of these instructions correctly state the law, and had not the court covered the subject by its own general instructions it might have been error to refuse some one or more of them; but in each instance the court covered the ground. The defendant's instruction No. 1 was covered by the court's instruction No. 1. The defendant's instruction No. 3 was covered by the court's instructions Nos. 25 and 29, which are almost in the identical words of those requested by the defendant. Defendant's instruction No. 4 is not a correct statement of the law, and the substance was correctly embodied in the court's instruction No. 24. No. 5, requested by the defendant, was covered by the court's instructions 30, 31, 32, 33, and 34, and the ground was much more fully covered. The defendant's instruction No. 6 was covered by the court's instruction No. 2, No. 7 likewise by the court's instruction No. 39. Defendant's instruction No. 8 was upon an immaterial subject, upon which there was no dispute, and a proposition well understood by all persons of ordinary intelligence.

This concludes all errors assigned that are argued in the brief. We might, by way of general observation, state that after a careful reading of the entire record in this case we are led to the inevitable conclusion that the defendant was more justly dealt with than he was entitled to be; that in this case, as in many others, the jury hesitated, and, hesitating, declined to render a verdict that would inflict the full measure of punishment that should have been inflicted for the crime committed. We surmise that this was brought about because of the low moral standing of the deceased. At least, we can attribute it to no

other cause. The evidence on the part of the territory presented a strong case of murder to the jury. The defendant offered nothing in his own behalf except what fell from his own lips, and even taking that by itself, we cannot see how it could be construed into a case of justifiable homicide. Having carefully examined the entire record, and having read the entire argument submitted by counsel, and being unable to detect any error in the record, and believing that the verdict was one warranted by the evidence, we decline to disturb it.

The judgment of the court below is therefore affirmed, and is ordered carried into execution. All the Justices concurring, except BEAUCHAMP, J., who tried the case below, not sitting.

#### SAMANIEGO v. TERRITORY.

(Supreme Court of Arizona. March 30, 1906.)  
HOMICIDE — SECOND DEGREE — MURDER — EVIDENCE.

In a prosecution for homicide, evidence held sufficient to sustain a conviction of murder in the second degree.

Appeal from District Court, Yuma County; before Justice Edward Kent.

Ygnacio Samaniego was convicted of murder in the second degree, and he appeals. Affirmed.

Wupperman & Wupperman, for appellant.  
E. S. Clark, Atty. Gen., for the Territory.

DOAN, J. The appellant was tried before a jury in the district court of Yuma county on December 7 and 8, 1904, on the charge of murder, and was found guilty of murder in the second degree, and on December 10th sentenced to a term of imprisonment. He has appealed from the judgment of conviction on the ground that the verdict of the jury was contrary to the law and the evidence.

The only part of the record in this case that is presented to us is the copy of the notice of appeal, motion for a new trial, the transcript of the reporter's notes of the oral testimony and the charge of the court. The appellant has not presented any assignment of errors, or bill of exceptions. From the testimony of the defendant we learn that on the morning of the homicide the defendant and the deceased left a ranch in the northern part of Yuma county, where they were camping, and went out into the hills; that neither of them was armed. The defendant testified that on the morning in question the deceased invited him to take a walk with him saying that he wanted to talk with him; that after they had gone about a mile a difficulty arose between them; that the deceased threw five rocks at him, but did not hit him with any of them; that he threw two rocks at the deceased, and with the third rock struck him on the side of the head, in-

flicting a wound that caused his instant death, after which he covered the body over with rocks and brush and went back to camp; that he there told the wife of the deceased that he had killed her husband and buried him; that he likewise told a couple of other persons, and later in the day went with them to the place where the body lay, and helped remove the rocks and brush therefrom. The wife of the deceased testified that before she and her husband had arisen in the morning the defendant came to them and called the deceased and asked him to get up and go into the hills to see a placer prospect; that on the invitation of the defendant deceased arose, and the two men, after drinking a cup of coffee, went off together to the hills; that on the return of the defendant alone she asked for her husband, and was told by the defendant that he had gone to Harqua Hala, an adjacent mining camp, to meet a friend. Later in the day, when she again asked the defendant, he told her not to get scared, that he had killed her husband and buried him. She at once repeated this statement to other persons, after which the defendant was arrested, and the body of the deceased was found and identified. The testimony of the two persons who went with the defendant to the scene of the homicide and brought in the body is to the effect that there were several wounds upon the head and face, one witness stating that there were as many as a dozen; that the entire side of the skull was crushed in on one side of the head. The case was submitted on this evidence to the jury under proper instructions from the court regarding the right of self-defense. The jury, after having heard the testimony, and having observed the appearance of the witnesses and their demeanor upon the stand, returned their verdict finding the defendant guilty of murder in the second degree.

The only ground for reversal urged in this case is that the verdict was against the evidence, whereas the record shows ample evidence to sustain the verdict. A further examination of all of the record that has been presented to us discloses no error in the proceedings in the lower court.

The judgment is therefore affirmed.

SLOAN, CAMPBELL, and NAVE, JJ., concur.

#### MATKO et al. v. DALEY.

(Supreme Court of Arizona. March 30, 1906.)

##### 1. EVIDENCE—RECORDS—HEARSAY.

Where, in a suit to quiet title to a mining claim, defendant claimed the same location as a forfeited location by reason of plaintiffs not having performed the annual assessment work thereon for the year 1902, and plaintiffs' witnesses, who participated in the making of plaintiffs' annual expenditure on the claim for that year, testified that two men, B. and S., helped them do the work on the location in December,

1902, but neither B. nor S. were produced by either party, nor their absence accounted for, certain time records kept by a mining company, alleged to have been signed by B. and S., were hearsay and inadmissible to show that they were working for such company in December, 1902, and could not, therefore, have then performed work on the claim in controversy.

## 2. SAME—IDENTIFICATION.

Where the only evidence that certain time records of a corporation were signed by B. and S. was the evidence of the paymaster of the corporation, who testified that the records were those of the company, that it was the custom of the company to insist on the men signing the pay rolls before paying them, but that witness was not present when the records in question were signed, and could not testify that the signatures in question were those of B. and S., except that they purported to be their signatures, such evidence was insufficient to prove the signatures.

## 3. MINES AND MINERALS—RELOCATION NOTICE—FORFEITED CLAIMS.

A location notice of mining property as forfeited or abandoned property, failing to state that the claim is relocated as forfeited or abandoned property, is fatally defective.

Appeal from District Court, Cochise County; before Justice Fletcher M. Doan.

Action by Nick Matko and others against August Daley. From a judgment in favor of defendant on a cross-complaint, plaintiffs appeal. Reversed.

John McGowan (Webster Street, of counsel), for appellants. Flannigan, Sames & Flannigan, for appellee.

KENT, C. J. The appellants, who were the plaintiffs in the district court, brought this action to quiet title to a mining claim in the Warren mining district, called the "Bangor Mine." The defendant claimed the same mining location by virtue of a subsequent location thereof upon the assertion that the claim, as located by the plaintiffs, had become forfeited by reason of plaintiffs not having performed the annual assessment work thereon for the year 1902; there being no resumption of labor on said claim prior to the date of their location of the claim on the 1st day of May, 1903. The issue before the court was whether the annual assessment work for 1902 had been done prior to May 1, 1903. The defendant introduced several witnesses to show that the annual expenditure had not been done, and the plaintiffs introduced evidence in rebuttal to show that the annual expenditure on said claim had been done by the owners thereof in November and December, 1902, and in January, 1903, and that full and sufficient annual expenditure had been made thereon before the 1st of May, 1903. As a part of the evidence of the plaintiffs, the witnesses Turner and Matko, who participated in the making of such annual expenditure and the doing of such work, testified that two men, Chris Brain and Dan Seffer, also helped them do work upon said mine in December, 1902. Thereupon the defendant offered in evidence certain entries from the records of the Copper Queen Mining

Company, tending to show that said Chris Brain and Dan Seffer. In December, 1902, were working for the Copper Queen Company, and could not, therefore, have performed the work on the claim. The evidence was admitted over the objection of the plaintiffs, and the correctness of the ruling of the trial court in that respect is the principal question presented for our consideration upon this appeal.

It is apparent that, if this evidence was improperly admitted it was prejudicial to the plaintiffs. The plaintiffs, in attempting to prove the amount of the assessment work done by them and the time of such performance, had put on the stand two witnesses, who testified that Brain and Seffer did a certain amount of such work in December. Brain and Seffer were not present at the trial, and their evidence was not given. Their absence was not accounted for. The defendant, however, to offset this testimony as to the whereabouts of Brain and Seffer at the time in question, introduced in evidence certain entries from the records of the Copper Queen Mining Company, to wit, the receipts on the pay rolls of the company for the month of December, purporting to be signed by the men, Brain and Seffer, in December, showing that they had worked for that company 26 and 13 days in that month, respectively. No other evidence to show that the men were working for the Copper Queen Mining Company was introduced. The jury might well assume, however, that if the pay rolls were correct, the work on the mine could not have been done by these men as testified to by the plaintiffs' witnesses, and the evidence of the pay rolls doubtless had weight in influencing the jury in finding their verdict.

We think the evidence was improperly admitted. The paymaster of the Copper Queen Company testified, in substance, that the records were the records of the company; that it was the custom of the company for the men to sign the pay rolls before they could get their money, and that it was necessary for them to do so; that these pay rolls were the pay rolls for December; that they were signed by men who had worked for that month; that he was not present when they were signed; that he could not testify that the signatures were the signatures of Brain or Seffer, only that the signatures purported to be their signatures; that the writing in the body of the pay rolls was in the handwriting of the former paymaster of the company; that precautions were always taken by the company to see that the person who signed the pay roll was the person to whom the money was due. We do not think that sufficient proof that the signatures were in fact the signatures of these men was offered to warrant the receipt of these documents in evidence. Furthermore, the evidence at best was but hearsay and inadmissible. No testi-

mony other than the pay roll containing the signatures was offered to show that the men were in fact employed by the company in December. Brain and Seffer had not given their testimony, and the evidence could not be introduced to contradict or impeach statements made by them, for they had made none. It was sought by the introduction of receipts signed by Brain and Seffer, and contained in the private books of a third person, to contradict the testimony of Turner and Matko that Brain and Seffer were working on the mine at that time. The evidence was inadmissible for such purpose. An affidavit of Brain that he had worked for the company during the time in question could not have been received, nor could the paymaster or other person have testified that Brain had stated to him that he had so worked for the company. A receipt by Brain was of no greater force than testimony of a statement made by him. It was clearly hearsay evidence, not within any of the exceptions to the rule excluding such evidence, and was improperly admitted.

Although the point does not seem to have been raised by counsel in the court below, or in this court, in view of the fact that the case must go back for a new trial, we deem it proper to point out that under the allegations in the defendant's cross-complaint with respect to the relocation by the defendant of the claim as a forfeited claim, the location notice of the defendant would seem to be void, in failing to state that the claim was located as forfeited or abandoned property, as required by the statute, and would seem to afford the defendant no ground for the relief claimed. *Cunningham v. Pirrung* (Ariz.) 80 Pac. 320.

The judgment of the district court is reversed, and the case remanded for a new trial.

SLOAN, CAMPBELL, and NAVE, JJ., concur.

#### DESSART et al. v. BONYNGE.

(Supreme Court of Arizona. March 30, 1906.)

##### 1. PLEADING—DEMURRER—WAIVER.

Where the parties go to trial upon the merits without calling the court's attention to a demurrer to the complaint, the demurrer is waived.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 524.]

##### 2. REFORMATION OF INSTRUMENTS—GROUNDS—NECESSITY OF SHOWING INTEREST.

A trustee in a trust deed cannot maintain an action to reform it so as to include other lands, without showing that the debt secured has not been paid.

Appeal from District Court, Santa Cruz County; before Justice Fletcher M. Doan.

Action by W. A. Bonyng against John Dessart and others. From a judgment for plaintiff, defendants appeal. Reversed.

Selim M. Franklin, for appellants. Ben Goodrich, for appellee.

CAMPBELL, J. This action was brought to reform a deed of trust executed by John Dessart and Alice Dessart, his wife, to W. A. Bonyng. Defendant Marsh is an attaching creditor of the Dessarts. From a decree reforming the instrument, as sought, the defendants appeal.

The complaint alleges that, by mistake of the scrivener employed to draft the instrument, a certain piece of real estate, the homestead of the Dessarts, was omitted, and that Marsh had notice of this omission at the time he caused the property to be attached. A demurrer was interposed to the complaint, but an examination of the record discloses that no ruling was had thereon, and that the parties proceeded to a trial of the cause upon the merits, without calling the attention of the court to the demurrer. Under such circumstances the demurrer is waived, and therefore some of the questions raised in appellant's brief need not be noticed, as it is too late to raise them for the first time on appeal. Several other questions, however, are properly raised by the assignment of errors, among them whether the complaint wholly fails to state a cause of action, and whether the court erred in denying a motion for a new trial, based upon the ground that the evidence does not sustain the judgment.

It appears from the complaint and from the trust deed in evidence that the instrument was executed for the purpose of securing the payment of a note given by John Dessart and one L. F. Swain, held by the Commercial National Bank, of Los Angeles, Cal., the beneficiary under the deed of trust. There is no allegation in the complaint that this note, though past due at the time the action was brought, had not been paid. Furthermore, there is no testimony in the record showing that the indebtedness secured by the deed of trust had not been satisfied, nor is there any finding of the court on the subject. A bill or complaint seeking the reformation of an instrument should show every element necessary to entitle the complainant to equitable relief. "The bill must show that the plaintiff is entitled to the relief sought, and must allege some equity superior to that of the party against whom he seeks it." 18 Enc. P. & P. 804. It would be an entirely idle proceeding for a court to reform an instrument, unless some right could be enforced under it after its reformation. A court will not reform an instrument merely for the sake of reforming it. *Thompson v. Phoenix Ins. Co.* (C. C.) 25 Fed. 296. So far as may be ascertained from the pleadings, evidence, or findings in this case, the trust raised by the instrument reformed was fully executed at the time the suit was brought, and the only effect of the decree is to cast a cloud upon the title to the Dessarts' property and prevent the enforcement of the

rights of the attaching creditor, against whom, certainly, no superior equity is shown. Had this been an action to foreclose the trust deed or mortgage, the complaint would have been fatally defective without an allegation of nonpayment (*Notman v. Green*, 90 Cal. 172, 27 Pac. 157; *Lent v. New York Railway Company*, 130 N. Y. 504, 29 N. E. 988), and this could have been first raised upon appeal. *Ryan v. Holliday et al.*, 110 Cal. 335, 42 Pac. 891. If such an allegation is necessary to authorize a court of equity to assist a trustee in foreclosing his trust, we can perceive no reason why it is not equally necessary in an action to reform a deed of trust. In our opinion the complaint is fatally defective, and the evidence does not sustain the judgment. The conclusion at which we have arrived on these points makes it unnecessary to consider the other questions raised in the case.

The judgment of the lower court is reversed, and the case is remanded for further proceedings in conformity with this opinion.

KENT, C. J. and SLOAN, J., concur.

#### SOUTHWESTERN COMMERCIAL CO. v. OWESNEY.

(Supreme Court of Arizona. March 30, 1906.)

##### 1. ATTACHMENT—PRESERVING PROPERTY—RECOVERY OF EXPENSE.

There being no provision as to keeping attached property, except in Rev. St. 1901, par. 350, providing that sale of attached personalty may be ordered when it appears that the keeping of it till the trial will necessarily be attended with such expense as greatly to lessen the amount likely to be realized, and paragraph 354, providing that if it be not replevied, claimed, or sold, the judge may make an order for its preservation, a sheriff, who, at the request of plaintiff in attachment, without order of court, places a person in charge of the property, may recover the expense of such plaintiff without regard to the result of the attachment proceedings.

##### 2. SAME—PAYMENT BY NOTE.

Even if it is a prerequisite to recovery by a sheriff of the expenses of preserving attached property at the request of plaintiff in attachment, that the sheriff shall have paid the watchman placed in charge by him, it is enough that he has paid with his note.

##### 3. ASSIGNMENT—ACTION BY ASSIGNEE—EVIDENCE.

A written assignment of a claim and testimony of the assignor that he had assigned it to plaintiff is sufficient evidence of the assignment to authorize the action by him thereon.

##### 4. APPEAL—OBJECTION NOT MADE BELOW.

Objection that a witness was not qualified to give his opinion as to value of services may not be made for the first time on appeal.

Appeal from District Court, Santa Cruz County; before Justice Eugene A. Tucker.

Action by George V. Owesney against the Southwestern Commercial Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Hereford & Hazzard, for appellant. George K. French, for appellee.

CAMPBELL, J. This action was brought by George V. Owesney, as the assignee of Thomas J. Turner, to recover the amount claimed to have been expended by Turner, as sheriff, in keeping certain property under attachment in an action wherein the Southwestern Commercial Company was plaintiff and William Reid and John Baker were defendants. The cause was tried to a jury and resulted in a verdict for plaintiff. From the judgment entered thereon, and an order denying a motion for a new trial, the defendant appeals.

The first assignment of error challenges the sufficiency of the complaint as against a general demurrer. The complaint alleges that the defendant instituted suit against Reid and Baker and caused their goods and chattels to be attached; that, at the instance and request of the attachment plaintiff, defendant herein, the sheriff placed a watchman in charge of the goods so attached, who performed services for a specified period. It is not alleged that the court or judge made any order for the preservation of the property, nor is it made to appear what the final result of the attachment proceedings was. Appellant urges that the expenses of keeping the attached property should be taxed as costs in the attachment action, and that the complaint in this action should show the disposition of the attachment proceedings, and why, if true, the expenses of keeping the property were not taxed as costs in that action. The statutes of this territory do not make specific provision for the payment of expenses incurred by sheriffs in keeping attached property, though clearly recognizing their rights to reimbursement. Paragraph 350. Paragraph 354 of the Revised Statutes 1901, provides: "If the personal property be not replevied or claimed or sold under the several provisions of this chapter, the judge, or justice of the peace, as the case may be, may, either in term time or in vacation, make such order for the preservation or use of the same as shall appear to be to the interest of the parties." The statutes of most of the states specifically provide the method by which such expenses are to be met. Because of the different statutory provisions, the opinions of the courts are of but little value except in connection with the particular statutes which they construe. The most of them, we believe, hold that where the law specifically provides the manner in which such expenses are to be paid, that manner only must be pursued. While we think the proper course under our statute is to have the court or judge make an order for the preservation of the property, as permitted in paragraph 354, in which event it would seem the expenses might properly be taxed as costs in favor of the attaching plaintiff, if successful in his suit, still, if he prefers to authorize the sheriff to incur the expenses without availing himself of the order of the court, we see no reason why the sheriff may not recover the amount nec-

essarily expended from the plaintiff in attachment, without regard to the result of the attachment proceedings. Indeed, it seems doubtful whether the plaintiff in such a case is entitled to have the expenses taxed as costs against the defendant. The statute evidently contemplates that the court should exercise supervision and control over such expenses in order to prevent unnecessary and excessive charges.

Appellants urge that the complaint is defective in other respects. While it is not, perhaps, as definite in its allegations as good pleading would require, we think that the facts that the attached property was held by the sheriff at the instance and request of the defendant, that at its instance and request he incurred expense in keeping a watchman in charge of the property for a specified period; that the amount paid the watchman was reasonable; that the sheriff assigned the claim for reimbursement he had against the defendant, to the plaintiff in this action; and that no part of the amount had been paid, are fairly well stated in the complaint and render it good as against the demurrer.

The second assignment of error is the refusal of the court to direct a verdict for the defendant at the close of plaintiff's evidence, on the ground that there was no evidence upon which the jury could legally return a verdict. It is claimed, by the appellant, that there is no evidence that the sheriff had paid the watchman for his services, or that the sheriff's claim had been assigned to plaintiff. Conceding that it was material that the sheriff must have paid the watchman before a right of action accrued to him against the defendant, we find testimony from both the sheriff and the watchman that the sheriff had given his promissory note to the watchman in payment, and the note is in evidence. It is true that in response to questions asked upon cross-examination, the watchman testified that neither the commercial company nor the sheriff had paid him anything. By this he evidently meant that he had received no money for his services, as he had just testified that he had received the sheriff's note, which had been put in evidence. There is a written assignment of the sheriff's claim to the plaintiff in this action in evidence, and the sheriff also testified that he had assigned the claim to the plaintiff.

Appellant complains of the action of the trial court in refusing to give certain instructions asked for by it, but reading all of the instructions given together, we fail to perceive that appellant has any ground for complaint. Complaint is also made of the action of the court in permitting witness S. F. Noon to express an opinion as to the value of the services of a watchman in the locality in which the services in this case were rendered. The objection made was, that opinion evidence is not admissible to prove the value of services. But it is urged here that the wit-

ness was not qualified to give such testimony, he not having lived in the vicinity at any time during the past seven years. Opinions as to the value of services are admissible where the witness is qualified from knowledge and experience to express them. The fact that the witness had not been familiar with the conditions in the vicinity in which the services were rendered for some years was developed on cross-examination. As no objection was made upon the ground that the witness was not qualified to testify as to the value of the services, and no motion was made to strike out the testimony after such fact was ascertained, the appellant may not now complain.

No error being apparent, the judgment is affirmed.

KENT, C. J., and SLOAN, DOAN, and NAVE, JJ., concur.

(10 Ariz. 80)

# ROY & TITCOMB v. FLIN.

(Supreme Court of Arizona. March 30, 1900.)

## 1. APPEAL AND ERROR—PRESENTATION OF OBJECTION TO TRIAL COURT—NEW TRIAL.

The denial of a motion by defendant for judgment at the conclusion of plaintiff's case cannot be reviewed on appeal, where such ruling was not presented to the trial court for review in the motion for a new trial.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1707-1712.]

## 2. SAME—ASSIGNMENTS OF ERROR—SPECIFICNESS.

An assignment of error that the evidence does not support the findings or judgment is insufficient for failure to specify in what particular or particulars the evidence is insufficient.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 3017-3021.]

## 3. FRAUDS, STATUTE OF—DEBT OF ANOTHER—PROMISE TO PAY.

A contractor for whom plaintiffs were sureties, having abandoned the contract and thereby released plaintiff, a subcontractor, from carrying out his contract, defendants, in order to induce plaintiff to complete the same, orally agreed to assume the payment of the amount due from the contractor to plaintiff. Held, that such promise by defendant was based on an independent agreement, and founded on a good consideration moving from plaintiff, and was therefore, not within the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 50-58.]

Appeal from District Court, Santa Cruz County; before Justice Davis.

Action by Julius Flin against Roy & Titcomb, Incorporated. From a judgment for plaintiff, defendant appeals. Affirmed.

Frederick S. Nave and Eb. Williams, for appellant. William M. Lovell and F. K. Miller, for appellee.

SLOAN, J. Roy & Titcomb, an incorporated company, was surety upon a contractor's bond given by one James Vandevort in favor of the county of Santa Cruz to insure

the faithful performance by Vandevort of a contract, by the terms of which Vandevort was obligated to build a courthouse for said county, according to plans and specifications made part thereof, on or before a certain date therein specified. The appellee, Flin, was a subcontractor under Vandevort, and by his written contract was obligated to furnish the labor and materials for the stone work on said courthouse and to complete the same on or before a certain date specified in said contract. In case Flin should fail to complete the stone work on or before said date, the contract provided that he should pay, by way of liquidated damages, the sum of \$50 for each day said work should remain uncompleted after said time limit. Vandevort defaulted in his contract after partially performing the same, and the appellant, as his surety, under agreement with the board of supervisors of said county, completed the work begun by Vandevort in accordance with the terms of his contract. At the time Vandevort defaulted, Flin had begun the stone work, and the former was indebted to him in the sum of \$1,000. Upon notice of Vandevort's default Flin ceased work under his contract. Thereafter, under a verbal agreement with Edward Titcomb, the president of the appellant company, Flin agreed to resume the stone work and to complete it as called for in the plans and specifications, and under this verbal agreement did resume the work and complete the same, but not until after the expiration of the time limit named in his written agreement with Vandevort. Upon the completion of the work Flin demanded a settlement of his account with appellant upon the basis of the full contract price agreed to be paid by Vandevort, less the amounts paid by Vandevort and by appellant. This demand was refused by appellant, whereupon Flin brought suit to recover the sum of \$1,406.99 claimed by him to be due as such balance, and to recover in addition two several sums of \$220. and \$87.40 claimed by him to be due for extra work done at the instance and request of the appellant. The appellant answered the complaint with a general denial, and also filed a counterclaim in the sum of \$3,550, based upon the failure of Flin to complete his contract within the time limit specified in his written contract with Vandevort. The case was tried by the court without a jury. At the conclusion of the testimony put in by appellee, appellant moved the court "for a judgment on the plaintiff's case in favor of the defendant." This motion was denied by the court, whereupon appellant put in its evidence, and, the case being closed, the court rendered judgment in favor of Flin in the sum of \$1,494.39, together with interest thereon, and the costs of suit. Appellant moved the court for a new trial upon the general grounds: First, that the court erred in admitting and rejecting evidence; second, that the judgment was

not supported by the evidence. The motion was overruled, and an appeal taken from this ruling and from the judgment.

Appellant assigns as error the ruling of the court in denying its motion for judgment at the conclusion of appellee's case. The merit of this assignment, if any there be, cannot be considered, for the reason that the ruling complained of was not presented to the trial court for review in the motion for a new trial. *Tietjen v. Snend*, 3 Ariz. 193, 24 Pac. 324.

The second and remaining assignment of error is that the evidence does not support the findings or judgment. The assignment is defective in not specifying in what particular or particulars the evidence fails to support the findings or judgment. It is argued in the brief of appellant that the findings are not sustained by the evidence in the particular that it shows that the agreement on the part of the appellant, if any there was, to pay the sum due Flin from Vandevort at the time appellant undertook to complete the contract, was not in writing, and hence not enforceable under the statute of frauds; it being an agreement to answer for the debt of another. An examination of the record shows that the evidence tends to establish that appellant, at the time of its verbal agreement with Flin to complete the stone work, assumed the payment of the amount due from Vandevort as an inducement and part consideration for the resumption of the work by Flin and the carrying out of the full terms of his contract with Vandevort, which he was under no legal obligation to do. The oral promise on the part of appellant to pay the debt due Flin from Vandevort was therefore an independent agreement and was founded on a good consideration. "The promise of one person, though in form to answer for the debt of another, if founded upon a new and sufficient consideration, moving from the creditor and promisee to the promisor, and beneficial to the latter, is not within the statute of frauds, and need not be in writing, subscribed by him, and expressing the consideration." *Dyer v. Gibson*, 16 Wis. 557.

A review of the evidence fails to disclose such failure of proof to sustain any of the material findings of the court as requires the reversal of the judgment.

The judgment is therefore affirmed.

KENT, C. J., and DOAN and CAMPBELL, JJ., concur.

#### FRIEDMAN v. SUTTLE.

(Supreme Court of Arizona. March 30, 1906.)

#### 1. BROKERS—COMPENSATION—AUTHORITY IN WRITING—NECESSITY—SALE OF LAND.

An agreement to compensate an agent or broker for services in the buying or selling of real estate need not be in writing.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 44.]

**2. CONTRACTS—CONSIDERATION—PAST CONSIDERATION.**

Where plaintiff had been engaged in investigating mining properties for newspaper purposes, and defendant instructed him to look for good prospects stating that he would examine any property that plaintiff brought to his notice, and, if satisfactory, purchase it, and plaintiff brought certain property to defendant's notice and showed him reports, etc., and defendant stated that he would investigate it and pay plaintiff a commission if he purchased, the contract was not unenforceable as founded on a past consideration.

Appeal from District Court, Yavapai County; before Justice Sloan.

Action by F. C. Friedman against H. A. Suttle. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Leroy Anderson, for appellant. Hawkins, Ellinwood & Ross and Herndon & Norris, for appellee.

CAMPBELL, J. This action was brought to recover the sum of \$4,000 which the plaintiff alleges the defendant expressly promised to pay the plaintiff for services rendered to the defendant at his special instance and request. The services, as alleged in the complaint, consisted of bringing to the notice and attention of the defendant, and in furnishing him information of the fact, that certain described mining property could be secured and purchased, and in assisting defendant to secure the right to purchase said property, and in furnishing drawings, reports, details of conditions, samples of ore and assay values, and in helping the defendant to make an examination of the property. The defendant interposed a special plea of the statute of frauds and further answering denied generally and specifically that the plaintiff had rendered the services at the instance and request of the defendant. The case was tried to a jury, and, at the conclusion of the plaintiff's evidence, the defendant moved the court to instruct the jury to return a verdict for the defendant upon the following grounds, to wit: (1) That the said evidence shows that the plaintiff relies for recovery upon a contract, promise, or agreement concerning the sale of real estate and that said evidence shows that said promise, agreement, or contract and no memorandum thereof in writing has ever been made or signed by the defendant, or by any person thereto authorized. (2) That said testimony fails to show any consideration for the alleged contract, promise or agreement, but shows that said alleged contract, is attempted to be based upon a past consideration, to wit: Services or information rendered or given by plaintiff as a volunteer. (3) That said testimony is insufficient to support a verdict in favor of plaintiff for the commission alleged to be agreed upon for services rendered in and about the sale or purchase of real estate wherein it fails to show that any sale or purchase of the real estate in question has ever been consummated by defendant through the services of plaintiff, or at all.

The trial court ruled that the last two grounds assigned in the motion were not well taken, but granted the motion upon the first ground. The learned trial judge, in instructing the jury to return a verdict for the defendant, based his instruction directly upon the ground that this court, in the case of *Czarnowski v. Holland*, 5 Ariz. 119, 78 Pac. 890, had established the rule that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission must be in writing. That case was an action to recover a commission as a broker for making a sale of real estate and was based upon a written contract. The trial court held that no sale had been made in accordance with the terms of the agreement; that the contract authorized a sale for cash, while the sale was made partly on deferred payments. The opinion states: "At the trial the contract was introduced in evidence and construed to mean that the sale of the property must be entirely for cash and upon proof of the terms, as shown to have been agreed to by the defendant it was, upon motion of the defendant, excluded, as not tending to prove the sale and the jury were instructed not to consider it, and further instructed that the defendant was entitled to a verdict, and advised them to find for the defendant. The court, also, before instructing the jury, offered to allow the plaintiff to prove a quantum meruit, that is, the value of his services in selling the lots in question, which plaintiff declined to do, and thereupon the jury, in obedience to the instructions of the court, found a verdict for the defendant." The court first considered certain oral testimony offered to prove the financial responsibility of the person to whom the agent sold the land, holding that the trial court committed error in excluding it, and said: "We think it is also error for the court to strike out the contract. We do not think there was manifested, by the terms of the contract, an intention that the purchase price should be solely for cash." The court thus disposed of every question raised in the case. The plaintiff did not and could not predicate error upon the offer of the trial court to permit him to give evidence upon a quantum meruit. However, the court said: "By striking out the contract, and leaving plaintiff to his action upon a quantum meruit, he was left remediless. That there are cases in which the law will imply a promise to pay for services rendered by one person to another, in the absence of any bargain to pay therefor, cannot be doubted, but no case has been brought to our attention in which it has been held where proof of employment is indispensable to a right to recover for services, that, in the absence of such proof, a recovery can be had. And to entitle a broker to recover for commissions for effecting a sale of real estate, it is indispensable that he should show that he was employed by the owner to make the sale, and this employment must be in

writing. In *McCarthy v. Loupe*, 62 Cal. 299, the court say: "The law in such case would never imply a contract. \* \* \* This particular kind of a contract can only be proved by the introduction of an instrument in writing. Therefore the plaintiff failed to prove an express contract and it was upon an express alone that he was entitled to recover." The provision of the Code in that state, it is true, specifically provides that the agreement authorizing the employment of an agent or broker to purchase or sell real estate for compensation or commission must be in writing; but we think the same thing is required by the statute of frauds. The written contract in this case being excluded, the plaintiff has no standing in court; but we think he was entitled to reply upon his written contract." As we have said, this question was not before the court and the opinion expressed thereon was wholly dictum. That the opinion so expressed was not well considered is clear. No reasons for the conclusion arrived at are given. The only case cited is based upon a statute of California, which, as is pointed out, specifically provides that an agreement authorizing the employment of an agent or broker to purchase or sell real estate for compensation or commission must be in writing. Prior to the adoption of such statute, the Supreme Court of California held such an agreement not to be within the statute of frauds. *Heyn v. Phillips*, 37 Cal. 529.

The author of the title, "Verbal Agreements," in the *American & English Encyclopedia of Law*, at page 892 of volume 29, states the law on this subject to be: "Contracts for the employment of an agent to buy or sell land are not regarded as within the operation of the statute for the reason that contracts of employment are not included and the agent's commission is earned when a customer is procured." This is supported by an overwhelming weight of authority. Only in those states where, like California, the statute expressly requires such agreements to be in writing, is the rule otherwise. Counsel for appellee freely concede that the opinion expressed on this point in *Czarnowski v. Holland* is against the weight of authority but contend that he should follow it in obedience to the doctrine of *stare decisis*. This doctrine has to do only with opinions expressed upon points necessary and proper to the decision of the case, and not with dicta. Chief Justice Marshall, speaking for the Supreme Court of the United States, in *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257, said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually

before the court is investigated with care and considered in its full extent. Other principles which serve to illustrate it are considered in their relation to the case decided, but their possible bearing upon all other cases is seldom completely investigated." In *Carroll v. Carroll*, 16 How. 275, 14 L. Ed. 936, the court say: "This court (and other courts organized under the common law) has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties." The case of *Czarnowski v. Holland*, so far as it may be regarded as authority for the rule that an agreement to compensate an agent or broker for services rendered in the buying or selling of real estate must be in writing, is disapproved and overruled. The appellee urges that should the *Czarnowski* Case be overruled, the judgment of the trial court should be sustained on other grounds, to wit: (1) That appellant failed to establish a completed sale of the property. (2) That his proof shows a contract with appellee based upon a past consideration. An examination of the record discloses that there was testimony that the defendant "has taken the property up," which evidently means that the defendant purchased it; and this is strongly corroborated by a letter written by the defendant, which is in evidence. We think there was sufficient evidence on this point to go to the jury.

There is testimony in the record tending to prove the following facts: The business of the defendant was that of a mine promoter and owner. The plaintiff at different times had been in the employment of the defendant "looking up" and "writing up" mining properties for him. Some time prior to the transaction involved in this action plaintiff had been engaged in traveling about the country surrounding Prescott seeing different mining properties and writing descriptions of them for newspapers. Defendant instructed him to look for good prospects for him, telling him that he would examine any property that plaintiff would bring to his notice and if satisfactory, purchase it. He brought the property known as the "Three Black Buttes" to the notice of defendant, showed him written reports concerning it and samples of ore from it and told him the name of the owner and its location. He advised him that the purchase price was \$36,000 and that he desired a commission of \$4,000 for his services. Defendant manifested an interest in the property and told plaintiff that he would at once investigate it and if satisfactory would purchase it and pay plaintiff the \$4,000 commission. All of the information was given before the promise of the defendant was made. At defendant's request plaintiff communicated with another person whom defendant desired to examine the property, giving him its location and the name of the owner. Defendant subsequently

purchased the property. Conceding that the promise made by defendant was wholly in consideration of the information previously given him by plaintiff and did not contemplate other or further services from the plaintiff, does the case fall within the rule contended for by appellee? He had previously requested plaintiff to furnish information as to such promising prospects as he should discover. In laying the information before defendant plaintiff was not acting entirely as a volunteer. We think it fairly may be said that plaintiff furnished this information to defendant at his request and that the request is such a one that, if complied with, the law would imply a promise to pay, especially if the information given is accepted and acted upon. The rule is that an executed consideration given upon such a request will sustain a promise founded upon it. 1 Parsons on Contracts (9th Ed.) 506. Lampleigh v. Braithwaite, 1 Smith's Lead. Cas. 267. Pool v. Horner et al., 64 Md. 131, 20 Atl. 1036.

Being of the opinion that the trial court erred in instructing the jury to return a verdict for the defendant and in denying a motion for a new trial, the judgment is reversed, and the case remanded for a new trial.

KENT, C. J., and DOAN, J., concur.

NAVE, J. I concur in the result in this case. I concur in the opinion, except that portion holding that the ruling in the Czarnowski Case, now disapproved, is dictum. It was one of two reasons given by the Supreme Court for reversing the judgment of the district court. In the view of the record taken by the Supreme Court, the matter now overruled was not dictum, but a formal determination. It was erroneous. It has not become a rule of property, nor does any other reason exist for adhering to it. It should be overruled.

# EMPIRE SMELTER CO. v. GARDINER, WORTHEN & GOSS CO.

(Supreme Court of Arizona. March 30, 1906.)

## 1. EVIDENCE — BEST EVIDENCE — CORPORATE RECORDS.

Testimony that witness was the treasurer and manager of a certain corporation was not objectionable on the ground that the identity of the incumbent of the offices could only be proven by the corporate records.

## 2. APPEAL — REVIEW — SUFFICIENCY OF EVIDENCE — ABSENCE OF ENTIRE EVIDENCE.

The sufficiency of the evidence to sustain the findings of the court cannot be reviewed on appeal unless all of the evidence is in the record.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2911-2915.]

Appeal from District Court, Cochise County; before Justice Doan.

Action by the Gardiner, Worthen & Goss Company against the Empire Smelter Com-

pany. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Frank M. Stone and Pickett & Bowman, for appellant. Hereford & Hazzard, for appellee.

SLOAN, J. In the district court of Cochise county the appellee, the Gardiner, Worthen & Goss Company, recovered judgment against appellant, the Empire Smelting Company, upon a merchandise account in the sum of \$4,094.75. The Empire Smelting Company moved the court for a new trial, which was denied, and from this ruling and from the judgment has appealed.

The case was tried to the court without the aid of a jury. The appellee, to sustain its complaint, introduced the deposition of one Peter Kirk. In this deposition the witness stated, in answer to an interrogatory, that he was the treasurer and manager of the appellant company during the time covered by the account sued upon. Counsel for the appellant moved to strike out the answer for the reason that the fact as to who may have filled the office of treasurer and manager of the corporation could be proven only by the records of the corporation. The motion was denied, and this ruling is made the basis of one of the assignments of error discussed by counsel for appellant in their brief. There is no merit in the contention of appellant, and the trial court did not err in denying the motion.

The remaining assignments of error which are discussed by counsel for appellant relate to the sufficiency of the evidence to sustain the findings and judgment of the court. There is no statement of facts of transcript of the evidence in the record. There is a bill of exceptions which purports to contain but a portion of the evidence introduced at the trial. This bill of exceptions distinctly states that other evidence, both oral and documentary, than that set forth therein was introduced by the plaintiff. The nature of the omitted evidence is not set forth. We may not, therefore, review the evidence under the assignments of error for the very obvious reason that the findings of the court may have been based in whole or in part upon the evidence omitted from the record.

The judgment is, therefore, affirmed.

KENT, C. J., and CAMPBELL, and NAVE, JJ., concur.

# MEADE et al. v. SCRIBNER et al.

(Supreme Court of Arizona. March 30, 1906.)

## 1. JUDGMENTS — RENDITION — TIME — SUBSEQUENT TERM.

Rev. St. 1901, par. 1386, provides that if, for any cause, business before the court be not determined before adjournment thereof, such business of whatsoever nature remaining undetermined shall stand continued until the next succeeding term of the court without an order

and without cost. *Held*, that where for any reason the court was not ready to pronounce judgment in a case tried, before the adjournment of the term, it retained jurisdiction by force of the statute to render judgment at a subsequent term.

## 2. JUDGES—JUDGMENT—RENDITION IN VACATION—OUTSIDE DISTRICT.

Rev. St. 1901, par. 1442, providing that a judgment may be "entered" in term time or vacation, did not justify the "rendition" of a judgment by a judge in vacation without the district in which the case was tried.

Appeal from District Court, Cochise County; Thomas Armstrong, Jr., Judge pro tem.

Action between William K. Meade and another and Electa Scribner and another. From a judgment in favor of the latter, the former appeal. Reversed.

Thomas F. Wilson and Kingan & Wright, for appellants. English & Miller, for appellees.

CAMPBELL, J. This cause was tried to the court without a jury on August 13, 1904. The court took the case under advisement, with leave to counsel to file written arguments. The record here does not disclose the time within which these arguments were to be filed nor the date of the final submission of the case. On September 27, 1905, the judge filed with the clerk of the court his findings of fact, conclusions of law, and judgment, all being filed as of the December term, 1904. The following recitation appears in the judgment: "Done at Phoenix, this 27th day of December, 1905, as of the December, 1904, term of this court." It is admitted in argument that the judge did not render judgment in open court, but rendered his decision or judgment at Phoenix. Appellants contend that the judgment is void for the following reasons: (1) That the court lost jurisdiction of the cause when the term at which it was tried adjourned without judgment being rendered. (2) That no judgment has been pronounced by the district court, the judgment having been rendered by the judge without the district, and not in open court. We will consider these points separately.

1. While there is authority for the proposition that a judgment may not be rendered at a term later than the one at which the case is tried, as of such later term, there is also very respectable authority to the contrary. *Abraham v. Levy*, 72 Fed. 124, 18 C. C. A. 469; *Tarpenning v. Cannon*, 28 Kan. 665; *Trulock v. Murty*, 72 Iowa, 510, 34 N. W. 307; *Reed v. Lane*, 96 Iowa, 454, 65 N. W. 380. Furthermore we have a statute which we think disposes of the question. Paragraph 1386, Rev. St. 1901, provides: "If from any cause the court shall not be held at the time prescribed by law, or if the business before the court be not determined before the adjournment thereof, such business, of whatsoever nature, remaining undetermined shall stand continued until the

next succeeding term of the court, without an order and without cost." Rendering judgments is certainly business of the court, and if, for any reason, the court is not ready to pronounce its judgment in a cause tried, before the adjournment of the term, we think, by force of the statute quoted, it does not lose jurisdiction and may render its judgment at a subsequent term.

2. The record does not disclose that the court in which the case was tried was in session on the day the judgment bears date, the date it was pronounced. On the other hand, it is admitted that the judge rendered the judgment in vacation, at Phoenix, Maricopa county, which we take judicial notice is without the district in which the case was tried. Mr. Black, in his work on judgments, says: "When the law provides for the holding of regular terms of a court, it is only during term time that the judges are vested with their full judicial character. Necessary rules and orders, ministerial acts, and some matters which go as of course, may fall within the powers of the court in vacation. But in general all judicial functions are suspended during that interval. Hence, unless under statutory authority, a judgment cannot be pronounced in vacation. The rendition of a judgment, in a court of record, is essentially a judicial act, and if performed when the court is not in session, that is, out of term, it is open to a fatal jurisdictional objection; the judgment is absolutely void, creates or affects no rights, and will be even disregarded on appeal." *Black on Judgments*, § 179. See, also, 11 Enc. P. & P. 814. Counsel for appellees contend that by reason of par. 1442, Rev. St. 1901, which provides, "A judgment may be entered in term time or vacation," the judgment is valid, though rendered in vacation; but there is a clear distinction between rendering a judgment, which is purely a judicial act, and which can be performed by the court alone, and entering a judgment, which is ministerial, and is usually performed by the clerk. *Black on Judgments*, § 106. 18 Enc. P. & P. 430.

We conclude that the judgment appealed from is void and of no effect. The cause is remanded to the district court for trial.

KENT, C. J., and SLOAN and NAVE, JJ., concur.

BARTON v. TERRITORY OF ARIZONA.  
(Supreme Court of Arizona. March 30, 1906.)

## 1. CRIMINAL LAW—APPEAL—REVIEW.

Where, on appeal in a criminal case, there is no bill of exceptions, assignment or errors, brief, or argument designating any error complained of in the proceedings had in the trial court, a conviction can only be reversed for error apparent on the face of the record.

## 2. SAME—INSTRUCTIONS—ALIBI.

An instruction that the burden was on accused to prove his defense of alibi by a preponderance of the evidence and that such de-

fense to be entitled to consideration must show that at the time of the commission of the crime charged accused was at another place so far away or under such circumstances that he could not, with any ordinary exertion, have reached the place so as to participate in the commission of the crime, was erroneous, it being incumbent on the jury to acquit if the evidence on the issue of alibi with all the other evidence in the case raised a reasonable doubt of accused's presence at the time and place of the commission of the offense.

Appeal from District Court, Pima County; before Justice John H. Campbell.

Robert Barton was convicted of robbery, and he appeals. Reversed.

E. S. Clark, Atty. Gen., for the Territory.

DOAN, J. The appellant, Robert Barton, was tried before a jury in the district court of Pima county on the 8th and 9th of November, 1905, upon a charge of robbery, and upon a verdict of guilty, was on November 11, 1905, adjudged by the court guilty of that crime, and sentenced to a term of imprisonment in the territorial prison, from which verdict and judgment of conviction he has appealed.

The counsel, who represented the defendant in the lower court, have not entered any appearance here. There is no bill of exceptions, assignment of errors, nor any brief or argument designating any error complained of in the proceedings had in the trial court, presented to us in support of the appeal in this case. Under these circumstances, we can only look into the record, and unless some reversible error be apparent therein, affirm the judgment of the lower court. While the record does not contain the entire charge of the court to the jury, it does present the following instruction given at the request of the territory: "The defendant claims as one of his defenses what is known in law as an alibi; that is, at the time the robbery with which he is charged was being committed, he was at a different place, so that he could not have participated in its commission. The burden is upon this defendant to prove this defense by a preponderance of evidence; that is, by the greater and superior evidence. The defense of alibi, to be entitled to consideration, must be such as to show that, at the very time of the commission of the crime charged, the accused was at another place, so far away or under such circumstances that he could not with any ordinary exertion have reached the place where the crime was committed so as to have participated in the commission thereof." This instruction was presented to this court in the case of *Schultz v. Territory*, and we held that it did not correctly state the law applicable to the defense of alibi. *Schultz v. Territory*, 52 Pac. 352. We there said: "The burden of proof never rests on the accused to show his innocence, or to disprove the facts necessary to establish the crime with which he is charged. The defendant's presence at, and participation in,

the corpus delicti, are affirmative material facts that the prosecution must show beyond a reasonable doubt, to sustain a conviction. \* \* \* If a consideration of all the evidence in the case leaves a reasonable doubt of his presence, he must be acquitted. We think it was the duty of the trial judge to have said to the jury that they must consider all the evidence in the case, including that relating to the alibi, and determine from the whole evidence whether it was shown beyond a reasonable doubt that the defendant had committed the crime with which he was charged." And upon the ground that the instruction as given might have misled the jury to the prejudice of the rights of the defendant, the giving of it was there held to be reversible error. The rule that the defendant is not required to prove an alibi beyond a reasonable doubt, or even by a preponderance of the evidence, but that it is incumbent on the jury to acquit if the evidence upon that point, when taken in connection with all the other evidence in the case, raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, when his presence is essential to his guilt, as announced by us in *Schultz v. Territory*, supra, has since been adhered to, and is the law in this jurisdiction. It has been since that time followed also in *People v. Roberts* (Cal.) 55 Pac. 137, *Wilburn v. Territory* (N. M.) 62 Pac. 968, *State v. Burton* (Wash.) 67 Pac. 1097, *Barr v. People* (Colo. Sup.) 71 Pac. 392, and *People v. Lang* (Cal.) 76 Pac. 232, with no ruling at variance therewith in those jurisdictions.

Because of this erroneous instruction, the judgment of the lower court is reversed, and the cause remanded for a new trial.

KENT, C. J., and SLOAN and NAVE, JJ., concur.

#### McPHERSON v. HATTICH.

(Supreme Court of Arizona. March 30, 1906.)

##### 1. CONTRACTS—BREACH.

The breach, on the part of the person for whom the services are to be performed, of a contract for the drawing of plans for and superintendence of the construction of a building, for an agreed compensation, is the nonpayment of the agreed compensation, and not the mere refusal of such person to permit the architect to perform the agreed services, and so must be alleged in the complaint in an action to recover on the contract and to enforce a lien for the agreed compensation.

##### 2. PLEADINGS—EXHIBITS—OMISSIONS IN COMPLAINT.

A statement in an exhibit filed with and made a part of the complaint cannot supply a necessary allegation omitted from the complaint.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Pleading, §§ 944-947.]

##### 3. MECHANICS' LIENS—PLEADING—NONPAYMENT—NOTICE OF LIEN.

The statement in the notice of lien, filed with and made a part of the complaint, that

a certain amount is due as compensation under the contract, even if it might be considered an allegation of the complaint, is an insufficient allegation of nonpayment; it referring to the time of filing the lien, and not to the time of commencing the action.

**4. TRIAL—DIRECTING VERDICT—FAILURE TO STATE CAUSE OF ACTION.**

Failure of a complaint to state a cause of action authorizes the direction of a verdict for defendant.

Appeal from District Court, Pima County; before Justice Campbell.

Action by John McPherson against B. Hattich. Judgment for defendant. Plaintiff appeals. affirmed.

S. W. Purcell and Vandyke & Worsely, for appellant. Kingan & Wright, for appellee.

SLOAN, J. This suit was brought by appellant, John McPherson, against appellee, B. Hattich, in the district court of Pima county, to recover upon a contract between appellant and appellee, wherein the former agreed to draw plans and specifications as an architect for a certain building to be erected upon a lot in the city of Tucson owned by appellee, and to superintend the construction thereof for a stipulated per cent. of the cost thereof, and wherein the appellee agreed to pay for such services at the rate of the percentage aforesaid; and also to foreclose a lien filed by the appellant upon said property for the amount of said agreed compensation. The notice of lien was referred to in the complaint as constituting a part thereof, and attached to the same as an exhibit. The complaint charged that appellant, after he had partially performed the services agreed upon, was prevented from further performing said services by the acts of appellee. There was no allegation in the complaint that the agreed compensation had not been paid by appellee, nor was there any direct allegation that any sum was due appellant from appellee by reason thereof. There was a statement in the notice of lien that the sum of \$750 was due appellant from appellee as compensation due under said contract at the agreed per cent. of the cost of said building. The answer filed by the appellee admitted the residence of the parties, the ownership of the property described in the complaint, the filing of the notice of lien as alleged therein, and denied the remaining allegations of the complaint. The cause was tried to a jury. The evidence put in by plaintiff related to the making of the contract sued upon, the work done by him under the contract, and the refusal of appellee to permit appellant to proceed with the work of drawing plans and specifications for the building, and to superintend its erection. No proof was offered or put in by appellant showing nonpayment on the part of appellee of the agreed compensation. At the conclusion of appellant's case, counsel for appellee moved the court to instruct the jury to return a verdict in his favor on the ground that the appellant had not made out his case.

Thereupon the court did so instruct the jury, and a verdict for the appellee was returned. In accordance with the verdict the court entered judgment in favor of the appellee and against the appellant. From the ruling of the court, denying appellant's motion for a new trial and from the judgment, the appeal is taken.

In the judgment it is recited that the grounds upon which the trial court based its instruction to the jury to return a verdict for the appellee were that it was not alleged in the complaint, nor proven by appellant upon the trial, that he had not been paid for his services. The correctness of this ruling of the court constitutes the sole question raised by the assignments of error. The first question presented is what constitutes a breach of a contract for the rendition of services as an architect and superintendent of construction on the part of the person for whom such services are to be rendered, where the latter refuses to permit the former to complete the work agreed to be done. Appellant argues that the breach consists in his refusal to permit the architect to perform the agreed services, that is to say, it consists in the repudiation and abandonment of the contract by the owner of the premises, and does not consist in the nonpayment of the agreed compensation. In determining this we have only to consider the question as to what the owner is obligated to do, and what will constitute a full compliance on his part with his contract. In this respect it does not differ from other contracts for the rendition of services on the one part and the payment of an agreed price, or of the value of the services by the other. The payment, therefore, of such agreed price, or the value of the services, as the case may be, on the part of the person for whose benefit the services are agreed to be rendered, is a complete discharge by him of his obligation. If the person who agrees to perform such services be paid for the same the other party has fully discharged his obligation, and nothing further can be required of him. The breach, therefore, on his part consists in his failure or refusal to pay for the work done or agreed to be done. In the case at bar, therefore, the breach, if any there was, consisted in the refusal or failure of appellee to pay appellant for what was due the latter under the contract. This being true nonpayment was an essential allegation of the complaint and a necessary averment to make out a breach of the contract. We do not think that the statement in the notice of lien, filed as an exhibit with the complaint and made a part thereof, can be taken as a substantive allegation of the complaint and to supply its omission to plead by direct averment the nonpayment of whatever may have been due appellant under the contract. In most Code states an exhibit cannot be referred to for the purpose of supplying the omission of a material allegation or the curing of a fatal defect.

Macdonell v. International, etc., Company, 60 Tex. 590; Burkett v. Griffith, 90 Cal. 542, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151; Brooks v. Paddock, 6 Colo. 36; Pomeroy v. Fullerton, 113 Mo. 440, 21 S. W. 19. In a few states, as in Nebraska, this may be done even to the extent of supplying such a defect. The better rule, in our judgment, is that the office of an exhibit should be limited to the aiding, by amplifying and making more definite and certain, essential allegations of the complaint. In this case, even if the exhibit be referred to for the purpose of supplying the omitted allegation, still, nonpayment cannot be said to be alleged for the reason that, what may have been true as to the nonpayment at the time the lien was filed, may not have been true at the time suit was brought; and as we hold that nonpayment is the gist of the action, this does not present a case for the application of the rule that a state of facts once shown to exist will be presumed to continue in the absence of contrary proof.

It is argued by appellant that, admitting the soundness of this rule of pleading, such a defect in the complaint is not ground for an instruction to a jury to find for the defendant. We do not understand this to be the rule. The true rule is that where a complaint fails to state a cause of action it is subject to attack at any stage of the trial, and may be taken advantage of by demurrer, by objection to the introduction of evidence, or, as was done in the case at bar, by an instruction to the jury. There is some contrariety in the holdings of the courts in reference to the necessity of proving nonpayment by a plaintiff. In California, and some other states, it is held that although nonpayment must be alleged it need not be proven by the plaintiff. Whether this holding be logical or not, and whether this court should follow it, it is unnecessary to decide, inasmuch as we hold that the complaint is fatally defective, and that the defect was such a one as warranted the instructed verdict.

The judgment is therefore affirmed.

KENT, C. J., and DOAN and NAVE, JJ., concur.

### HELBERT v. TATEM.

(Supreme Court of Montana. March 6, 1906.)

#### MINES AND MINERALS—ADVERSE CLAIM—PLEADING.

In an action to determine an adverse claim to a mining location, a complaint alleging that on July 9th defendant made application for a patent for a conflicting location, and that on the 8th day of September, before 60 days' notice of defendant's application for a patent had expired, plaintiff filed his adverse claim and protest under oath, was sufficient, as against a general demurrer, in its allegation as to the time of filing the protest; it not appearing that the first publication of the notice of application was made on the same date as the application for the patent.

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

Action by Charles Helbert against Benjamin H. Tatem. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Lincoln Working, for appellant. H. G. and S. H. McIntire, for respondent.

HOLLOWAY, J. This is an action to determine an adverse claim, commenced in the district court on October 6, 1903. The amended complaint alleges that the plaintiff is a citizen of the United States; that he is the owner (except as against the paramount title of the United States) in possession and entitled to the possession of the Rocky Point quartz lode mining claim, situated in Lewis and Clarke county, Mont., and that he located the claim in 1893. A description of the claim is given, and the several acts done in locating it are set forth at length. It is alleged that the defendant claims a part of the ground covered by the location of the Rocky Point claim, as the Dorset quartz lode mining claim, and the ground in dispute is particularly described and a plat showing such conflict is attached to the complaint. It is also alleged that on July 9, 1903, the defendant made application for patent for the Dorset claim. The amended complaint then proceeds: "Plaintiff further alleges that on the 8th day of September, A. D. 1903, and before the sixty days' notice of application for patent of said Dorset lode mining claim had expired, plaintiff duly filed in the United States land office at Helena, Montana, wherein said application for patent was and is pending, his adverse claim and protest under oath," etc., and on the same day the register and receiver made an order staying all further proceedings, etc. It is alleged that the claim of the defendant to the ground in controversy is without any right, and that such claim casts a cloud upon plaintiff's title to the Rocky Point claim, and interferes with and injures him in the use and enjoyment thereof. The prayer is that the defendant be required to set forth the nature of his claim to the ground in controversy, and that the relative rights of the parties thereto may be determined, and that the defendant may be enjoined from asserting any claim whatever to any portion of the Rocky Point claim. There are numerous other allegations in the complaint which are not necessary to be considered now. To this amended complaint a general demurrer was interposed and sustained, and, the plaintiff electing to stand on his amended complaint, judgment was entered in favor of the defendant, from which judgment the plaintiff appeals.

It is contended by the respondent that the amended complaint shows upon its face that the adverse claim was not filed in the local land office within the 60-day period of publication of notice of application for patent for the Dorset claim, and therefore does not

state a cause of action. It is to be observed that the amended complaint does not anywhere state when the first publication of notice of application for patent for the Dorset claim was made, and it is not necessary, if it otherwise appears that the adverse claim was filed in time. It does allege that the adverse claim was filed on the 8th day of September, 1903, and before the expiration of the 60 days' notice of application for patent. This allegation may be open to the objection that it is ambiguous and uncertain, but we think it may fairly be gathered therefrom that the adverse claim was filed before the expiration of the 60-day period of publication of notice of application for patent for the Dorset claim. Counsel for respondent in their brief say: "The 8th day of September was 61 days after July 9th, the date of the first publication of the notice of patent application." This may be true as a matter of fact, but it does not appear from the amended complaint, and we cannot go outside the record in determining the sufficiency of this complaint. To say the least, there is not any presumption that the first publication occurs upon the same date that the application is filed. The 60-day period, during which the notice of application for patent must be published, as required by section 2325, United States Revised Statutes [U. S. Comp. St. 1901, p. 1429], commences to run from the date of the first publication (Regulations Interior Department June 24, 1899), and that may or may not have been made on the day the application was filed. If, in any given instance, publication is made in a weekly paper, and it should so happen that application for patent is made the day following the publication of any particular issue of the paper, then the first publication of the notice would be six days later than the date of application for patent. And it might so happen, because of a press of business in the land office, that the first publication would be deferred even later than that; so that, in the absence of any allegation showing when the first publication of the notice was made, it is impossible to say that this adverse claim was not filed in time, while, on the contrary, the allegation of the amended complaint quoted above is sufficient, in the absence of a special demurrer for ambiguity or uncertainty, to show that it was filed in time.

The questions, also suggested by this record: (1) Did the leaving of the adverse claim and proper fees with the officials of the local land office, on September 5, 1903, constitute the filing of such adverse claim within the meaning of section 2326 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 1430]? and (2), if the sixtieth day of the period of publication falls on a legal holiday, may the adverse claimant file his adverse claim on the next succeeding day? are not properly before us, as a decision of neither is necessary to a deter-

mination of the question actually involved here. This appeal only presents the single question: Does the amended complaint state a cause of action? We think it does, and that the district court erred in sustaining the general demurrer.

Let the judgment be reversed, and the cause remanded for further proceedings.

Reversed and remanded.

BRANTLY, C. J., and MILBURN, J., concur.

## FRIEL v. KIMBERLY-MONTANA GOLD MINING CO.

(Supreme Court of Montana. March 19, 1906.)

### 1. MASTER AND SERVANT—MASTER'S LIABILITY—INJURIES TO SERVANT—SAFE PLACE TO WORK.

A miner assumed the risks attendant upon his assistance in making a chamber in a mine.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 557.]

### 2. NEW TRIAL—STATEMENT—SUFFICIENCY.

The fact that a statement on motion for a new trial was denominated, by the moving party, "a statement of the case and bill of exceptions," did not render it objectionable; it being immaterial what a paper is called.

### 3. SAME—REDUCTION TO NARRATIVE FORM.

Under Supreme Court Rule 7, subsec. 3 (82 Pac. viii, 30 Mont. xxxiv), providing that testimony in the statement on motion for a new trial or the bill of exceptions shall be reduced to narrative form, unless the court below order otherwise, the overruling of an objection to testimony other than in narrative form was equivalent to an order.

### 4. SAME—NUMBERING LINES.

A statement on a motion for a new trial is not objectionable because the lines are not numbered, as required by rule of court, where neither counsel nor the court invoked the rule.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

Action by Mack Friel against the Kimberly-Montana Gold Mining Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. J. Walsh, W. S. Hartman, A. P. Stark, and Chas. Klotz, for appellant. Wm. Wallace, Jr., and Chas. Donnelly, for respondent.

MILBURN, J. This is an appeal from an order granting a new trial; a motion for nonsuit having been made and granted. Plaintiff sustained personal injuries on August 21, 1903, while employed in the quartz mine of defendant, and the action was brought to recover damages. The evidence for the plaintiff, which, for present purposes, must be taken as true, shows that plaintiff was employed by the defendant about August 4, 1903, and worked until the time he was injured. On August 20th, the day before he was hurt, the plaintiff, an experienced miner, had worked on the top or fourth floor of the mine at his regular business as miner. On the morning of the day of the accident he was directed by the shift boss to go with

another to the third floor and help the shovelers. He had never before been directed to shovel, and he had never before shoveled on the floor below where he had mined. He obeyed the order, and with three others commenced to shovel on the said floor. While thus at work, the floor upon which he was standing was 16 feet below the roof or "back" of the fourth floor, from which roof the rock fell which injured him. Above his head the roof of the third floor, which constituted the floor of the fourth floor, shut out from his view, and from the view of the men working with him, all the conditions obtaining upon the floor above. He did not at any time on the day on which he was injured go to the floor above, and no one of the men with him went there. The rock fell because there was no lagging under it to support it. The timbers were up and the cross-timbers in place, but the lagging had not been put upon them. This had been the condition since the afternoon before. In the meantime another shift had worked, and the breast of the stope had been carried far enough to allow one or more sets of timbers to be put in. The unlagged timbers, in the usual course of mining, should have been lagged. No one had been set to work on the fourth floor under the unlagged place on the morning of the injury, and there was no one there at the time of the accident. A mass of rock fell from the unsupported roof of the fourth floor crashing through the timbers and lagging of the roof of the third floor above plaintiff's head and struck him, causing the injuries of which he complains. The plaintiff contends that the defendant did not, as in duty bound, use reasonable care, or any care, to furnish a safe place in which he should work. Defendant charges contributory negligence and argues that the spot from which the rock fell was not a "place," but a place in course of construction, and that the plaintiff was engaged in co-operation with the miners who were overhead in the construction of said place, and therefore assumed all of the risk incident to the making thereof. The testimony tends to show, and for the purposes of the motion did show, that it was the custom as well as the duty of the master to follow closely behind the miners working at the breast and to timber the floor and lag the same in order to protect all parties working in the vicinity. If, as the evidence also tends to show, the part of the stope from which the rock fell was one in which the mining had been completed, it was the duty of the defendant to timber and lag the same in order that that part of the place, already created, might be kept safe. If the plaintiff had been injured while in the actual work of making a place—and the evidence tends to show that he was not—then he could not recover from the company, for he would assume the obvious risks of his occupation. But he did not assume the risk following defendant's failure to exercise reasonable care

to keep that part of the place already created safe and secure, if it did thus fail.

Objection is made by appellant to a consideration by this court of any evidence on the part of the witnesses of plaintiff tending to show what the duty of the company was in respect of timbering that particular part of the stope. We have examined the evidence, and think that a prima facie case was made for the plaintiff, and that the court should not have withdrawn the case from the jury. We are of the opinion that the case of *Kelley v. Fourth of July Mining Co.*, 16 Mont. 484, 41 Pac. 273, covers the law of the case as presented by the evidence introduced by plaintiff.

The appellant made certain technical objections to the allowance and settlement of the statement on motion for a new trial. These objections were incorporated in the record and are before us. One point is that the document, which we have heretofore called "a statement on motion for new trial," is denominated by the plaintiff "a statement of the case and bill of exceptions," and that, as appellant says: "There is no authority in law for combining in one instrument a bill of exceptions and statement on motion for a new trial, and it is impossible to tell whether the plaintiff seeks to settle the bill of exceptions as provided in section 1155 of the Code of Civil Procedure, or statement on motion for a new trial as provided in subdivision 3 of section 1173 of the Code of Civil Procedure." As to this matter, suffice it to say that it is immaterial what a paper is called. We look to the paper itself to see what it is. This is a statement on motion for a new trial. The manner of settling a bill of exceptions and that of settling a statement on motion for a new trial seem to us to be the same. Moreover, there is not anything in this record to show what steps were taken to procure the settlement, and we must necessarily assume that it was settled according to law.

A further objection made, saved, and urged by appellant is, that the statement should not have been settled "because the said bill of exceptions and statement on motion for new trial is not reduced to the narrative form, and extensive portions of the testimony are, without reason, reproduced by question and answer." So far as the objection that extensive portions of the testimony are reproduced by question and answer is concerned, we find that much of the evidence has been so presented in the statement. Under a rule of this court (rule 7, subsec. 3, 30 Mont. xxxiv, 82 Pac. viii), the testimony contained in the statement on motion for a new trial or the bill of exceptions should be reduced to narrative form, unless the court below order otherwise. Objection, as we have seen, was seasonably made in the court below to the form in which the testimony was produced. The court overruled the objection, and we consider that this is an order

by the court to let it be in the form of question and answer as it appears.

The further technical objection was made and saved that in the statement the lines were not numbered, and that the pages were not numbered after page 45. Under a certain rule of the district court in which the case was tried, the statement was required to be paged and the lines numbered. The purpose of this rule, of course, is to furnish to the party upon whom the statement is served, ready means of preparing such amendments as he may see fit to propose, and to aid the court in comparing the same in case of dispute as to the question of amendments. When the reason of the rule fails, the rule falls. One rule of this court requires transcripts to be indexed; but, if a transcript consisted of only one page, we would not listen to an objection that the transcript was not indexed. Counsel in this case submitted 57 amendments, and they were allowed by the court. Neither the counsel nor the court invoked the rule to facilitate labor. Rules of the sort referred to are not made for the purpose of punishing any one, but to aid counsel who may invoke them for the purpose of avoiding unnecessary labor and to make certain what is done.

We find no error in the record, and the order of the court granting the motion for new trial is affirmed.

Affirmed.

BRANTLY, C. J., and HALLOWAY, J., concur.

#### STATE v. KREMER.

(Supreme Court of Montana. March 19, 1906.)

##### 1. CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—MOTION FOR NEW TRIAL.

Under Pen. Code, §§ 2172, 2173, certain matters including orders on motions for new trial were deemed excepted to, and by section 2176, they could be reviewed without a bill of exceptions. Acts 1903, p. 48, c. 34, § 2, amended the above sections by providing that "the only method of preserving for review by the Supreme Court on appeal any proceeding, evidence, or matter not designated by the Penal Code as part of the record on appeal without bill of exceptions shall be by bill of exceptions; \* \* \* thus \* \* \* the following mentioned papers and matters must be included in such a bill: \* \* \* Motions for new trial, together with the matter in support thereof, including affidavits used thereon." Held that the only manner of presenting a motion for new trial in a criminal case is by bill of exceptions.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2368.]

##### 2. SAME—SETTLEMENT—NOTICE.

Under Pen. Code, § 2171, and Acts 1903, p. 47, c. 34, § 1, providing for the settlement of bills of exceptions in criminal cases, and requiring that the draft of the proposed bill must be presented, upon at least two days' notice to the adverse party, to the judge for settlement, or delivery to the clerk for the judge, the giving of two days' notice to the county attorney is an indispensable prerequisite to the consideration of the bill of exceptions by the appellant court,

and the record must affirmatively show that such notice was given.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2334.]

##### 3. SAME.

Pen. Code, § 2171, and Acts 1903, p. 47, c. 34, § 1, requiring at least two days' notice of the settlement of bills of exception, is not complied with by delivering a copy of the draft of the proposed bill of exceptions to the adverse party.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2835.]

##### 4. SAME—RECORD—INSTRUCTIONS—EVIDENCE.

In a prosecution for larceny, an instruction that, if it is possible for the jury upon the evidence to account for the taking of the property mentioned upon any reasonable hypothesis other than the guilt of defendant, they should do so, and find the defendant not guilty, cannot be said to be appropriate to every case, and, where the evidence is not before the Supreme Court on appeal, the refusal of the trial court to give such instruction will not be reviewed.

##### 5. SAME—TRIAL—INSTRUCTIONS.

A requested instruction in a criminal prosecution that the jury should not consider their personal opinions as to the facts proven, and that they might believe as men that certain facts exist, but as jurors they could only act upon the evidence introduced upon the trial, and from that and that alone they must form their verdict, unaided, unassisted, and uninfluenced by any opinion or presumption not framed upon the testimony, was properly refused.

##### 6. SAME—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

There was no error in refusing to give an instruction as to reasonable doubt, where the same matter was covered by instructions given in different language.

Appeal from District Court, Silver Bow County; Michael Donlon, Judge.

Nellie Kremer was convicted of the crime of grand larceny, and appeals. Affirmed.

J. Bruce Kremer and Edwin S. Booth, for appellant. Albert J. Galen, Atty. Gen. and W. H. Poorman, Asst. Atty. Gen., for the State.

HOLLOWAY, J. Nellie Kremer was convicted of the crime of grand larceny, and appeals from the judgment and from an order denying her a new trial. The record presented here consists of the record of the action or judgment roll, a bill of exceptions, the order denying the motion for a new trial, and the notice of appeal. There are nine assignments of error, four of which are presented by the record of the action or judgment roll, and five by the bill of exceptions.

We are met at the outset by an objection on the part of the Attorney General that the bill of exceptions cannot be considered for any purpose, for the reason that it does not appear, affirmatively or otherwise, that the proposed bill was presented to the judge, or delivered to the clerk for the judge, for settlement upon notice of at least two days to the county attorney. That portion of the record to which reference is made is designated "Statement on Motion for a New Trial, and Bill of Exceptions." There is not any such thing recognized by the law of this

state as a statement on motion for a new trial in a criminal case.

The motion may be presented to the trial court on affidavits, or a bill of exceptions, or both. For purposes of review by this court the Code did not formerly require the affidavits to be made a part of the record, or to be authenticated by a bill of exceptions; but, by section 2, c. 34, Sess. Laws 1903 (Laws 1903, p. 48), they must be made a part of the record by bill of exceptions. Likewise, by sections 2172 and 2173, Pen. Code, certain matters were deemed excepted to, and by section 2176 of the Penal Code these could be reviewed without a bill of exceptions; but by section 2, c. 34, p. 48, Acts 1903, above, these sections were also amended to the extent that every matter enumerated in either section 2172 or 2173, above, must now be incorporated in a bill of exceptions, except the order granting or refusing a new trial, which is incorporated in the record by certificate of the clerk, as is the notice of appeal. So that, taking these provisions together, it is perfectly clear that the only manner of reviewing an order granting or refusing a motion for a new trial in a criminal case is upon a bill of exceptions incorporating the matters upon which it is based.

Considering, then, that portion of the record here designated "Statement on Motion for a New Trial and Bill of Exceptions" as a bill of exceptions only, we are face to face with the Attorney General's objection. Section 2171 of the Penal Code provides for the settlement of a bill of exceptions when presented by the defendant. Section 1, c. 34, p. 47, Acts 1903, above, provides for the settlement of a bill of exceptions when presented by either party, but the procedure is the same in either case. The draft of the proposed bill must be presented, upon at least two days' notice to the adverse party, to the judge for settlement or delivered to the clerk for the judge; if delivered to the clerk, the clerk must deliver it with proposed amendments, if any, to the judge. In *State v. Gawith*, 19 Mont. 48, 47 Pac. 207, decided in 1896, it was held that the giving of the two days' notice to the county attorney, as provided in section 2171, above, is an indispensable prerequisite to the consideration of a bill of exceptions by the appellate court, and that it must appear affirmatively from the record that such notice was given. This was followed and approved in *State v. Moffatt*, 20 Mont. 371, 51 Pac. 823, and in *State v. Stickney*, 29 Mont. 523, 75 Pac. 201. Section 1 of chapter 34, p. 47, Acts of 1903, must be given the same meaning. We now repeat what was decided in those cases: That the provisions of section 2171 of the Penal Code, and of section 1 of chapter 34, p. 47, of the Acts of 1903, above, relating to the settlement of bills of exceptions in criminal cases, are mandatory, and that the record must show affirmatively that such notice was given;

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otherwise, the bill of exceptions will not be considered by this court.

But it may be said that a copy of the draft of the proposed bill of exceptions was, in this instance, given to the county attorney; but that does not meet the requirements of the statute. The reason for the rule announced in the cases above is apparent. After the county attorney receives notice that the proposed bill will be presented for settlement, he has from that time until the settlement of the bill, or until the proposed bill is delivered to the clerk, within which to propose amendments; and if he has not this notice, he has no knowledge of the time within which he must propose his amendments. In any event, the law in unmistakable language requires the notice to be given. It is not an unreasonable requirement and will be rigidly enforced. The presumption at least is that laws are enacted with that purpose in view. The record does not show that the notice which is required to be given by section 2171, or section 1, c. 34, p. 47, Laws 1903, was given; nor does it even appear that the county attorney was present when the bill of exceptions was settled or that he knew anything about its settlement. Upon the authority of the cases cited above, we decline to consider the bill of exceptions in this case for any purpose whatever. It is also to be observed that by the provisions of section 2, of chapter 34, p. 47, of the Acts of 1903, above, a demurrer to an information must be presented by bill of exceptions in order to have the action of the court thereon reviewed.

The questions presented upon the appeal from the judgment and which properly appear from the record of the case or judgment roll, relate to the refusal of the trial court to give instructions numbered 21, 23, 25, and 26, requested by the defendant. The first half of No. 23 was given in a number of other instructions. No. 21 and the last half of No. 23 are to the same effect—that if it is possible for the jury, upon the evidence in the case, to account for the taking of the property mentioned in the information upon any reasonable hypothesis other than the guilt of the defendant, then they should do so and find the defendant not guilty. It cannot be said that an instruction to this effect should be given in every case. As the evidence is not properly before us, we cannot examine it to determine whether in this particular case any error was committed by the trial court in refusing to give either or both of these offered instructions. Error will not be presumed; it must be made to appear affirmatively. Instruction No. 25 is erroneous, and was properly refused. It is as follows: "You are instructed that your personal opinion as to the facts proven cannot properly be considered as the basis of your verdict. You may believe as men that certain facts exist, but as jurors, you can only act upon evidence introduced upon the trial, and from that, and that alone you must

form your verdict, unaided, unassisted, and uninfluenced by any opinion or presumption, not framed upon the testimony." If the juror is not to consider his personal opinion as to the facts proven, it would be interesting to know whose opinion he must consider. *Blashfield on Instructions to Juries*, § 360, *Ramsey v. Burns*, 27 Mont. 154, 69 Pac. 711, *Spies v. People*, 122 Ill. 79, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, and *Villereal v. State* (Tex. Cr. App.) 61 S. W. 715, are cited in support of appellant's contention that this instruction should have been given. But in the authorities cited an instruction such as No. 25 above was not considered. In every instance the instruction approved in effect told the jury not to consider any matter not in evidence in the case before them. Instruction No. 26, refused, only attempts to emphasize the fact that the state must prove every material allegation of the information beyond a reasonable doubt. We think this feature of the case had been fairly covered by the numerous instructions upon that subject, given by the court. While the instructions given are not in the same language as No. 26 above, the jury must have understood from them their duty quite as fully as if this refused instruction had been given.

As it does not appear from this record that any error was committed, the judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

#### STATE v. MORRISON.

(Supreme Court of Montana. March 26, 1906.)

##### 1. CRIMINAL LAW—RECORD ON APPEAL—BILL OF EXCEPTIONS.

A bill of exceptions on appeal in a criminal case will not be considered, where it does not appear that any notice was given to the county attorney as to the time when the draft of the bill would be presented for settlement or that the state had waived notice.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2834.]

##### 2. SAME—QUESTIONS REVIEWABLE—ADMISSIBILITY OF EVIDENCE.

Where, on appeal in a criminal case, the evidence is not in the record, alleged errors in respect to the admission of evidence will not be considered.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2932.]

##### 3. SAME—INSTRUCTIONS.

Where the brief of appellant in a criminal case fails to comply with rule 10, subsec. 3b (82 Pac. x), providing that, where error is alleged in the charge of the court, the instructions given or refused shall be set out in the specifications in totidem verbis, errors in giving and refusing of instructions will not be considered.

##### 4. SAME—RECORD OF ACTION—MANNER OF BRINGING UP ON APPEAL.

The record of the action, as defined in Pen. Code, § 2229, providing that the indictment, a copy of the minutes of the plea, and of the trial, the charges given or refused and the indorsements thereon, and a copy of the judgment shall be the record of the action, cannot

be brought up on appeal in the body of a bill of exceptions.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2732, 2805.]

##### 5. SAME—REVIEW—INVITED ERROR.

A defendant in a criminal case cannot complain of errors in instructions requested by him.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3009.]

Appeal from District Court, Silver Bow County; Michael Donlon, Judge.

Elizabeth Morrison was convicted of manslaughter, and she appeals. Affirmed.

J. Bruce Kremer and Edwin S. Booth, for appellant. Albert J. Galen, Atty. Gen., and W. H. Poorman, Asst. Atty. Gen., for the State.

MILBURN, J. This is an appeal by the defendant from a judgment of conviction of the crime of manslaughter and from an order denying defendant's motion for a new trial.

1. Appellant has attempted to set out in her brief 30 specifications of error. The bill of exceptions used in this case, which is called "a statement on motion for a new trial," being that which was used on motion for new trial, cannot be by us considered. The point is raised by the respondent and is well taken, to wit: That it does not appear that any notice was given to the county attorney as to the time when the draft of the bill would be presented to the judge for settlement, and it does not appear that the state in any way waived notice. *State v. Kremer*, 85 Pac. 736.

2. Specifications of error 1 to 17, inclusive, as set out in appellant's brief, refer to alleged errors of the court in respect of the evidence and the introduction thereof. The evidence not being before us, having been stricken out as aforesaid, these specifications cannot be considered. The remaining specifications, 18 to 30, inclusive, pertain to the giving and refusing of instructions. As to them it is sufficient to say that the brief of appellant fails to comply with rule 10, subsec. 3b (82 Pac. x), requiring that instructions shall be set out in the specifications in totidem verbis; and for this reason, as heretofore so frequently said by this court, defendant has not the right to have these specifications considered.

3. There is not any record of the action before this court in the transcript. The transcript on page 1 commences with "Statement on Motion for a New Trial," and contains, with the evidence and other things, what is certified in the body of the statement to be the "judgment roll." What is called the statement is, as we have seen in the first paragraph of this opinion, stricken out. Therefore there is not anything before the court in the form of a record or transcript. Neither the "record of the action" in a criminal case (as defined in section 2229, Pen. Code), nor the judgment roll in a civil case, can be brought up in the body of a bill of exceptions.

4. Notwithstanding the condition of the

transcript, as before set forth, we have examined into the matter of the alleged specifications of error, so far as we have been able to do it, from 18 to 30, inclusive, on the appeal from the judgment, assuming that "the record of the action," if it were before us, would be identical with the "judgment roll" as contained in the bill of exceptions, and find that several of the instructions given and complained of were given at the request of the defendant, and therefore, however erroneous or prejudicial they may be, she may not object to them. We find, further, as to the rest of the instructions given and refused and cited as error, that the court did not commit any error prejudicial to the defendant.

The judgment and the order are affirmed.  
Affirmed.

BRANTLY, C. J., and HOLLOWAY, J.,  
concur.

# BOWEN v. WEBB.

(Supreme Court of Montana. March 19, 1906.)

## 1. APPEAL — DEFAULT — VACATION—APPEAL-ABLE ORDER.

An order made before final judgment, refusing to set aside defendant's default, is not an appealable order, within Code Civ. Proc. § 1722, as amended by Sess. Laws 1899, p. 146, specifying the orders from which an appeal may be taken.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 380, 414.]

## 2. EVIDENCE — JUDICIAL NOTICE — COURT RULES.

Under Code Civ. Proc. § 3150, specifying the facts of which courts take judicial notice, the Supreme Court will not take judicial notice of the provisions of rules of district courts.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 61.]

## 3. APPEAL—DEFAULT—VACATION—DISCRETION—ABUSE.

The granting or refusing to grant a motion to set aside a default being within the legal discretion of the trial court, its action will not be reversed on appeal, in the absence of a showing of manifest abuse of discretion.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3877-3879.]

## 4. JUDGMENT—DEFAULT—MOTION TO VACATE—GROUNDS.

To justify the granting of a motion to vacate a default, defendant must show that he proceeded with diligence; that the default occurred through his excusable neglect; that the judgment, if permitted to stand, will affect him injuriously; and that he has a defense to plaintiff's cause of action on the merits.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 250, 270, 271.]

## 5. SAME—ATTORNEYS—PRESS OF BUSINESS.

Affidavits submitted on an application to open a default, showing merely a press of business engagements on the part of defendant's attorney, which called him out of his office a great deal of the time, whereby he made a mistake in the day on which he was required to make his appearance, were insufficient to establish excusable neglect.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 279-287.]

## 6. SAME—AFFIDAVIT OF MERITS—DEMURRER.

A default will not be vacated merely to permit the defendant to file a demurrer to the

complaint, but the application must be accompanied either by a proposed answer showing a defense on the merits or by an affidavit of merits.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 311-318.]

## 7. APPEAL—PRESUMPTIONS.

Where, on appeal from an order denying a motion to open a default, there is no affidavit of merits other than a proposed answer, which is neither identified nor referred to as a paper offered in support of the motion, the bill of exceptions merely alleging that the motion was made on the complaint, motion, and affidavits, it will not be presumed that the proposed answer was considered as an affidavit of merits.

Appeal from District Court, Carbon County; Frank Henry, Judge.

Action by Ellen Bowen against Samuel Webb. From a judgment denying a motion to set aside a default judgment in favor of plaintiff and permit defendant to file a demurrer to the complaint, he appeals. Affirmed.

In this case there is an appeal to this court from a judgment by default rendered in the district court of Carbon county on May 8, 1905, and an attempted appeal from an order of the district court refusing to set aside the default, which order was made on February 21, 1905. This action was commenced on January 21, 1904. Service of summons was made by delivering a copy thereof, together with a copy of the complaint, to the defendant, personally, on January 22, 1904. On February 15th following, the defendant having failed to make any appearance in the case, on application of counsel for plaintiff, the clerk of the district court entered the default of the defendant, and thereafter plaintiff made proof, and judgment was rendered and entered in her favor according to the prayer of her complaint. On February 15th, after the default, and before judgment had been entered, defendant's attorney filed a motion to set aside the default and permit him to file a demurrer to the complaint. This motion recites that it is made upon the papers in the case and the affidavit filed with it. The motion was accompanied by an affidavit of the attorney for the defendant, to the effect that he had been employed on January 28th to make appearance for defendant in this case; "that by reason of mistake and inadvertence as to the time within which said appearance must be made, affiant failed to make such appearance by demurrer or answer." On February 16th the defendant served upon the attorney for plaintiff a proposed answer, which had been offered for filing on February 15th, after the default had been entered; but no reference whatever is made to this proposed answer in any of the defendant's moving papers. On March 1, 1904, counsel for defendant filed another affidavit of himself in support of the defendant's motion to set aside the default. This second affidavit recites that the default was entered by the clerk when court was in session, contrary to a rule of that

court; but the rule is not set forth. This affidavit alleges that the failure of the defendant to appear within the time allowed by law "was occasioned by and due to an unusual amount of business engagements, calling affiant out of his office a great deal during said time after the case had been brought to him and his services had been engaged by the defendant, and prior to the first day of the regular February term of court; and that by reason of the consequent confusion of his business affiant mistook the day upon which he must file appearance of the defendant in the case." The bill of exceptions recites that the motion to set aside the default came on for hearing before the court on February 21, 1905, on the complaint, motion, and affidavits, and was overruled.

W. F. Meyer, for appellant. Geo. W. Pierson, for respondent.

HOLLOWAY, J., after stating the facts, delivered the opinion of the court.

1. The order, made before final judgment, refusing to set aside the default is not an appealable order. Section 1722 of the Code of Civil Procedure, as amended by an act of the Sixth Legislative Assembly. Sess. Laws, 1899, p. 146.

2. This court does not take judicial notice of the provisions of rules of district courts. Code Civ. Proc. § 3150.

3. The granting or refusing to grant a motion to set aside a default is within the sound legal discretion of the trial court, and the appellant here assumes the burden of showing facts which made the denial of his motion a manifest abuse of that discretion. *Briscoe v. McCaffery*, 8 Mont. 336, 20 Pac. 691; *Blaine v. Briscoe*, 16 Mont. 582, 41 Pac. 1002; *Morse v. Callantine*, 19 Mont. 87, 47 Pac. 635; *Eakins v. Kemper*, 21 Mont. 160, 53 Pac. 310; 6 Ency. Plead. & Prac. 163, and cases cited.

4. In order to justify the district court in granting the motion, the defendant was required to show (a) that he proceeded with diligence, which may be conceded; (b) his excusable neglect; (c) that the judgment, if permitted to stand, will affect him injuriously, and that he has a defense to the plaintiff's cause of action upon the merits. So far as defendant's affidavits attempt to make out a case of excusable neglect, at most it may be said they show merely a press of business engagements on the part of defendant's attorney which called him out of his office a great deal of the time, and by reason whereof he made a mistake in the day upon which he was required to make appearance. We are not prepared to say that this showing was sufficient in this respect to justify the court in setting aside the default. Frequently it has been held to be insufficient. *Thomas v. Chambers*, 14 Mont. 423, 36 Pac. 814; *City of Helena v. Brule*, 15 Mont. 429, 39 Pac. 456, 852; *Herbst Importing Co. v. Hogan*, 16 Mont. 385, 41 Pac. 135. While

the law allows a defendant 20 days, after service of summons upon him, within which to appear in the action, it does not require him to defer his appearance until the last day, and when he does so he assumes the risk of his delay, if in fact he miscalculates the time. It has been held uniformly that the defendant must present in support of his motion to set aside a default, an affidavit of merits; that is, an affidavit showing a defense to the plaintiff's cause of action upon the merits. *Donnelly v. Clark*, 6 Mont. 135, 9 Pac. 887. A default will not be vacated to permit the filing of a demurrer. Conceding that a proffered answer, if identified and offered for that purpose and sufficient in form, may perform the office of an affidavit of merits, we are met, in this instance, with the recital in the bill of exceptions that the trial court heard the motion upon the complaint, motion, and affidavits. Nowhere is the proffered answer referred to as a paper offered in support of the motion. It is not identified at all, while the motion itself seeks to have the default set aside in order that the defendant may demur to the complaint. In view of the declared purpose of this motion, and in view of the recital in the bill of exceptions above, and in the absence of anything to show affirmatively that the proposed answer was offered as an affidavit of merits, we cannot presume that it was considered by the trial court, and, in its absence, there is not anything presented by way of an affidavit of merits, and, of course, a trial court would not grant the motion without such affidavit. Every presumption in favor of the district court's ruling will be indulged in this court. Error will not be presumed. It must be made to appear affirmatively.

We have examined the other questions presented by appellant, but there does not appear to be merit in them. We think this record fails to disclose any error. The appeal from the order overruling the motion to set aside the default is dismissed, and the judgment is affirmed.

Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

#### YEGEN v. BOARD OF COM'RS OF YELLOWSTONE COUNTY et al.

(Supreme Court of Montana. March 26, 1906.)

##### 1. COUNTIES—BOARD OF COMMISSIONERS—AUTHORITY—IMPLIED AUTHORITY.

A valid statute conferring on boards of county commissioners the power to build detention hospitals for their respective counties, confers on the boards the power to acquire by purchase, or otherwise, sites for the erection of such hospitals.

##### 2. STATUTES—TITLE—SUFFICIENCY.

The title of Laws 1901, p. 80, entitled "An act creating a state board of health, defining its powers and duties and providing for the

compensation of its officers and providing for the enforcement of the rules and regulations of said board," does not embrace the provisions creating county boards of health consisting of the members of the boards of commissioners of the respective counties and one physician selected by them, defining their powers and duties so as to authorize such boards to declare quarantine against contagious diseases and confining affected persons in a suitable detention hospital, etc., within Const. art. 5, § 23, declaring that no bill containing more than one subject which shall be clearly expressed in its title shall be passed.

### 3. COUNTIES—PUBLIC OFFICERS—AUTHORITY—STATUTORY PROVISIONS.

Pol. Code, § 4230, subsds. 5-7, 9, conferring on boards of county commissioners the power to provide for the care of the indigent sick, and erect hospitals therefor, to provide a farm for the support of the poor of the county, to provide suitable rooms for county purposes, and to cause to be erected a courthouse, jail, hospital, and "such other buildings as may be necessary," does not authorize a board of county commissioners to establish a county detention hospital, the word "hospital" in the statute meaning a hospital for that class of persons for whom the board may provide and the phrase, "such other public buildings as may be necessary," not enlarging the class of purposes for which the board may erect buildings.

### 4. SAME.

Pol. Code, § 2864, providing that the necessary expenses incurred by the county board of health, consisting of the county commissioners and one physician, must be paid out of the county treasury, does not confer on boards of county commissioners the power to acquire land on their own motion to erect a permanent detention hospital thereon, the power conferred by the section conferring no authority on boards of county commissioners as such.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

Action by Christian Yegen against the board of county commissioners of Yellowstone county and others. From an order refusing a temporary injunction, plaintiff appeals. Reversed.

Fred H. Hathorn and Harry A. Groves, for appellant. A. J. Galen, Atty. Gen., and W. H. Poorman, Asst. Atty. Gen., for respondents.

BRANTLY, C. J. Appeal from an order refusing to issue an injunction. It appears from the complaint on file herein, that the board of county commissioners of Yellowstone county, having concluded to establish a county detention hospital, opened negotiations with the Minnesota-Montana Land & Improvement Company, a corporation, to purchase from it a certain block in the city of Billings on which to erect a suitable hospital building. The negotiations had progressed so far that upon proper application the district judge of the district of which that county is a part, had appointed appraisers to fix the price, and this had been done. Thereupon the plaintiff brought this action as a taxpayer to enjoin the board from proceeding further in the matter, on the ground that the board has no power to purchase property for such a purpose or to establish such a hospital. An order to show

cause was issued, fixing the hearing for November 18, 1906, at chambers, at Miles City. The defendant board showed cause by demurrer, on the ground that the complaint does not state a cause of action, and moved the judge to deny the injunction. After argument, this motion was sustained. Thereupon the plaintiff appealed.

The sole question presented is whether the board has power under the act of 1901 (Laws 1901, p. 80), to purchase a site and erect a detention hospital at the expense of the county, or, in case that statute is invalid, whether the statute defining the general powers of boards of county commissioners confers the power. The act referred to is entitled, "An act creating a state board of health defining its powers and duties and providing for the compensation of its officers, and providing for the enforcement of the rules and regulations of said board." Section 1 creates the state board of health. Sections 2, 3, 4, 5, 6, and 8 define its powers and duties and fix the compensation of its secretary. Section 7 provides for the compensation and expenses of its members. Sections 2, 3, 4, and 8 also provide for the organization and meetings of the board, the organization of local boards in the cities and villages of the state, the adoption of rules and regulations and the means of enforcing them, the payment of expenses in the emergencies of existing or threatened epidemic or pestilential diseases in particular localities and for public conferences of local health officers appointed by the board. Sections 9 to 35 create county boards of health of the members of the boards of commissioners of the respective counties and one physician selected by them, define their powers and duties, provide for local health officers, define their powers and duties and deal with certain miscellaneous matters concerning the public health in general. Sections 11, 25, and 26 are as follows:

"Section 11. The board of health of any county may declare quarantine therein, or in any part thereof, against contagious or infectious diseases prevailing in any other place, and against all persons and things likely to spread contagion or infection. The board has power and authority to enforce such quarantine until the same is raised by it, and may confine any person affected with or likely to spread contagious or infectious diseases in a suitable detention hospital prepared and used for that purpose, or if not such place is prepared by the county, then such persons shall be quarantined in his or her home or abode."

"Section 25. The municipal or county authorities may provide for the use of the city, town or county, hospitals or temporary places for the reception of the sick; and for that purpose may themselves build such hospitals or places of reception, or enter into an agreement with any person having the management of any hospital for the reception of the sick inhabitants

of their city, town or county, on payment of such sums as may be agreed upon; or two or more local authorities may combine in providing a common hospital.

"Section 26. Any expenses incurred by the authorities of any city, town or county in maintaining a hospital or a temporary place for the reception of a patient shall be paid from the general fund of the city or county."

While these sections do not in express terms empower the boards of commissioners to acquire sites for the erection of detention hospitals for their respective counties, they do confer the power to build them, and, by the well-settled rule that every power necessary to execute the power expressly granted is necessarily implied, the power to acquire by purchase or otherwise suitable sites for these hospitals is necessarily implied; for it would be idle to say that the boards have power to erect suitable buildings for the expressed purpose, and then say that they have no power to proceed because there is no express grant of power to purchase suitable sites for them. So that whether any power in the premises has been effectively granted depends upon an answer to the further inquiry, whether the legislation is invalid because it was not enacted in conformity with section 23, art. 5, of the Constitution, as appellant contends. This section declares: "No bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject which shall be clearly expressed in its title: but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." The particular criticism of the act is that the title of it does not express the subject of the legislation. The reasons for the enactment of this constitutional provision are stated by this court in *State v. Mitchell*, 17 Mont. 67, 42 Pac. 100, and in *State v. Anaconda Copper Min. Co.*, 23 Mont. 498, 59 Pac. 854. In the latter case they are summarized as follows: "To restrict the Legislature to the enactment of laws the objects of which legislators and the public as well may be advised of, to the end that any who are interested, whether as representatives or those represented, may be intelligently watchful of the course of the pending bill. The limitation is likewise designed to prevent legislators and the people from being misled by false or deceptive titles, and to guard against fraud in legislation by way of incorporating into a law provisions concerning which neither legislators nor the public have had any intimation through the title read or published." This summary is in substance the same as that laid down by Judge Cooley in his work on *Constitutional Limitations* (7th Ed.) p. 205, and by Sutherland in his work on *Statutory Construction*, § 78. It is said in *State v. McKinney*, 29 Mont. 375, 74 Pac. 1005, "The title is general-

ly sufficient if the body of the act treats only, directly or indirectly, of the subjects mentioned in the title, and of other subjects germane thereto, or of matters in furtherance of or necessary to accomplish the general objects of the bill, as mentioned in the title. The title need not contain a complete list of all matters covered by the act." It was also said in *State v. Anaconda Copper Min. Co.*: "But by this constitutional notice it is only intended that the subject of the bill shall be fairly expressed in the title. It is not necessary—for the Constitution has not so declared—that a title shall embody the exact limitations or qualifications contained in the bill itself which are germane to the purpose of the Legislature, if the general subject of the measure is clearly expressed in the title. Upon the highest authority it is held that under constitutional provisions substantially like that referred to in Montana, where the degree of particularity necessary to be expressed in the title of a bill is not indicated by the Constitution itself, the courts ought not to 'embarrass legislation by technical interpretations based upon mere form of phraseology. The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or, if but one object, that it was not sufficiently expressed by the title.'"

So long as the particular legislation in question is not repugnant to some provision of the fundamental law of the state, this court may not proceed to inquire and determine whether it is good or bad, or moral or immoral in its tendencies. It may be vicious in its tendencies, yet this fact of itself is of no moment. Within the limitations of the Constitution the Legislature is the exclusive judge as to whether a particular bill should be enacted into law, and its judgment and discretion in the performance of its duties may not be reviewed by the courts. It is, then, the imperative duty of the courts to sustain its action in all cases except when it is clearly repugnant to the fundamental law. What is the underlying object of this legislation? As indicated by its title, it is not an act dealing generally with the whole subject of the public health, but one that deals only with the establishment of the state board of health and subjects germane thereto. And it must not be overlooked that at the time of its passage there had already been created by law county boards of health, with a clear definition of their powers and duties (Pol. Code, §§ 2860-2864); and inasmuch as this legislation is not referred to in the act, though its provisions are substantially embodied therein, we are justified in concluding that it was not the purpose of the Legislature to repeal it or set it aside. If the act had been entitled "An act to protect the public health," then it might have included local and county boards as subsidiary instru-

mentalities to accomplish the general purpose so declared (*State v. McKinney*, supra); but, in view of the law as it already existed and the purpose of the act as indicated by its title, the object sought was restricted to the formation of a state board and a definition of its powers. It seems that no one would conclude from a reading of its title that the act had concealed in its bosom a provision creating county boards of health and others touching the duties of county officers, and the enlargement of the powers given them for the conduct of the ordinary affairs of the county. No one would have understood, for instance, that one purpose was to give more extensive powers to boards of county commissioners to expend the funds of the county to acquire property for purposes for which they could not therefore acquire it, and that the burdens of the taxpayers would be in consequence thereof increased. Indeed, the sections of the Political Code cited, are copied substantially into the act; but the county boards of health already created by this independent and already existing legislation are nowhere by appropriate language made subordinate means or instrumentalities to accomplish the purposes of the state board. They are continued as independent local bodies with well-defined powers, which they may exercise under such rules and regulations as they may adopt, even though inconsistent with those of the state board, and they owe no duty to the state board except that their respective secretaries must report to it certain information at stated times, but for a neglect of which there seems to be no penalty provided. But, besides this anomalous condition, there are in the act sections 25 and 26, quoted, which not only enlarge somewhat the powers of county boards of health to incur expense, but also add to those of the boards of commissioners of the respective counties the power to expend money for purposes for which, as we shall see, there is no warrant of law under the general powers conferred upon that body under section 4230 of the Political Code. If the Legislature had enacted a portion of the act, viz., sections 9, 10, 11, 12, 13, 25, and 26, under the title "An act to create boards of health for the respective counties in the state, and define their powers," it would have had a law complete in itself and not open perhaps to any constitutional objection. This feature of the act makes it clearly open to the objection urged against it, and the result is that section 25 must be declared invalid. In so far as this section of the act is concerned, it is not effective to give the defendant board of commissioners the power under which it was proceeding. Nor, for the same reason, are either of the others.

Nor do we think that under their general powers, as defined in section 4230 of the Political Code, supra, the boards of commissioners have power to build and maintain detention

hospitals for contagious or pestilential diseases at the expense of their counties. It is therein declared (subdivision 5) that these boards have power to provide for the care and maintenance of indigent sick and otherwise dependent poor, and that they may erect and maintain hospitals for that purpose. However desirable it may be that they should have the power to provide separate hospitals for able-bodied and not dependent persons suffering from contagious or pestilential diseases, they are not here empowered to erect and maintain them at the expense of the taxpayer. So they may, under subdivision 6, acquire farms for the support of the dependent poor—not others. So, again, they have the power to provide necessary county buildings under subdivision 7. But what are necessary county buildings? Manifestly such as are required for ordinary county purposes, as is indicated in these and similar provisions, as, for instance, in subdivision 9. Under this latter provision they may cause to be erected a courthouse, jail, hospital, and such other buildings as may be necessary. The word "hospital" evidently does not mean one or more hospitals for all classes of persons; but for that class of persons for whom the board may provide at the expense of the people, namely, the indigent sick. The phrase "such other public buildings as may be necessary" has no wider meaning, nor does it enlarge the class of purposes for which these boards may erect and maintain buildings so as to include others not of the class already mentioned.

The extent of the powers of boards of county commissioners in the state of Montana, to care for the dependent poor, whether sick or well, under provisions of statutes similar to those referred to, are discussed in *Lebcher v. County Commissioners of Custer County*, 9 Mont. 315, 23 Pac. 713, and we think the conclusion of the court there stated the correct one. That decision is conclusive of this branch of the case. If, under the law as it stood at the time of the passage of the act in question, the necessity arose for a place for temporary detention of persons suffering from contagious and infectious diseases, the county boards of health had power to make provision therefor at the expense of their respective counties (Political Code, § 2864); but the power thus given to these boards is not a power given to the boards of county commissioners to acquire land on their own motion and to erect permanent buildings thereon. It must not be overlooked that the two boards, though closely associated, have distinct and separate powers, and the two must not be confounded, as the Attorney General seems to have done in his argument in support of the order of the district court refusing to issue the injunction; for he insisted that the power conferred upon boards of health under section 2864 of the Political Code, is an authority conferred upon the

boards of county commissioners as such, by which they might purchase sites and erect detention hospitals.

The result is that the order of the district court is erroneous, and must be reversed. Reversed.

MILBURN and HOLLOWAY, JJ., concur.

STATE ex rel. CRUMB v. MAYOR, ETC.,  
OF CITY OF HELENA, et al.

(Supreme Court of Montana. March 26, 1906.)

1. CONSTITUTIONAL LAW — SELF-EXECUTING  
PROVISIONS—TELEGRAPHS AND TELEPHONES  
—CONSTRUCTION AND MAINTENANCE.

Const. art. 15, § 14, providing that any person shall have the right to maintain telephone lines within the state, and the Legislature shall by general law provide reasonable regulations to give effect to the section, is not self-executing, and, in the absence of legislation authorizing it, the placing of telephone poles in the highways is an unlawful obstruction thereof, and, when the Legislature enacts a law on the subject, it must be a general one, so as to give effect to the constitutional grant.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 32; vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 2, 6.]

2. TELEGRAPHS—CONSTRUCTION—VALIDITY OF  
STATUTES.

Sess. Laws 1905, p. 122, c. 55, authorizing the maintenance of telephone lines along the public highways outside of incorporated cities, is in conflict with Const. art. 15, § 14, authorizing the maintenance of telephone lines within the state, and directing the Legislature to provide by general law regulations to give effect to the section, because of its failure to enable the business to be conducted in cities; and Pol. Code, § 4800, subd. 43, as amended by Sess. Laws 1907, p. 203, empowering city councils to regulate the erection of poles and the stringing of wires within the city limits, does not remedy the defect.

3. SAME.

Where the Legislature has complied with Const. art. 15, § 14, authorizing the maintenance of telephone lines within the state, and directing the Legislature to provide by general law, reasonable regulations to give effect to the section, it may authorize cities to make such reasonable rules for the regulation of the business as may be considered necessary.

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

Mandamus by the state, on the relation of W. H. Crumb, against the mayor and city council of the city of Helena and another, to compel respondents to designate the place for the erection of poles for a telephone system. From a judgment of dismissal, the relator appeals. Reversed.

M. S. Gunn, for appellant. E. C. Day, for respondents.

HOLLOWAY, J. In April, 1905, this appellant, W. H. Crumb, made demand upon the mayor and city council of the city of Helena that they designate the places for the erection of poles and fixtures in and upon the streets, avenues, and alleys of that city for the proper construction and installation

of a telephone system, and permit the erection of such poles and fixtures and the placing of necessary wires thereon. Compliance with this demand was refused, and these proceedings begun. An alternative writ of mandate was issued and served, and upon the return a motion to quash the alternative writ and dismiss the proceedings was interposed and sustained, the proceedings dismissed, and a judgment in favor of the defendants entered, from which judgment this appeal is prosecuted.

Section 14 of article 15 of the Constitution of this state provides: "Any association, or corporation, or the lessees, or managers thereof, organized for the purpose, or any individual, shall have the right to construct or maintain lines of telegraph or telephone within this state, and connect the same with other lines; and the legislative assembly shall by general law of uniform operation provide reasonable regulations to give full effect to this section. \* \* \*

Pursuant to this provision of the Constitution, section 1000 of the Civil Code was enacted. That section reads as follows: "A telegraph or telephone corporation, or a person, is hereby authorized to construct such telegraph or telephone line or lines from point to point, along and upon any of the public roads, by the erection of necessary fixtures, including posts, piers and abutments, necessary for the wires; but the same shall not incommode the public in the use of said roads or highways." In 1905 the Legislature amended this section by enlarging its provisions so as to make them applicable to electric light and electric power lines also, and adding this proviso: "Provided, however, that the provisions of this act shall not apply to public roads and highways within the limits of incorporated cities or towns." Sess. Laws 1905, p. 122, c. 55. The question presented for determination here is: Does the act of 1905 violate the mandate of the Constitution contained in section 14, art. 15, above? This section of the Constitution is not self-executing. Legislation must be had to make the right granted effective. If the Legislature failed or refused to enact any measure on the subject at all, then the right granted would simply lie dormant, for it must be conceded that there is not any power which can coerce the Legislature into enacting a particular law. In the absence of legislation making the grant effective, it is of no use whatever. In the absence of legislation it would be an unlawful obstruction of any public highway to place poles, posts, or other fixtures for use of a telephone or telegraph line in it. The Constitution commands the Legislature to enact a law upon the subject; but, if the Legislature refuses to do so, there is not any way to enforce the command. If, however, the Legislature does act, the law which it enacts must be a general one of uniform operation, providing reasonable regulations which will give full effect to

the grant contained in the section of the Constitution quoted above. Does the act of 1905 meet these requirements?

We may concede without discussion, for the purposes of this case, that it is a general law; that it is so far of uniform operation as not to violate the uniformity clause, and that, so far as it goes, its regulations are reasonable. But does it give, or tend to give, full effect or any practical effect to the grant contained in section 14 of article 15 above? That grant was not intended merely to enable telegraph and telephone lines to be constructed and maintained for the purpose of ornamenting railroad lines or public roads in country districts, but to enable the telegraph and telephone business, as such, to be conducted in this state. The act of 1905 provides that the public roads and highways of the state may be utilized for the erection of necessary posts, piers, and abutments for the stringing of wires, provided they are so used as not to interfere with or endanger the public in their use, but that this privilege shall only extend to public roads and highways outside of incorporated cities and towns. However, counsel for respondents contends that this act is fully supplemented by subdivision 43 of section 4800 of the Political Code, as amended by an act of the Fifth Legislative Assembly, approved March 8, 1897 (Sess. Laws 1897, p. 203), which reads as follows: "The city or town council has power: \* \* \* (43) To regulate or suppress the erection of poles and the stringing of wires, rods, or cables in the streets, alleys, or within the limits of any city or town." But, at most, this provision does not enable a corporation or individual wishing to engage in the telegraph or telephone business to do so. Even assuming, for the sake of argument, that the Legislature could delegate to incorporated cities and towns exclusive authority to legislate upon a subject with respect to which the Constitution says the Legislature itself must act, this provision only leaves it to the option of the cities and towns to legislate upon this subject, and, if they do not do so, they cannot be coerced into acting any more than the Legislature itself, and if they fail to enact any ordinances upon the subject at all, as they are left free to do, then we have an act of the Legislature which doubtless assumes to give effect to section 14 of article 15 above, but which in fact only permits the telegraph and telephone business to be carried on in the country districts of the state; for, the constitutional provision not being self-executing, and the act of 1905 not applying to incorporated cities or towns, then, if the cities and towns fail to legislate upon the subject, the right granted by the Constitution in section 14, art. 15, above, can only be made useful in the country districts of the state.

A statute which provides that a corporation or individual, seeking to erect and maintain a line of telephone and engage in the telephone business, may erect and maintain

such telephone line along the public roads and highways outside of incorporated cities and towns only, and which leaves the cities and towns free to refuse to enact legislation upon the subject and thereby prevent such business being conducted within those municipalities, does not give full effect, or any practical effect, to the grant contained in section 14, art. 15, above. In the Red Lodge Case (State ex rel. Tel. Co. v. Mayor, 30 Mont. 338, 76 Pac. 758) it is said: "If the subordinate divisions of the state are vested with the authority either of preventing the construction of these lines, or of imposing restrictions which will have that effect, then the Legislature has not complied with this constitutional command." As said before, a failure on the part of a municipality to enact an ordinance upon the subject is just as effective means of prohibiting the business being conducted within the corporate limits of such municipality, as could possibly be devised. When the constitutional provision above was adopted, it was common knowledge that practically the only use of the telephone was for commercial purposes, and that the great bulk of that business originated in, if it was not absolutely confined to, incorporated cities and towns, and, in order to secure the business and accommodate the public, the terminals for long distance lines and the local exchanges must of necessity be located in the business centers, where, as a matter of fact, they have always been located, and the grant was intended to enable a corporation or individual seeking to do so to carry on the telephone business as it was done at the time the provision was adopted. To confine a telephone company or an individual operating a telephone line to country districts alone would defeat the very purpose of the grant. State ex rel. Tel. Co. v. Mayor, above; Chamberlain v. Iowa Tel. Co., 119 Iowa, 619, 93 N. W. 596.

The command in section 14, art. 15, of the Constitution, above, to the Legislature, is to pass a general law of uniform operation, with reasonable provisions, and which will enable the telephone business to be conducted in this state as it was generally conducted throughout the country in 1889; that is, access to the business centers—the cities and towns—must be granted, and any law which falls short of this does not comply with the constitutional provision above. Nothing said herein renders inoperative subdivision 43 of section 4800 above, as amended; for after the Legislature has complied with the command of section 14, art. 15, of the Constitution, by the enactment of such legislation as is there contemplated, it may then, doubtless, authorize cities and towns to make such reasonable rules and regulations for the regulation of such business as may be considered necessary. Red Lodge Case, above, 30 Mont. at page 346, 76 Pac. 758. In so far as the act of 1905 fails to meet the requirements of section 14, art. 15, of the Constitution, it is in-

valid. It is not necessary to consider in this case whether the whole of the act of 1905 above is inoperative. The proviso is, and so far as this appellant is concerned, his rights are the same whether they be measured by the act of 1905 or by section 1000 of the Civil Code. With the proviso eliminated from the act of 1905, the conditions presented in this case are the same as in the Red Lodge Case, and the decision rendered therein is conclusive of this appeal.

The judgment is reversed, and the cause remanded to the district court, with directions to issue the writ of mandate as prayed for.

Reversed and remanded.

BRANTLY, C. J., and MILBURN, J., concur.

### GLASS et al. v. BASIN & BAY STATE MINING CO.

(Supreme Court of Montana. April 3, 1906.)

#### 1. JUDGMENT — RES JUDICATA — EFFECT OF DISMISSAL—PRESUMPTION.

Code Civ. Proc. § 1004, enumerates the cases in which an action may be dismissed or judgment of nonsuit entered. Section 1005 declared that in all other cases than those mentioned in section 1004 the judgment must be on the merits. Section 1007 declares that a final judgment dismissing the complaint does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll, that it is rendered on the merits. *Held*, that a judgment on the pleadings resulting in dismissal of the action, though not enumerated in section 1004, does not bar another action on the same cause of action, unless rendered on the merits, which fact must be expressly declared on the face of the judgment or appear from the judgment roll, so that the trial court cannot presume that a judgment of dismissal in a former action on the same cause of action was on the merits, the judgment not so declaring, and the judgment roll not being before it.

#### 2. LIMITATION OF ACTIONS—DISMISSAL—SECOND ACTION.

An action having been terminated by a judgment of affirmance of a judgment of dismissal on the pleadings, which was not on the merits, a second action on such cause of action may, under the provisions of Code Civ. Proc. § 547, be commenced within a year after such termination.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Action by James Glass and another against the Basin & Bay State Mining Company. Judgment for defendant. Plaintiffs appeal. Reversed.

M. S. Gunn and Edward Horsky, for appellants. Bach & Wight, for respondent.

BRANTLY, C. J. Action for money had and received. The complaint is in the ordinary form, alleging that the defendant, a corporation organized under the laws of Montana, is indebted to the plaintiffs in the sum of \$140,000 for money had and received for the use and benefit of plaintiffs. Judgment is demanded for that amount and costs.

The answer presents six separate defenses. The first is a denial of all allegations contained in the complaint. The second, third, fourth, and fifth allege, respectively, that the cause of action is barred by the provisions of subdivision 1 of section 514 of the Code of Civil Procedure, of subdivision 1 of section 513 as amended by Session Laws 1903, p. 292, of subdivision 3 of section 514 as amended by the same act, and by section 512 of the same Code. The sixth defense alleges, in substance, that heretofore, on August 21, 1901, in an action then pending in the district court of the Fifth judicial district of the state of Montana, in and for the county of Jefferson, between the plaintiffs herein as plaintiffs and the defendant herein as defendant, being the same parties as are parties to this cause, and for the same cause of action, there was interposed by defendants a motion for judgment on the pleadings, which, upon consideration by the court, was sustained and a final judgment rendered and entered for defendant dismissing the action. The amended replication denies that the cause of action is barred by any of the provisions relied upon by the defendant in the second, third, and fifth defenses, or otherwise, or at all, and alleges by way of avoidance of the sixth defense that in the month of February, 1900, the plaintiffs began an action against the defendant in the district court of the Fifth judicial district upon the same cause of action as stated in the complaint herein; that judgment was rendered and entered therein in favor of the defendant as alleged; that the plaintiffs thereupon appealed to the Supreme Court; that such proceedings were had in the cause in the Supreme Court that the judgment was on June 27, 1904, affirmed on the ground that the complaint therein did not state a cause of action, but that said judgment was not a judgment upon the merits. It is further alleged by way of avoidance of the defense of the statutes of limitation that since the accrual of the cause of action stated in the complaint each and all the officers and agents of the defendant upon whom service of process could be had had been absent from the state, except for a period of about two years and eight months prior to the commencement of this action. Upon these pleadings the defendant moved for judgment, on the ground that no issue of fact is presented upon the fourth defense pleaded in the answer, for that the same is not denied in the amended replication, and for the reason that the avoidance thereof pleaded in said replication is contrary to the laws of the state of Montana, and for the further reason that there is no issue of fact to be tried on the sixth defense pleaded in the answer, the same being admitted in the amended replication, and the avoidance thereof pleaded in the replication is contrary to the laws of the state of Montana. This motion was, after argument,

granted and judgment entered for the defendant. The appeal is from the judgment.

The judgment referred to in the pleadings was affirmed in 31 Mont. 21, 77 Pac. 302, under the title of Glass et al. v. Basin & Bay State Min. Co. In this case two questions are submitted for decision: (1) Whether the right to maintain this action is barred by the judgment in the former action; and (2) Whether upon the face of the proceedings it is apparent that the cause of action is barred by any of the limitations pleaded. It is contended by appellants that upon the face of the pleadings both of these questions should have been answered in the negative and that the motion for judgment should have been denied.

1. Does it appear that the former judgment was upon the merits of the controversy? Section 1007 of the Code of Civil Procedure declares that "a final judgment dismissing the complaint, either before or after a trial, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll, that it is rendered upon its merits." The appellants' position is that the judgment pleaded does not expressly declare that it was rendered on the merits; and, since the judgment roll was not before the district court, it could not tell on the trial of the motion what its effect was. The argument of respondent is that section 1004 of the Code of Civil Procedure enumerates the cases in which an action may be dismissed or judgment of nonsuit entered; that section 1005 declares that in all other cases than those mentioned in section 1004 the judgment must be rendered on the merits; and that, since the judgment in controversy does not fall within the cases enumerated in section 1004, the presumption must be indulged that it was rendered on the merits. Hence it is said that the judgment of the district court, since it is aided by this presumption, must be deemed correct. In this contention we think respondent is in error. The rule contended for by respondent is recognized by the Supreme Court of the United States in *United States v. Parker*, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601. In that case the court had under consideration the statutes of Nevada, which are nearly identical with sections 1004 and 1005, supra; but that decision has no application to this case, for the reason that the Code of Nevada contains no such provision as section 1007. Furthermore, this court in *Kleinschmidt v. Blunzel*, 14 Mont. 31, 35 Pac. 460, 43 Am. St. Rep. 604, held under an identical statute (Comp. St. 1887, Div. 1, § 243) that a judgment rendered on demurrer did not estop the plaintiff in the action from asserting his claim in a subsequent action; nothing appearing upon the face of the pleadings to show that the judgment went to the merits, rather than to some defect of form. A judgment on the pleadings is the same as a judgment on demurrer. *Power*

et al. v. Gum, 6 Mont. 5, 9 Pac. 575. Judgments on demurrer or on the pleadings which result in the dismissal of the action are not enumerated in section 1004. As will be seen by an examination of the case of *Kleinschmidt v. Blunzel*, supra, and the authorities cited, it was a matter of dispute when that decision was made, as to what presumption should attach to them when pleaded in bar. That case declared the rule which controlled in this state until the adoption of the Code in 1895, which, besides bringing forward in sections 1004 and 1005 the provisions of the Compiled Statutes, supra, added section 1007. This provision, construed with the others, means nothing more nor less than that judgments of dismissal, whether included in the enumeration in 1004 or not, shall not be a bar to another action upon the same cause of action, unless rendered on the merits, which fact must be expressly declared upon the face of the judgment or appear from the judgment roll. In other words, such a judgment must show of itself, or by aid of the judgment roll, that it concludes the merits of the controversy, or it is no defense. The judgment relied on here shows, upon its face that it belongs to the class referred to in section 1007. It does not declare that it adjudicates the merits, and, since the judgment roll was not before the district court, no presumption can be indulged that it was rendered on the merits. In so far, therefore, as the action of the district court was based upon such presumption, it was erroneous.

2. This being so, the question whether this action is barred by the provisions of any of the statutes pleaded depends for its answer upon the further inquiry whether section 547 of the Code of Civil Procedure applies to the circumstances of this case. That section reads: "If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits; the plaintiff, or, if he dies, and the cause of action survives, his representative may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination." There is no question that the first action was begun within the time limited therefor. The judgment of dismissal was affirmed by this court. The action was, therefore, not voluntarily discontinued, nor was it dismissed for want of prosecution, nor, so far as the record before us shows, was the judgment rendered upon the merits. It was terminated by the judgment of affirmance in a manner other than those which do not toll the statute. It was commenced within one year from the termination of the former action. It therefore falls within the

provisions of the statute, and none of the limitations pleaded apply so far as the pleadings show. If on the trial, and upon inspection of the judgment roll in the former action, it is manifest that the former judgment was upon the merits, this will be conclusive of the case, and the inquiry as to whether the limitations apply will become immaterial.

The view we have thus taken of the case renders it unnecessary to consider whether the absence from the state of all of the agents of a domestic corporation upon whom process may be served tolls the statute of limitations during the time of such absence.

The judgment of the district court was erroneous, and must be reversed.

MILBURN and HALLOWAY, JJ., concur.

### GRIFFITH v. ROBERTSON.

(Supreme Court of Kansas. May 12, 1906.)

#### 1. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE—PERSONAL SERVICES.

Before a daughter can recover from the estate of her deceased mother for services rendered while residing with and as a part of her mother's family, it must be shown that an express contract existed between herself and mother that such services should be paid for. It is not essential that the evidence in support of such express contract shall consist of a formal offer and acceptance; it may be established, like other disputed facts, by any competent testimony.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 733.]

#### 2. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEDENT.

A daughter or other party prosecuting a claim against the estate of a deceased person is competent to testify to conversations had between the deceased and a third person in the presence and hearing of the witness.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 696, 697.]

#### 3. WILLS—CONTRACTS TO BEQUEATH—CLAIMS AGAINST ESTATE—EVIDENCE.

When a daughter nurses and cares for her mother for several years, including her last sickness, under an express contract that payment for such services will be provided for in the will of her mother, who dies intestate, the daughter may recover the reasonable value of such services from the estate of the deceased mother.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 177.]

(Syllabus by the Court.)

Error from District Court, Sumner County; C. L. Swarts, Judge.

Action by Alexandrina Robertson against Jewell Griffith, administrator. Judgment for plaintiff, and defendant brings error. Affirmed.

James Lawrence and J. S. Dey, for plaintiff in error. W. W. Schwinn, for defendant in error.

GRAVES, J. The defendant in error presented a claim against the estate of her

deceased mother for personal services, and recovered thereon both in the probate and district courts of Sumner county. The administrator brings the case here for review. The family formerly resided in Scotland, and consisted of George Gunn, his wife, and several children. Three of the adult children came to Kansas, and afterwards in October, 1883, the mother came, leaving her husband and the remaining children in Scotland. Mrs. Gunn owned the land in controversy, and resided thereon. One of her sons lived with her for a time, and later she managed the farm alone, with the aid of hired assistance. In 1895, she sent back to Scotland for her youngest daughter, Alexandrina Gunn, known as Ina, to come and live with her on the farm, and furnished the money for the necessary expenses of the trip. This daughter remained with the mother from the time of her arrival from Scotland until the mother's death, in January, 1904. In 1900 this daughter, Ina, married Donald Robertson, and they remained with the mother and as a part of her family. At the time Ina came to Kansas she was about 26 years of age, and her mother was about 70. After the death of Mrs. Gunn, Ina, then Mrs. Robertson, filed a claim against the estate for work and labor performed, a copy of which, without caption or verification, reads: "Estate of Isabella Gunn, deceased, to Alexandrina Robertson, Dr. To services in caring for deceased from July 1st, 1905, to December 1st, 1902, at \$3.00, under agreement to make a will providing for payment of full value of claimant's services, \$1,158.00. To services for nursing deceased on sick bed from December 1st, 1904, at \$10 per week, under agreement that deceased would make a will and provide for payment at full value of services \$1,030.00. Total amount of claim \$2,188.00." Mrs. Robertson claims that her mother agreed to give her the farm in payment for her services, and that it was the intention of Mrs. Gunn to make a will to that effect, but she postponed it from time to time until it was too late. In the absence of such a will, she claims the reasonable value of the services. The plaintiff, being an incompetent witness as to any conversation or transaction had personally by her with her deceased mother, was compelled to rely upon other proof to establish her contract. This difficulty on the part of the plaintiff appears to have been the chief reliance of the defendant, and every possible phase of the question was vigorously contested.

Thirty-three assignments of error are presented to this court, nearly all of which involve some feature of the competency of the plaintiff's evidence. In addition to this, it is urged that the plaintiff was permitted to introduce evidence which did not tend to establish the agreement set forth in the account.

For convenience we will consider this last objection first. In our view of the case, there

was but one serious question at issue, and that was whether the services of the plaintiff were rendered gratuitously or not. If the mother agreed to pay for them, and failed to do so, the manner in which she intended to make payment is only important as indicating that she did not think they were rendered gratuitously. The administrator claims that, as the burden was upon the plaintiff to show that there was an express agreement to pay for the alleged services, and as she has stated the transaction in which such express contract was made, her evidence must be confined to such transaction. As a question of pleading this is probably correct, but the informal and summary manner which the statutes provide for the disposition of this class of cases suggests the application of a liberal rule of construction, both to the statements of the account and to the admissibility of testimony in support thereof. Therefore, any evidence which tended to show that the mother agreed to pay the plaintiff for her services by the provisions of a will would be proper under the statements of her claim. The plaintiff, as a witness in her own behalf, testified to several conversations between her mother and sister, which took place in the presence and hearing of the witness. This is the subject of vigorous complaint, on the grounds (1) that the witness is incompetent, and (2) the evidence does not tend to sustain the account sued upon, which constitutes the plaintiff's pleading. The general scope of the evidence admitted over these objections will be seen by a few quotations therefrom: Q. "What was the conversation about, Mrs. Robertson? A. She always told Mrs. Clark that after her death the land where she lived would be mine, if I stayed with her and took care of her until she died. Q. Now you may tell what your mother said to Mrs. Clark about that? A. She always told she sent to Scotland and wanted to take me here to take care of her, and if I stayed here it was mine after her death. Q. Did you ever hear your mother say anything to Mrs. Clark about the farm you were living on? A. Yes, sir; that was all she had, and it was that that she was to leave me, if I stayed with her. Q. Go ahead. A. She told Mrs. Clark that I wasn't satisfied to stay with her, but if I stayed with her until after her day it would be mine—the farm that she was on. Q. Did you ever hear your mother say anything to Mrs. Clark about how she intended the farm to become yours? A. No, sir. She just said she was going to fix it after her death to be mine, and that is all I ever heard her say; she would leave it. Q. Now Mrs. Robertson do you remember anything else that you heard your mother tell Mrs. Clark in regard to what she had told you? A. Nothing further than that; that the land would be mine after her death if I stayed there and took care of her. She was going to fix it that way if she was able to get to Wellington here; that

she was going to fix it that way." This is only a small part of the entire evidence of this character admitted. Under the rule stated by this court in the cases of McKean v. Massey, 9 Kan. 600; Jaquith v. Davidson, 21 Kan. 341; McCartney v. Spencer, 26 Kan. 62, this witness was competent to testify to a conversation had between her mother and another. The evidence itself is competent, as it tends to show that the mother had agreed to pay for the services of the plaintiff, and that such payment was to be made by the provisions of a will. Bonebrake v. Tauer, 67 Kan. 827, 72 Pac. 521.

Several neighbors testified to conversations had by them with the mother, in which she stated that she intended to send to Scotland for the plaintiff to come and live with her while she lived, and it is shown that she did send money to the plaintiff to pay the expenses of her trip to Kansas. She also stated to several visiting neighbors that Ina was going to take care of her the rest of her life, and was to have the farm in payment therefor, and that she intended to fix it that way as soon as she was able to go to Wellington. She also remarked that they were lonesome there, living alone, and Ina did not like to stay, but she would not leave; "she is a good, good, girl and will be paid well for her trouble." It also appears that the plaintiff's husband urged her to leave her mother, and go with him to their own place, which she refused to do, and he went to it alone, and remained apart from her much of the time during the last two years of the mother's life. The rendition of the service by the plaintiff is not denied. That the mother intended to pay liberally therefor is clearly shown. The conclusion that the plaintiff at all times expected to be paid therefor is fully justified by the evidence. That there was an express contract between the mother and daughter is a fair deduction from the testimony. That the plaintiff was kind and careful of her mother's comfort during her illness is shown by the repeated statement of the mother that "Ina is a good, good girl." The fact that payment was to come after the mother's death if service continued to that time, and that this was to be fixed when the mother went to Wellington, suggests that payment would be provided for by the provisions of a will. Under ordinary circumstances, the law would imply a promise on the part of the deceased to pay for the services received; but, in compliance with a wise and beneficent public policy designed to protect and preserve the relations which belong to home and the family fireside, the law presumes all such services to have been rendered solely from considerations of filial affection and duty. This, however, like any other presumption, may be overcome, and a contract, if any existed, may be established by any competent evidence.

It is not essential that a formal offer and acceptance, in writing or otherwise, be shown.

In the absence of more direct evidence, the fact may be established by circumstances. An express contract exists whenever there is a mutual meeting of the minds upon any contractual proposition. The essential contractual proposition in this case is this: Were the services in question to be paid for? What was the mutual understanding of these parties upon this subject? This was a proper question for a jury, and that tribunal has answered it in the affirmative.

Many objections are made to the instructions of the court, both on account of those refused and those given. These are too numerous to discuss in detail. The principal contention of counsel may be shown by one instruction asked and refused, which reads: Briefly stated, a contract can only be entered into when there are at least two competent contracting parties, and one or more definite propositions or offers are made by one for the acceptance of the other, and such propositions or offers are accepted by the other, absolutely as made, in such way that each knows the state of mind of the other on the offers."

The court's view of the law applicable to this case is shown by instructions given, which read: "If you should find from the evidence, by a preponderance thereof, that the services claimed for, or any part thereof, were performed by the plaintiff for the deceased upon an express contract that the same should be paid for, or with the understanding and agreement of both the plaintiff and the deceased that the same should be paid for, then you should allow her in your verdict the fair and reasonable value of such services as she so rendered, at the time and place where rendered. Unless you so find, you must find for the defendant. It is not necessary that the plaintiff prove the exact words of the contract or agreement had between herself and her mother, if you find that she had an agreement with her mother; but in determining whether there was such an agreement you may take into consideration such evidence as has been given before you of the declarations and statements of the plaintiff's mother, if you find that she made such declarations and statements, and all the facts and circumstances surrounding the plaintiff and her mother; and if from these declarations and facts and circumstances surrounding the parties you believe from a preponderance of the evidence that the plaintiff and her mother did have an agreement that the plaintiff should be compensated by her mother by making provision for her out of her estate, then your finding should be for the plaintiff. If you find from a consideration of all the evidence that there was a mutual understanding between plaintiff and her mother that the plaintiff should be compensated for working for her mother and caring for her, and that she did the work and cared for her, as she claims, under such mutual under-

standing, then your finding should be for the plaintiff. The plaintiff must recover in this action, if she recovers at all, on the agreement which she alleges she had with her mother, and the burden of proof is upon her to show by a preponderance of the evidence that she had a contract with her mother by which her mother was to pay to her for her services by making a provision for her to be paid out of her estate." The court uses the words "understanding and agreement" as equivalent to "express agreement," and to this vigorous objection is made. We think the instruction requested requires a formality, unnecessary in any case, one seldom observed between parent and child, and it contains conditions not applicable to the evidence in this case. It was therefore properly rejected. As before stated, we think that a mutual meeting of the minds upon a matter of contract creates an express contract, whether evidenced by a formal offer and acceptance or otherwise. The case of *Ayres v. Hull*, 5 Kan. 419, is in many respects similar to this. Justice Kingman in the following language states that a mere promise or understanding between the parties would be sufficient: "For nearly eight years the defendant in error lived in the home and farmed a part of the homestead of the mother, rendering services abundantly proven to have been valuable, and receiving in return but a scanty supply of clothing, a living, and a home. Had there really existed any contract or promise or understanding between the parties, we would not disturb the judgment."

Complaint is also made of instructions upon the amount of recovery. We think the criticism made here is due more to the condition of the proof than to the action of the court. The only evidence upon the subject of the value of the services shows the value of the ordinary service of a servant girl on a farm to be \$3 a week, and that of trained or partially trained nurses ranged from \$10 to \$15 per week. The services embraced farm work, housekeeping, and nursing. The plaintiff was not a trained or experienced nurse, but gave all the care and attention to her mother possible, besides looking after every other matter about the place. The evidence upon this subject was all given by the plaintiff. From it the jury had to reach a conclusion as to the amount the plaintiff's labor was reasonably worth. The court directed them, in substance, to consider the evidence given, and any facts within common knowledge, and award such amount as to them seemed reasonable and just. We see no error in this. The court throughout its instructions repeatedly presented the idea that no recovery could be had without an express contract be shown; that the amount of recovery should be the reasonable value of the services rendered.

We have carefully examined all the instructions given, and think that they fully

and fairly presented the case. We are unable to find any error sufficient to reverse the judgment of the court, and it is therefore affirmed. All the Justices concurring.

# FORAN v. HEALY.

(Supreme Court of Kansas. May 12, 1906.)

## 1. INSANE PERSONS—APPOINTMENT OF GUARDIAN—JURISDICTION.

Jurisdiction to appoint a guardian over the person and estate of a lunatic belongs exclusively to the probate court of the county where such lunatic has a permanent residence.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Insane Persons, § 47.]

## 2. SAME—EXTENT.

The jurisdiction conferred upon other probate courts by section 3941, Gen. St. 1901, to inquire into and adjudicate upon the sanity of persons in the county, is intended as a police regulation, and jurisdiction ends with the adjudication and commitment or discharge of such person.

## 3. SAME—ADJUDICATION—CONCLUSIVENESS.

An adjudication of lunacy under section 3941, Gen. St. 1901, legally had, is conclusive upon the lunatic and all other persons, and the probate court of the county where such lunatic has a permanent residence may accept and act thereon, the same as if such adjudication had occurred in that court.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Insane Persons, §§ 35, 36.]

## 4. SAME—ACTIONS AGAINST—SERVICE OF SUMMONS.

Where a guardian has been appointed by the probate court of the proper county, as above stated, and a suit to foreclose a mortgage upon the real estate owned by the lunatic, for whose estate such guardian was appointed, is commenced in the district court of such county, service of summons upon such guardian will confer jurisdiction upon the district court to adjudicate the rights of such lunatic in said real estate.

## 5. SAME—MORTGAGE FORECLOSURE—REDEMPTION.

A lunatic whose property has been sold under foreclosure proceedings, wherein his guardian was served with summons, as above stated, has no right to redeem said property from such sale after his restoration to sanity, merely for the reason that the court did not acquire jurisdiction by service of summons on such guardian.

(Syllabus by the Court.)

Error from District Court, Lincoln County; R. R. Rees, Trial Judge.

Action by Joseph Healy against Timothy Foran. Judgment for plaintiff, and defendant brings error. Reversed, and judgment ordered for defendant.

Geo. D. Abel and Z. C. Millikin, for plaintiff in error. Garver & Larimer, for defendant in error.

GRAVES, J. This is an action to redeem real estate from what is claimed to be void foreclosure proceedings. The defendant in error owned the real estate, which is located in Lincoln county, Kan., where he resided with his family. He became insane sometime before March 8, 1897, and wandered away from his home. Soon afterwards he

appeared at the Governor's office in Topeka armed with two revolvers, and demanded of that official the redress of some imaginary wrong. He was arrested, and tried for insanity in the probate court of Shawnee county, adjudged a lunatic, and committed to the State Asylum for the Insane, where he remained continuously until August 18, 1904, when he was discharged as restored to his right mind. A duly certified copy of the inquisition proceedings whereby he was committed to the asylum was filed in the probate court of Lincoln county, and application was made there for the appointment of a guardian for Healy's person and estate, and the court appointed John F. Linker as such guardian April 19, 1897. Linker took immediate possession of the estate, returned an inventory thereof, sold personal property under orders of the court, paid the debts, and generally managed the estate as guardian and made reports to the court. The real estate had been mortgaged by Healy and his wife in 1891. The land mortgaged consisted of 160 acres, the north half of which was owned by the wife. She died, leaving five children and her husband surviving as her heirs. Afterward, and on March 13, 1897, one Fitzpatrick, the then owner of the mortgage, began a suit of foreclosure in said Lincoln county. Service of summons upon Linker as guardian was the only service or notice given to Healy. All the other interested parties were duly and properly served with summons. On August 27, 1897, more than four months after the appointment of Linker, the probate court of Shawnee county, Kan., appointed one Strauss of that county guardian of the estate of Healy, who qualified as such, but did nothing whatever under such appointment but make a final report when he was discharged after the restoration of Healy to sanity. In the foreclosure suit the land was duly sold to the plaintiff, Fitzpatrick. The sale was confirmed and a sheriff's deed executed. Fitzpatrick retained possession of the land afterwards until January 18, 1900, when he sold it to the plaintiff in error, who bought in good faith and for full value. Healy claims the right to redeem upon the ground that the probate court of Shawnee county, where he was adjudged to be insane, had the exclusive power under the statutes to appoint a guardian, and therefore the appointment of Linker in Lincoln county was void, service of summons upon him also void, and the court did not acquire jurisdiction of Healy in the foreclosure suit. This presents the principal question in the case, and the only one if the appointment of Linker was valid.

The sections of the statute bearing most directly upon this question are sections 3941 and 3945 of the Statutes of 1901, which, so far applicable, read:

"Sec. 3941. If information in writing is given to the probate court that any one in its county is an idiot, lunatic, or person of unsound mind, or an habitual drunkard and in-

capable of managing his affairs, and praying that an inquiry therein be had, the court, if satisfied that there is good cause for the exercise of its jurisdiction, shall cause the facts to be inquired into by a jury."

"Sec. 3945. \* \* \* Upon the return of the verdict the same shall be recorded at large by the probate judge, and if it appear that the person is insane, and is a fit person to be sent to the insane asylum, the court shall enter an order that the insane person be committed to the State Insane Asylum.

\* \* \* And if it be found by the jury that the subject of the inquiry is of unsound mind, or an habitual drunkard and incapable of managing his or her affairs, the court shall appoint a guardian of the person and estate of such person."

It is claimed that the words "the court," used near the close of the last section quoted, refer exclusively to the court in which the inquisition was held; that this language is clear, specific, and conclusive. In support of this contention sections 3948, 3977, and 3978 are cited, which read:

"Sec. 3948. The court may, if just cause appears at any time during the term at which an inquisition is had, set the same aside and cause a new jury to be impaneled to inquire into the fact."

"Sec. 3977. If any person shall allege in writing, verified by oath or affirmation, that any person declared to be of unsound mind \* \* \* has been restored to his right mind, \* \* \* the court by which the proceedings were had shall cause the facts to be inquired into, either by a jury or without a jury, as may seem proper to the court.

"Sec. 3978. If it shall be found that such person has been restored to his right mind \* \* \* he shall be discharged from care and custody, and the guardian shall immediately settle his accounts, and restore to such person all things remaining in his hands belonging or appertaining to him."

It is urged that the probate court of Lincoln county could not appoint a guardian for the person of Healy without having personal jurisdiction of him, which it did not have, as he was then in the asylum outside of that county, and received no notice of such appointment.

On the other hand, it is insisted by the plaintiff in error that section 3941 of the statute was enacted to provide for a special purpose, and should not be permitted to interfere with the operation of other sections of that chapter according to their apparent design; that this section was intended to give jurisdiction over insane persons in counties where they do not reside, but are merely found, so that the public might thereby be protected from the danger and annoyance of such persons; in other words, it was intended to meet the very contingency shown by the facts of this case. In the organization of our courts it seems to have been intended that all proceedings relating to real

estate and the settlement of estates should take place where the subject-matter of such proceedings are located. This purpose is indicated by the various statutes to such an extent that it may be regarded as the settled policy of the state. Statutes relating to these subjects should therefore be construed so as to harmonize with this policy where a contrary purpose is not clearly expressed. In discussing the question as to whether a guardian for minor children should be appointed where the minors resided or not, Justice Atkinson, in the case of *Connell v. Moore*, 70 Kan. 88, 78 Pac. 164, said: "It has been and is the policy of the law to give to the individual a nearby and convenient court. Save in exceptional cases hardships have not been visited upon the citizen by requiring him, at the expense of time and means, to respond over long distances to the process of the courts. The jurisdiction of tribunals having judicial powers has wisely been limited in that particular. In pursuance of this policy of the law there has been established by the Legislature a probate court in each county of the state. The undoubted purpose of the Legislature in so doing was to give to the inhabitants of each county a nearby and convenient tribunal having jurisdiction of probate matters. It will hardly be urged that an exception to these favors in the law was intended by the Legislature to be made against the resident minors. The mere fact that the Legislature failed to specifically designate in the act relating to guardians and wards what probate court would acquire jurisdiction of the person and estate of minors will not be presumed to have been intended to operate against the minor; nor should it be construed to his disadvantage if equally susceptible of two constructions, one to the advantage of the minor the other to his disadvantage. If, as in the case at bar, the county adjoining the county of the minor's domicile had jurisdiction of the person and estate of the minor, as was sought to be exercised by the probate court of Elk county, then any county in the state, no matter how remote, especially where there chanced to be property belonging to his estate, would have or could acquire jurisdiction. This might not only result in much inconvenience and be used to the minor's disadvantage in administering the affairs of the state, but the distance would necessitate added and unnecessary expense." In that case, there being no place designated by statute, the court, in harmony with this general policy of the law, held that jurisdiction belonged to the county where the minors resided. In this case, however, there is more difficulty, as the language of sections 3941 and 3945, when construed together, furnish some reason for the contention of the defendant in error that the words "the court," as used in the last clause of section 3945, refers to the court holding the inquisition. We ap-

preciate this difficulty, but think it more apparent than real. We feel satisfied in holding that section 3941 is in the nature of a police regulation, intended to protect the people of every county from the annoyance and danger incident to the presence of strange, homeless lunatics wandering about without restraint. With this disposition of that section the whole act is in harmony with the general policy of the state, and the rule announced in the case of *Connell v. Moore*, supra, applies to its provisions, and fixes the jurisdiction of the person and estate of Healy in the probate court of Lincoln county. This preserves the general symmetry of the statutes as a whole, and eliminates many difficulties and incongruities which would otherwise result.

This very case illustrates some of the mischievous consequences which might result under a different rule. Healy was found to be insane, a resident of Lincoln county, and without an estate. No necessity appearing for the appointment of a guardian, none was appointed until several months after the appointment of Linker in Lincoln county. Why the appointment was made at that time does not appear. This guardian took no steps to find or administer upon the Lincoln county estate of his ward, or to do anything whatever as such guardian. Healy left his family, a farm, and personal property in Lincoln county. He might have wandered into a county where the court would not have ascertained even the place of his residence. In such case the guardian would not have known where to look for property or family, and the family would not have known where to apply for the service of a guardian. Many difficulties might be suggested which would make such a rule very inconvenient and objectionable. It may be said that these considerations belong to the Legislature rather than to the court, and this would be true if the Legislature had spoken in unmistakable terms upon this subject; but, as it has not done so, courts in choosing between interpretations of the statute may well consider such matters in determining the legislative intent.

We conclude that Healy had a permanent residence, a home, family, and estate, real and personal, in Lincoln county. Becoming insane there, he could not change his residence. The probate court of Shawnee county had jurisdiction of the person of Healy for the purpose of determining the question of his sanity only. Its adjudication of this question was final and conclusive everywhere and upon all persons.

Under these circumstances, the probate court of Lincoln county had jurisdiction to appoint a guardian to take possession of the estate, real and personal, belonging to such lunatic, and to represent his interests therein. Service upon such guardian in any suit or proceeding in which the estate of such

lunatic was involved is binding upon such lunatic. The fact of lunacy gives jurisdiction to the probate court where the lunatic resides and has an estate to appoint a guardian to represent the interests of such lunatic, but this jurisdictional fact of lunacy need not necessarily be first adjudicated by such court. It will be sufficient to accept and act upon any valid adjudication thereof.

The district court had jurisdiction of Healy in the foreclosure proceedings, and he is bound thereby. This conclusion makes it unnecessary to consider the other questions presented.

The district court is reversed, with direction to enter judgment for the defendant, Timothy Foran, for costs. All the Justices concurring.

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#### MORRILL TP. v. FLETCHALL et al.

(Supreme Court of Kansas. May 12, 1906.)

TOWNS—ACTION AGAINST TOWNSHIP—COSTS—PRESENTATION OF CLAIM.

Costs will not be taxed to the successful plaintiffs in an action against a township, though the claim was not before action presented to the township for payment: the statute to this effect in case of a claim against a city not applying, there being no such statute with respect to claims against townships.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Towns, § 129.]

Error from District Court, Brown County; Wm. I. Stuart, Judge.

Action by Charles E. Fletcher and another against Morrill Township. Judgment for plaintiffs. Defendant brings error. Affirmed.

Jas. Falloon, for plaintiff in error. Sample F. Newlon, for defendants in error.

PER CURIAM. The plaintiff's children, one 10, the other 5, years of age, were sent by their parents to a neighboring town in a one-house conveyance. While the older son was driving along the public highway, the vehicle was turned over into a ditch, the younger child falling under it, in consequence of which he died. The parents recovered judgment in this action for damages against the township for the loss of their child on the grounds of negligence on the part of its officers in permitting the highway at the place where the child was killed to remain in such condition as to be dangerous to public travel. An examination of the errors assigned discloses nothing prejudicial to the township. The contention is made that the court should have taxed the costs to the plaintiffs, because there is no evidence that the plaintiffs' claim was presented to the township board for allowance before the action was commenced. This cannot be sustained. Counsel cite no such statutory requirement, and we know of none. The statute which requires all claims against cities to be presented to the council for allowance or costs shall not be awarded in an action there-

on does not apply to actions against townships. In the absence of such a statute, the plaintiffs are entitled to their costs.

The judgment is affirmed.

SPAULDING et al. v. PEPPER.

(Supreme Court of Kansas. May 12, 1906.)

MASTER AND SERVANT—ACTION FOR SERVICES—PLEADING AND PROOF—VARIANCE.

In an action for the recovery of wages and expenses under a contract of hiring, an answer which merely disputes the length of time the plaintiff was in the defendant's service, and pleads payment, is insufficient to authorize a forfeiture of all compensation on the ground of dishonesty and other flagrant misconduct.

(Syllabus by the Court.)

Error from District Court, Kingman County; P. B. Gillett, Judge.

Action by W. R. Pepper against H. W. Spaulding and others. Judgment for plaintiff, and defendants bring error. Modified and affirmed.

Geo. L. Hay, for plaintiffs in error. C. W. Fairchild, Geo. W. Freerks, and M. C. Freerks, for defendant in error.

BURCH, J. The defendant is a corporation engaged in the manufacture and sale of buggies and other vehicles. It employed the plaintiff to work for it as collector, agreeing to pay him \$85 per month and traveling expenses. The contract provided that it should not take effect until a bond for the faithful performance of the plaintiff's duties was given and approved, and further provided that the plaintiff might be discharged for incompetency, immorality, or failure to comply with instructions. His instructions covered the subjects of stated reports of business done, the keeping of accounts, the remittance of cash collected, and the forwarding of renewal notes. The defendant undertook to forward drafts to cover the items of the plaintiff's expense accounts as soon as reports were received, so as to keep \$75 expense money always with him. The employment was terminated at a time when the plaintiff had in his possession a considerable sum of the defendant's money and a number of notes belonging to it. A replevin action was instituted for the notes, which were later delivered to the defendant, but the plaintiff continued to retain the cash. Afterward the plaintiff instituted the action from which this proceeding in error arises to recover his wages, charging the defendant with the amount due on that account and the amount of his traveling expenses, and giving the defendant credit for money he had received. The defendant answered pleading payment, and pleading facts showing that the plaintiff had been in its service for a shorter period than that stated in the petition. These facts

were the failure to give bond at the commencement of the service, and a discharge for incompetency, immorality, and failure to obey instructions before the date the plaintiff claimed his employment ceased. A counterclaim for moneys of the defendant received and retained by the plaintiff was added to the answer. On the trial the jury returned a verdict for the plaintiff. The evidence introduced by the defendant would bear the interpretation that the plaintiff had been quite remiss in following instructions. Because of this fact, and because of the plaintiff's retention of the defendant's money and notes after his discharge, it is claimed the plaintiff forfeited all compensation, and the court was requested to instruct the jury upon that theory. The refusal of the court to give such instructions gives rise to the only substantial law question in the case.

The contract did not go to the extent of forfeiting compensation for time which had elapsed in the event of a discharge for incompetency, immorality, or disregard of instructions. Those facts having been considered by the parties and made the subject of a special agreement, the law should not, ordinarily, annex penalties beyond those stipulated for. But conceding that the conduct of the plaintiff was sufficiently culpable to justify the application of the rule sometimes invoked in cases of embezzlement (*Peterson v. Mayer*, 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72) and other flagrant acts of dishonesty and crime (*Turner v. Kouwenhoven*, 100 N. Y. 115, 2 N. E. 637), the answer went no further than to dispute the length of time the service continued, and to allege payment of the indebtedness described in the petition. The claim of a forfeiture of compensation is therefore not within the contemplation of the answer. That such a forfeiture is a matter of defense is clear, and consequently the facts upon which it is based must be pleaded. This being true, the requested instructions were rightfully refused, and the special questions which the court refused to submit to the jury were rightfully withheld.

The defendant submitted to the jurisdiction of the court by giving a forthcoming bond for the attached property. The signature used as a basis for comparing handwriting appears to have been *prima facie* proved. Under the long established practice in this state, the general assignment of "error of law occurring at the trial" as a ground for a new trial is not limited by the specific mention of grounds which by construction might have been included within it.

No answer having been made to the sixth assignment of error, the judgment of the district court will be modified by reducing it \$15.20. As modified, the judgment is affirmed. The costs in this court are divided. All the Justices concurring.

**BENNETT v. CUMMINGS.**

(Supreme Court of Kansas. May 12, 1906.)

**1. SALES—CONTRACT.**

Where one dealer solicits another to make an offer to buy certain produce, the latter wires such an offer, giving terms in full, and the former sends an answer in the form of a statement that he will sell the produce mentioned, repeating the very terms of the offer, a contract of purchase and sale is thereby effected.

**2. SAME—ACQUIESCENCE—TERMS.**

In such a case, where a time of delivery is mentioned in the request for an offer, a shorter time is named in the offer, and the final telegram is silent on the subject, circumstances may justify treating such silence as an acquiescence by the seller in the time proposed by the buyer, and *held*, that such circumstances exist in the present case.

**3. SAME—ACCEPTANCE.**

Where the acceptance of an offer is otherwise sufficient, it is not rendered ineffective by the addition of words which do no more than state a condition which the law would imply in any event.

(Syllabus by the Court.)

Error from District Court, Marshall County; Sam Kimble, Trial Judge.

Action by A. H. Bennett, doing business as the Bennett Commission Company, against M. T. Cummings. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

M. M. Miller (W. S. Glass and E. S. Quinton, of counsel), for plaintiff in error. L. M. Pemberton, for defendant in error.

MASON, J. A. H. Bennett, of Topeka, who does business under the name of the "Bennett Commission Company," brought an action against M. T. Cummings, of Beatrice, Neb., to recover damages for the failure of the latter to comply with a contract for the sale to the former of a quantity of corn. Upon the trial the defendant objected to the introduction of any evidence under the petition, for the reason that it failed to state facts sufficient to constitute a cause of action. The court sustained the objection and rendered judgment, which the plaintiff now seeks to reverse. The negotiations between the parties which the plaintiff claims culminated in a contract were conducted by the interchange of telegrams and letters while one was in Topeka and the other in Beatrice. The contention of the defendant is that this correspondence consisted merely of a series of propositions and counter propositions, and never resulted in a definite offer and acceptance; that the minds of the parties never met upon all the essential elements involved, and consequently no contract was ever entered into; and that all of the communications having any color of acceptance were qualified by new conditions, which prevented them from being such in fact. Whether this contention is sound is the sole matter to be here determined.

The disputed questions of law might perhaps be adequately presented by means of an abridgement of the correspondence re-

ferred to; but in order that every detail of the controversy may be exhibited, it is deemed expedient to show in full all communications that passed between the parties, as alleged in the petition. They were as follows:

(1) Telegram: "Beatrice, Nebr., May 18, 1903. Bennett Commission Company, Topeka, Kansas: Give me best bid 10,000 No. 3. white corn or better, same No. 3 mixed corn, or better to be delivered to Union Pacific Railway at Beatrice within fifteen days. M. T. Cummings."

(2) Telegram: "Topeka, Kansas, May 18th, 1903. M. T. Cummings, Beatrice, Nebr.: Will pay 41 cents per bushel for 5,000 bu. No. 3 or better mixed corn at Kansas City, and will pay 42 cents per bushel for 5,000 bushel No. 3 or better white corn at Kansas City. Reply instantly one week for shipment. Bennett Commission Co."

(3) Telegram: "Beatrice, Nebr., May 18. Bennett Com. Co., Topeka, Kansas: Will sell you 5,000 bushels No. 3 or better mixed corn on track at Kansas City at 41 cents per bushel, and 5,000 bushels of No. 3 or better white corn on track at Kansas City at 42 cents per bushel. Terms good firms. M. T. Cummings."

(4) "Beatrice, Neb., May 18, 1903. M. T. Cummings, Grain. Bennett Com. Co., Topeka, Kansas—Dear Sirs: I hoped in the attached message to interest you in my desire to sell 10,000 bu. each of white and mixed corn on the U. P. Am shelling from my own cribs here. I would not want to sell for inspection beyond K. C. and yet we think that if any corn is safe to ship further south this corn would be. I have quite a line of it left, and if you are strong in the market should like to have your bids from time to time. Yours, truly, M. T. Cummings."

(5) "Beatrice, Neb., May 18, 1903. M. T. Cummings, Grain. Bennett Commission Co., Topeka, Kansas—Dear sir: This will confirm sale to you of 5,000 bu. 3 or better mixed and 5,000 bu. 3 or better white corn at 41 and 42 cents respectively track K. C. Am hoping this will turn out to be Topeka terms. We are not partial to K. C. and would it to be good firms if that destination which your message seems to indicate. In any event would not want terms south of K. C. Have had all the grief I can stand for this season. This, however, will be corn from my cribs and if any corn is safe to send south without kiln drying I think this would be. I do not care to dabble in that market at my own risk, however—never again forever. Yours truly, M. T. Cummings. Am trying to get shelling started tomorrow, and think can get it forward within the weeks time M. T. C."

(6) "Confirmation of Purchase. The Bennett Commission Co. Topeka, Kans., Sta. A, May 18, 1903. M. T. Cummings, Beatrice, Neb.—Dear Sir: This confirms our purchase from you to-day, per wire of 5,000 bushels of 3 or better white corn at 42 cents, track

Kansas City subject to Kansas inspection, destination weights, to be shipped from Beatrice, Neb., in seven days via U. P. Ry., and billed to us at Topeka, Kans. Yours very respectfully, The Bennett Commission Co., by F. H. B."

(7) "Confirmation of Purchase. The Bennett Commission Co. Topeka, Kans., Sta. A, May 18, 1903. M. T. Cummings, Beatrice, Neb.—Dear Sir: This confirms our purchase from you to-day, per wire of 5,000 bushels of 3 or better mixed corn at 41 cents, track Kansas City, subject to Kansas inspection, destination weights to be shipped from Beatrice, Neb., in seven days via U. P. Ry., and billed to us at Topeka, Kans. Yours very respectfully, The Bennett Commission Co., by F. H. B."

(8) "M. T. Cummings, Grain. Beatrice, Neb., May 19, 1903. Bennett Commission Co., Topeka, Kans.—Dear Sirs: I have your favor of the 18th. with confirmations which I note read K. C. grades "Destination weights." Please advise where and by whom this grain is supposed to be weighed. In selling to local trade beyond K. C. and outside Memphis I have been getting settlement on my own weights and other terms would not look attractive nor satisfactory. Even Memphis weights would carry with them some proviso as to who the weighing firms should be. Yours truly, M. T. Cummings, M. T. C. Are you not fixed to give me Topeka terms on this stuff."

(9) "Topeka, Kansas, May 20th, 1903. M. T. Cummings, Beatrice, Neb.—Dear Sir: Acknowledging your two favors of the 19th, allow us to say that as our confirmation shows we expect to give you Kansas state inspection and will add that we also expect to give you Topeka weights. We have no intention of asking you to accept destination weights at a little interior point where weighing is not reliable. Yours truly, The Bennett Commission Co."

(10) "Topeka, Kan., May 23d, 1903. M. T. Cummings, Beatrice, Nebraska—Dear Sir: The party to whom we sold the corn bought from you is already beginning to make inquiries as to its arrival and we presume that it will be imperative that all bills of lading and weigh bills be dated within the time limit of the contract in order to have the grain applied thereon. Please hurry this matter up as rapidly as you can. Yours truly, The Bennett Commission Co."

(11) "M. T. Cummings, Grain. Beatrice, Neb., May 25th, 1903. Bennett Com. Co., Topeka, Kansas—Dear Sirs: I note your letter of the 23d. Also that to-day is last day of our trade. I shall be down to road to-day and if I can get anything forward will do so, but the heavy rains have probably put us clear out this time. Yours truly, M. T. Cummings."

The plaintiff maintains that the three telegrams resulted in a complete contract, which was confirmed by the subsequent letters and

was never abrogated. The defendant insists that the third telegram was not the acceptance of the offer made in the second one, but was merely the submission of an independent proposition, which the plaintiff might accept or reject. The connection between the telegrams, however, is too obvious and too intimate to be ignored. The seller wires to the buyer asking for an offer. The offer is made. The seller then replies, but, instead of referring in terms to the message he has received, and either accepting it or proposing a modification, he states in detail what he is willing to do. Under the circumstances stated, if the essential features of the trade indicated in the last telegram are identical with those of the one preceding it, it is, in effect, an acceptance of it, and requires no answer in order to complete the contract. The two telegrams correspond exactly, except that in the last there is no reference to the time of delivery, and the words "terms good firms" are added. The matter of time is of course important, and unless it was agreed upon there could be no meeting of the minds of the parties. The first telegram sent by Cummings solicited an offer, and referred expressly to the time of shipment, placing it within 15 days. In response to this Bennett submitted an offer reducing the time to one week, and asking an immediate reply. An answer was at once made which restated the other terms of the sale, but was silent as to the time. The consideration of time cannot be thought to have been overlooked. That it was given attention by both parties is manifest from the first two telegrams, and in view of this fact it cannot be supposed that Cummings when he sent his last dispatch intended to leave the time of delivery open. He must be deemed either to have stood upon his own first proposal in that regard, or to have acquiesced in the modification made by Bennett. Inasmuch as Bennett in his offer distinctly placed the time of shipment at one week, and asked an immediate reply, and as an immediate reply came which was absolutely silent as to this feature of the case, we decide that such silence, under the circumstances, is fairly to be interpreted as an acceptance of the conditions imposed in this respect by Bennett. That it was so intended by Cummings is apparent from the fact that in his letter following his second telegram, and written on the same day (communication No. 5), he undertook to confirm, not merely an unaccepted offer on his part to sell, but an actual sale of the corn described, and added that he thought he could get it forward "within the week's time"; reference obviously being had to the time proposed by Bennett and accepted by him.

If the words "terms good firms" added to the second telegram sent by Cummings imported a new condition, they, of course, prevented its operating as an acceptance of Bennett's proposal. However blind the expression may seem in itself, it is not difficult to

attach a meaning to it when it is read in the light of the whole correspondence. It clearly meant that the corn was to be weighed at its destination by responsible business men; that Cummings did not bind himself to accept weights made by unreliable people. In the absence of a special agreement, there was no obligation on his part to do so. The words used did not affect the contract between the parties. The situation was the same as though Cummings had said "I reserve the right to insist upon honest weights." The mere declaration of a matter which the law clearly implied was not the addition of a new term.

Since we hold that a complete agreement for the sale and purchase of the corn resulted from the interchange of the communications thus far specifically mentioned, it is unnecessary to discuss the remainder of the correspondence further than to say that at no stage of the negotiations could it be contended with any plausibility that Bennett had abandoned the contract, or otherwise forfeited his right to demand its performance. Indeed, no serious differences appear to have arisen between the parties. Their subsequent letters have the color of discussions relating to the interpretation to be placed upon a contract already entered into, or to concessions that might be made as a matter of grace upon one side or the other. If there were any misconceptions upon either side or upon both of the effect of the contract, or if by common consent its terms were modified, neither fact is now important. We are concerned here only with the inquiry whether the petition stated a cause of action; that is, whether the correspondence it sets out shows a completed agreement.

This question being answered in the affirmative, it results that the judgment must be reversed, and the cause remanded for further proceedings. All the Justices concurring.

#### SAMSON v. ZIMMERMAN.

(Supreme Court of Kansas. May 12, 1906.)

#### 1. TRIAL—VERDICT—SPECIAL FINDINGS—INCONSISTENCIES.

In a trial, where one special finding of the jury is apparently adverse to and destructive of the general verdict, if there be any material fact in issue which was omitted and not submitted to the jury for special finding, and which, if found favorable to the general verdict, would support it and would overcome the adverse finding, then it must be presumed that the jury determined such omitted fact in harmony with the general verdict; in other words, all the facts in issue which are not specially found should be presumed to have been determined in accordance with their general verdict.

#### 2. COVENANTS—BREACH—EVICTION OF GRANTEE.

A grantor of real estate by a deed of general warranty is responsible in damages to his grantee when a final judgment is rendered evicting his grantee from his possession of the premises, or awarding the title or any portion thereof to another upon any alleged right or lien antedating

the conveyance, provided the grantor has proper notice to appear and defend such action, or does in fact appear therein; and this notwithstanding the judgment is based upon the erroneous finding that the grantor was not the full and free owner of the premises at the time of the conveyance. The grantor must defend according to his covenant, and if he fails in his defense it is at his own peril.

(Syllabus by the Court.)

Error from District Court, Shawnee County; Robert C. Heizer, Judge.

Action by Johanna Henrietta Zimmerman against William Zimmerman. On the death of plaintiff, C. L. Samson, administratrix, was substituted. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

This action was brought by Johanna Henrietta Zimmerman, since deceased, against the defendant, William Zimmerman, in the district court of Shawnee county to recover damages on the breach of warranty in a deed executed by the defendant to the plaintiff in 1883, purporting to convey certain real estate in said county, with the usual covenants of warranty, and for the consideration of \$1,500. The case was tried in said court to a jury, and the jury returned the following verdict, omitting the title, viz.: "We, the jury impaneled and sworn in the above-entitled case, do upon our oaths find for the plaintiff, and assess her damages at fifteen hundred dollars. J. M. Orner, Foreman." In addition to the general verdict the court submitted the following questions, and the jury returned the following answers thereto: "(1) At the time of the execution of the deed in controversy, was the defendant the owner of the lots on Topeka avenue? Ans. Yes. (2) If you answer question number one in the negative, then state what interest he had in the premises? Ans. ———. (3) If anything was paid, how and with what did she pay therefor? Ans. We have no evidence just how or in what manner this was paid, whether in draft, check, or currency. (4) Did William Zimmerman receive anything for this property or for making the deed? Ans. Yes. (5) If yes, how much did he receive? Ans. Fifteen hundred and fifty dollars. (6) How and in what manner was this paid? Ans. We have no evidence just how or in what manner this was paid, whether in draft, check, or currency. J. M. Orner, Foreman." And thereupon the jury was discharged without any motion from either party to in any way change or correct any matter appearing in the special findings, and thereafter, without any motion by either party for a new trial, the defendant filed his motion for judgment in his favor upon the special findings of the jury notwithstanding the general verdict, and the plaintiff filed her motion for judgment on the general verdict in her favor notwithstanding the special findings of fact. The court overruled the motion of the plaintiff and sustained the motion of the defendant, and adjudged that the plaintiff take nothing

by her action and that the defendant recover his costs. At some stage of the proceedings the plaintiff died, and the action was brought here by the administratrix of her estate to reverse said judgment.

A. B. Jetmore, for plaintiff in error. Loomis, Blair & Scandrett, for defendant in error.

SMITH, J. (after stating the facts). The case was brought here on a transcript, and of course does not include the evidence and it does not include the instructions of the court to the jury; so practically the only question presented for our determination is whether the court should have rendered judgment upon the general verdict in favor of the plaintiff, or, in other words, whether the court erred in disregarding the general verdict and rendering judgment upon the special findings of fact in favor of the defendant. It will be observed that the general verdict is in favor of the plaintiff, and all the special findings of fact are favorable to the plaintiff unless it be No. 1. To determine whether there is an irreconcilable contradiction between finding No. 1. and the general verdict, we have to examine the pleadings to see what were the issues. The plaintiff in her petition makes the following allegations. (1) The execution and delivery of the deed for the consideration of \$1,500 paid, a copy of which is attached to the petition, and which contains a general covenant of warranty in the usual form, viz.: " \* \* \* That at the delivery of these presents he is lawfully seised in his own right of an absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged, and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and incumbrances of what nature or kind soever, and that he will warrant and forever defend the same unto said party of the second part, heirs and assigns, against said party of the first part, his heirs, and all and every person or persons whomsoever lawfully claiming or to claim the same. (2) Plaintiff alleges that defendant, William Zimmerman, his heirs and executors, have not warranted and defended said real estate with the appurtenances to the plaintiff, her heirs and assigns, against all and every person or persons whomsoever lawfully claiming or to claim the same, as he was bound to do; but, on the contrary, plaintiff avers that at the time of the execution and delivery of said deed the paramount title and freehold of the undivided two-thirds of said real estate was in William Opp and Phillip Zimmerman; that by virtue of said paramount title the plaintiff afterwards, to wit, at the September term, 1901, of the district court of Shawnee county, Kansas, in an action wherein said William Opp was plaintiff and the heirs of Phillip Zimmerman

and the defendant, William Zimmerman, were defendants, the said William Zimmerman then and there appearing thereto and having full knowledge thereof, he not having good and sufficient title thereto, by the consideration of said court plaintiff was dispossessed and evicted out of and from the undivided two-thirds of said real estate and all the appurtenances thereof by due course of law, and so the said defendant, William Zimmerman, his heirs and executors, have not kept and performed his covenants in said deed, but have broken and made breach of the same." (3) That plaintiff had expended \$500 in defending said action, and had sustained damages by reason of the premises in the sum of \$1,500, ending in a prayer for judgment for \$1,800. On leave the plaintiff afterwards filed supplementary allegations and amendments to her original petition as follows: "Now comes the plaintiff, Johanna Henrietta Zimmerman, and by way of amendment and supplementary petition, in addition to her original petition herein, says: That the defendant, William Zimmerman, with the intent to cheat and defraud the plaintiff, and in utter disregard of his covenants for title contained in said deed, did, as plaintiff has been informed and believes, induce said William Opp as plaintiff to institute said action in said district court, and make him a codefendant; that said defendant appeared in said action, and refused to protect and defend his covenant for title in his said deed, as he was bound to do, but claimed to own the title and estate to and in said real estate, notwithstanding said covenant for title in his said deed; that in furtherance of said fraud, and during the pendency of said action, Mary M. Zimmerman, the wife of said defendant, with the knowledge and approbation of said defendant, and in furtherance of the intention of said defendant to cheat and defraud the plaintiff, in his refusal to defend said title, on or about the 28th day of May, 1901, during the pendency of said action, with full knowledge of all the facts, and to assist the defendant in cheating and defrauding the plaintiff, for a nominal consideration procured the said William Opp to, and who did by his deed of that date, convey and transfer said real estate to her, the said Mary M. Zimmerman, and who, in virtue of said deed, claims to own the interest of said William Opp in said real estate. Plaintiff further states that, in pursuance of the judgment and order of the said district court rendered in said action, said real estate was by the sheriff of Shawnee county, Kansas, duly sold at public auction on the 19th day of May, 1902, and that plaintiff, in order to preserve her rights, interest, and estate in said real estate at said sheriff's sale, was compelled to and did bid in and buy said real estate for the price and consideration of \$2,000, the defendant being present at such sale, and refused to protect and defend his said covenants for title contained in said

deed, as he had obligated himself to and was bound to do." To this petition as amended and supplemented the defendant filed the following answer, omitting title: "Now comes said defendant, William Zimmerman, and for his answer to the plaintiff's petition and to the 'amendment and supplementary petition' herein filed: (1) Denies each and every allegation made or contained in said petition and in said 'amendment and supplementary petition.' (2) And for a second and further answer herein this defendant says that said plaintiff never did nor did any person for her ever pay to said defendant, or to any person for him, any consideration whatsoever for said property or for making of said deed, and that there was no consideration for said deed or any covenant therein contained. (3) And said defendant says that he executed said deed, of which a copy is attached to said plaintiff's petition, only to enable said plaintiff to become surety for said defendant and for Phillip Zimmerman and other employes of said defendant upon bail bonds, recognizances, undertakings, or other bonds for the appearance in any court of said William Zimmerman or said Phillip Zimmerman, or other employes of said defendant, to answer in prosecutions for violation of the prohibitory laws of the state of Kansas, which were then threatened against them, or which they apprehended, and to invest said plaintiff with the record title to sufficient property so that she would be accepted as such surety, and never executed any such bond, recognizance, or undertaking, and never received or paid any liability, money, or expenses under or in connection therewith; and defendant says there was no consideration for said deed or for any of the covenants therein contained." And to this answer the plaintiff replied as follows, omitting title: "The plaintiff, Johanna Henrietta Zimmerman, for her reply to the defendant's answer herein, says: First. She denies all and singular the allegations and averments contained in the second and third defenses, and each of them, of said answer. Second. For further reply to second and third defenses of said answer and each of them the plaintiff says that in a certain action pending in this court wherein one William Opp was plaintiff and the plaintiff, Johanna Henrietta Zimmerman, the defendant, William Zimmerman, and others were defendants, the said defendant, William Zimmerman, by way of answer and cross-petition therein, set up as his cause of action and defense against the plaintiff for the same identical defenses as set forth in said second and third defenses herein; and that on the 22d day of July, A. D. 1901, by the consideration of said court, the plaintiff recovered a judgment against said defendant, William Zimmerman, upon his said answer and cross-petition for costs of said action, and which judgment is unreversed. Wherefore, plaintiff demands judgment as prayed for in her petition in said case."

From these pleadings it will be noted that the plaintiff asserted that the defendant was not the owner of the two-thirds interest in the land in question at the time of the delivery of the deed, but that William Opp and Phillip Zimmerman were the owners of such interest, and in the amendment the plaintiff alleged that the defendant induced William Opp as plaintiff to institute the action in which plaintiff was dispossessed and evicted of said interest, and that the defendant appeared in said action, and thereupon asserted that he himself owned the "title and estate to and in said real estate"; that in place of defending the title of plaintiff thereto the defendant persuaded said Opp to convey an interest in said land to Mary M. Zimmerman, the wife of the defendant, for the purpose of cheating and defrauding the plaintiff herein, and further that, in pursuance of the order of the court in said action, the sheriff of Shawnee county sold said real estate at public sale, and the plaintiff in this action was compelled to and did buy the same for the consideration of \$2,000, and that the defendant was present at such sale, and refused to protect and defend his covenants in the deed.

It is rather difficult to tell just what facts the general denial of the defendant to this petition, supplement, and amendment puts in issue. The remainder of his answer only goes to dispute the covenants of the deed, and to explain the circumstances under which it was given, and the reply of the plaintiff alleges that in the action in which William Opp was plaintiff and both the plaintiff and defendant in this action were defendants the defendant herein "set up as his cause of action and defense against the plaintiff for the same identical defenses as set forth in the second and third defenses herein." It will be observed these are the defenses of no consideration and the purposes for which the deed was given. That the court in said action rendered judgment in favor of plaintiff and against the defendant on said issues in said action.

The pleadings of the plaintiff are very in-artistic, yet by a reasonably fair construction she pleads that the question as to whether the defendant was the owner of the entire fee of the land in controversy at the time of making and executing the deed in question, as well as the question as to the consideration for the deed, was brought in issue in the action in the district court of Shawnee county, in which William Opp was plaintiff and this plaintiff and this defendant and others were defendants, and that said issues of fact were both adjudged and determined adversely to the defendant herein. Whether this claim of the plaintiff was supported by evidence we cannot determine from the record. The jury may have believed, and been justified in believing, from the evidence that the claim of the plaintiff of former adjudication was true as alleged,

and yet they may have believed from the evidence produced in this action, as set forth in finding No. 1, that as a question of fact the defendant was the owner of the lots in question at the time of the execution of the deed in controversy, notwithstanding the former adjudication to the contrary. If the jury believed, and were justified in believing, from the evidence in this action according to the above hypothesis, finding No. 1 is not inconsistent with the general verdict. "All the elements which go to make up a plaintiff's right of recovery are found in his favor by a general verdict for him. And before special findings will avail to overthrow the general verdict, they must have determined all those elements against his right of recovery." *Seeds v. Bridge Co.*, 68 Kan. 522, 75 Pac. 480. In *Anderson v. Pierce*, 62 Kan. 756, 64 Pac. 633, Judge Pollock in the opinion, speaking for the court, says: "Every presumption is in favor of the general verdict. The special findings must overthrow it or it must stand. In the absence of the evidence from the record, we must assume all of these findings to have support in the evidence, and all must be construed together." In volume 8, *Am. & Eng. Encyc. of Law*, p. 206, we read: "Where the covenantor has been notified by the covenantee to defend an action of ejectment brought against the latter, or where he has appeared and defended, a judgment rendered against the covenantee in such action is conclusive evidence of the paramount title of the plaintiff therein, and in an action on the covenant by the covenantee or his grantee the covenantor will not be permitted to deny the validity of such judgment; and the covenantee is relieved from the obligation of proving that the title of the plaintiff therein was superior to that of the covenantor, even though the judgment was rendered upon an agreement to which the covenantor was not a party, or though a valid defense might have been made to the action or though the covenantee, to save himself from eviction under the judgment, purchased the outstanding title, unless the judgment was obtained by collusion or negligence on the part of the covenantee." If this be the law, and it seems to be supported by authority, the plaintiff in this action might well have pleaded the execution and delivery of the deed, the record and judgment in the *Opp* case, and that the judgment in the *Opp* case was not obtained through title derived from the plaintiff after the making of the deed to her by the defendant, and, after alleging her damages, have rested her case upon these allegations. Assuming, as we are bound to do, that the allegations of the plaintiff in regard to the former adjudications were found to be true as the basis of the general verdict, judgment should have been rendered on the general verdict in favor of the plaintiff. As before indicated, there is no essential contradiction or inconsistency

between the general verdict and finding No. 1.

The judgment of the district court is reversed, and the case is remanded, with instructions to enter judgment in favor of the plaintiff in accord with the general verdict. All the Justices concurring.

#### CAMPBELL v. FAXON, HORTON & GALLAGHER.

(Supreme Court of Kansas. May 12, 1906.)

##### 1. MASTER AND SERVANT—DEATH OF MASTER—TERMINATION OF EMPLOYMENT.

A contract that one party was to be the managing agent of a drug store owned by another, which might be terminated at any time by either party, and in which it was agreed that instead of a salary the agent's compensation should depend upon the extent and success of the business, created a personal relation which was dissolved by the death of one of the parties, and was without binding effect upon the administrator of his estate.

[Ed. Note.—For cases in point, see vol. 34, *Cent. Dig. Master and Servant*, § 26.]

##### 2. ADMINISTRATOR—CARRYING ON BUSINESS OF DECEASED—LIABILITIES.

In the absence of a testamentary direction an administrator of the estate of a deceased person cannot carry on the business of the decedent, and if he does so without authority he will be individually bound for the contracts of the business.

[Ed. Note.—For cases in point, see vol. 22, *Cent. Dig. Executors and Administrators*, §§ 407, 408.]

(Syllabus by the Court.)

Error from District Court, Doniphan County; Wm. I. Stuart, Judge.

Action by Faxon, Horton & Gallagher against James A. Campbell. Judgment for plaintiffs, and defendant brings error. Affirmed.

Action by Faxon, Horton & Gallagher to recover for drugs purchased for the "Elk Pharmacy," in Kansas City. C. F. McCormick owned a drug store and employed R. E. Ela, Jr., as his agent and manager of the store. A few months afterward McCormick died, and J. A. Campbell was appointed administrator of the estate. Campbell took possession of the drug store, inventoried the stock and agreed with Ela to continue the business upon the same plan as it had been conducted in McCormick's lifetime. The business was continued for about six months, during which time the goods in suit were purchased, but as it was not a success it was discontinued, and the stock of drugs was sold to Mrs. McCormick. The written agreement under which the store was managed by Ela prior to McCormick's death is as follows: "Know all men by these presents, that R. E. Ela, Jr., of Kansas City, Kansas, party of the first part, and C. F. McCormick, of Kansas City, Missouri, party of the second part, have entered into this agreement on the 1st day of February, 1903, witness as

follows: That R. E. Ela, Jr., party of the first part and C. F. McCormick, party of the second part, have entered into a contract this 1st day of February, 1903, that R. E. Ela, Jr., is to be the manager of said drug store now owned by C. F. McCormick located in Kansas City, Kansas, on lot two (2) block three (3), No. 1932 Walnut — Park Addition. It is agreed between the parties that R. E. Ela, Jr., is to be in full charge of the store and in full control of its management, and to be its manager and it is further agreed between the parties to this contract that C. F. McCormick is the sole owner and proprietor of all stock, merchandise and fixtures in said store. It is further agreed between the party of the first part and the party of the second part that the stock of goods shall be kept up to the invoice price which the goods invoiced on or about the first of October, 1902, and it is further agreed that the amount of stock, including medicines, drugs, sundries, fixtures, other goods and merchandise, shall always be equal and amount to invoice price which the goods invoiced on or about the first days of October, 1902. It is further agreed and consented on the part of R. E. Ela, Jr., that he will put in all of his time, energy and efforts to control such business, and that he will not engage in any other business while this contract is in effect, but give his whole time and attention to the management of the store now subject of this contract. It is further agreed that R. E. Ela, Jr., shall have full charge of said store, and that R. E. Ela, Jr., of the first part, out of the proceeds of the business shall pay all expenses in operating the store, including light, fuel, water, and insurance. It is further agreed that R. E. Ela, Jr., is to pay C. F. McCormick, party of the second part, eight per cent. per annum on five thousand (\$5,000) dollars. To be paid on the 25th of each month. The first payment is to be paid February 25, 1903. The amount to be paid each month is thirty-three (33 $\frac{1}{3}$ ) dollars and the payment of thirty-three (33 $\frac{1}{3}$ ) dollars is to be paid as long as this contract is in force. R. E. Ela, Jr., is to have all of the profits the store makes after paying the eight per cent. per annum monthly payments to C. F. McCormick, of the second part, and that the party of the first part shall draw no salary whatever. It is further agreed by and between the parties hereto that the party of the second part shall have the privilege and reserve the right to put an end to and terminate this contract any time if he believes the business is not running satisfactory. It is further agreed on the part of the party of the first part that the party of the second part shall have the right to sell, convey and dispose of this stock of merchandise at any time that he can secure a buyer for the same and also take immediate possession of said stock when he has found a buyer. It is further agreed by party of the second part that R. E. Ela, Jr., is to have an option on buying

said stock if it is to be sold or disposed of, option good for 30 days. It is further agreed between party of the first part and party of the second part that second party can make a weekly inspection of the books and examine the stock and demand an accounting at any time desired. It is further agreed that R. E. Ela, Jr., party of the first part, and C. F. McCormick, party of the second part, that first party can terminate this contract at any time he desires. In witness whereof, parties hereto set their hands and affix their seal on the day and year first above written. R. E. Ela, Jr. C. F. McCormick."

The goods purchased of plaintiffs below, under the Campbell régime, were not paid for, and hence this action was brought and a recovery had against Campbell.

Ryan & Ryan, for plaintiff in error. C. W. Reeder, Austin & Austin, and Karnes, New & Krauthoff, for defendant in error.

JOHNSTON, C. J. (after stating the facts). The material facts in the case are not in dispute, but there is a contention as to the relation of J. A. Campbell to the drug business and his liability for the contracts made while he was conducting it. These depend mainly upon the interpretation and obligation of the McCormick-Ela contract under which Campbell continued the business. At an early stage of the litigation there appears to have been some claim that the contract created a partnership relation, but all parties now agree that McCormick and Ela were not partners, and Campbell therefore does not stand in such relation and cannot be held liable as a partner. He does contend that he was warranted in continuing the business, and did so without personal liability because Ela's contract did not terminate with McCormick's death. It will be observed that it was a personal contract which ended with the life of McCormick. It was expressly stipulated that McCormick should be the sole owner of both goods and fixtures; and, while Ela was given the management of the store, he was not to have any ownership or interest in it. Instead of receiving a fixed salary, his compensation was to be regulated by the extent of the business done; that is, he was to receive as compensation all above a fixed amount of the earnings which was to be paid monthly to McCormick. Aside from this, there was the specific provision that the contract could be terminated at any time by McCormick, and if McCormick was not bound to continue the relation with Ela, it is certain that no obligation rested upon Campbell to do so. It is clear, therefore, that the contract was dissolved by the death of McCormick, and that it had no binding effect on Campbell. *Marvel v. Phillips*, 162 Mass. 309, 38 N. E. 1117, 26 L. R. A. 416, 44 Am. St Rep. 370; *Smith v. Preston*, 170 Ill. 179, 48 N. E. 688; *Shultz v. Johnson's*

Adm'r, 5 B. Mon. (Ky.) 497; Dickinson v. Calahan's Adm'rs, 19 Pa. 227; Bland's Adm'r v. Umstead, 23 Pa. 316; 2 Woerner on American Law of Administration, § 328. When Campbell renewed the contract with Ela for a continuance of the business he made himself individually liable for such obligations as his agent should contract. Upon his appointment as administrator the legal title of the stock of goods vested in him, and it became his duty to sell it and administer the proceeds as the statute provides. He had no authority to continue and carry on the drug business for the estate, and contracts made by him in the conduct of the business bind him personally and not the estate. A representative expressly authorized by a will to carry on the business of the testator for a time may do so under the direction of the probate court. One so authorized is not bound to incur the hazard, but if he does, the contracts made will be his own, and he will be individually bound by them. In 2 Woerner on American Law of Administration, § 328, it is said: "The executor carrying on the business under the will is personally liable to the persons with whom he deals as such; but they have a right to indemnify themselves for the payment of the debts thereby incurred, and an equitable right arises to the trade creditors to resort to the estate, if their remedy against the executor is unavailable."

Here there was no will, and the administrator's only duty with respect to the business was to wind it up. In 18 Cyc. 241, it is said: "The general rule is that neither an executor nor an administrator is justified in placing or leaving estates in trade, for this is a hazardous use to permit of trust moneys, and trading lies outside the scope of administrative functions. So great a breach of trust is it for the representative to engage in business with the funds of the estate that the law charges him with all the losses thereby incurred, without, on the other hand, allowing him to receive the benefit of any profits that he may make; the rule being that the persons beneficially interested in the estate may either hold the representative liable for the amount so used, with interest, or at their election take all their profits which the representative has made by such unauthorized use of the funds of the estate." See also, Willis v. Sharp, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493; Lucht v. Behrens, 28 Ohio St. 231, 22 Am. Rep. 378; Williams on Executors (7th Ed.) 791; Schouler's Executors and Administrators, § 325; 11 A. & E. Encycl. of L. 974. Ela was not employed by Campbell to wind up the business of the estate, but to carry it on in the same manner and upon the same plan in which it had been conducted during McCormick's lifetime. It was not carried on in pursuance of an order of the court or other authority, and hence Campbell took the risk of any loss that might occur and made himself individually liable

for the purchases of goods and other contracts made by his agent.

We find no error in the record, and therefore the judgment will be affirmed. All the Justices concurring.

#### COX et al. v. CITIZENS' STATE BANK.

(Supreme Court of Kansas. May 12. 1906.)

##### 1. BILLS AND NOTES—TIME FOR PRESENTATION OF CHECK FOR PAYMENT.

Payment of a check need not be demanded immediately, but, if the party receiving it and the bank on which it is drawn are in the same place, presentation of it on the day after it is given is timely, and, if they are not in the same place, it is only necessary to put it in the course of collection within such time.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1095-1098.]

##### 2. SAME—EFFECT OF DELAY.

In order for delay in forwarding and presenting a check for payment to defeat recovery on the check by a bona fide holder, the drawer must show the delay caused him to suffer loss.

##### 3. SAME—ACTION ON CHECK—DISREGARDING INDORSEMENTS.

An indorsee, in suing on a check which was not paid, may disregard or cancel all indorsements carrying it forward from him to the drawee.

Error from District Court, Allen County.

Action by the Citizens' State Bank against W. D. Cox and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Chris Ritter and C. J. Peterson, for plaintiffs in error. Amos & Orton, for defendant in error.

PER CURIAM. It is the law that checks are payable instantly on demand, but it is not the law that payment of a check must be demanded instantly. Granting that a check has some features of a bill of exchange, under the statutes of this state, it need not be presented until the day after it is given, if the party receiving it and the bank upon which it is drawn are in the same place. If they are not in the same place, it is only necessary that the check be put in course of collection within the time otherwise allowed for presentation. It cannot be said to be due until demand for payment is made. If not forwarded and presented within the time allowed by the rules of commercial law, the drawer must show the delay caused him to suffer loss, before he can defeat recovery by a bona fide holder. The same rule holds regarding protest and notice of nonpayment. Geo. M. Noble & Co. v. Wm. Doughten (opinion of this court filed Dec. 9, 1905, and cases there cited) 83 Pac. 1048. The statement in the defendant's answer that the check was due the day it was drawn could not be true, and no facts showing a violation of the rule of diligence in presenting the check and subsequent damage are pleaded. In suing upon the check the indorsee had the right to disregard or cancel all indorsements carrying the check for-

ward from it to the drawee. The defendant's remedy is against the party defrauding them, and not against the party who in good faith cashed their check.

The judgment of the district court is affirmed.

# STALEY v. HUFFORD et al.

(Supreme Court of Kansas. May 12, 1906.)

## BROKERS—SALE OF REALTY—COMMISSIONS.

Where one employs a real estate broker to find a buyer for land which he occupies with his wife as a homestead, and the broker produces a purchaser ready and willing to take the property upon the prescribed terms, the latter's claim for compensation is not defeated by the fact that a sale is prevented through the refusal of the wife to execute a conveyance.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 94.]

(Syllabus by the Court.)

Error from District Court, Allen County.

Action by J. H. Hufford and another against C. G. Staley. Judgment for plaintiffs, defendant brings error. Affirmed.

Chris Ritter, for plaintiff in error. J. B. Atchison, for defendants in error.

MASON. J. C. G. Staley employed Hufford & Napier, real estate agents, to sell for a stated price a tract of land, a part of which was occupied by himself and wife as a homestead, or to arrange a satisfactory exchange of this for other property. The agents found a buyer, one C. A. Martin, who was ready and willing to take the land upon terms that were satisfactory to Staley, and Staley and Martin signed a paper purporting to be a contract for its sale or exchange. Staley's wife did not execute this instrument or otherwise consent to the bargain. She refused to execute a deed, and the deal consequently fell through. Hufford & Napier sued Staley for a commission and recovered a judgment which it is the purpose of this proceeding to reverse.

The principal contention of the plaintiff in error is that, inasmuch as the contract entered into by Staley and Martin was void for want of the consent of Mrs. Staley, there could be no recovery for services in connection with it; *Thimes v. Stumpff*, 33 Kan. 53, 5 Pac. 431, being relied upon to support this view. The invalidity of that contract does not affect the matter. It was competent for Staley to employ Hufford & Napier to find a buyer for property which he had no power to convey, just as he might have employed them to get a bidder for property which he did not own, but which he expected to be able to control. Having asked and received their services, no reason is apparent why he should not pay them therefor; they having done everything possible on their part, and their efforts to accomplish a sale having been rendered futile by the inability of Staley to procure a conveyance,

which resulted from no fault of theirs. The purported contract signed by Staley and Martin is of no importance in the matter, except as evidence that the terms of sale or exchange negotiated by Hufford & Napier in fact met the requirements of Staley, and therefore that the agents had performed the duty they had undertaken. The case is within the reason of the rule that a real estate broker's claim for commission is not defeated where a sale is prevented by the fault of the owner, his employer. A letter written by the agents contained an expression to the effect that they expected no pay, unless they made a trade. This did not alter the essential character of their contract with Staley, or affect the application of the rule referred to. 23 A. & E. Encycl. of L. (2d Ed.) 919, 920.

Complaint is also made of the refusal of the court to permit the introduction of certain testimony, but the offer was made under such circumstances that it was clearly within the discretion of the court to refuse to consider it on account of the time of making it.

The judgment is affirmed. All the Justices concurring.

# FOWLER et al. v. WOOD et al.

(Supreme Court of Kansas. May 12, 1906.)

## 1. STATES—BOUNDARIES—NAVIGABLE WATERS—CHANGE IN COURSE.

If a navigable river dividing the territory of two states changes its position by gradual and imperceptible encroachment or insensible recession, so that the process by which the removal is accomplished cannot be detected while in operation, the boundary follows the shifting thread of the stream.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. States, § 8.]

## 2. NAVIGABLE WATERS—TITLE TO BED AND BANKS OF NAVIGABLE RIVER.

In Kansas the title to the bed of a navigable river is vested in the state. Private ownership in bordering land extends only to the river's margin, and if the position of the stream changes in the manner described in paragraph 1, the boundary between the land of the state and that of other proprietors follows the movement of the river's edge.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, § 270.]

## 3. SAME—SUDDEN CHANGE.

If, while a river of the character described is at flood stage, an ice gorge causes a sudden and violent irruption of the water, whereby the lands upon one side are visibly degraded or submerged, or a new channel is cut, the state boundary remains stationary at its former location, and the titles and boundaries of private owners remain unchanged.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, § 279; vol. 44, Cent. Dig. States, § 8.]

## 4. SAME—REAPPEARANCE OF SUBMERGED LANDS.

If, through the deposit of alluvion upon the former site, a deflection of the current of the river, or other action of the water, land submerged by avulsion be made to reappear, it may be reclaimed, if its identity can be established.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, § 279.]

### 5. SAME—ACCRETION AND RELICTION.

New formations arising from the bed of a river belong to the owner of the bed, and new formations added to a bar or an island in the channel of a river by the processes of accretion and reliction belong to the owner of the island or bar.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, § 270.]

### 6. SAME.

In order to effect a change of boundary, formations resulting from accretion or reliction must be made to the contiguous land and must operate to produce an expansion of the shore line outward from the tract to which they adhere.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, § 267.]

### 7. SAME.

If the owner of a body of land, a part of which has been submerged, convey the upland and retain title to the remainder, the purchaser, upon the reappearance of the submerged portion, can include it within his boundary only by the processes of accretion or reliction.

### 8. SAME—RIGHTS OF RIPARIAN OWNERS.

An owner of land bounded by a navigable stream has the right to protect his soil against inroads of the water, to secure accretions which form against his bank, and to erect and maintain improvements necessary to promote commerce, navigation, fishing, and other uses of the river as navigable water; but he has no right, by obstructions placed across the main current, to deflect the stream itself into a new channel.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, § 247.]

### 9. SAME—ACCRETIONS.

If the channel of a river separating mainland belonging to one proprietor, and an island, bar, restored land, or other formation belonging to another proprietor, be deflected and fill up so that the two bodies of land join, each owner is entitled to the accretions to and the relictions from his own shore. If the channel fill up from the bottom, without accretion to or reliction from either side, the boundary is the center of the channel, as it was before the water left it.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, § 270.]

### 10. PARTITION—FINALITY OF DECREE—SUBMERGED LAND—REAPPEARANCE AFTER PARTITION.

After proceedings had been commenced to partition a body of land bounded upon two sides by navigable streams and containing 250 acres more or less, a portion of the tract was submerged by a violent flood. A survey was made before the water had subsided, and the partition commissioners reported that, owing to the waste by the washing away of the banks of the rivers, the quantity of land had decreased to 200 acres. Allotments were made proportional to that quantity, and the report was confirmed. The next year, when the water went down, a portion of the submerged land reappeared, and all of it, with accretions added, was subsequently restored. *Held*, the owners are entitled to a partition of the undivided land, with its accretions, on the equitable ground of a mistake as to the existence of a part of the subject-matter of the former suit.

### 11. BOUNDARIES—NAVIGABLE RIVER—PRESUMPTION.

If a private owner grant land, bounding it generally upon a river, the presumption that the grant will carry title as far as he owns is rebuttable, the question being purely one of intention; and when the intention is ascertainable from the record of a proceeding or the

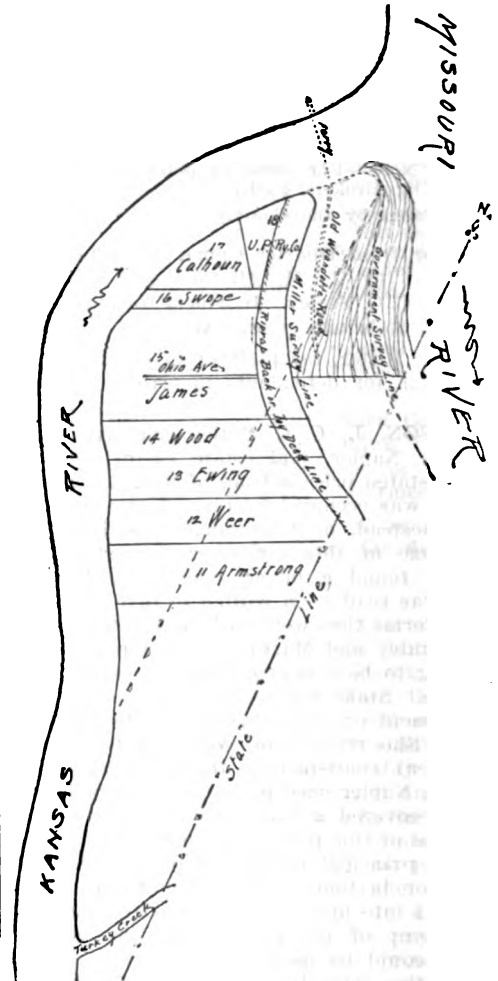
face of an instrument, other evidence is inadmissible.

(Syllabus by the Court.)

Error from District Court, Wyandotte County; E. L. Fischer, Judge.

Action by Annie B. Wood and others against George Anderson Fowler and others. There was judgment for plaintiffs, and defendants bring error. Affirmed.

The following is the map referred to in the opinion:



H. M. Meriwether, Thos. J. White, Miller, Buchan & Miller, and C. F. & S. D. Hutchings, for plaintiffs in error. Rossington, Smith & Histed, W. L. Wood, J. O. Fife, E. C. Wright, Frank Hagerman, and Wm. B. Trembly, for defendants in error.

BURCH, J. The action in the district court was one of ejectment and partition. In 1857, pursuant to treaty stipulations with the Wyandotte Indians, the United States patented to Silas Armstrong a tract of land, irregular in shape, lying in the forks of the Missouri and Kansas rivers, north of Turkey creek,

containing some 274.7 acres. The land was low bottom land, of the peculiar formation which characterizes the valley of the Missouri river in this region, and subject to the vicissitudes which result from the conduct of that capricious stream. By purchase and descent various parties acquired undivided interests in this land. In some instances quantities in acres were conveyed, to be derived from the undivided holdings of the grantors. By the close of the year 1866 some 25 different parties claimed to be tenants in common of the tract, and, on January 23, 1867, an action was brought in the district court of Wyandotte county to partition it. The petition designated the land as "all that parcel of land lying in the forks of the Missouri and Kansas rivers and between the Missouri state line and the Kansas river as lies north of Turkey creek." The area was estimated at "about 250 acres more or less." On April 11, 1867, the court ordered that, "for the purpose of ascertaining the quantity of land included in the boundaries mentioned in the petition of said plaintiffs a survey of the same be made, and it being represented that John Runk, Jr., is a competent person to make said survey, he is hereby empowered to make the same and report by Saturday morning next." On April 13, 1867, a decree of partition was entered, which describes the land as it is described in the petition, and which closes by ordering a writ in due form to be issued to the sheriff of Wyandotte county, commanding him, by the oath of three judicious and disinterested freeholders named, to cause "the same said land" to be set off and partitioned among the parties found by the court to be entitled to portions thereof. On September 26, 1867, the partition commissioners made their report. Those who were entitled to acre quantities were given shares out of the undivided interests of their grantors. In the description of various allotments, boundary lines are described as running "to the east bank of the Kansas river; thence down the same \* \* \*" etc., and "to the west bank of the Missouri river; thence down the same \* \* \*" etc., and on the plat accompanying the report a number of lots are extended from river to river. The commissioners' report concludes with the following statements: "By a survey which was made of the lands during the April term of the first district court, 1867, they were found to contain 208.4 acres, upon which a division was based. \* \* \* A careful survey made during the month of July last shows that, owing to the waste by the washing away of the banks of the Missouri and Kansas rivers, the quantity of the land has decreased to 200 acres. The allotments are proportioned to this in quantity, and give an area to Thomas Ewing, Jr., of  $18\frac{3}{100}$  acres; Armstrong heirs,  $34\frac{58}{100}$  acres; James,  $54\frac{42}{100}$  acres; Wood,  $20\frac{94}{100}$  acres; Wm. Weer's heirs,  $25\frac{13}{100}$  acres; Swope,  $9\frac{9}{100}$  acres, and the Union Pacific Railway

E. D.  $11\frac{52}{100}$  acres. The accompanying plat hereto attached represents the allotments with the courses and distances marked on the lines and the several areas in acres and hundredths of an acre." The report of the commissioners was confirmed by the court on October 15, 1867, and no action having been taken to review the proceedings, they became final.

Subsequent to the partition suit the Missouri river continued to encroach upon those allotments of which it formed the boundary, and, in order to prevent their lands from washing away, the several owners entered into a contract with James F. Joy to deed him certain tracts bordering upon the stream and extending back for quantity, in consideration of his riprapping the river bank. The agreement is dated in August, 1868, and the work was completed within a few months following. Deeds were duly delivered to Joy, whereby he acquired the entire Missouri river frontage from the mouth of the Kansas river to the state line, except that opposite the land of two of the allottees in the partition suit, Swope and Ewing, who paid for their proportion of the work of riprapping in cash. The calls in the Joy deeds were to the bank of the Missouri river and down and along the same. Later the title of these riparian owners passed either mediately or directly to the Armour Packing Company, the Hannibal & St. Joseph Railroad Company, the Fowler Land Association, the Metropolitan Water Company, and others. From the time of the partition down to the time when the bank was protected, a considerable quantity of land along the channel of the river was carried away by erosion. The final survey under which partition was made is known as the Miller survey and the riprap bank, or Joy deed line, lay south of the north line of the Miller survey at distances varying from 200 to 300 feet. The composite map following indicates crudely the position of the Missouri river bank at the time of the government survey, the Miller survey line, the riprap bank or Joy deed line, several of the allotments made by the commissioners in the partition suit, and affords some other information which may be useful in arriving at a comprehension of the case. From 1869 until 1889 the deep water channel of the Missouri river lay next to the riprap bank. Business enterprises requiring access to the river were established there. For a long time the Fowler Packing Company maintained a wharf upon its land (partition lot 16 and a segment of lot 15), from which steamboats loaded and discharged their cargoes, and all the commerce of the stream was carried upon the current, which pressed against that bank. About the year 1889, the main current was diverted to the Missouri side of the stream. The old channel filled up and, at the commencement of this litigation, the river was separated from the old riprap bank by a wide stretch of land many

acres in extent. This suit relates to land lying north of the Miller survey line and between that line and the river where it now runs. The plaintiffs are persons who have obtained title by purchase or descent from the allottees in the partition suit, other than those who were given acre quantities, and, for all purposes of the case, may be termed tenants in common of the Armstrong grant. The defendants may be designated as purchasers of those portions of the Armstrong grant which are shown by the report of the commissioners in the partition suit to border upon the Missouri river. With them are joined some of the co-tenants of the plaintiffs. The plaintiffs claim that, following unusual rains, the ice in the Missouri and Kansas rivers broke up early in the year 1867 after the partition proceedings were begun, and formed a gorge near the confluence of the streams. A stage of extraordinary high water followed, and the Missouri river with great rapidity and violence cut a new channel through the tract described in the partition suit. The June rise succeeded, and the water continued high throughout the year. The April survey in the partition proceedings disclosed that but 208 of the 250 acres of land remained, and, by the next July, 8 acres of that had washed away. Consequently 200 acres and no more were partitioned; the allotments being made proportional to that quantity. Upon the subsidence of the flood in 1868, a portion of the Armstrong grant which had been submerged, and which had been cut off from the partitioned land by the new channel of the river, reappeared in the form of an island, upon both sides of which the water flowed; the great volume, however, passing through the channel and continuing to erode the bank until the Joy deed line was reached. The size of this island increased by accretions to it upon all sides. About the year 1889 some of the defendants placed obstructions out in the channel of the stream which, together with other artificial means, caused the main current to be deflected to the opposite shore. For some time the water lay in pools along the channel next to the riprap bank, but these at last disappeared and the island expanded to the mainland. The plaintiffs say they were not deprived of their land by the action of the river in the year 1867 or by the partition proceedings or by any other means, and that all of such land, with its accretions, has been restored to them unpartitioned and in identifiable form. The defendants dispute the facts furnishing the foundation of the plaintiffs' claim. They dispute some of the legal principles invoked in aid of such claim, and they deny the applicability of other principles essential to its support. Further than this, they assert that the plaintiffs are estopped from claiming that all the land of the Armstrong grant was not partitioned and are estopped from denying that the partition allotments have followed the recession of their movable boundary, the river itself, to its

present location. Upon a trial by jury, the plaintiffs and those defendants who are co-tenants with them were awarded land indicated by the shaded portion of the map. The court rendered judgment upon the verdict and reserved the matter of partition, pending this proceeding in error. The jury returned answers to a large number of special questions covering practically all of the facts.

The special findings show that in 1856 the Armstrong grant contained 274.7 acres. When the partition suit was commenced it contained 250 acres, more or less. A new channel was cut through the land in controversy by the high waters of the Missouri river in 1867; the land in controversy was suddenly and perceptibly submerged by the violent rise of the river in that year; the ice gorge of that year caused the river to cut a new channel and to wash away the bank; the cutting and the washing away of the bank between Kaw Point (the point of land at the junction of the rivers) and the state line was not done in the usual manner of cutting along the banks of the Missouri river; the new channel varied from 200 to 300 feet in width, and after it was cut was the main channel of the river. The jury further finds that in 1865 or 1866 the Missouri river began to wash away the bank forming the border of the Armstrong grant, and in 1866 and 1867 the land caved into the river and washed away quite rapidly; but, as distinguished from this process, a portion of the land was cut off by the new channel of 1867 and left lying to the north of it in the form of an island. The land so cut off was from 100 to 200 feet wide and from 800 to 1,000 feet long. It lay some 600 or 700 feet out, measured from the line the river reached when the south bank was ripped, and the south boundary of partition lot 18, if extended, would have about crossed its northwest point. No island was in existence between the mouth of the Kansas river and the state line when the partition suit was commenced. The one formed as described continued in existence at all times up to 1891 or 1892, when the water ceased to flow in the channel separating it from the mainland. The findings also state that the high water continued during the entire season of 1867. During the flood the island referred to was entirely submerged. The top of it was scoured off and washed away. It did not reappear until the water had subsided the next year, and then it presented itself as a new formation of sand, or sand and soil, which afterward supported a growth of willows and weeds for some of the time. In later years it was frequently submerged and its configuration changed somewhat, but it remained visible at all times in low stages of water. In answer to one of the numerous and pertinacious special questions upon this subject, the jury used the expression "very low water." The jury further finds that a portion of the land in controversy was formed by

accretions to the island. Prior to 1889 an accretion of sand, or sand and soil, formed in front of partition lot 18, about 100 feet wide at Kaw Point. In that year what is known as the "waterworks dyke" was constructed in the river by the defendant, the Metropolitan Water Company, commencing 100 feet from the riprap bank. At the time the dyke was built no deposits had begun to form in front of lots 12, 13, and 14. An accretion also formed in front of lots 15 and 16, but to the time of bringing suit it had extended only 250 feet, less than the width of the channel between the mainland and the island. After the dyke was constructed the river ran around the end of the island in a south easterly direction in a channel lying north of it. The Ohio avenue sewer of Kansas City, Kan., was extended to this channel in 1889, but the river ceased to run there, and by 1892 it had entirely filled up; the river having receded beyond the government survey line of 1856. These findings are conclusive upon the facts to which they relate, and require consideration in the light of the legal doctrines of avulsion, submergence, and reappearance, and accretion and reliction, to determine the rights of the parties to the suit. The verdict being a general one, the evidence favorable to the plaintiffs and consistent with the special findings controls in all matters not covered by the findings themselves.

In the year 1867 the Missouri river formed the boundary between the state of Missouri and the state of Kansas at the place in question. The stream was navigable, constituted a public highway between the two states, and, under the legal policy of each, title to its bed was vested in them; the dividing line being the center of the main channel. The courses of rivers being determined by the operation of the elements, according to natural laws they are subject to changes of location. If the change in the position of a navigable river dividing the territory of two states be by gradual and imperceptible encroachment or insensible recession, so that the process cannot be detected while it is going on, the boundary follows the shifting thread of the stream. But if, from storm or flood or other known violent natural cause, there be a sudden, visible irruption of the water, whereby the lands upon one side are degraded or submerged or a new channel is cut for the stream, the boundary remains stationary at its former location, and the boundaries of riparian owners whose lands have been affected remain unchanged. These principles are elementary in the law. The books teem with learning upon the subject, and the collation of authorities would be a work of supererogation. *McBride v. Steinweden* (opinion by this court, filed January 6, 1906) 83 Pac. 822. It is argued, however, that because of its crooked course, the velocity of its current, the friable character of its banks, and the quicksand substratum of the adjacent

soil, it is characteristic of the Missouri river that large pieces of upland should suddenly, visibly, and perceptibly break off, plunge into the water, and be swept away; and from this fact it is concluded that the law of avulsion cannot be applied to the conduct of this stream, or, at least, that it governs only in "ox-bow" cases like *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300; *Missouri v. Nebraska*, 196 U. S. 23, 25 Sup. Ct. 155, 49 L. Ed. 372, and *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186. If this river be distinguished from others by the violence and rapidity with which it invades the lands adjacent to its course the findings of the jury are explicit upon the point that the *Armstrong* grant was not ravaged in the usual manner of cutting along its banks, and a clear distinction is made between the carving and washing away of marginal soil and the phenomena of this case. The ice dam in the stream added an unusual and aggravating feature. Nothing short of the liberated energy of gorged water at flood tide could have produced the tremendous results described in the testimony supporting the special findings. It is said that after the water gained headway it went through the land with a rush, tearing out the earth in massive blocks 5, 10, 20, 25, and 30 feet in width and sometimes 40, 50, and 300 feet long, felling forest trees and otherwise devastating the tract so that, upon an abatement of the inundation, in place of farm land a river channel 100 yards wide separated a denuded island from the shore. The argument for the limitation of the avulsion doctrine was made in favor of the abolition of the law of accretion from the valley of the Missouri river in the cases of *Missouri v. Nebraska* and *Nebraska v. Iowa*, supra. The court held, however, that notwithstanding the greater rapidity of changes here than elsewhere, the fundamental principles of the law were not affected.

In the case of *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941, the litigation arose out of circumstances much less extraordinary than those connected with the flood of 1867, but the rights of the parties were solved upon the theory of an avulsion. The facts were that the washing away of the banks of the Mississippi river opposite the city of St. Louis usually occurred at the time of the spring floods, which varied in duration, but lasted from 4 to 8 weeks. Each flood usually carried away a strip of land from off the river bank 250 to 300 feet in width, the loss of which could be perceived in its progress. As much as a city block would be cut off and washed away in a day or two, and masses of earth from 10 to 15 feet in width frequently caved off, fell into the river, and were washed away at one time. The court said: "By findings of fact 6 to 9, the sudden and perceptible loss of land on the premises conveyed to the plaintiff, which was visible in its progress, did

not deprive Blumenthal, as riparian proprietor, of his fee in the submerged land, nor in any manner change the boundaries of the surveys on the river front, as they existed in 1865, when the land commenced to be washed away. It is contended by the defendant, not only that the plaintiff never had any title to the bed of the river, but that, when the dry land of which he was in possession was swept away by the river and ceased to exist, his ownership of that land also ceased to exist. It is laid down, however, by all the authorities, that, if the bed of the stream changes imperceptibly by the gradual washing away of the banks, the line of the land bordering upon it changes with it, but that, if the change is by reason of a freshet, and occurs suddenly, the line remains as it was originally. This principle is recognized by the Supreme Court of Illinois, in *Buttenuth v. St. Louis Bridge Company*, 123 Ill. 535, 546, 17 N. E. 439, 443, 5 Am. St. Rep. 545, in these words: "The law, as stated by law writers, and in the adjudged cases, seems to be that where a river is declared to be the boundary between states, although it may change imperceptibly, from natural causes, the river, as it runs, continues to be the boundary. But if the river should suddenly change its course, or desert the original channel, the rule of law is that the boundary remains in the middle of the deserted river bed." In the case of *City of Chicago v. Ward*, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185, the testimony disclosed that the building of certain piers in the city of Chicago had the effect of throwing a strong current of the Chicago river against the shore of Lake Michigan, which gradually undermined the bank. Upon the occasion of storms the bank would fall, sometimes 5, 10, and 30 feet in width at a time, and sometimes as much as 100 feet would be washed away in a single storm. The court held that the boundaries of the land were not changed, quoting, among other authorities, *Hargrave's Law Tracts*, 36, 37, as follows: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or, though the marks be defaced, yet if by situation and extent of quantity and bounding upon the firm land the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject does not lose his property; and accordingly it was held by *Cooke and Foster*, M. (7 Jac. C. B.), though the inundation continue 40 years. But if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make it out where and what it was, for he cannot lose his propriety of the soil, though it be for a time become part of the sea and within the admiral jurisdiction while it so continues." The conclusion of the court was expressed thus: "Under the authorities, and

according to all reasonable deductions from legal principles, we must hold that the title to these lands submerged by the action of Lake Michigan was not lost, and that by their subsequent reclamation the city has completely reasserted its title thereto, as such title stood at the time of the dedication of the respective plats thereof." In *Farnham on Waters*, vol. 3, § 848, it is said: "In case the river shifts its position so as to submerge land on one shore, the question is one of boundary. As seen in the preceding section, if the change in the river channel is sudden, titles of the opposite proprietors are not changed, but if it is gradual and imperceptible, the middle thread of the river remains the boundary line. \* \* \*

It will be remembered that the rule that the thread of the stream remains the boundary regardless of changes is based on the fact that the law presumes that the river does not change. This presumption should not be permitted to overcome an obvious and well-established fact. Therefore, if the change does not come within the definition of gradual and imperceptible, but the land is rapidly washed away on one side and formed on the other, the fiction should give way to the fact, and the owner should not lose title to his property. The title to the land itself is of more importance than the riparian right of access to the water or convenience of having a natural, rather than a mathematical, boundary; and rules which were made for convenience should not be permitted to wrest the title to land from its true owner." These authorities are sufficient to show that the events of 1867 are clearly comprehended within the meaning of the term "avulsion," and it is not necessary that time be spent refining upon the words "gradual" and "imperceptible," or in framing new definitions to fit the varying facts of different cases. They further show that it is not necessary that the river should be "annihilated" in its old bed and "reproduced in its new bed"—borrowing an expression from *Vattel*.

If the earth where Dr. Wood's house stood had not been swept away by the torrent, if his fences had not gone down the stream, if his cornfield had remained undisturbed, and that part of the *Armstrong* grant cut off by the new channel had not been stripped of its vegetation, there would be no contention now that a portion of the land had not been partitioned. The fact of its submergence and the formation of new land on the old site makes no difference in the rights of the parties. "If the sea swallow land, if the bounds can be ascertained the owner may have them again if they are subsequently left to dry or are regained by him. And if the former extent of land can be known, it shall be returned to the owner." *Hale, De Jure Maris*, chap. 4; 2 *Rolle's Abr.* 168. "When the denudation of the soil by the water is sudden and perceptible, the title is not changed. \* \* \* If navigable waters,

owned by the Crown or State, suddenly encroach upon private lands adjoining, and there are marks by which their limits can be determined, the title to the soil thus covered remains in the former owner, and upon the recession of the water it is restored as his property. Though the overflow continues for 40 years, yet if the water recedes the owner has his land again." Gould on Waters, § 158. In Farnham on Waters, § 848, it is said: "When the title to the bed of the river is in the public, the sudden submergence of a parcel of land on the foreshore does not destroy the title of the private owner, if within a reasonable time it can be reclaimed and the former boundaries established." These texts are supported by the decisions of the courts, and undoubtedly express the true rule of law.

Mulry v. Norton et al., 100 N. Y. 424, 3 N. E. 581. 53 Am. Rep. 206, is a leading case upon this subject. The syllabus reads: "Land lost by submergence may be regained by reliction, unless the submergence has been followed by such a lapse of time as precludes the identity of the land from being established. If, after a submergence, the water disappears from the land either by its gradual retirement or the elevation of the land by natural or artificial means, the proprietorship returns to the original owner. No lapse of time during which the submergence has continued bars the right of the owner to enter upon the land reclaimed and assert his proprietorship when the identity can be established by reasonable marks, or by situation, extent of quantity or boundary on the firm land. And so, if an island forms upon the land submerged, it belongs to the original owner." In the opinion it is said: "It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner, or enables another to acquire it, for the erosion must be accompanied by a transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained. \* \* \* A case quite in point is referred to by the respondent's counsel as arising in Delaware in 1815, decided by the court of common pleas upon a learned opinion by Judge Wilson, a copy of which is attached to the plaintiff's brief. The case does not seem to be elsewhere reported. It arose over the ownership of an island called 'Wilson's Bar,' which had been created by alluvion upon land formerly contained within the boundaries of an island called 'Little Tinnicum,' but which at some time had been worn away by the ocean. The court say: 'The right to the new island and also to land gained by alluvion or dereliction,

all of which are governed by the same principle, follows the right to the soil which is covered by the water. Though the surface of the lower part of Little Tinnicum was destroyed by the force of the winds and the waves, and it was consequently overflowed by the water of the river, yet the owner did not lose the propriety of the remaining land covered by the water; if it was regained either by natural or artificial means, it continued to belong to the original proprietor.' The earth deposited on it became his by the right of alluvion, and of course this island formed on it by such deposit became his. And though it probably has extended beyond the limits of the old island, the addition is plainly alluvion." The Delaware decision referred to, Morris v. Brooke, Del. Common Pleas, July, 1815, has been printed in 53 Am. Rep., at page 215. In the recent case of Hughes et al. v. Heirs of Birney et al., 107 La. 664, 32 South. 30, the principle under consideration was applied to land uncovered by the recession of the waters of "Lake Centennial" from a portion of De Soto point opposite Vicksburg. The so-called lake was an enlargement of the Mississippi river which was formed by a cut made through the tongue of land in 1876. The water was drawn off, and the lake gradually filled up, by the river making another cut to a point further down the stream in 1898. The opinion was based on the standard authorities, and the syllabus reads: "If, after submergence, the water disappears from the land, either by gradual retirement, or by the elevation of the land by natural or artificial means, and its identity can be established by reasonable marks, or by situation, extent, quantity, or boundary lines, the proprietorship returns to the original owner." In the case of St. Louis v. Rutz, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941, it is said: "It is laid down by all the authorities that, if an island or dry land forms upon that part of the bed of a river which is owned in fee by the riparian proprietor, the same is the property of such riparian proprietor. He retains the title to the land previously owned by him with the new deposits thereon." The same rule applies to titles held by the United States. "Island No. 42 in the Missouri river, within the present state of Missouri, was surveyed by the United States in 1820, and then contained about 50 acres. Subsequently, during floods, it was submerged, and a portion of the surface was washed away; but on the subsidence of the waters a portion of it reappeared, and at no time was it washed away to the level of the bed of the river; a channel remaining between the island and the west bank of the river. About 1880 the river cut a new channel, commencing above the island, and returning to the old channel below it, making a curve to the eastward, which inclosed about 1,100 acres, and leaving the old channel and the island dry. Thereafter the plaintiff entered

the island as public land, and received a patent therefor according to the original survey. Under the law of Missouri the title of riparian owners on a navigable stream extends only to the water line. Held, that the title of the United States to the island was not lost by the erosion or submergence, and that, by its conveyance after it reappeared on the reliction of the waters, plaintiff took title thereto with the additions made by alluvion and accretion." *Widdicombe v. Rosemiller* (C. C.) 118 Fed. 295, syllabus.

It is suggested that the right to reclaim submerged land can be asserted only when the riparian proprietor owns to the thread of the stream, but no reason is offered in support of the suggestion, and none is apparent. If, through some catastrophe, the river make its bed upon private land, the burden should fall as lightly upon the private owner as possible. It is sufficient for the state that control be retained over the stream for the preservation of its public highway character. More than this the state ought not to take. Whatever the riparian owner lost should not be withheld when the water recedes and the need of public supervision is at an end. Whether originally he had or had not some land already under water cannot affect his rights. The land, when restored, is his own, because avulsion affects neither boundaries nor titles. Proprietorship is not lost in the portion covered, and, when it rises to the surface, whether by the deposit of alluvion or a change in the channel of the river, dominion reattaches as if it had never been suspended, and whatever accretions may have been added to the tract belong to its proprietor as in ordinary cases. By a failure to discriminate between the effects of avulsion and ordinary erosion, counsel for defendants have been led into an error respecting the prevalence of the doctrine of submergence and reappearance in the region through which the Missouri river flows. Nowhere has it been repudiated where the facts have required its application. Such being the law and the facts, the avulsion of 1867 did not disturb the boundary between the state of Missouri and the state of Kansas, and the boundaries of the Armstrong grant, as they existed when the partition suit was commenced, were not changed. The land under the new channel of the river, the island, and the shoals beyond the island, still belonged to those who owned the soil before the flood. This land has been identifiable from the time the high water subsided and the limits of the entire tract as they were known in 1867, have been proved in this suit. The owners are entitled to reclaim it and to have it partitioned, unless they have lost title to it in some manner or are debarred from asserting their rights upon some ground suggested by the defendants. It is, of course, idle to assert that the partition proceedings conclusively prove the fact to be that the proprietors of the Armstrong grant had no more land in

July, 1867, than the 200 acres which were divided. There is fair ground to argue that the allottees are estopped to claim title to more, but the physical existence of a portion of the earth's surface cannot be annihilated by writing up a court record to that effect. It is plain that the surveyor measured a tract of land surrounded by three streams, two of them, at least, at flood stage, and found 200 acres of land out of water. The partition commissioners believed that the two rivers had permanently appropriated the remainder of the tract described in the petition, and, in effect, so reported. The retirement of the waters of the Missouri river and the restoration to its owners of a large body of land not included in the report were not contemplated. The court and the parties acted upon the circumstances as they then appeared, and closed the case before the river went down. Ordinary sagacity is to be imputed to them. They were mistaken, and the report, false in fact because based upon conditions erroneously believed to be perpetual, does not stand in the way of the truth.

It is the law that courts will not allow one co-tenant to vex those having estates in common with him with a multiplicity of suits for partition, and ordinarily all the joint property must be included in one suit. But if they own two tracts they may voluntarily divide one of them, or they may ask the court to divide one of them, without depriving themselves of the right or the court of jurisdiction subsequently to apportion the other. Neither will relief be denied them if, acting in good faith, they should overlook a tract. "It is true that a petition for a partition of a part of an estate held by tenants in common will not be entertained against the objection of any person interested. Ordinarily, a petition of this kind should include the entire estate held in common; but it does not follow, if, by mistake, or by the consent of all the tenants, a partition has been made of a portion of their estate, whether by order of the court or otherwise, that the court is powerless to divide the remainder on a petition of one or more of the tenants in common. It would be a harsh rule, that, after a division of a part of an estate, partition of the remainder could never be ordered by the court. When parties have acted innocently and fairly in making or obtaining a division which does not cover all their estate, there is no reason why the law should not aid them when they ask for a division of the remainder." *Barnes v. Boardman*, 157 Mass. 479, 32 N. E. 670. See, also, *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712; *Richardson v. Ruddy* (Idaho) 77 Pac. 972. Likewise, if parties have acted innocently and fairly and a portion of the estate described in the petition and ordered to be partitioned has been omitted from the report of the commissioners under a mistake as to the facts, there is no reason why, upon discovery of the true state of affairs, they should not have the right to bring suit

in equity to enforce the decree as to the remainder as the exigencies of the case and the interests of the parties require (*Bank v. Kingman*, 62 Kan. 571, 64 Pac. 65, and authorities there cited; *Wadhams et al. v. Gay*, 73 Ill. 415), or else be permitted to avail themselves of the more direct remedy of an ordinary action for partition of the omitted part, in which the equitable right to relief may, under the practice in this state, be fully investigated. The enforcement of any other rule would breed deserved contempt for the formalism of the law and prove it to be a tyrant over the fortunes of men, rather than a servant in the accomplishment of their just and blameless desires.

Conceding to the partition proceedings that for which the defendants argue—the effect of mutual deeds—still, if parties are mistaken as to the quantity of land they actually own and the disparity is great enough to challenge the attention of a court of conscience, relief may be granted. “Where plaintiff and his two codefendants attempted to partition their land under a mutual mistake that it only consisted of 17 acres, when, in fact, they owned 52 acres, and one of them refused to execute deeds, and thereafter defendant purchased the land except plaintiff’s interest, claiming ownership of the entire 52 acres except the  $5\frac{3}{4}$  acres first deeded to plaintiff, there was such disparity between the quantity of land believed by all the parties to exist and that which they actually owned that plaintiff was entitled to relief on the ground of mutual mistake, and hence a judgment in partition awarding plaintiff an equal one-third of the remainder of the land was proper.” *Cartmell v. Chambers* (Tex. Civ. App.) 54 S. W. 362. The principle upon which this decision is based is fundamental in the law of contracts. “In cases of mutual mistake going to the essence of the contract, it is not necessary that there should be any presumption of fraud. On the contrary, equity will often relieve, however innocent the parties may be. Thus, if one person should sell a message to another, which was, at the time, swept away by a flood, or destroyed by an earthquake, without any knowledge of the fact by either party, a court of equity would relieve the purchaser, upon the ground that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract.” *Story’s Equity Jurisprudence*, § 142. The same principle should govern if the conditions were reversed and the parties innocently but erroneously believed the message had washed away. The head notes to the report of the case of *Ross v. Armstrong* (25 Tex. Sup. 354) in 78 Am. Dec. 574 give the gist of the decision as follows: “Under the joint adventure between holder of head-right certificate and locator to secure patent to government land, and to divide the land when acquired, if, after securing the grant

and dividing the land, it is discovered that part of the land which the government has thus granted had been previously appropriated by older title, the partition is one upon a mistake of facts, from which equity will relieve. It is a general rule in equity that an act done or contract made under mistake or ignorance of material fact is voidable and relievable against in equity, when such mistake or ignorance constitutes a material ingredient in the contract, or the motive of the act done by the parties, and disappoints their intention by a mutual error.” The obligation to abide a judgment and refrain from a second suit is affected by the same considerations: “There is no doubt respecting the general correctness of the proposition expressed in the maxim: ‘*Nemo debet bis vexari pro una et eadem causa.*’ This rule, however, is not of universal application. The origin and object of the rule were the prevention of the vexations incident to a multiplicity of suits, which the law, equally as much as equity, abhors. The principle above asserted finds more familiar expression in the statement that a party shall not split his cause of action. Now, it is quite obvious that such prohibition presupposes knowledge of the constituent elements of the cause of action sought to be unwarrantably divided. If this be true, and it be true also that the law does not require what is impossible, then it must needs follow that a party should not be precluded in consequence of a former action, if such action were brought in unavoidable ignorance of the full extent of the wrongs received or injuries done. Any other conclusion would be reached only through sanctioning the rankest injustice. In *Farrington v. Payne*, 15 Johns. (N. Y.) 432, the question is asked: ‘Suppose a trespass, or a conversion of a thousand barrels of flour, would it not be outrageous to allow a separate action for each barrel?’ Undoubtedly it would. But in such a case, where the owner is ignorant of the extent of his loss, would it not be far more outrageous to allow a recovery of 1 barrel to prevent the recovery of the remaining 999? This question with meet with an affirmative response in every honest heart.” *Moran v. Plankinton et al.*, 64 Mo. 337. See, also, *Alexander v. Bridgford*, 59 Ark. 105, 27 S. W. 69; *Gedney v. Gedney*, 160 N. Y. 471, 55 N. E. 1.

A mistake in a division line, in a decree of partition originating in the report of the referees which was confirmed without objection, will be corrected in equity. *Smith v. Butler*, 11 Or. 46, 4 Pac. 517. Equity will likewise take jurisdiction to correct a decree of foreclosure from which a lot has been omitted by mistake. *Snyder v. Ives*, 42 Iowa, 157. And the fact that the cause in which a mistake occurs has been taken to the Supreme Court, and the judgment affirmed, will not defeat the exercise of such power. *Partridge & Co. v. Harrow*, 27 Iowa, 96, 99 Am. Dec. 643. It is true that the

partition proceedings are conclusive in reference to the nature and extent of the titles of the respective parties. The decree that they are tenants in common cannot be impeached to show that one or more of them owned in severalty. Neither can any of them take advantage of a second proceeding to make a claim for compensation for improvements which should have been asserted in the first instance. *Forder v. Davis*, 38 Mo. 107; *Bobb v. Graham*, 89 Mo. 200, 1 S. W. 90; *Spitts v. Wells*, 18 Mo. 468; *Burger v. Beste (Mich.)* 57 N. W. 99; *Kane v. Canal Co.*, 15 Wis. 179; *Janes v. Brown*, 48 Iowa, 568. So, if the commissioners had established a right of way to some of the allotments, another could not now be claimed, and if a strip of land had been left undivided for the purpose of furnishing to some of the allottees free access to their premises, the fact could not now be disputed. *Carey v. Rae*, 58 Cal. 159; *Miller v. City of Indianapolis*, 123 Ind. 196, 24 N. E. 228; *Turpin v. Dennis*, 139 Ill. 274, 28 N. E. 1065. In *Miller v. City of Indianapolis* it is said: "In their report to the court the commissioners reported that they had divided the land intended for partition into lots, blocks, streets, and alleys, and in their report of partition they informed the court that they had assigned to each of the parties interested in said land his or her share of the same, in severalty. No person examining these proceedings would be led to believe that any portion of the land described therein was left undivided, but, on the contrary, when examining the plat in connection with the report of the commissioners in partition, and the judgment of the court thereon, would be led to the belief that the strip in controversy was intended as a 60-foot street, furnishing an outlet for the blocks abutting thereon. \* \* \* The property adjoining this strip has passed into the hands of third parties. \* \* \* To permit the appellant to say now that this strip was left by the commissioners as undivided land, and was not intended as a street, would be obviously unjust to those who purchased the property on the faith of the plat and the partition proceeding. We do not think the court erred in refusing to admit this offered testimony."

None of these cases, however, which are referred to because cited by counsel for defendants, reach to the marrow of this controversy, which relates, not to what the commissioners' report includes, but to what it disregarded. The report shows that 200 acres and no more of the land described in the petition were partitioned. A flood prevented the division of the remainder. The commissioners led the court and the parties to believe that the omitted territory had washed away. It was under water at the time, and remained so until the next year. The parties were not at fault in relying upon the statement of the commissioners as true. They were all, however, mistaken. The mis-

take involved the existence of a large portion of the subject-matter of the action. Belief in its nonexistence led them to take no further account of it. Therefore, under the ancient and well-established principles of equity jurisprudence, the plaintiffs are entitled to relief, unless the defendants will be deprived of some right to the land, and, under the liberal rules of procedure prevailing in this state, the question may be determined in an action for the possession and partition of the tract excluded from the former report. The defendants cite the leading authorities to the effect that when a private individual grants property belonging to him and bounds it generally upon a stream, the presumption is he does not intend to reserve any land between the upland and the stream, and if his property extend beyond the water line the presumption is that the grant will carry title as far as he owns. The subject is discussed in *3 Farnham on Waters*, § 852, p. 2509. As stated by the author just referred to (section 855), the presumption ordinarily indulged is rebuttable; the question being purely one of intention. When the intention is ascertainable from the face of an instrument or a record, other evidence is not admissible, and, under the well-understood rule, the court must make the interpretation and not the jury.

The full intention of the court and the parties to the partition proceeding is clearly expressed. No land whatever north of the Miller survey line was partitioned or conveyed, for the stated reason that none remained. It had washed away. The meaning is as clear as if the line had been established at a granite escarpment instead of a navigable river. In the theory of the law, one form of earth-sculpture is as enduring as another. The bank of a river is a monument the same as the face of a cliff. The presumption is that it does not change, and dominion may be limited as conclusively by a river bank as by any other natural object. The allotments were intentionally made proportional to a residue of 200 acres, and the proposition that the design was that the six allottees whose proportional shares touched the river should, because of that fact, receive some 50 acres more of unpartitioned common land, is not worthy of discussion. No land was reserved between the partitioned land and the river. Lot 18 was first conveyed by a description limited as follows: "As set apart to the Union Pacific Railway Company, Eastern Division, by the judgment and decree of court in the case of *Thomas Ewing, Jr., et al. v. William Weer et al.*, at the April term, 1867, of the First judicial district in and for the county of Wyandotte, Kansas, numbered on the appearance docket of said court 911, as remains of record and on plat in cause numbered 18." Lot 16 was first conveyed as "the same land designated as lot 16 as shown on the plat in case No. 911, *Thomas Ewing, Jr., et al. v. William Weer et al.*, in the First

judicial district court, Wyandotte county, Kansas, and set apart to said Swope in said suit, the papers and records in which case are here referred to for description of said lot 16." Lot 15 was first conveyed by deeds which limited the grant to a part of lot 15 in the plat in the partition suit of Thomas Ewing, Jr. v. William Weer; such plat being on file in the clerk's office of the First judicial district of Kansas, in Wyandotte county. A further reference in these deeds to a plat of the city across the Kansas river, which, by its own outlines and by the certificates of the surveyor and the dedicating party, excludes this land, added no certainty to the specific description already given; and to say that the decorative sketch upon this plat—no doubt satisfactory to the artistic taste of the draftsman—was seized upon by the grantor as the indisputable mark by which he could evince a determination to give to James F. Joy land which Joy was trying to keep covered by the water of a navigable river, involves a flight of fancy which the court hesitates to attempt. Other primary conveyances of partition allotments are equally conclusive. No purpose to deed undivided interests in other land owned by numerous tenants in common can be interpolated.

Some of the defendants make no point that their deeds carried with them title to undescribed land by implication, and the position of the others is quite inconsistent with the very substantial and meritorious claim that they were purchasers of tracts bordering upon a navigable river whose bed belonged to the state, and hence that they took title only to its margin. *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Peuker v. Canter*, 62 Kan. 363, 63 Pac. 617. It is entirely clear that several of the defendants made their purchases from a desire to secure a location upon the main navigable channel of the Missouri river. Believing they had secured a permanent frontage of that character, they have expended fortunes in the improvements of their estates. To be cut off from the river is an incalculable hardship, and the plaintiffs will not be allowed to interfere in any wrongful way with the riparian rights of the defendants. What, then, are the riparian rights of the defendants? Manifestly those of access to the stream, accretions to their shores, and land left by the reliction of the water from such shores. From the findings of the jury, it fairly appears that the building of the waterworks dyke deflected the main channel of the Missouri river from the land of the defendants, and that none of their land protruded northward either by accretion to it or by the recession of the water from it, beyond the line of the Miller survey. The little that is lacking in the findings is abundantly supplied by the evidence given in connection with that upon which the findings are based. It is to the effect that the water company drove a double row of piling across

the main channel of the river flowing between the island and the riprap bank, obstructing the current and diverting it to the north side of the island. Sand and sediment settled below the dyke and formed a bar across the channel, which then commenced to fill up. Because the current had always scoured the riprap bank, the progress of accretion while the channel was filling was from the island toward that bank, until a slough, and then pools of water next to that bank, were all that remained of the stream. After the waterworks dyke was constructed the city sewer was extended to reach flowing water. Later the harbor line was established at the end or the dyke, to which an addition had meantime been made; considerable reclamation work and dumping of material into the stream helped to clog it, but much of plaintiffs' land was uncovered by the initial work of diversion. It is useless to discuss the irreconcilable conflicts in the testimony bearing upon these important questions. They have been settled by the findings and verdict of the jury adversely to the defendants. All the evidence in the 3,000 pages of the record favorable to the plaintiffs is brought to the aid of the findings and the verdict. It is abundant to support every claim the plaintiffs make, and the court is now concerned with nothing but the rules of law governing the case.

If the title to the bed of the river had been in the state and had not remained in the plaintiffs because of the avulsion of 1867, the piling in question would have constituted a purpresture, abatable by a suit in equity at the instance of the state. *Revell v. People*, 177 Ill. 468, 52 N. E. 1052, 43 L. R. A. 790, 69 Am. St. Rep. 257. As it is, they were an obstruction to navigation, and a public nuisance. Besides this, the deflection of the river by means of them invaded the private right of every individual entitled to the flow of the water past his land. The water company had the right to protect its land against inroads of the stream. It had the right to secure the 100 feet of accretion to its land; and it had the right to erect all improvements necessary to secure and promote commerce, navigation, fishing, and other uses of the stream as navigable water. But it could not destroy the stream itself. All the courts agree that even wharves, which are indispensable to navigation, cannot be extended beyond the line of navigability, and will not be endured if they constitute a nuisance in fact. *Madison v. Mayers*, 97 Wis. 399, 73 N. W. 43, 40 L. R. A. 635, 65 Am. St. Rep. 127, and note on page 642, of 40 L. R. A. The claim of the water company, stripped of all sophistry, reduces to the demand that it may remove the stream from its channel to some remote locality and then appropriate the plaintiffs' land in order to obtain access to the water; and the claim of the other defendants, similarly denuded, is that because the water company

has preyed upon them they are licensed to prey upon the plaintiffs. Manifestly, such is not the law. The syllabus of *Halsey v. McCormick*, 18 N. Y. 147, reads: "Where the water is diverted by artificial means, and not imperceptibly, from the land of a proprietor bounded by low water marks, he acquires no title to the derelict bed of the stream." In the opinion it is said: "McCormick deepened the bed of the stream on the south side, and placed stones along the centre so as to confine the water in the channel thus deepened, and by this means the land in question was left bare. He may have been guilty, by these acts, of a violation of the riparian rights of the plaintiff or his grantors, but I know of no rule of law which would constitute an illegal act of the kind a transfer of the title." In *Lewis v. Lumber Co.*, 113 N. C. 55, 18 S. E. 52, the area of an island in a swamp had been enlarged by drainage. It is said: "Such enlargement of the original island by artificial means was not an accretion that inured to the plaintiff's benefit, and, if not, it was competent in all such cases to show the original low-water line as defining the limits of the island when granted. Tiedman, section 685 et seq.; Malone on R. P., page 253." In *Wood on Nuisances*, § 494, the text reads: "Every proprietor of land exposed to the inroads of the sea may erect on his own land groins, or other reasonable defenses for the protection of his land from the inroads of the sea. \* \* \* But a man has no right to do more than is necessary for his defense, and to make improvements at the expense of his neighbor." In the cases of *Tatum v. City of St. Louis*, 125 Mo. 647, 28 S. W. 1002, and *Whyte v. City of St. Louis*, 153 Mo. 80, 54 S. W. 478, the trustee of a riparian owner, and later the assignee of the rights of such owner, sought to recover from the city itself accretions formed by the acts of the city and by a railroad company over which the plaintiff had no control, and declarations of law in favor of the plaintiffs were made. In the case of *Steers v. City of Brooklyn*, 101 N. Y. 51, 4 N. E. 7, a wrongful structure was given to the riparian owner in front of whose land it had been erected as an accretion. The court said: "The wrongdoer should gain nothing by his wrong, and justice cannot be done to the upland owner except by awarding to him, as against the wrongdoer, the accretion attached to his soil as an extension thereof. *Ledyard v. Ten Eyck*, 36 Barb. (N. Y.) 102, 125; *Langdon v. Mayor*, 93 N. Y. 129; *Mulvey v. Norton* (N. Y.) 3 N. E. 581; *Gould on Waters*, §§ 123, 124, 128, 148, 158; *Angell on Tide Waters*, 249."

It is equally clear that the defendants other than the water company cannot keep for their own use accretions to plaintiffs' land. Peter may not be plundered to recompense Paul. Especially is this true since

the other defendants had a right to redress against the water company. In the case of *Fulmer v. Williams*, 122 Pa. 191, 15 Atl. 726, 1 L. R. A. 603, 9 Am. St. Rep. 88, a riparian owner filled up the channel of a river running between an island and the land of an opposite proprietor. The party wronged was awarded damages for the injury special to himself, the court holding the maxim, "*Sic utere tuo ut alienum non lœdas*," to be clearly applicable. Upon a subsequent appeal of the same case, the court said: "The diversion of the stream was an injury to his land that was direct, peculiar, and not shared with the general public. It was as clearly actionable as the diversion of a stream passing over his land. Whoever brought about such diversion so as to deprive him of the advantages of his location, whatever they were, inflicted a pecuniary wrong upon him. The manner in which the diversion is brought about is not important. It might be accomplished by means of elaborate works arranged to carry the stream elsewhere, or it might be effected by filling up the channel so as to compel it to seek another. The result accomplished and the injury inflicted would be the same. The lower riparian owner would be deprived of the natural advantages which ownership of the land at that point gave him, by the unlawful act of another; and he would have a right to call upon the wrongdoer to repair the wrong done him by restoring the stream to its channel or making compensation for its loss." *Williams v. Fulmer*, 151 Pa. 405, 25 Atl. 103, 31 Am. St. Rep. 767. In the case of *City of Georgetown v. The Alexandria Canal Co.*, etc., 12 Pet. (U. S.) 91, 9 L. Ed. 1012, the syllabus reads: "The Potomac river is a navigable stream, or part of the *jus publicum*, and any obstruction to its navigation would, upon the most established principles, be a public nuisance. A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding at law is by indictment or information, by which the nuisance may be abated, and the person who caused it may be punished. A court of equity may take jurisdiction in cases of public nuisance by an information filed by the Attorney General. If any particular individual shall have sustained special damages from the erection of it, he may maintain a private action for such special damage; because, to that extent, he has suffered beyond his portion of injury, in common with the community at large." Citations of authority to the same effect might be multiplied. Therefore the fact that the navigable channel of the river has been diverted by the means described, from alongside the defendants' land, gives them no right to appropriate the plaintiffs' premises in order to preserve their riparian privileges. They must acquire title to the coveted tract in some manner recognized by law.

Upon their own theory of the case, the de-

fendants' purchases being bounded upon a navigable river, they took no title beyond the bank; the bed of the river belonging to the state. If so, they could obtain title to no part of the bed of the stream, nor to any land formations upon the bed of the stream, except by grant, which they did not receive, or by the processes of accretion and reliction. It is a matter of no concern to the defendants who may own that which is not theirs; and, since the title of the plaintiffs was not taken away by the catastrophe of 1867, the defendants are limited to precisely the same methods of acquisition as if the bed of the river belonged to the state. Accretions must consist of deposits formed against and added to the bank. In Lord Hale's treatise, "*De Jure Maris et Brachiorum Ejusdem*," it is said: "Let us now come to the *maritima incrementa*, viz., *Alluvio maris*; *recessus maris*; *et insula maris*. (1) For the *jus alluvionis*, which is in an increase of the land adjoining by the projection of the sea casting up and adding sand and slubb to the adjoining land, whereby it is increased, and for the most part by insensible degrees." Chapters 5 and 6 of this valuable tract, from which the quotation is made, are reprinted in 16 Am. Rep. 54 et seq. The definition of Gantt, J., given in *Lammers v. Nissen*, 4 Neb. 245, notes this characteristic: "An accretion to land is the imperceptible increase thereto on the bank of a river by alluvion, occasioned by the washing up of sand or earth, or by dereliction, as, when the river shrinks back below the usual water mark; and land so formed by addition belongs to the owner of the land immediately behind it." In *Wallace v. Driver*, 61 Ark. 429, 33 S. W. 641, 31 L. R. A. 317, it is said: "According to the cases we have cited, the high-water mark, as thus far defined, being the boundary line of the riparian owner of this state, is the point at which the formation of all lands acquired by him by accretion must begin. A formation of alluvion beginning at any other point would belong to the state or other party." In *Holman v. Hodges*, 112 Iowa, 714, 84 N. W. 950, 58 L. R. A. 673, 84 Am. St. Rep. 367, a bar formed on the bed of the Missouri river, which increased in size until it became fit for agriculture and finally joined the shore. The opinion reads: "Without setting out the evidence in detail, it is enough to say that the formation of the bar or island has been entirely distinct from any accretion to the shore. It arose near the middle of the river, though probably east of the thread of the then main current, without any connection with the Iowa shore, and was gradually added to by accretion or reliction until an island of the proportions mentioned was formed. Not only is this true, but the conclusion seems inevitable, from the circumstance shown, that the additions to plaintiffs' land, whether from accretion thereto or the receding of the waters, have resulted from the formation of the island. Its existence

undoubtedly changed the main current of the river, and by its growth to the northeast gradually cut off the stream formerly flowing between it and the shore. Whether this be true, however, need not now be determined. It is enough for the purposes of this case that the land beyond the channel last mentioned was formed independently of plaintiffs' land. It then never became part of their lots through the process of accretion or reliction. \* \* \* It is said that, even though it [the state] may have owned the island when surrounded by water, that title moved from beneath it as soon as connected with shore. It is conceded that no authorities have been found announcing such a doctrine, and we have been unable to discover any case awarding a riparian owner land because connected to his own, save when this has occurred through the imperceptible accretion or the reliction thereof by the gradual receding of the waters." In *Linthicum v. Coan*, 64 Md. 439, 2 Atl. 826, 54 Am. Rep. 775, it is said: "If the land in question was formed by gradual accessions extending from the shore into the river, it would belong to the riparian proprietor; and this would be the case notwithstanding the fact that by the influence of floods and freshets, large deposits of mud have been made in the bed of the river. These deposits would, of course, materially contribute to the formation of land, and would hasten the time when it would appear above the surface of the water. But the leading characteristic of alluvion is the gradual extension of the land from the shore into the water; and when this is the case, it is irrelevant to consider the causes which, operating beneath the surface of the stream, have brought about the result. On the other hand, if land was formed in the river, and extended inwards towards the shore, it would be the property of the plaintiff, with all its accretions." The decisions in *Posey v. James*, 7 Lea (Tenn.) 98, and *Hammond v. Shepard*, 186 Ill. 235, 57 N. E. 867, 78 Am. St. Rep. 274, were based upon the same propositions. In the case of *Glassell v. Hansen*, 135 Cal. 547, 67 Pac. 964, the court had under consideration the rights of parties to an island which sprang up in the Sacramento river, originally a wide expanse of navigable water, and by its own accretions finally closed one of the channels which separated it from the shore. The patentee of the shore claimed it. In the opinion it is said: "The accretions were to the island, and not to the lands described in plaintiffs' patent. It is a familiar doctrine of the common law that the owner of land bounded by a river, being exposed to the danger of loss from its floods, is entitled to the increment which, from the same cause, may be gradually annexed to it.

\* \* \* It is also elementary that if an island springs up in a navigable stream, it belongs to the sovereign, and not to the owner of the land on either of the banks of the stream. So in this case the principle is the same,

whether the island existed at the time of the confirmation of the Mexican grant, or was afterwards formed in the river. If the accretions had been to plaintiffs' land, and had gradually extended to the island, the plaintiffs would have been the fortunate ones, and the accretions so added to theirs would have been theirs in law." In *King v. Young*, 76 Me. 76, 49 Am. Rep. 596, holding that a mussel-bed over which the water flows at every tide cannot properly be called an island, but should be dominated "flats" under a colonial ordinance, it is said: "It seems to be settled, both in England and in this country, that the land of a riparian proprietor may be increased by accretion. This is not denied by the defendant's counsel. But he contends that the increase must be gradual, and from the shore outward; that if an island forms at a distance from the shore, and then, by its own growth, extends inward till it reaches the shore, such new made land will not become the property of the owner of the shore; and in this we think he is correct. He then contends that a mussel-bed is an island, if it first commences to form at a distance from the shore, and there first shows itself above the surface of the water at ebb tide, leaving sufficient water between it and the shore for boats to pass, although by its continued growth it subsequently extends to and connects with the shore, so as to leave no water between it and the shore at ebb tide. In this we think he is wrong. We think a mussel-bed over which the water flows at every tide cannot properly be called an island. We think such formations constitute what are called "flats" and by virtue of the ordinance of 1641-7 belong to the owner of the adjoining land, if within 100 rods of high-water mark and so connected with the shore that no water flows between them and the shore when the tide is out."

The principle under consideration holds in the case of reliction. "The formation by accretion or reliction must be imperceptible, and must be made to the contiguous land so as to change the position of the water's margin or edge." *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300. See, also, *Cox v. Arnold*, 129 Mo. 337, 341, 31 S. W. 592, 50 Am. St. Rep. 450. If the space between the mainland and an island be reduced to a slough, which fills up in such a manner that the two bodies of land join, the respective owners will be entitled to the accretions to their shores. If the slough fill up from the bottom, and the accretions do not begin at the sides, the boundary is the center of the slough, as it was before the water left it. *Buse v. Russell*, 86 Mo. 209; *Minton v. Steele*, 125 Mo. 181, 28 S. W. 746. If an island be separated from the mainland by the channel of a river which becomes dry, the same rule obtains. "It will be noted that refused instructions 4 and 5 announce the proposition that if the land in controversy was originally formed in the Missouri river

as an island or sand bar with a channel between it and the mainland belonging to plaintiff, and that by accretions to said bar or island on the south side it finally extended to plaintiff's land on the south bank, or if, by the recession of the river from this intervening channel after the formation of the bar or island, the bar and the mainland became connected, then plaintiff became the owner thereof as an accretion. This instruction was clearly erroneous, in that it ignores the fundamental idea upon which the title to accretions is based, namely, that they must be the imperceptible or gradual accretions to the plaintiff's lands, or the gradual receding of the river therefrom. If the accretions were to the island on the south side, and to the mainland on its north side, and by a change of the river they were thus brought together, such a union of the two tracts did not make the island an accretion to the mainland." *Hahn v. Dawson*, 134 Mo. 581, 36 S. W. 233. "Suppose the channel of the river between an island and the mainland is left dry by the water, and entirely filled up with deposits of mud, and the island and mainland are at last one continuous tract of land; could the owner of either claim the entire tract? Certainly the newly-formed land would belong to the United States, or it would be divided between the opposite owners, upon the common-law principle, applicable to nonnavigable streams, of each going to the thread of the channel, as it was before it was deserted by the water. In the event supposed, the river might be regarded as ceasing to be a navigable one, pro hac vice, or, rather, as being converted, at the slough between the island and the shore, into a nonnavigable one. In any event the owner of the shore could not claim both the alluvion and the island, nor, vice versa, could the owner of the island claim the tract on the bank, with its accessions by alluvion." *Benson v. Morrow*, 61 Mo. 345. If the plaintiff's land had not been devastated by a violent and convulsive process whose operation was manifest to all who desired to gaze upon it, and its original banks had been worn away by ordinary erosion to the Joy deed line, the defendants could acquire title to it only in the manner described in *Peuker v. Canter*, 62 Kan. 363, 63 Pac. 617; that is, by the outward expansion of their shore line across it. These principles hold whether the channel separating the plaintiffs' land from that of the defendants' filled on account of the waterworks dyke or from some other cause.

The defendants argue that the so-called island was a mere sand bar; that an island, to be worthy of the name, must have become elevated above the bed of the stream far enough to make it fit for agricultural purposes, and that the riparian right of accretion can attach to nothing less dignified. It is not necessary to give a formation on the bed of a river a specific name in order that

proprietary rights may attach to it. In many states, lands totally or partially submerged are made the subject of grant by the sovereign in order that they may be reclaimed for useful purposes. Islands that arise from the beds of streams usually first present themselves as bars. *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300; *Cox v. Arnold*, 129 Mo. 337, 31 S. W. 592, 50 Am. St. Rep. 450; *Perkins v. Adams*, 132 Mo. 131, 33 S. W. 778; *Hahn v. Dawson*, 134 Mo. 581, 36 S. W. 233; *Moore v. Farmer*, 156 Mo. 33, 56 S. W. 493, 79 Am. St. Rep. 504; *Glassell v. Hansen*, 135 Cal. 547, 67 Pac. 964; *Holman v. Hodges*, 112 Iowa, 714, 84 N. W. 950, 58 L. R. A. 673, 84 Am. St. Rep. 367. Before it will support vegetation of any kind a bar may become valuable for fishing, for hunting, as a shooting park, for the harvest of ice, for pumping sand, and for many other well-recognized objects of human interest and industry. If further deposits of alluvion upon its borders would make it more valuable, no reason is apparent why the law of accretion should not apply. It is not before the court to say what primitive formation will carry the right to accretions, but the ability to support crops certainly is not the single test. In any event the rights of the parties to this litigation are to be determined as of the time the formation in the river and that against the shore came together. Before then the defendants could not claim title. At that time there is no doubt such formations, whether sand bar, island, restored land, or something else, were as properly the subject of dominion by the plaintiffs as by the defendants who seized them. The Supreme Court of the state of Missouri, within whose jurisdiction the lower course of this river lies, has been called upon to deal with almost every phase of this subject. Its opinions are in full accord with the principles of law elsewhere recognized. Three brief quotations are quite pertinent: "If the island was washed away, in whole or in part, after it was surveyed and then reformed on the same bed, the owner of it, as it was before it was so washed, would be entitled to it, but if it was washed away and the land sought to be recovered as made by deposits to and against the survey of the mainland, then such deposits became the property of the owner of the survey." *Buse v. Russell*, 86 Mo. 209. "The sole issue made by the pleadings is whether the lands sued for were accretions to plaintiff's shore land. If they were and are, he is entitled to them, without reference to whether they now extended beyond what was once the center line of the main channel. If they were not formed to his land on the bank of the river by gradual accretion of land thereto, or by a gradual reliction of the adjoining bed of the river by the receding of the waters, then he is not entitled to recover, whether the lands be called an island or a sand-bar or by any other designation." *Perkins v. Adams*, 132 Mo. 131, 33

S. W. 778. "In view of all this evidence, it is plain that whether island 45 remained substantially as originally surveyed, or whether it was washed away and afterward reformed on its original site, it is too plain for discussion that what is termed 'the island' now is not an accretion to section 21 or section 16. The doctrine of accretion will scarcely admit of jumping a slough 40 to 60 yards wide. In a word, there is nothing saltatory about accretion." *Crandall v. Smith*, 134 Mo. 633, 36 S. W. 612.

Of course, the plaintiffs were obliged to recover upon the strength of their own title. This they did by connecting themselves with the allottees of the Armstrong grant under the partition proceedings of 1867. The views of the law herein expressed were substantially given to the jury by well-drawn instructions. The period of time within which an owner may reclaim land after it has been submerged is not a question for determination in this suit. The plaintiffs show a title good against the defendants. The state has not intervened, and whether it has any rights is immaterial to the present decision. If it really holds the paramount title, the defendants cannot take advantage of the fact. *McBride v. Steinweden* (opinion of this court, filed January 6, 1906) 83 Pac. 822. One hundred and ninety-eight special questions were answered by the jury. The court has considered them all and finds them to be harmonizable with each other and with the general verdict. Many pitfalls were prepared for the jury by using the terms "washing away," and "washed away"; but it made itself entirely clear with reference to the precise effect of the action of the water upon the plaintiff's land. The argument that there was not sufficient land remaining when the partition suit was commenced from which an island could be cut off and leave 208 acres was doubtless submitted to the jury, the proper tribunal to determine the fact. Eighty-eight instructions were given to the jury, and numbers of requests for instructions were refused. The instructions given and those refused have been examined, and no error prejudicial to the defendants is discovered. In view of the findings of fact, several matters argued relating to instructions become immaterial. Defenses were fairly submitted. The jury evidently gave the Water Company full benefit of its special defense that the accretion in front of its lot abutted upon the Kansas, and not upon the Missouri, river bank. Unwarranted assumptions of fact were not made in the instructions. It was the duty of the court, and not of the jury, to interpret the partition proceedings.

The petition names a large number of persons as plaintiffs, and describes them as co-tenants of the tract sued for. The verdict was in favor of all these parties. The petition further names a number of persons as defendants, who are described as co-tenants with the plaintiffs. The verdict was also

in favor of "those defendants who are tenants in common with the plaintiffs," evidently meaning those named in the petition. The right to the possession of the land described was a matter of common interest to many persons. One tenant in common may recover the entire estate from a trespasser for the benefit of all. Any fractional interest in land is sufficient upon which to base a judgment of ouster against a trespasser. This being true, the plaintiffs in error suffered no material injury because the jury did not catalogue the names of the prevailing defendants and specify the precise proportional share of each plaintiff and prevailing defendant. The plaintiffs in error are not at all solicitous because the names of some five or six persons appear to have been written in the judgment whose right to recover may not be supported by the record, but they seek to overturn the entire judgment because the verdict is in the form described. This they cannot do. Some of the plaintiffs below may be injured. The plaintiffs in error cannot be. Those who were given acre quantities in the original partition suit had no interest in the unpartitioned common lands when their demands for specific measures were satisfied. Therefore they and their successors have no interest in the litigation. The land recovered is sufficiently described in the verdict.

The 170 assignments of error in the briefs have been duly considered, and none of them requires the case to be tried again. The foregoing observations, which already transcend the proper limits of a written opinion, express the views of the court with reference to those which are of greatest importance.

The judgment of the district court is affirmed. All the Justices concurring.

#### STATE v. ROUPETZ.

(Supreme Court of Kansas. May 12, 1906.)  
CRIMINAL LAW—INSTRUCTIONS.

If, during the progress of the trial of a criminal case, testimony which has been introduced is withdrawn by the court, and the court states to the jury that whenever testimony is ruled out they are not to consider it in the case, that it is the same as not given, it is not error to deny a request for a written instruction to disregard such testimony; and a written instruction that the jury in arriving at its verdict should consider all the evidence given by the witnesses is neither erroneous nor misleading.

(Syllabus by the Court.)

Appeal from District Court, Thomas County; Chas. W. Smith, Judge.

August Roupetz was convicted of manslaughter, and he appeals. Affirmed.

Waters & Waters and C. L. Wilson, for appellant. C. C. Coleman, Atty. Gen., and Arch. L. Taylor (T. L. Bond, of counsel), for the State.

: BURCH, J. August Roupetz was convicted of manslaughter in the first degree, and he appeals.

Under the repeated decisions of this court, the juror Bourgoine was qualified. Threats of the deceased against appellant's brother, and not involving the appellant himself in any way, were irrelevant. The testimony of the witness Frank Kersenbrock, that he heard shots fired while he and his father were passing appellant's premises at night, could not be prejudicial, especially after the court stated to the jury that the witness could not say appellant fired them. Early in the progress of the trial, upon the occasion of striking out some testimony, the court said to the jury: "Gentlemen, when the court rules out any evidence, you are not to consider it in the case; it is the same as not given; it should be out of your minds entirely." Afterwards all the testimony of a witness was withdrawn because his cross-examination developed the fact that he did not understand the nature of an oath or the effect of false swearing. When the evidence was closed, the court instructed the jury upon the law of the case, and, referring to the duties of the jurors, said that in determining the intent of the appellant in doing any of the acts charged against him they should take into consideration all the evidence given by the witnesses tending to show what his intention was. It is now argued that the jury had the right to believe the court had taken back in writing what had been stated orally, and that all excluded evidence could be lugged into the case. The court is of the opinion that danger to the appellant from such a fatuity is discernible only by the red and roving eye of imagination.

A special instruction upon the final submission of the case, that the jury should disregard the excluded testimony, was properly refused. Two instructions to disregard testimony would constitute a superfluity which even the liberal criminal procedure of this state does not indulge, and after testimony has been withdrawn, and is no longer in the case, an instruction to disregard it would virtually be an aberrance.

The fact that the deceased said appellant would have to walk over his dead body before appellant should have any of his mother's property was not a threat, was not pertinent to the issues, except that it might have furnished a motive for the homicide, and hence the appellant was not harmed by its exclusion. Besides, the state of feeling between the parties was so abundantly proved, and so many direct and positive threats by the deceased against appellant's life were shown, that the omission of this item could not have affected the verdict.

The cross-examination of appellant with reference to the land difficulty was fairly invited by a number of questions put to him by his counsel. Independent of that fact, it was proper to fix an important date, and was pressed no further than seemed necessary for that purpose. The cross-examination of appellant in reference to peace pro-

ceedings against him was clearly admissible to affect his credibility. The fact that he had been arrested, and after a trial had been put under bond to keep the peace because of threats to kill his father and mother, tended to discredit, disgrace, and degrade him, within the rule announced in *State v. Greenburg*, 59 Kan. 404, 53 Pac. 61, and other decisions of this court. The instructions of the court given at the time were ample to protect the rights of the appellant if the remarks of the county attorney infringed them. Erroneous instructions relating to murder are immaterial; appellant having been convicted of an inferior crime. Requested instructions 4, 8, and 20, invaded the province of the jury, and requested instructions 24 and 28 were arguments of the case to the jury from the appellant's standpoint, rather than statements of law. It is not the law that the presumption of good character stands until overcome beyond a reasonable doubt, as the sixty-first requested instruction states. It may be overthrown by evidence much less conclusive. The sixty-eighth requested instruction was wrong because some of the matters to which it referred did not have a bearing upon the case. The instruction given by the court upon the same subject was correct. Instructions refused and instructions given which are not printed in the brief are not considered. Rule 10, 79 Pac. ix.

The appellant had a fair trial. The jury apparently gave him the benefit of every doubt, and the judgment of the district court is affirmed. All the Justices concurring.

#### WALTERS v. CHANCE et al.

(Supreme Court of Kansas. May 12, 1906.)

#### 1. PLEADING—DEPARTURE—DEMURRER.

Under our Code a demurrer will not raise the question of inconsistency or departure in pleading.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Pleading, § 535.]

#### 2. MORTGAGES — POSSESSION BY MORTGAGEE AFTER DEFAULT—EJECTMENT—DEFENSES.

A quiet and peaceable entry into possession of unoccupied land, and the continued possession thereof by a mortgagee, after condition broken, is a complete defense to an action in ejectment by the owner until the mortgage lien has been satisfied.

(Syllabus by the Court.)

Error from District Court, Ness County; Chas. E. Loddell, Judge.

Action by Julia A. Chance and others against E. J. Walters. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

Wheeler & Switzer, for plaintiff in error. N. A. Yeager, for defendants in error.

GREENE, J. This was an action in ejectment commenced September 14, 1903, by the heirs of William Chance. The answer, while indefinite in its allegations, was an attempt to plead title and possession under a tax deed,

and also possession under a past due and unpaid mortgage. Upon motion the court required defendant to attach copies of these instruments, which was done by filing an amended answer. To this answer a demurrer was sustained, and upon leave being granted a second amended answer was filed, to which a demurrer was sustained and judgment rendered thereon for plaintiffs. In this second amended answer the defendant relied wholly upon his rights as a mortgagee in possession. The material allegations of this answer are that on April 1, 1886, William T. Tarter, being the owner of the land in controversy, executed a mortgage thereon for \$250, payable to Lew E. Darrow, due April 1, 1891; that the defendant was the owner of said mortgage; that it had not been paid; that on May 3, 1886, Tarter and wife conveyed the land to Alexander McCollum by warranty deed, and on September 3, 1887, McCollum conveyed the land by warranty deed to William Chance, who by a condition in the deed assumed and agreed to pay the mortgage; that on April 1, 1891, William Chance secured an extension of five years from that date for its payment; that for a long time prior to February 11, 1901, William Chance and his heirs had abandoned the land; that it was then unoccupied; and that on that date defendant went into possession thereof under his mortgage and has continued in the exclusive occupancy thereof ever since, claiming to be a mortgagee in possession.

The grounds of plaintiffs' demurrer to this second amended answer were: First, that the first and second amended answers were inconsistent with and a departure from the defense pleaded in the original answer; second, that the second amended answer did not state a defense. We are not informed upon which of these grounds the demurrer was sustained, or that it was not sustained for both reasons. Where a demurrer contains several grounds, and it is sustained, it would be much better practice to make the record show upon what ground or grounds it was sustained. It is not unusual in practice that only one of the grounds assigned in a demurrer is presented to the trial court, while any one of the other grounds may be relied upon in the court. It would be much fairer to the trial court and the parties, as well as simplify the work of this court, if the grounds upon which the trial court relied were stated in the record. In the present case we must assume that the demurrer was sustained on the general ground of insufficiency of the answer, since a departure in pleading is not a ground of demurrer under our statute.

The answer states that the taxes have been in default since 1893. It is contended that this allegation, coupled with the following condition in the mortgage, matured the debt in 1893, and that, more than five years having elapsed before the filing of the answer,

the defendant's cause of action is barred by the statute of limitations. "The said first parties agree to pay all taxes and assessments levied on the said premises when the same are due, and, if not so paid the holder of this mortgage may, without notice, declare the whole sum of money herein secured due and payable at once, or may elect to pay such taxes and assessments and be entitled to interest on the same at the rate of 10 per cent. per annum until paid, and this mortgage shall stand as security for the amount so paid, with such interest; but, whether the holder of this mortgage elect to pay such taxes and assessments or not, it is distinctly understood that the holder hereof may immediately cause the mortgage to be foreclosed and shall be entitled to the immediate possession of premises and the rents, issues and profits thereof." If the question depended upon a construction of this provision alone, we would hold that the statute did not commence to run until the holder of the mortgage declared the debt due. The holder of the note and mortgage might have declared the debt due and payable upon such default, but he was not compelled to do so, and, until he exercised this right, the statute of limitations would not start. Two things had to transpire in order to start the statute of limitations: First, a default in the payment of taxes; and, second, a declaration of the holder of the mortgage that he had elected to take advantage of the default. That this is the correct construction of this provision is too apparent to become a subject of serious controversy, especially when read with the following condition in the note: "If default be made in the payment of any interest notes or any portion thereof for the space of thirty days after the same becomes due and payable, or in the payment of any taxes assessed against the real estate mortgaged to secure this loan until the same shall have become delinquent, then all said principal and accrued interest shall, at the option of the legal holder of this bond, become due and payable without any notice of any kind whatsoever"—and with the following in the mortgage: "That said first parties agree that if the maker of said bond shall fail to pay any of said money, either principal or interest, within thirty days after the same becomes due, or to conform to or comply with any of the foregoing covenants, the whole sum of money herein secured may, at the option of the second party, or his assigns, and without notice, be declared due and payable." The answer states the mode by which the defendant acquired possession to be as follows: "This defendant further avers that for several years prior to the 11th day of February, 1901, the lands described in said petition and in said mortgage were vacant and unoccupied, and have been abandoned by the said William Chance and his heirs, and no taxes were paid upon the same by any of the owners since 1893, and said lands were sold for the taxes of 1893. This defendant

further avers that on the 11th day of February, 1901, being the owner and holder of the note and mortgage above referred to, and no part of the principal having been paid, and no part of the interest having been paid, in 1895, and believing that said lands had been abandoned by the owners, he went into the peaceable possession thereof for the purpose of better securing the indebtedness due him upon said note and mortgage, which were then a valid and subsisting lien upon the lands prior and superior to all others, and that afterwards he paid up all the taxes past due upon said real estate, and has since paid all taxes and assessments levied upon said lands as the same became due; said taxes so paid by him amounting to the sum of \$200. That ever since the 11th day of February, 1901, the defendant has been and now is in the actual and exclusive possession of said real estate as the mortgagee and owner and holder of said note and mortgage, claiming and now claims the right in said lands of a mortgagee in possession."

The defendants in error contend that, before the holder of a mortgage can invoke the defense of a "mortgagee in possession," in an action of ejectment, he must show that he took possession under his mortgage with the consent of the owner of the land. They also contend that the answer shows that no such consent was obtained, therefore the entry was unlawful, and that an equitable defense cannot be predicated upon an unlawful act. The decisions of this court, where the defense of a mortgagee in possession has been made, do not sustain the contention that the possession must have been acquired with the consent of the owner. In *Kelso v. Norton*, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308, the mortgagee got possession under a void foreclosure sale, and it was held that he was a mortgagee in possession. The facts in the case of *Stouffer v. Harlan*, 68 Kan. 135, 74 Pac. 610, 64 L. R. A. 320, 104 Am. St. Rep. 396, were substantially the same, and it was again held that the mortgagee was entitled to the rights of a mortgagee in possession. In *Rogers v. Benton*, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613, it was said that, where the mortgaged land has been abandoned, and the mortgagee had gone peaceably and quietly into possession, the owner could not maintain ejectment until he has paid the mortgage lien; that abandonment is an implied assent that the mortgagee may take possession under his mortgage. In *Cooke v. Cooper*, 18 Or. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709, it is said that: "If he [the mortgagee] can make a peaceable entry upon the mortgaged premises after condition broken, he may do so, and may maintain such possession against the mortgagor and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of his debt." Whether the holder of a mortgage, in possession, is entitled to make the defense of a "mortgagee in possession"

after condition broken, depends upon the equities of each case. No general rule applicable alike to all cases can be stated, except where the mortgagee enters under an express agreement with the owner. Of course, if he obtain possession by force, intimidation, deceit, or fraud, a court of equity will not permit him to profit thereby. But where, after condition broken, the land is unoccupied, and he enters peaceably, a court of equity will not eject him at the suit of the owner, until his lien upon the lands shall have been satisfied. Such a rule does equity between the parties and deprives the owner of the land of no rights. Justice Mason, speaking for the court in *Stouffer v. Harlan*, supra, said: "The expression frequently used, that the entry must be lawful, we interpret to mean not that it must have been effected under a formal right capable of enforcement by legal proceedings, but that it must not be through any unlawful or wrongful act, upon which the mortgagee would be estopped to found a right." If, after condition broken, the premises are unoccupied, the mortgagee may, if he can do so peaceably, enter into the possession under his mortgage, and he cannot be ejected therefrom by the owner until his mortgage lien has been fully satisfied. The land in question had been sold and deeded for the taxes of 1893. The owners had paid no subsequent taxes. No interest had been paid on the mortgage debt after 1895. In February, 1901, the land was unoccupied and "abandoned," as stated by defendant in his answer. The mortgagee went quietly and peaceably into possession under his mortgage and continued therein without objection until this action was commenced, September, 1903. The facts pleaded are ample to sustain the defense of a mortgagee in possession. It was error therefore to sustain the demurrer.

The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer. All the Justices concurring, except PORTER, J., not sitting.

(73 Kan. 722)

**PARKER-WASHINGTON CO. v. KANSAS CITY, KAN., et al.**

(Supreme Court of Kansas. May 12, 1906.)

**1. STATUTES—AMENDMENT BY IMPLICATION.**

Statutes which effect the amendment of existing laws by implication are not within the purview of the constitutional provision that "no law shall be revived or amended, unless the new act contain the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed." Const. art. 2, § 16.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 210.]

**2. SAME—SPECIAL AND LOCAL LAWS.**

It is competent for the Legislature to classify cities according to population for various purposes and laws applicable to all of the members of any class so created may be general

laws and have a uniform operation throughout the state.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 101.]

**3. SAME—CLASSIFICATION OF CITIES SUBJECT TO STATUTE.**

The matter of the method of providing for the cost of street improvements is one with relation to which cities may reasonably be divided into classes upon the basis of population.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 102.]

**4. SAME—APPLICATION OF STATUTE.**

A law for the government of cities of a certain population is not rendered special in its operation by the fact that there is at the time only one city in the state of the size designated.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 102.]

**5. SAME.**

Chapter 112, p. 152, of the Laws of 1905, providing that in cities of the first class having over 50,000 population payment for street improvements shall be made by the issue of tax bills chargeable against the property specially benefited instead of by the issue of negotiable bonds of the corporation, is not obnoxious to that provision of the Constitution relating to the amendment of laws, or to that forbidding the conferring of corporate powers by special act, or to that requiring general laws to have a uniform operation throughout the state.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 72, 102.]

**6. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—LEGISLATIVE CONTROL.**

It is competent for the Legislature to require that persons contracting with cities for the improvement of streets shall give bonds for the faithful carrying out of their contracts, executed by some surety company authorized to do business in the state.

(Syllabus by the Court.)

Mandamus proceeding by the Parker-Washington Company against the city of Kansas City, Kan., and others. Writ denied.

T. A. Pollock, for plaintiff. E. S. McAnany, Ralph Nelson, and Nathan Cree, for defendants.

MASON, J. The statute for the government of cities of the first class as it existed prior to 1905 authorized all such cities to issue bonds to cover the expense of improving streets. In 1905 an act was passed (Laws 1905, p. 152, c. 112), providing among other things that in cities of the first class having a population of over 50,000 such expenses should be met by the issuance of special tax bills against the property chargeable with the cost of such improvements. After this act took effect the Parker-Washington Company under contract with the city constructed some pavement in Kansas City, Kan. By the terms of the act payment for this work should be made by tax bills, but the company now brings this proceeding seeking by mandamus to compel the city to make payment by bonds, under the provisions of the old law, upon the theory that the act of 1905 is void because it violates these several provisions of the state Constitution: (1) That relating to the method of amending existing laws;

(2) that forbidding the conferring of corporate powers by special act; and (3) that requiring laws of a general nature to have a uniform operation throughout the state. The portion of section 16 of article 2 of the Constitution invoked in support of the first proposition reads: "No law shall be revived or amended, unless the new act contain the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed."

It is argued that the act of 1905 amends various specific sections of the statute relating to cities of the first class, the language of which is closely followed in the corresponding sections of the new act, only such alterations being made as are necessary to accomplish the object already indicated—a change in the method of paying for public improvements in cities having a population of over 50,000; that the new act contains no reference to the old one, does not accomplish its repeal, and is therefore within the letter and spirit of the prohibition quoted. It is needless at this time to go into a discussion of the purpose and effect of the provision of the Constitution referred to. That it has no application to amendments by implication is well settled. *Cooley on Constitutional Limitations* (6th Ed.) 182; 26 A. & E. Encycl. of L. (2d Ed.) 708. The act of 1905 in a sense amends various sections of the earlier act, but it does so by implication; it does not cover their entire subject-matter, and hence does not supersede them, but merely restricts the field of their operation; it is a complete and in a sense an independent enactment, which requires no reference to any other statute to make its meaning clear; the objection made to it in this respect is therefore not well taken. Section 1 of article 12 of the Constitution provides that "the Legislature shall pass no special act conferring corporate powers," and section 17 of article 2 that "all laws of a general nature shall have a uniform operation throughout the state." Whether the act in question is to be regarded as special, and whether its operation is uniform throughout the state depend upon whether population affords a fair basis for the classification of cities with reference to the matters to which it relates, and whether the result it accomplishes is in fact a real classification upon that basis, and not a designation of a single city to which alone it shall apply, under the guise of such classification. "In order to determine whether or not a given law is general, the purpose of the act and the objects on which it is intended to operate must be considered. If these objects are distinguished from others by characteristics evincing a peculiar relation to the legislative purpose, and showing the legislation to be reasonably appropriate to the former and inappropriate to the latter, the objects will be considered, as respects such legislation, to be a class by themselves, and legislation affecting such a class, to be gen-

eral. But if the characteristics used to distinguish the objects to which the legislation applies from others be not germane to the legislative purpose, or do not indicate some reasonable appropriateness in its application, or if objects with similar characteristics and like relation to the legislative purpose have been excluded from the operation of the law, then the classification is incomplete and faulty, and the legislation not general, but local and special." 26 A. & E. Encycl. of L. (2d Ed.) 683.

That for many purposes the classification of cities according to population is a natural and proper one is clear, and we think has never been doubted. The statutes providing for municipal government in this state have always proceeded upon the theory that a system adapted to a small town might not be suitable for a larger one. The theory has not been attacked and is not open to attack. This general principle reaches the present case. Merely for illustration it may be suggested that the Legislature was warranted in believing that in a large city there would be no difficulty in procuring all needed street improvements by issuing to the contractors nonnegotiable obligations running directly against the property specially benefited, while in a smaller city the same result could only be assured by pledging the credit of the whole municipality to the final payment of the cost, by the use of negotiable bonds. Granting the reasonableness of the principle of classification, its application rests with the Legislature and is not subject to judicial review, although an extreme case could perhaps be imagined in which a court would be justified in holding that an ostensible classification upon the basis of population was only colorable, its real purpose and effect being to limit the application of an act to a single community or group of communities, not distinguishable from others by any differences having relation to the subject-matter involved. Counsel for plaintiff contend that the present instance is such a case. Judicial notice is of course taken that Kansas City is now the only city in Kansas having over 50,000 inhabitants. This is not determinative of the matter, however, for it is not only conceivable and probable, but practically inevitable, that other cities in the state will in time attain that size. As was said in *State v. Downs*, 60 Kan. 788, 57 Pac. 962: "An act general in its provisions but which can presently apply to only one city on account of there being but one of requisite population or other qualification, but which was designed to, and can in all substantial particulars apply to other cities as they become possessed of the requisite population or other qualification, cannot be regarded as a special act." In the plaintiff's brief much stress is laid upon the case of *State v. Jones*, 66 Ohio St. 453, 64 N. E. 424, 90 Am. St. Rep. 392, where the court set aside an act purporting to provide a general scheme for the gov-

ernment of all cities in the state by dividing them into a number of classes and subclasses or grades. The ground of the decision is clearly shown by this language of the opinion: "In view of the trivial differences in population, and of the nature of the powers conferred, it appears that the present classification cannot be regarded as based upon differences in local requirements. Its real basis is found in the differing views or interests of those who promote legislation for the different municipalities of the state."

The full force of this statement can be appreciated only from a consideration of the precise situation by which the Supreme Court of Ohio was confronted. The Legislature had originally divided all municipal corporations, according to population, into cities of the first class, cities of the second class, incorporated villages and incorporated villages for special purposes. Separate rules were made for the government of each kind of organization, but as each municipality attained a size entitling it to a place in the next higher class it was advanced thereto by virtue of the statute. Later, subdivisions were made of these primary classes by means of which single cities became in fact vested for the time being with peculiar powers, and were governed by what were in fact charters for local government differing from those of any other city in the state. The court upon the view that this legislation fell within the rule already stated "reluctantly" upheld its validity. Gradually the tendency toward the localization of municipal law increased, until at the time of the decision under consideration cities of the first class were divided into three grades, and cities of the second class into eight grades, and as a result each one of the eleven principal cities of the state was governed according to a plan different from that of any other. Moreover during the time that Cincinnati was the most populous city of the commonwealth it was governed by a statute which in operation applied to it alone, and was sustainable only on the theory that the Legislature believed such a statute to be required by, or at least to be peculiarly suitable to, a city of that size. But when the growth of Cleveland placed it in advance of Cincinnati in the matter of population, instead of its becoming endowed with those powers which had been determined to be appropriate, the old plan for its government was perpetuated by the device of shifting the classification. This situation certainly forced upon the court the duty of seriously considering the difficult question of when, if ever, the limit of legislative discretion is reached—when, if ever, it may be judicially determined that a statute bears upon its face, or discloses in the light of all the information of which a court may avail itself, proof of the intention of the Legislature under color of the exercise of an undoubted right, to evade and in effect to nullify an express mandate of the Constitu-

tion. But this was not all. Hitherto the pretext had been maintained that the classification was real; that as each city advanced in population and passed the boundary marked by the general law it would, in virtue of that growth either *ipso facto* or by means of machinery provided by the law, pass into the next higher grade and become amenable to the statute relating thereto. But the statute which was directly involved in that case, with the obvious purpose of preventing such a result, at least in respect to two cities, created a new grade—a fourth grade of the first class, of which the court says: "We are not aware that there is now in the state a city of the fourth grade of the first class, but the class is provided to the end that it may receive any city of the second class which may be advanced, and that such city may thus be excepted from the operation of these acts relating to Cleveland and Toledo, which are, respectively, cities of the second and third grade, of the first class."

The conclusion of the court is thus expressed: "The body of legislation relating to this subject shows the legislative intent to substitute isolation for classification so that all the municipalities of the state which are large enough to attract attention shall be denied the protection intended to be afforded by this section of the Constitution. The provisions of the section could not be more clear or imperative, and relief from the present confusion of municipal acts and the burdens which they impose would not be afforded by its amendment. Since we cannot admit that legislative power is in its nature illimitable, we must conclude that this provision of the paramount law annuls the acts relating to Cleveland and Toledo." We see no just ground of criticism of this Ohio decision. We have stated the circumstances out of which it grew in some detail for the purpose of showing the extreme length to which specialization of the law was permitted to be carried under the form of general enactments before the courts felt justified in interfering, and also of showing the wide difference between the facts of that case and of this. By the Kansas act under discussion the Legislature in effect created a new class of cities. In doing so it did not approach near enough to the line which separates the legitimate exercise of legislative discretion from the illegitimate employment of a guileful device to accomplish an unconstitutional end by indirection, to make it at all difficult for the court to sustain its action. The act is proof also against this attack.

A further objection is incidentally made to the statute, because of a provision that all persons contracting with the city to make street improvements shall be required to secure the faithful performance of their contracts by the giving of bonds executed by some surety company authorized to do business in the state. It is argued that this tends to the creation of a monopoly in the

business of making such bonds. The writing of such bonds is a form of insurance. There are reasons why a bond given by a corporation over which the state exercises a certain control might be deemed preferable to any executed only by individuals. It would be competent for the Legislature to authorize the municipality in its discretion to exact such a bond—that is one signed by a surety company, and it is equally competent for it to exercise its own judgment in the matter in the first instance and require that character of security.

The writ is denied.

### A. J. HARWI HARDWARE CO. v. KLIPPERT et al.

(Supreme Court of Kansas. May 12, 1906.)  
APPEAL AND ERROR—SECOND APPEAL—LAW OF THE CASE.

Where a case is brought a second time in error to the Supreme Court, its first decision is the law of the case not merely as to all questions actually presented by counsel on its first appearance, but to all questions then existing in the record, and necessarily involved in the decision.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4358-4368.]

Error from District Court, Brown County; Wm. I. Stuart, Judge.

Action by the A. J. Harwi Hardware Company against Conrad Klippert, defendant, and Henry Reh, garnishee. The judgment for plaintiff was set aside as to the garnishee, and plaintiff brings error. Reversed and directed.

W. F. Guthrie and Ryan & Ryan, for plaintiff in error. W. F. Means and Jas. Falloon, for defendants in error.

PER CURIAM. This is the second appeal of this case to this court. The facts are set forth in the former decision. Hardware Co. v. Klippert, 67 Kan. 743, 74 Pac. 254. Every principle of law set forth in the present appeal was therein decided. The judgment in favor of the plaintiff in error was therein held valid, and the order of the court below modifying the same set aside, although negotiable promissory notes of Henry Reh were outstanding for the same indebtedness for which the judgment was rendered against him on his answer as garnishee. The situation is not changed by the subsequently occurring fact that the notes have been paid to the legal holder thereof. "Where a case is brought a second time on error to this court, the first decision will be deemed the settled law of the case, and will not be made a subject of re-examination. This rule extends, not merely to all questions actually presented by counsel, but to all questions existing in the record, and necessarily involved in the decision." Headley v. Challiss, 15 Kan. 602; Central Branch U. P. R. Co. v. Shoup, 28 Kan. 394, 42 Am. Rep. 163; Crockett v. Gray, 31 Kan. 346, 2 Pac. 809; Western

News Co. v. Geo. O. Wilmarth, 34 Kan. 254, 8 Pac. 104; 26 Am. & Eng. Encyc. of Law, 184. Of course, this is a hardship on Reh, but it is no greater than the hardship usually incurred by any plaintiff who submits his cause to the decision of a court without pleading or setting forth some right of recovery which in fact he has, or which occurs to a defendant where he submits his defense to the decision of the court without pleading or setting forth some valid defense which he in fact has. When the court is the final trier of the facts and renders a valid judgment upon the facts as presented, and no effort is made to correct the error or omission while such cause is within the jurisdiction of the trial court, the party who erred to his own prejudice is remediless, unless the matter omitted may be made the basis of an independent action. The order of the district court is reversed, and the plaintiff in error restored to whatever he may have lost by reason thereof.

### STATE v. CAMPBELL.

(Supreme Court of Kansas. May 12, 1906.)

#### 1. CRIMINAL LAW—SPEEDY TRIAL—DISCHARGE FOR DELAY.

The terms of court which intervene, pending an appeal by the state in a criminal action, are not to be counted in determining whether a person under indictment and held to bail is entitled to be discharged under section 221, Code Cr. Proc. (Gen. St. 1901, § 5666), because not brought to trial before the end of the third term of court after indictment found or information filed.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1300.]

#### 2. SAME — CONFESSIONS — STATEMENTS BEFORE GRAND JURY.

Statements and declarations by a defendant in a criminal action, in denial of guilt, while a witness before a grand jury, are not confessions within the rule requiring them first to be shown to have been made voluntarily before they are competent evidence against him.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1140.]

#### 3. SAME—INVOLUNTARY STATEMENTS.

The fact that his testimony before the grand jury was in obedience to a subpoena will not render such statements or declarations involuntary. His rights are protected by his privilege to refuse to answer, when the answer tends to incriminate him, and, by the failure to exercise his privilege in this respect, his statements and declarations become voluntary.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1187.]

#### 4. SAME.

Voluntary statements of fact made by a defendant in a criminal action, which do not tend to establish his guilt, but which are exculpatory in their nature, are competent evidence against him as admissions of a party.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 894.]

#### 5. WITNESSES — GRAND JURORS — EVIDENCE BEFORE GRAND JURY.

The language of section 5535, Gen. St. 1901, providing that "no grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify

as a witness in relation thereto." is not limited by the provisions of section 5533, Gen. St. 1901, permitting such evidence in certain cases.

6. SAME.

The secrecy imposed by the common law and statutes upon the proceedings before a grand jury will not prevent the public or an individual from proving by members of the grand jury, in a court of justice, what passed before the grand jury, when, after the purpose of secrecy has been effected such disclosure becomes necessary in the furtherance of justice, or for the protection of public or individual rights.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 186; vol. 24, Cent. Dig. Grand Jury, §§ 86, 87.]

7. STATUTES—CONSTRUCTION—ADOPTION FROM ANOTHER STATE.

The rule that, where a statute is adopted from another state, the adoption carries with it the construction placed thereon by the courts of that state, is a general rule, to which there are exceptions. Where the statute is not peculiar to the state from which it was adopted, but other states have substantially the same statute which their courts have construed differently, and when the construction placed upon it by the courts of the state from which it was adopted is opposed to the weight of reason and authority, or against the general policy of our laws, such construction will not be followed.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 307.]

8. CRIMINAL LAW—APPEAL—LAW OF THE CASE.

A former judgment of this court holding an indictment sufficient in substance is the law of the case. All questions in this case raised by the motion in arrest of judgment are controlled by the former decision in *State of Kansas v. Frank M. Campbell*, 79 Pac. 1133, 70 Kan. 899.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3003.]

9. BRIBERY—MEMBER OF BOARD OF EDUCATION.

The board of education of a city of the first class is charged with the care and custody of school buildings. A member of such board, who accepts money as a bribe to influence his opinion, judgment, and action in favor of letting and causing to be let a contract for cleaning school buildings, is guilty of bribery, under section 2212 of the General Statutes of 1901, notwithstanding the fact that the board had by resolution referred the matter of cleaning such buildings to the superintendent of buildings, who was an employé but not a member of the board, where it appeared that the member charged with the offense let the contract with the approval of the superintendent of buildings.

10. SAME—EVIDENCE.

When the gravamen of the charge is the receiving of money as a bribe to influence the opinion, judgment, and action of defendant as a member of such board in causing such contract to be let, testimony showing that the contractor, who paid defendant the bribe, soon afterwards took a similar contract with an individual at a much lower price, is material and competent evidence of the intent with which the money was received.

11. SAME.

In such a case, where defendant is shown to have cashed a check payable to his order for the amount he is charged with receiving, drawn by the person from whom it is charged he received the bribe, the check itself is competent evidence against him to establish the receipt of the money.

12. CRIMINAL LAW—CALLING WITNESSES.

In a criminal action, the state is not

obliged to place upon the stand every witness whose name is indorsed upon the indictment.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1568.]

13. SAME — WITNESSES — SUBPŒNAED BY STATE.

If the defendant desires to rely upon the attendance of witnesses under subpœna by the state he may notify them and the court of such fact, or may cause them to be subpœnaed in his own behalf. He has no right to rely upon the attendance of a witness merely because the state may have caused a subpœna to issue for such witness.

14. SAME — NEW TRIAL — MISCONDUCT OF PROSECUTING ATTORNEY.

Upon a motion for a new trial on the ground of alleged misconduct of the prosecuting attorney in his argument to the jury, affidavits in support thereof were contradicted by the affidavit of the prosecuting attorney, raising an issue of fact as to what was said in the argument. The ruling of the trial court denying the motion for a new trial will be considered as a finding against the facts alleged in the motion.

(Syllabus by the Court.)

Appeal from District Court, Wyandotte County; J. McCabe Moore, Judge.

Frank M. Campbell was convicted of bribery, and appeals. Affirmed.

At the June term of the district court of Wyandotte county, appellant was convicted of the crime of accepting a bribe to influence his official action as a member of the board of education of Kansas City. He was sentenced to confinement in the state penitentiary for a period of not less than one or more than seven years. From the judgment he appeals.

The second count of the indictment upon which he was tried charges that appellant, while a member of the board of education of Kansas City, from the sixth ward of said city, and while acting in his capacity as a member of said board of education, and acting under and by virtue of his office as a member thereof, did make, cause, and permit to be made a contract with one G. E. Gilhaus whereby it was agreed that the said Gilhaus was to clean out a school building and remove the mud, filth, and water therefrom, and should receive as compensation therefor the sum of \$35 per day for the time occupied in performing said work. "And on or about the ——day of August, 1903, in the county of Wyandotte, state of Kansas, the said Frank M. Campbell did then and there unlawfully, feloniously, corruptly, and wickedly receive and accept from the said G. E. Gilhaus, a large sum of money, to wit, the sum of four hundred and twelve dollars (\$412) to the value of four hundred and twelve dollars (\$412) as a reward for having given the vote, opinion, judgment, and action of the said Frank M. Campbell in favor of letting, and causing to be let to the said G. E. Gilhaus, the said contract, and as a reward and bribe for having wrongfully and unlawfully permitted and caused to be let to the said G. E. Gilhaus, the said contract as afore-said set forth." When the Kaw river flood

of 1903 subsided, the lower floors of the school buildings in the Armourdale district were filled with mud and filth to the depth of 18 inches. Appellant was a member of the board of education, consisting of six members. At a meeting of the board the matter of arranging for the cleaning of these buildings was referred to the superintendent of buildings, one Biscomb, who was not a member of the board. Afterwards Biscomb consulted and acted with appellant, Campbell, and C. M. Bowles, another member of the board, in reference to the work and in letting the contract. Appellant lived in the flooded district, and by consent of Biscomb and Bowles took the lead in making arrangements for having the work done. He saw G. E. Gilhaus, who was engaged, under the style of the Gilhaus Manufacturing Company, in doing similar work, and arranged with him to pump out these buildings, at a price agreed upon of \$35 per day for whatever time was required to do the work. Appellant introduced Gilhaus to Biscomb the day that the work of pumping was begun, and after the buildings were cleaned took the bill of the Gilhaus Manufacturing Company for the work to Biscomb to have the latter certify to it. With some changes the bill was certified by Biscomb, and, on August 3d, allowed by the board and a warrant drawn for \$988.75, payable to the company. It is not shown what date the warrant was received by Gilhaus, but it appears to have been paid some days after its date. On the 11th of August Gilhaus gave to appellant the check of the Gilhaus Manufacturing Company for \$412, and on the same day appellant cashed it at the bank upon which it was drawn. It appeared from the testimony of one witness that, some time after the work at the school buildings was completed, Gilhaus removed the mud and filth from a building in the flooded district belonging to the witness, and that the price agreed upon was \$7.45 per day. It was claimed by appellant that the personal transaction with Gilhaus had no connection with the contract for cleaning the school buildings, that the \$412 was in payment for a certain steam valve sold by appellant to Gilhaus after the work in the school buildings had been begun. He claimed that he had, some five years before that, invented the steam valve and had applied for a patent on it, but the patent had never been granted through delays, and that he sold to Gilhaus the valve and the right to use and manufacture it.

Hale & Maher, for appellant. C. C. Coleman, Atty. Gen., for the State.

PORTER, J. (after stating the facts). 1. The appellant contends that the trial court erred in refusing to discharge him, for the reason that more than three terms of court had elapsed since the indictment was filed. The grand jury returned the indictment on January 25, 1904. At the next regular term

of the court, which was the March term, appellant's motion to quash the indictment was sustained. The state appealed from that decision, and, on February 11, 1905, the judgment of the court was reversed, and the cause remanded for another trial. *State v. Campbell*, 70 Kan. 899, 79 Pac. 1133. By Gen. St. 1901, § 5606, it is provided as follows: "If any person under indictment or information for any offense, and held to answer on bail, shall not be brought to trial before the end of the third term of the court in which the cause is pending which shall be held after such indictment found or information filed, he shall be entitled to be discharged so far as relates to such offense, unless the delay happen on his application or be occasioned by the want of time to try such cause at such third term." By section 5605 it is provided that, if the person indicted be committed to prison, and not brought to trial before the end of the second term after the indictment is filed, he shall be discharged. The appellant here was admitted to bail immediately after his arrest, and therefore his case falls under section 5606, *supra*. Counsel for the state contend that, the delay having been caused by the erroneous ruling of the district court, upon appellant's motion to quash, appellant was himself responsible for it, and it comes within the exception in the statute, *supra*, as one which "happened on his application." On the other hand, it is argued: (1) That the delay was the result of the state's appeal, not caused by any act of appellant; (2) that, the statute having excepted certain delays, all others not mentioned are necessarily excluded. It is proper here to refer to the history of the statute insuring to a person indicted and imprisoned or held to bail a speedy trial. By considering the evil sought to be remedied, we are better enabled to construe the statute. When it was enacted it followed in general terms the provisions of similar statutes in the older states, and in them the evil sought to be remedied was one which the English people had struggled against since before the days of Magna Charta and the petition of rights. It recalls the days of tyranny and despotism, when men were allowed to lie in dungeons for long periods without even an opportunity to know the nature of the charge against them. A speedy trial for all accused persons was one of the things insisted upon by the people of England in the first Bill of Rights, and English laws have jealously guarded the right from that time. It is provided for in the first ten amendments of the federal Constitution, being embodied in the sixth of the ten amendments submitted by the First Congress. The guaranty of the federal Constitution, however, has been held not to apply to acts of the Legislatures of the several states or to state courts. *Fox v. State of Ohio*, 5 How. (U. S.) 410, 12 L. Ed. 213; *Murphy v. People*, 2 Cow. (N. Y.) 815. The same provision, or one similar, is

found in the Constitutions of most of the states. It is a part of section 10 of our Bill of Rights. The statute is for the purpose of carrying into effect this provision of the Constitution. It was never intended to apply to the facts in a case like the one at bar. Here there was no laches or delay on the part of the state within the spirit and intention of the statute. The state was doing all within its power to bring the appellant to a speedy trial. A trial was begun, a motion to quash sustained, and the state appealed. This statute must be construed with the one giving to the state the right to appeal from a judgment sustaining a motion to quash the indictment. Code Cr. Proc. § 283; Gen. St. 1901, § 5721. To hold as appellant contends would deny to the state all benefit of the appeal which the statute expressly gives. This cannot be the law. The appeal deprived the trial court of power to proceed further until it was determined, and, in effect, it held in abeyance the provisions of section 5666. Even though appellant had been in prison, unable to furnish bail, while the appeal was undetermined, his right to a speedy trial under this section was in no manner infringed. In *People v. Glesea*, 63 Cal. 345, the same question arose, and the Supreme Court reversed an order discharging the prisoner. The court said: "We are of opinion that the case of the defendant does not come within the provisions of the section above referred to. That section has no application where the prisoner has demurred to the indictment, the demurrer sustained, the effect of which ruling had to be gotten rid of by an appeal." See, also, *Marzen v. People*, 190 Ill. 81, 60 N. E. 102; *Patterson v. State*, 50 N. J. Law. 421, 14 Atl. 125; *State v. Conrow*, 13 Mont. 552, 35 Pac. 240.

2. That the court erred in allowing members of the grand jury which indicted appellant to testify to statements made by him while a witness before the grand jury.

It is contended: (1) That, before such testimony was competent, the state should have shown that the statements of appellant were voluntary; (2) that members of a grand jury are prohibited by statute from testifying as to what a witness before that body has sworn to, except for the purpose of impeaching his statements made in court or in a case where the witness is being prosecuted for perjury. In its testimony in chief, the state introduced four members of the grand jury which returned the indictment, and proved by them certain statements made by appellant while a witness before the grand jury. These statements were to the effect that appellant made the contract with Gilhaus, that the \$412 was paid to him for the steam valve sold to Gilhaus after the contract was made for cleaning the school buildings, that he had invented it, and further statements in reference to his efforts to procure letters patent for the valve, his account of the loss of certain correspondence with

his patent attorneys, and as to his procuring from Gilhaus the valve to be used in his defense against the charges made. When this evidence was offered, counsel for appellant objected, and the following took place: "Q. What did Mr. Campbell say in his examination before the grand jury as to who had employed Mr. Gilhaus? By Mr. Wooley: I object to that as incompetent. Testimony taken before the grand jury cannot be reiterated by the grand juror. They are attempting to make out their case in chief by hearsay testimony taken before the grand jury, in an ex parte proceeding. The Court: Of course, statements by a defendant are different from statements by other witnesses. Was that voluntary testimony, or was he compelled to go there—that might make a difference? Mr. Wooley: He was brought there by subpoena. Mr. Coleman: I do not think there is anything in the objection. The witness comes before the grand jury, and he is there as a witness generally in the investigation of violations of the law. He is supposed to tell the truth. By Mr. Wooley: No proper foundation is laid here for the introduction of testimony of a grand juror. It is incompetent, at least at this time. Mr. Coleman: It is competent as an admission, if it amounts to one. The Court: It may have been voluntarily made, and competent, if shown they are not made under compulsion. He may answer." Another objection was made, as follows: "Mr. Wooley: Objected to as incompetent, for the jurors to disclose what was said in the grand jury room, and for the further reason he says his memory is refreshed by reading notes taken by some one else, and not by some notes he made himself."

These objections can hardly be said to raise the points now urged by appellant, but we prefer to consider them as if they did. Counsel for appellant urges: First, that before this evidence was competent the state must have shown that "the confession, admission, or declaration, it matters not what they are called, were voluntarily made or given." It is insisted that the same rule applies to the admissibility of statements and declarations of a defendant in a criminal action as obtains in reference to a confession. The distinction between a confession and a statement or declaration is one recognized by courts and text-writers because it is a patent distinction in the very nature of things. The only reason why confessions are sometimes not admitted in evidence is because experience has shown that, when under certain circumstances, they cannot be relied upon as true. It is not out of any consideration for the rights of the party alleged to have made the confession that it is excluded, but simply because of the inherent probability of its untruthfulness, unless it first appears to have been made voluntarily and not under the influence of fear or duress, occasioned by threats or

hope of immunity by reason of promises. "A 'confession,' in a legal sense, is restricted to an acknowledgment of guilt made by a person after an offense has been committed, and does not apply to a mere statement or declaration of an independent fact from which such guilt can be inferred." *State v. Reinhart*, 26 Or. 466, 38 Pac. 822. In *State v. Gilman*, 51 Me. 206, 225, it is said: "The declarations of accused persons are not necessarily confessions, but generally, on the other hand, they are denials of guilt, and consist in attempts to explain circumstances calculated to excite suspicion." In 1 Wignore on Evidence, § 821 (page 930), the author says: "(3) An acknowledgment of a subordinate fact, not directly involving guilt, or, in other words, not essential to the crime charged, is not a confession, because the supposed ground of untrustworthiness of confessions is that a strong motive impels the accused to expose and declare his guilt as the price of purchasing immunity from present pain or subsequent punishment, and thus, by hypothesis, there must be some quality of guilt in the fact acknowledged. Confessions are thus only one species of admissions, and all other admissions than those which directly touch the fact of guilt are without the scope of the peculiar rules affecting the use of confessions." "When a person only admits certain facts from which the jury may or may not infer guilt, there is no confession." *Covington v. State of Georgia*, 79 Ga. 687, 690, 7 S. E. 153, 155. "A confession of guilt is an admission of the criminal act itself, not an admission of a fact or circumstance from which guilt may be inferred." *State v. Red*, 53 Iowa, 69, 74, 4 N. W. 831, 835. One of the early cases in point is *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721. The appellant was charged with murder. His testimony given before a coroner's inquest previous to his arrest was held to be competent against him. The court there say: "His statement as a witness was in no respect an admission of guilt. On the contrary, it was a denial of material facts attempted on his trial, to be established by other witnesses. His testimony was calculated to ward off suspicion from himself, not to attract it towards him." It also held: "The general rule is that all a party has said, which is relevant to the questions involved in the trial, is admissible in evidence against him. The exceptions to this rule are where the confession has been drawn from the prisoner by means of a threat or a promise, or where it is not voluntary, because obtained compulsorily or by improper influence." On the competency of a defendant's admissions generally, see *State v. Inman*, 70 Kan. 804, 79 Pac. 162.

The question of whether the statement is voluntary or an involuntary one does not depend upon the fact of the witness being under a subpoena. *State v. Finch* (Kan.) 51 Pac. 494. He may protect himself if he

sees fit by refusing to answer because the answer tends to incriminate him. *Greenleaf on Evidence*, § 225. In *State v. Finch*, supra, appellant was charged with manslaughter, and his testimony given at the coroner's inquest in pursuance to a subpoena was held admissible. In that case, as in this, appellant relied upon some expressions in *State v. Taylor*, 36 Kan. 329, 13 Pac. 550, and the court say: "But that case [*State v. Taylor*] is not an authority that testimony given under a subpoena and without compulsion and duress is inadmissible." *State v. Broughton*, 29 N. C. 96, 45 Am. Dec. 507, is a leading case which is in point. The person on trial had testified before the grand jury which indicted him, and his statements before the jury were held admissible. It is there said: "The counsel for the prisoner took the further ground here that it was incompetent to prove the evidence of the prisoner, because it was in the nature of a confession, which, compelled by an oath, was not voluntary. It is certainly no objection to the evidence, merely, that the statement of the prisoner was given by him, as a witness under oath. He might have refused to answer questions, when he could do so without criminating himself, and the very ground of that rule of law is that his answers are deemed voluntary and may be used afterwards to criminate or charge him in another proceeding, and such is clearly the law. \* \* \* But it is altogether a mistake to call this evidence of a confession by the prisoner. It has nothing of that character. It was not an admission of his own guilt, but, on the contrary, an accusation of another person. That it was preferred on oath in no way detracts from the inference that may be drawn from it unfavorably to the prisoner, as being a false accusation against another, and thus furnishing, with other things, an argument of his own guilt. There was, in our opinion, no error in receiving the evidence." In *Hendrickson v. People*, supra, it is said: "It is now regarded as a well-settled rule, and recognized in the elementary books, that where a witness answers questions upon examination on a trial tending to incriminate himself, and to which he might have demurred, his answers may be used for all purposes. \* \* \* Such answers are deemed voluntary, because the witness may refuse to answer any question tending to criminate him. \* \* \* Independent of any supposed authority, I do not see how, upon principle, the evidence of a witness, not in custody and not charged with crime, taken either on a coroner's inquest or before a committing magistrate or a grand jury, could be rejected." In the celebrated case of *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, defendant attended the inquest in obedience to a subpoena and testified under a threat of punishment for contempt if he refused. His testimony was held admissible, notwithstanding he was not advised of his

rights when it was given; it being shown that he was not under arrest or formally accused of the crime. The court in the opinion speaks as follows: "The law presumes that a party who is called upon to testify as a mere witness knows his rights. He may decline to testify to anything that may tend to incriminate him. This the defendant could have done had he chosen to claim his privilege. Having failed to do so, he cannot now complain." "A 'confession' receivable in evidence, only after proof that it was made voluntarily, is restricted to an acknowledgment of the defendant's guilt, and the word does not apply to a statement made by the defendant of facts which tend to establish his guilt." *Taylor v. State*, 37 Neb. 788, 56 N. W. 623. To the same effect see *People v. Mondon*, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469; *Wilson v. State*, 110 Ala. 1, 20 South. 415, 55 Am. St. Rep. 17; *State v. Coffee*, 56 Conn. 399, 16 Atl. 151; *People v. Hickman*, 113 Cal. 80, 45 Pac. 175; *People v. Parton*, 49 Cal. 632.

Tested by these well-established rules, how can it be said that the statements of appellant before the grand jury amounted to a confession? They were made in positive denial of guilt and for the purpose of exculpating himself. He admitted the making of the contract with Gilhaus; there was no guilt, no crime, no offense in that. He admitted the receipt of \$412 from Gilhaus; but, if the story he told was true, and this money was in payment of the purchase price of the steam valve which he had sold to Gilhaus, there was no offense in that. No statement by itself amounted to an acknowledgment of guilt; nor could his guilt be necessarily inferred by the jury from all his statements taken together. The constitutional right which every man has to refuse to answer any question which may incriminate him seems, in these days of "immunity pleas," to be fully recognized and appreciated. It furnishes ample protection and does not, in our opinion, require reinforcement by the adoption of the rule contended for by the appellant.

The second ground upon which it is contended that this testimony was incompetent is that the statutory as well as the common-law rules prohibit a grand juror from disclosing the testimony of a witness before that body, except for two purposes: (1) To prove whether the testimony of such witness before the grand jury is consistent with or different from his testimony before the court; (2) upon a complaint against such person for perjury, or upon his trial for that offense. Section 91, Code Cr. Proc. (Gen. St. 1901, § 5533), reads as follows: "Members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such grand jury is consistent with or different from the evidence given by such witness before such court; and they may also be required to disclose the

testimony given before them by any person upon a complaint against such person for perjury, or upon his trial for such offense." Section 93, Code Cr. Proc. (Gen. St. 1901, § 5535), is as follows: "No grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto; nor shall he disclose the fact of any indictment having been found against any person for felony, not in actual confinement, until the defendant shall have been arrested thereon. Any juror violating the provisions of this section shall be deemed guilty of a misdemeanor." These sections first appear in our statutes in the laws of 1855, and have been subsequently re-enacted without change. It is historical that the territorial Legislature of 1855, often referred to as the "bogus Legislature," adopted the entire statutes of Missouri, substituting the word "territory" for "state," and making some other slight changes where it was found necessary. These sections had been construed by the Supreme Court of Missouri in the case of *Tindle v. Nichols*, 20 Mo. 326, decided in January, 1855, and it is now contended that we are bound by the judicial construction placed thereon. In the *Tindle Case*, supra, which was an action for slander, defendant justified and answered that plaintiff had sworn falsely in a certain matter before the grand jury. On the trial defendant sought to prove by members of the grand jury what the witness had testified. The court held that, inasmuch as section 91 specified two classes of cases in which a grand juror may be required to disclose such testimony, it followed that all other cases not enumerated were excluded, and that the words of section 93 "when lawfully required to testify as a witness in relation thereto" had reference only to those two exceptions. We recognize the force of the rule that, where one state adopts a statute from another state, it adopts the construction placed thereon by the courts of that state. But this is a general rule to which there are numerous exceptions. It is not an absolute rule. In *Dixon v. Ricketts*, 26 Utah, 215, 216, 72 Pac. 947, 949, it is said: "It is a general, though not a binding, rule of statutory construction, that, where the provisions of a statute have received judicial construction in one state, and it is then adopted in another state, it is adopted with the construction so given it." See, also, *F. M. Davis Ironworks Co. v. White* (Colo. Sup.) 71 Pac. 394; *Coulam v. Doull*, 4 Utah 267, 9 Pac. 568. Endlich on the Interpretation of Statutes (section 371) says: "Whilst admitting that the construction put upon such statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it, its binding force has been wholly denied, and it has been asserted that a statute of the kind

in question stands upon the same footing, and is subject to the same rules of interpretation, as any other legislative enactment. And it is manifest that the imported construction should prevail only in so far as it is in harmony with the spirit and policy of the general legislation of the home state, and should not, if the language of the act is fairly susceptible of another interpretation, be permitted to antagonize other laws in force in the latter, or to conflict with its settled practice." Thus it has been held that the presumption will not be indulged where other jurisdictions having the identical or substantially the same provision had, almost without exception, given to the language a different construction long prior to the adoption in question." 26 A. & E. Enc. of Law, 703. It has been held that, where the statute is not peculiar to the state from which it was adopted, but other states have substantially the same statute which their courts have construed differently, and when the construction placed upon it by the courts of the state from which it was taken is contrary to the weight of authority, the decision is not binding. In *Coad v. Cowhick et al.*, 9 Wyo. 316, 63 Pac. 584, 87 Am. St. Rep. 953, the court refused to follow a decision of the Ohio court construing a statute adopted from that state holding a judgment not a lien upon after-acquired lands of the judgment debtor. The reasons stated by the court are that the statute under consideration is not peculiar to Ohio, because other states have similar provisions, using the identical words or language the same in substance, and because the decision of the Ohio court in the opinion of the Wyoming court was opposed to the best reasoning and the weight of authority. In *Current Law*, vol. 3, p. 739, it is said: "A statute copied from a similar statute of another state is presumed to be adopted with the construction it had already received. The presumption, however, is not conclusive, and, where the same provision exists in several states, there is no presumption that the construction of any particular state was in view."

The question before us, however, is not whether this statute was in fact adopted from Missouri, about which there can be no dispute, but whether we should be bound by it absolutely. To regard ourselves as bound by it absolutely would give it greater weight than if it had been the decision of this court originally. If such were true, the right and duty of this court to disregard it would not be denied, if, upon re-examination, it should be found opposed to the better reasoning, in conflict with the great weight of authority, or not in harmony with the spirit and policy of our laws. The exact question decided in the *Tindle Case* has been the subject of much discussion by the courts. In some of the states there are no statutory prohibitions, and the decisions are placed upon the reasoning deduced from common-law principles, and in some cases it is made to turn upon

the peculiar oath required of grand jurors by the statutes. In many of the states the subject is controlled by statute, and provisions almost identical with our statutes are in force. The various statutory provisions of the several states are set forth in a note to section 2360 in *Wigmore on Evidence*, vol. 4, p. 3316. From the time the grand jury was first established the law has surrounded its deliberations and all that transpired before it with secrecy. By the common law, a grand jury was not permitted to disclose how any witness testified before that body or how any member voted. 12 *Viner's Abr.* 20, tit. Evidence, H, 1. The grand juror's oath required him to keep "the state's counsel, his own and his fellows' secret." The purpose of this requirement has been, manifestly: First, to protect the interests of the state by preventing information reaching the accused which might enable him to escape, or induce him to suborn witnesses to prove the contrary of the charges; second, to protect the members of the grand jury, and leave them free to act without fear of consequences to themselves; and, third, to protect witnesses in the same way. Gradually, exceptions to these rules have been allowed, and the first naturally to suggest themselves were those permitting a grand juror to testify what a witness swore to before the grand jury in a prosecution of the witness for perjury, and, again, for the purpose of impeaching the testimony of the witness on a trial of an indictment or in another action. The tendency of modern authorities has been to hold that, when the reasons for secrecy no longer exist, the ancient rules with reference thereto do not apply, and, in all cases where justice or the rights of the public require it, the facts should be disclosed. "It was at one time supposed that a grand juror was required by his oath of secrecy to be silent as to what transpired in the grand jury room; but it is now held that such disclosures, wherever it is material to explain what was the issue before the grand jury, or what was the testimony of particular witnesses, will be required." *Wharton's Crim. Ev.*, c. 9, § 510. "It is equally clear that the jurors were competent witnesses. In *Haak v. Breidenbach* [3 Serg. & R. (Pa.) 204] and *Leonard v. Leonard* [1 Watts & S. (Pa.) 342], the parol evidence was given by jurors, and in the latter case under a special objection and exception; yet the judgment was reversed for the rejection of the evidence. There is no principle of law or rule of policy which in such a case ought to exclude them. It is entirely different from where they are called to impeach a verdict on the ground of their own misbehavior or that of their fellows." *Follansbee v. Walker*, 74 Pa. 306, 310. In *Commonwealth v. Mead*, 12 Gray, 167, 71 Am. Dec. 741, it was said: "But, when these purposes are accomplished, the necessity and expediency of retaining the seal of secrecy are at an end." Mr. Wig-

more, in his work on Evidence (section 2362) says: "But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused." In a note to the same section, in referring to *Tindle v. Nichols*, supra, the author characterizes the decision as "clearly unsound and unjust." The Florida Supreme Court, in a well-considered case (*Jenkins v. State*, 35 Fla. 737, 18 South. 182, 48 Am. St. Rep. 267), decided in 1895, construed a statute which is in the same language as ours so far as section 93 is concerned. The court holds that the provision of the Florida statute, permitting a member of the grand jury to testify in the two special cases, does not exclude an inquiry in other cases sanctioned by law, when, in the discretion of the court, it becomes proper to open up such inquiry. The *Tindle* Case is cited, and the court comments upon the absence in their statute of the provision of the Missouri statute which prohibits a member of the grand jury from disclosing any evidence given before the grand jury, "except when lawfully required to testify as a witness in relation thereto"; but it is apparent that the same result would have been reached if the Florida statute had contained this latter provision. The *Tindle* Case rests upon the theory that the first section specifies two cases, and that "the bare specification excludes all other cases not enumerated." The Florida statute, likewise, specifies these same two cases, yet that court refuses to restrict the operation of the statute so as to exclude other cases not mentioned. They say: "But, independent of statutory regulation, it has long been established that it is discretionary with the trial court to permit a grand juror to be examined as to what a witness testified to before the grand jury, when competent and the ends of justice require it, and we do not see that our statutes have changed this rule." In *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157, the appellant was charged with murder. Over his objection a member of the grand jury was permitted to testify to appellant's testimony before the grand jury. The same statute, substantially as ours, was construed, and in addition a statute prescribing a form of oath for the members of the grand jury, which latter provision, it was claimed, added to the inadmissibility of the evidence. It was held: "The oath of grand jurors that they will not disclose the proceedings given before them does not prevent them from testifying in court as to such proceedings. Section 1731, Burns' Rev. St. 1894 (section 1662, Rev. St. 1881), providing that a member of a grand jury may be required to disclose the testimony of a witness examined before the grand jury, 'for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given be-

fore them by any person upon a charge against him for perjury in giving his testimony upon his trial therefor,' does not limit the right to require grand jurors to testify to the two cases specified."

It should be noticed, perhaps, that the form of the grand juror's oath provided by our statute is silent with respect to keeping anything secret. In the case of *United States v. Negro Charles*, 2 Cranch, C. C. (U. S.) 76, Fed. Cas. No. 14,786, it was said: "Grand jurors may testify as to the confessions made by the prisoner before them, upon oath, made under examination as a witness against another person." "The oath of grand jurors to keep their proceedings secret does not prevent the public or an individual from proving by one of the jurors, in a court of justice, what passed before the grand jury." *Burnham v. Hatfield*, 5 Blackf. (Ind.) 21. "The fact that a witness testified before the grand jury, together with his testimony delivered there, may, when otherwise competent, be proved in the trial of an action, when such evidence is required for the purposes of public justice, or the establishment of public rights." *Hunter v. Randall*, 69 Me. 183. The Oregon statute is substantially the same as ours. In *State of Oregon v. Moran*, 15 Or. 262, 273, 14 Pac. 419, 426, the court say: "The policy of the law, generally, is that the proceedings before the grand jury are secret. The reasons for this secrecy are many and obvious. It assists them in discharging their important duties, they are not troubled with any questions by the interested or curious, the means and sources of their information are not made public until the trial of the accused, and in many cases the guilty may not know that he is even suspected of crime until he is in custody. But there are cases in which the court is authorized to remove this secrecy, and to require the proceedings before the grand jury to be disclosed. It is provided by section 58 of the Code of Criminal Procedure that a member of a grand jury may be required by any court to disclose the testimony of a witness examined before such grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before such grand jury by any person upon a charge against such person for perjury, or upon his trial therefor. \* \* \* It may be conceded that the authorities cited from Missouri and Minnesota are opposed to this view; but it seems clear to us that they are at variance with the great weight of authority on this subject, and, in addition to that, they rest upon a narrow and technical construction of the statutes of those states. The court, therefore, did not err in allowing the grand juror, Severson, to disclose Moran's testimony before that body." "Upon the trial, the defendant offered to prove, by a member of a previous grand jury, some admissions respecting the cause of action made by the

plaintiff on his examination before the grand jury. The evidence was objected to, and the objection sustained." *Burnham v. Hatfield*, supra. "It seems not to be contrary to the policy of the law to allow disclosures by them [grand jury] of what has been testified to before them, when they are called upon as witnesses in court, to speak in relation thereto; but to permit it or not is in the discretion of the court, according to the time and circumstances of each case." *Sands v. Robinson*, 12 *Smedes & M.* (Miss.) 704, 51 Am. Dec. 132. "Where these reasons have ceased to operate, it is the better opinion, contrary perhaps to some cases, but maintained in most, that any revelations of the grand jury's doings, which justice demands, may be made. The witness may be the prosecuting attorney or a third person present, a grand juror himself, or one who gave evidence before the grand jury, who may be even required to state what his own testimony was." 1 *Bishop's New Crim. Proc.* § 857, 2. Mr. Wigmore, after referring to and criticising the Missouri and Connecticut cases, says: "There remain, therefore, on principle, no cases at all in which, after the grand jury's functions are ended, the privilege of the witnesses not to have their testimony disclosed should be deemed to continue. This is, in effect, the law as generally accepted today. It is, however, not usually stated in such a broad form. The common phrase is that disclosure may be required 'whenever it becomes necessary in the course of justice.' Disregarding a few local exceptions, this is in practice no narrower a rule than the one above deducible from principle." Volume 4, § 2362. The same author disposes of the motion that the two exceptions contained in many statutes should be held to exclude all others. He says: "It is now universally conceded that a witness may be impeached, in any subsequent trial civil or criminal, by self-contradictory testimony given by him before the grand jury. In the same way, a party to the cause, not taking the stand as a witness, may be impeached by his admissions made in testifying before the grand jury. The occasional statutory sanction for the former of these uses cannot be construed to prohibit the latter, which goes upon the same reasoning. Nor should any of the ensuing legitimate purposes of disclosure be considered to be obstructed by the statutory omission to mention them, else the integrity of common-law principles would tend to be diminished in direct ratio to the ignorance or unskillfulness of the Legislature which attempted in any respect to make a declaratory statute." Volume 4, § 2363.

Appellant, in addition to the Missouri cases, relies upon the old case of *State v. Fasset*, 16 Conn. 457, which is a leading authority in support of the rule excluding such testimony. This case was decided in 1884, and has been to some extent discredited by that court in the case of *State v. Coffee*, supra,

decided in 1888. In the later case the court use this language: "Some of the reasons given for keeping the testimony secret are temporary in their nature, and some do not exist, under our practice, where the prisoner is before the grand jury. Nevertheless the oath and the policy of the law have ever regarded the testimony as among the secrets of the grand jury room, not, however, inflexibly so. In *State v. Fasset*, 16 Conn. 457, the court notices two exceptions—in prosecutions for perjury, and in case witnesses testify differently on the trial. Perhaps it would be proper to say that the oath has this implied qualification; that the testimony is to be kept secret unless a disclosure is required in some legal proceeding. It does not seem that the policy of the law should require it to be kept secret at the expense of justice. And so the weight of authority outside of this state seems to be that, where public justice or the rights of parties require it, the testimony before the grand jury may be shown.

\* \* \* We make these quotations, not for the purpose of showing what the law is in this state, but for the purpose of showing the principles which prevail in other jurisdictions. The case of *State v. Fasset*, supra, may be regarded as somewhat inconsistent with the broad principles elsewhere enunciated. It is doubtful whether the court intended to go further than the two exceptions there noticed." In an early Maine case, cited by appellant (*McClellan v. Richardson*, 13 Me. 82), the testimony was held inadmissible because in conflict with the policy of the law and with the grand juror's oath, but in *State v. Benner*, 64 Me. 267, 285, the contrary is held, and this language used: "So, in all cases when necessary for the protection of the rights of parties, whether civil or criminal, grand jurors may be witnesses." In the case of *State v. Gibbs*, 39 Iowa, 318, cited by appellant, a different question was involved. It was sought by defendant to impeach the action of the grand jury by presenting affidavits of several members for the purpose of showing that the indictment had not been concurred in by the requisite number of jurors. It is a universal rule that the evidence of members of the grand jury is not competent to impeach their action. 1 *Bishop's New Crim. Proc.* § 858, 3. The same rule applies to the verdict of a petit juror. It is true, the Iowa court in the opinion refers to the statutory and common-law rules, enjoining strict secrecy upon the proceedings before a grand jury, and lays down the same rule as to the admissibility of testimony of its members as in the *Tindle Case*. However, in the case of *Steele Smith Gro. Co. v. Potthast*, 109 Iowa, 413, 80 N. W. 517, a party's admissions before a grand jury were held to be competent evidence against him. In this case the evidence of his admissions was in the minutes of the evidence, taken by the clerk of the grand jury, and the court say: "We know of no rule that would restrict the use

of such minutes to cases of perjury." No reference is made to *State v. Gibbs*, supra. Another case upon which appellant relies is the case of *Gutgesell v. State* (Tex. Cr. App.) 43 S. W. 1016, in which the court of appeals of Texas held that such testimony was incompetent. It was declared to be against the policy of the law of that state as appeared by the oath required of grand jurors, and the statute authorizing a disclosure in the two classes of cases, and that the statute excludes any other exceptions. In *Wisdom v. State* (Tex. Cr. App.) 61 S. W. 926, a different view is taken, and the language of the former case is criticised. It appears beyond question, we think, that the doctrine of the *Tindle Case* is opposed to the weight of modern authority, and as its reasoning does not accord with our views, we must decline to be bound by it. The oath provided for grand jurors by our state imposes none of the common-law restrictions of secrecy, required by the statutes of many of the states. While the obligations of the oath are by many of the courts considered indicative of the policy of the law in those states, the absence of any such requirements in the oath provided by our statute is perhaps of little importance in view of the other obligations as to secrecy imposed by the sections which we are considering. In principle we see no good reason why the statements, admissions, or declarations made by a witness before a grand jury should not be disclosed by a member of the grand jury whenever lawfully required to do so, and that a member of the grand jury may be lawfully required to testify "in relation thereto," when, after the purpose of secrecy has been effected, it becomes necessary in furtherance of justice or for the protection of public or individual rights. To the same effect, see the following cases: *Simms v. State*, 60 Ga. 145; *Loyd v. State*, Id.; *State v. Broughton*, supra; *People v. Young*, 31 Cal. 543; *People v. Northey*, 77 Cal. 620, 19 Pac. 865, 20 Pac. 129; *People v. Reggel*, 8 Utah, 21, 28 Pac. 955; *Perkins v. State*, 4 Ind. 222; *Burdick v. Hunt*, 43 Ind. 381; *State v. Van Buskirk*, 59 Ind. 384; *Shattuck v. State*, 11 Ind. 473; *State v. Wood*, 53 N. H. 484; *United States v. Kirkwood*, 5 Utah, 123, 13 Pac. 234.

3. The next serious contention is that, because the appellant as a member of the board of education had no legal authority to personally make the contract for the cleaning of of the school buildings, the prosecution for bribery in accepting money to make such a contract must fail. This point is urged in complaint of certain instructions given, and of error in refusing to sustain the motion for a new trial, and in arrest of judgment. So far as this contention bears upon the charge in the indictment, the former decision in this case is controlling. The motion in arrest of judgment is based upon three grounds: "First, that the facts stated in the indictment filed in this cause, and upon which the defendant was tried, do not consti-

tute a public offense; second, that the facts stated in the indictment filed in this case, and upon which the defendant was tried, are not sufficient to constitute an offense or sustain the verdict heretofore rendered against the defendant in said cause; third, that the indictment filed in this cause, and upon which the defendant was tried, has never been signed by the prosecuting attorney of said county."

When this case was here before, it was held that the indictment was properly signed and sufficient in substance, so that upon every question raised in the motion in arrest of judgment the former decision is the law of the case. But it is urged that the evidence of the state shows that the board placed the matter of letting the contract for this work in the hands of *Biscomb*, superintendent of buildings, and that, if the evidence shows that anything was done by appellant, it is that he let the contract to *Gilhaus* himself. It is the contention that, as *Biscomb* alone could lawfully let the contract, no offense was committed. The case of *State v. Butler*, 178 Mo. 272, 77 S. W. 560, is relied upon. In that case the defendant was charged with bribery in offering money to *Dr. Chapman*, a member of the board of health, to influence his vote upon the letting of a contract for the disposal of garbage. The board of health was given authority to make the contract by an ordinance of the city of *St. Louis*. The point was raised that the removal of garbage was a public work, and the authority to contract therefor belonged to the board of public improvements, and that the ordinance giving the authority to the board of health was invalid. This view was sustained, and the court held that offering money to a member of the board of health to influence his action in letting such contract did not constitute bribery. The contract providing for an expenditure of \$45,000 was, in fact, entered into by the board of health, and when executed, doubtless, a plea of *ultra vires* on the part of the city in defense of payment would not have proved availing. The money offered was clearly to influence the officer to do what the bribe giver and every one else believed he had authority to do, and which, if done, would, under some circumstances, bind the city. The decision in this case is one which does not appeal to our sense of justice, nor does the reasoning satisfy our views of the law of bribery. Let us transpose the facts and suppose that, instead of the board of health, the ordinance had authorized the board of public works to let contracts for the removal of garbage, and suppose that the bribe had been offered to a member of the board of public works. It is apparent that the ingenuity of counsel would have at once discovered the same defense. It appears that the charter of *St. Louis* gives to the municipal assembly power to enact laws to prevent the introduction and spread of contagious diseases and to secure the gen-

eral health of the inhabitants by any measure necessary, and to pass laws to sustain good government, the health and welfare of the city, and to establish a sanitary system. With equal plausibility it might, in such a case, be argued that the disposal of filth and slops, instead of being a public improvement such as waterworks, streets, sewers, bridges, public buildings, parks, boulevards, harbors, and wharves, looking to permanency and requiring repair and improvement, very properly belonged to the department which for years had controlled it, namely, the board of health, and therefore the ordinance attempting to give authority to the board of public improvements was invalid, and the offer of money no bribery.

The second ground upon which the decision is based is, perhaps, as unsatisfactory. The particular ordinance in question was passed by the council and signed by the president of the council September 11, 1901, and signed by the speaker of the house of delegates on September 13, 1901. On September 17, 1901, the mayor reported to the council that he had signed the ordinance. Dr. Chapman testified that defendant came to his house on the evening of September 16th and offered him the bribe. The trial court instructed that if defendant knew the ordinance had been passed, and that the matter might come before the board for action, and offered the money to influence the vote of the member, it was bribery. The Supreme Court held that, because the ordinance was not signed until the next day, the board of health had no authority to let the contract, and therefore it was not bribery to offer money to influence the action of a member of the board. Suppose a member of the board of county commissioners is offered \$100 to influence his vote upon a claim filed before the board against the county. The next day, when the matter is to come before the board, it is discovered that the claim is not such a one as can be allowed, because it is not verified or itemized as the statute requires. Suppose it is amended, and the member votes to allow it; could it be claimed in defense of the charge of offering or accepting the bribe that, when the bribe was offered and accepted, there was in fact no lawful claim pending before the board? In the case of *State v. Gregory*, 46 Kan. 290, 26 Pac. 747, defendant was charged with perjury in an affidavit to a claim filed against Finney county. The defense was that the claim appeared upon its face to have been barred by the statute of limitations, and, not being a claim which the board could lawfully allow, the oath was not material. The trial court set aside the conviction, and upon a second trial quashed the indictment. On appeal by the state, the cause was reversed. The court in the *Butler Case* seeks to distinguish that case from *State v. Ellis*, 33 N. J. Law, 102, 97 Am. Dec. 707, where there was pending before the common council an application for per-

mission to lay a railroad track in the streets of the city. A member of the council was offered a bribe to influence his vote thereon. It was contended that, as the council had no authority to grant the application, there could be no bribery. The contention of defendant was not upheld. The Missouri court approves the ruling and uses this language: "It was immaterial whether the action of the council could be enforced. It was a matter pending before the council, upon which the members had a right to vote. It was not necessary 'that the vote, if procured, would have produced the desired result.'" It is somewhat difficult to understand how the result in the *Butler Case* was reached and the ruling of the *Ellis Case* approved. The Missouri statute is slightly different from ours. It contains the words "which may by law be brought before him," and the court construes these words to mean "a law in force at the time of the offer of the bribe." Our statute defines bribery as follows: "Any officer of the state or of any county, city, district, or township, after his election or appointment, and either before or after he shall have qualified, or entered upon his official duties, who shall accept or receive any money or the loan of any money, or any real or personal property, or any pecuniary or other personal advantage, present or prospective, under any agreement or understanding that his vote, opinion, judgment or action shall be thereby influenced, or as a reward for having given or withheld any vote, opinion, or judgment in any matter before him in his official capacity, or having wrongfully done or omitted to do any official act, shall be punished by a fine of not less than two hundred dollars nor more than one thousand dollars, or by imprisonment for not less than one year nor more than seven years in the penitentiary at hard labor, or by both such fine and imprisonment, at the discretion of the court." Gen. St. 1901, § 2212. Appellant was a member of the board of education which had the exclusive power to act in reference to cleaning the schoolhouses. It was the duty of the board to act. It was the duty devolving upon him to participate. The gravamen of the charge was feloniously receiving money as a bribe for giving his vote, opinion, judgment, and action in favor of letting or causing to be let the contract with Gilhaus. True, there was no vote, but there was opinion, judgment, and action by him in favor of giving Gilhaus the contract. He saw Gilhaus and made the arrangement with him, agreed upon the terms, the amount Gilhaus was to be paid, and introduced him to the superintendent of buildings, so that the superintendent to whom the letting had been referred adopted and acquiesced in appellant's action. Appellant was acting officially when he saw and arranged with Gilhaus to do the work, although, if the arrangement had not been adopted by the superintendent, there might possibly have been a question

of the authority of appellant to make the contract. He "permitted and caused to be let" the contract in question. If, therefore, he accepted money to influence his action in causing the contract to be let, why is he not guilty of accepting a bribe, as contemplated by the statute? A valid contract was let through his influence—his official opinion, judgment, and action. The mere fact that, before it could be made valid, it had to be ratified by the superintendent of buildings, to whom he took Gilhaus, in no legal sense destroys the criminal nature of his offense. In our view of the law, to hold otherwise would be placing entirely too much importance upon a play of words—giving to strained technicalities more consideration than they deserve in order to avoid, rather than attain, substantial justice. In *People v. Ellen*, 100 N. W. 1008, the Michigan court held: "Where a proposition to let a contract for waterworks was one which might come before a city council for official action, the fact that the council has no authority to enter into the contract proposed did not prevent the payment of money to councilmen to influence their action on the same from constituting" bribery. See *People v. McGarry* (Mich.) 99 N. W. 147; *Glover v. State*, 109 Ind. 391, 10 N. E. 282; *State v. Potts*, 78 Iowa, 656, 43 N. W. 534, 5 L. R. A. 814; *State v. McDonald*, 106 Ind. 233, 6 N. E. 607; *State v. Lehman*, 182 Mo. 424, 81 S. W. 1118, 66 L. R. A. 490, 103 Am. St. Rep. 670.

Complaint is made that the testimony of the witness Lilly, in reference to the amount Gilhaus charged him for similar work, was immaterial, and that no foundation was laid showing that the conditions were the same. The work consisted of pumping mud and water out of a building in the same flooded district with a steam pump, and the work was done soon after the other work was completed. The testimony was material as evidence of a circumstance bearing upon the price allowed Gilhaus, and the intent with which the money was received. There was no error in admitting in evidence the \$412 check from Gilhaus to appellant. It was competent to establish the payment of the money by Gilhaus which appellant was charged with receiving from him. *People v. McGarry*, supra.

Appellant insists that the court erred in refusing him a new trial: (1) On account of newly discovered evidence, consisting of a letter dated September 21, 1889, addressed to him at Sioux City, Iowa, written by his patent attorney in reference to his claim for letters patent upon the steam valve. This would have merely corroborated his own testimony that years before he had made an effort to secure a patent. It could not have been material evidence to disprove the charge of bribery. (2) To enable appellant to procure the testimony of G. E. Gilhaus, a witness whose name was indorsed upon the indictment, and for whom the state had issued a subpoena.

Appellant claims that it was the duty of the prosecution to produce all the witnesses whose names were indorsed upon the indictment, that it was particularly its duty to procure the attendance of Gilhaus, and that he had the right to rely upon the performance of this duty. Cases are cited to the effect that a prosecutor owes the duty of laying before the jury all the facts of which he is informed and has the means of proving, and other cases holding that all witnesses whose names are indorsed upon the indictment should be called and sworn, and defendant given an opportunity to cross-examine them. This may be the rule in some jurisdictions, but we believe it has never been recognized as the proper practice in criminal actions in this state. A prosecutor is bound by his oath to perform his duty fearlessly and vigorously. He is not to seek to convict a man whom he knows to be innocent, or to conceal facts which would establish one's innocence; and his duty to the court forbids him to employ trickery to convict any one. But he is not required to place on the stand every witness whose name happens to be indorsed upon the indictment, nor is he required to produce a witness merely because he has issued a subpoena for such witness. The defendant has no right to rely upon the presence of witnesses for whom subpoenas have been issued by the state. At his request the court may order a witness under subpoena by the state to remain, and other opportunities are afforded him for procuring the attendance of witnesses in his own behalf. (3) The third ground for a new trial, which is insisted upon, is misconduct of the Attorney General in his closing argument to the jury. Affidavits of several persons present at the trial were offered to show that in his remarks counsel for the state told the jury that the appellant was not satisfied with a bribe from Gilhaus, but that he had "bought lots for \$150 apiece and sold them to the school board for \$1,000 apiece." The trial court evidently accepted as true the affidavit of Gen. Coleman that he had made no such statement. He explains that he did use substantially the following language: "This thing of giving a makeshift and sham consideration for money really received as a bribe is no new thing. You have all doubtless heard of the thrifty member of the Legislature, not of Kansas, but of some other state, who owned a cheap lot down in Missouri not worth over \$150; how there was a bill pending before the Legislature in which a certain rich corporation was deeply interested, and how the thrifty legislator voted for that bill, and how, immediately after it was passed, he sold that cheap lot of his to the same rich corporation for the sum of \$1,500. Of course he claimed he had not accepted a bribe. He just sold a lot. So, in this case, Campbell did not accept a bribe. He tells you he simply sold a valve." There had been, of course, no evidence of any such transactions upon the part of appellant, and, aside

from his positive denial, the extreme improbability of counsel having employed the language imputed is apparent. The ruling of the trial court upon the motion should be regarded as a finding against the affidavits. The language which counsel admits having used was not improper in argument. We have considered the other remarks of counsel of which complaint is made, and find nothing prejudicial to appellant or which warranted a new trial.

It becomes unnecessary to consider the errors complained of in the instructions to the jury, for the reason that from our view of the law governing this case it follows that the instructions were properly given.

The judgment will be affirmed. All the Justices concurring.

#### STATE v. DEWEY et al. (three cases).

(Supreme Court of Kansas. May 12, 1906.)

##### 1. CRIMINAL LAW—DELAY IN TRIAL—DISCHARGE—WAIVER.

A person under indictment and held to bail, who claims the right to be discharged because he has not been brought to trial before the end of the third term of court held after indictment found or information filed, must bring himself within the spirit and intention of the statute in order to be entitled to its benefits. His rights under the statute may be waived. If he has consented to a continuance of his cause at the third or any subsequent term, or failed to object to such continuance made when he is present, such term cannot be claimed by him as one of the terms at which he should have been brought to trial.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1300, 1303.]

##### 2. SANE—ACQUITTAL.

The discharge of a person under indictment, when not brought to trial as provided in sections 220 and 221, Code Cr. Proc. (Gen. St. 1901, §§ 5665, 5666), amounts to an acquittal of the offense charged.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 357, 1297.]

(Syllabus by the Court.)

Appeals from District Court, Norton County; A. C. T. Geiger, Judge.

Chauncey Dewey and others were indicted for assault with intent to kill, and for murder in the first degree in the killing of Alpheus W. Berry, and with murder in the first degree for the killing of Daniel P. Berry. Motions for discharge on the ground that three terms of court had elapsed without trial were denied, and defendants appeal. Affirmed.

Waters & Waters, for appellants. C. C. Coleman, Atty. Gen., and F. S. Fackson, for the State.

PORTER, J. In the first of these cases, appellants were charged with assault with intent to kill Roy Berry, in the second with murder in the first degree for the killing of Alpheus W. Berry, and in the third with murder in the first degree for the killing

of Daniel P. Berry. On May 1, 1905, on the first day of the regular May term of court, appellants filed motions in each case, under section 221, Code Cr. Proc., asking to be discharged on the ground that more than three terms of court had elapsed after indictment without their being brought to trial. On the 2d day of May these motions were overruled. At the same time, upon the request of the county attorney, and over the objections of appellants, the court entered an order in each case dismissing it "without prejudice." Exceptions were saved, and the appellants bring the causes here for review.

Error is alleged in both of the rulings. The record in each case discloses that the information was filed in the district court of Cheyenne county on December 2, 1903. On the application of defendants the venue was changed to Norton county, and a certified copy of the information filed in the district court of Norton county January 12, 1904. The regular February term of the district of Norton county convened February 1, 1904, and at this term the cases were continued by the court. At the regular May, 1904, term of the court, orders were entered for continuances over the term on account of there being no jury called or in attendance. On the last day of the regular September, 1904, term of the court, continuances were ordered by consent of the parties. The regular February, 1905, term of court convened February 6, 1905, at which time defendants appeared and announced themselves ready for trial, and the cases were passed until a later day. Afterwards they were continued over the term; defendants being present and making no objections. The appellants were on bail during all the time from the filing of the informations.

No brief has been filed on the part of the state. There are two questions raised: (1) Whether the court erred in denying the application of appellants to be discharged; (2) whether error was committed in dismissing the actions without prejudice. The consideration of the first will necessarily dispose of the second. Our statute reads as follows: "If any person under indictment or information for any offense, and held to answer on bail, shall not be brought to trial before the end of the third term of the court in which the cause is pending which shall be held after such indictment found or information filed, he shall be entitled to be discharged so far as relates to such offense, unless the delay happen on his application or be occasioned by the want of time to try such cause at such third term." Gen. St. 1901, § 5666. There is some diversity of opinion among the members of the court with respect to the proper construction to be given this statute. According to one view, the words "before the end of the third term of court" refer to a distinct period of time measured by the first three successive terms of court, and, if at the end of the third term the person under indictment be

not entitled to claim the benefit of the statute because delay has happened on his application or for want of time to try the cause, then a new period of like duration begins, the slate is wiped clean, and the state has another three-term period in which to bring him to trial. Under this theory, single terms of court are not counted against the state and in favor of the person accused. Another theory counts the first, second, and third terms. If the accused has asked for a continuance at the first, second, or third term, or the delay at either of them was occasioned by want of time to try the cause, that particular term is not counted, and the state has an additional term in its stead in which to bring him to trial. Another view gives all importance to "such third term" and regards what transpired at the first or second as of no consequence. If at the end of the third term he be not entitled to claim the benefit, for the reason that the delay at that term happened on his application, the state has another term in which to bring him to trial. In *State v. Campbell* (decided at the present term) 85 Pac. 784, it was held that the terms of court intervening while an appeal by the state was pending should not be counted, although the statute makes no exception in such a case.

In the cases at bar, we are not left in doubt as to the theory of the trial court in refusing to discharge the appellants. The orders recite that the court held that, if the applications should be presented at the last day of that term or the first day of the following term, they would be granted. The court apparently considered that appellants were not entitled to count the third regular term of court, for the reason that they consented to a continuance at that term and were likewise not entitled to count the fourth, for the reason that they were present and made no objections to the causes being continued at that term. There is no diversity of opinion that, in any view of the statute, the appellants were not entitled to be discharged at the time their application was presented. A defendant may waive his rights under the statute. He may do this by consenting to, or by failing to object to, a continuance at the third or subsequent term. The court therefore committed no error in refusing to discharge the appellants. The regular third and fourth terms of court are not to be considered as terms at which they should have been brought to trial. In the one they consented to a continuance, in the other they were present and made no objection when the continuance was ordered. Under a statute which has been construed, so liberally as this has been, to mean that when discharged under it a defendant is to be deemed as acquitted of the charge against him (*State v. Edwards*, 35 Kan. 105, 10 Pac. 544), we think that, before a defendant is entitled to such an order, he must bring himself clearly within the spirit and inten-

tion of the statute. Its purpose was not to enable the guilty to escape upon technicalities, but to shield the innocent by preventing unnecessary and unreasonable delays. A defendant under indictment, who consents or raises no objection to his case being continued, is not within the purpose and intention of the law. Delay does not hurt him. Often it serves his purpose better than a speedy trial.

The judgment will be affirmed. All the Justices concurring.

#### STATE v. STEVENSON.

(Supreme Court of Kansas. June 9, 1906.)

##### 1. CRIMINAL LAW—NEW TRIAL—MISCONDUCT OF JURY.

It is not error to overrule a motion for a new trial in a criminal case for misconduct of the jury, unless the facts are such that the court may presume that prejudice resulted therefrom to the defendant.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2238, 2253, 2256.]

##### 2. HOMICIDE—INSTRUCTIONS.

In a trial upon a charge of murder it is not error for the court to define the crime of manslaughter in the second degree in the language of the statute.

(Syllabus by the Court.)

Appeal from District Court, Rawlins County; A. C. T. Geiger, Judge.

Charles R. Stevenson was convicted of manslaughter, and he appeals. Affirmed.

W. S. Morlan and Fred Robertson, for appellant. C. C. Coleman, Atty. Gen., D. O. Bye, J. P. Noble, and F. S. Jackson, for the State.

GREENE, J. Charles R. Stevenson and John Tutt engaged in a personal encounter, which resulted in Stevenson's shooting and instantly killing Tutt. Stevenson was convicted of manslaughter in the second degree, from which conviction he prosecutes this appeal.

Appellant's first contention is that the evidence is not sufficient to justify the jury in finding him guilty of manslaughter in the second degree. Upon this question suffice it to say that there was some very strong testimony of defendant's guilt from which the jury could very properly and justly return the verdict which they did.

His next contention is that he was prejudicially affected because a volume of the General Statutes of Kansas was in the room with the jury during their deliberations. Upon the motion for a new trial several of the jurors were sworn, and testified that the statutes were in the room during their deliberations, and H. F. Larsen, one of the jurymen, in his testimony said that: "I don't remember who it was, but somebody asked what manslaughter in the first degree was. Some one else said that we would find that in the Statutes of Kansas, and I mentioned then the Statutes of Kansas lay right there."

but not with the intention that we want to use it. I remember Charley Brown said that we have no right whatever to use the Statutes of Kansas in deciding this case, and the book was not touched at that time." Mr. Brown, another juror, testified that before they had arrived at a verdict he saw "D. W. Anderson, the foreman of the jury, open the Statutes, and examine it about a minute. He was looking at the paragraphs along the front, just like he was going to hunt something up." All of the jurors who testified concerning this fact stated that the Statutes and its contents were not discussed by any of the jurors at any time, and there was no testimony tending to show that it was opened by any juror, except the testimony of Mr. Brown concerning Anderson's examination, and no reference whatever was made to the Statutes during the deliberations except the statement that the definition of manslaughter could be found in it. It has been held in this court that the use by the jury of documents, the contents of which might influence the jury, is misconduct, and prejudice will be presumed. *State v. Lantz*, 23 Kan. 728, 33 Am. Rep. 215; *State v. Clark*, 34 Kan. 280, 8 Pac. 528. In the present case, however, no use appears to have been made of the Statutes in the deliberations. The mere presence of the Statutes in the room where the jury were would not, of itself, be prejudicial to the appellant, although its use might be. The idea of examining it to ascertain what the definition of manslaughter might be, if such an idea was entertained by any member of the jury, was promptly suppressed by the statement of one of them that they could not examine it, but must be governed solely by the instructions. The rights of appellant could not therefore have been prejudicially affected by the mere presence of the Statutes in the room while the jury were deliberating.

Another contention is that the jury while deliberating were permitted to separate. The only testimony on this point was given by Charley P. Hill, one of the jurors, who testified as follows: "Q. You went out with the jurors, and left the other jurors in some of the time? A. I think the jury was divided in going out a time or two, possibly three times. Q. So far as you know, you don't know what each juror did during the time you were not in the juryroom? A. Not all the time." There is no showing that these separations of the jury were not necessary to attend to the calls of nature, or that the bailiff was not with those absent. There is no claim that while out of the juryroom they came in contact with other persons. The jury were deliberating from 5 o'clock p. m. until the next morning. A mere suspicion that jurors might have been guilty of misconduct is not sufficient to justify a court in setting aside a verdict. The evidence in this case on that question does not even raise a suspicion of misconduct.

The contention that the court erred in its

instruction defining manslaughter in the second degree is not deserving of much attention. The instruction given follows: "Next, as to manslaughter in the second degree, so far as any definition of manslaughter in the second degree is concerned that can in anywise be deemed applicable to the evidence in this case, it is the unnecessary killing of another either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, after such attempt shall have failed, shall be deemed guilty of manslaughter in the second degree." It will be observed that the instruction is in the exact language of the statute, and is clear and easily understood, and the jury could not have misunderstood it. Where a statute defining a particular crime is couched in language easily understood, the court may always quote such language in defining the crime. If such statute were so long and involved or so obscure that the jury might be misled or unable to understand it readily, it might be the duty of the court to explain it, but such a rule can have no application to the statute under consideration. There was no error in defining manslaughter in the language of the statute.

The judgment of the court is affirmed. All the Justices concurring.

#### STATE v. LOGAN.

(Supreme Court of Kansas. May 12, 1906.)  
CRIMINAL LAW—INSTRUCTIONS—DUTY OF JUROR.

An instruction, relating to the individual responsibility of each juror in a criminal case, which implies that he is to act solely upon his individual judgment, and is silent as to his duty to consult with his fellow jurors, is erroneous.

(Syllabus by the Court.)

Appeal from District Court, Atchison County; B. F. Hudson, Judge.

William Logan was convicted of burglary, and appeals. Affirmed.

W. W. Guthrie, for appellant. C. C. Coleman, Atty. Gen., and F. S. Jackson, for the State.

SMITH, J. Two errors are alleged in addition to the overruling of a motion for a new trial: First, the refusal to give instruction No. 10, asked by the defendant, as follows: "The defendant is entitled to the separate judgment of each and every one of the 12 jurors, and it is the duty of each juror to refuse to concur in a verdict of guilt, unless he is satisfied in his own mind that each and every fact necessary to establish the guilt of defendant has been established by the evidence beyond a reasonable doubt." This instruction was probably intended to be framed after an instruction approved in *State v. Witt*, 34 Kan. 488, 8 Pac. 769, which reads: "If any one of the jury, after having considered all the evidence in this case, and

after having consulted with his fellow jurymen should entertain a reasonable doubt of the defendant's guilt, or after such consideration and consultation should entertain a reasonable doubt as to whether or not the defendant was present at the time and place of the alleged homicide, then the jury cannot find the defendant guilty." It will be observed, however, that a material element in the individual responsibility resting upon each juror is omitted from the instruction requested, and it is therefore erroneous. The verdict of a jury is the combined judgment of 12 men who have all heard the same evidence, and each one of whom may have received some impression therefrom differing from all his fellows, and is not the separate independent act of 12 men; that is, 12 independent verdicts. After hearing the evidence and the arguments of counsel thereon, pro and con, in which arguments the evidence is usually sought to be harmonized with the conclusion of the guilt of the defendant by the attorneys for the state, and with the conclusion of the innocence of the defendant by the attorneys for the defendant, the jurymen are segregated for the purpose of consultation and comparison of views for the purpose, of course, of coming to a common conclusion that will satisfy the judgment of each juror. If such common conclusion can be arrived at, it should be embodied in a verdict. If it cannot be arrived at, there should be a disagreement. Witnesses may feel an interest or a sympathy for one side or the other, and counsel are presumed to use all honorable efforts in favor of the side for which they appear. The deliberations, therefore, of the jury, in which all the evidence should be considered as well as all of the different theories of counsel, and the different impressions of the individual jurors, are of the utmost importance, and any instruction as to the individual responsibility of a juror which omits the important matter of consultation is clearly erroneous. The instruction asked in this case should have been, as it was, refused.

As to the second error complained of, it is the province of counsel in argument to apply the instructions of the court to the facts as shown by the evidence, and then to aid the jury in so doing. In the argument of the county attorney in this case, he told the jury that the term "reasonable doubt" in the instructions of the court did not mean a mere imaginary or captious doubt. Defendant's counsel thereupon objected, and the court remarked that, while the court had not used those words in its instructions, the definition of "reasonable doubt" was probably correct. This was no new instruction, and is not therefore required to be written. It is simply an elaboration of words. It was an illustration of what "reasonable" means—not imaginary, not captious. In this there was no error. Counsel for appellant makes a strong and vigorous argument in support

of his contention that the court should have set aside the verdict of the jury and granted a new trial on the ground that the verdict is contrary to the evidence. It is contrary to much of the evidence, and is in accord with much of the evidence. If the jury had believed the evidence upon which the attorney for the appellant places emphasis, and had disbelieved the evidence for the state, its verdict should have been different. It is the especial duty of the jury to determine the weight and credibility of the evidence, and when it has done so, and the court has approved the verdict, this court will not reverse the result on this ground, providing, of course, there is evidence which, if credible, sustains the conclusion reached.

The judgment of the district court is affirmed. All the Justices concurring.

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ROBERTSON v. ROCK ISLAND LUMBER & MFG. CO.

(Supreme Court of Kansas. June 9, 1906.)

EJECTMENT—EVIDENCE OF TITLE.

Where the title to real property is shown to have vested in seven trustees for the benefit of a church, a deed subsequently executed by two of these trustees and two other persons, the four assuming to act in behalf of the church, in the absence of any showing that these two other persons were in fact trustees, or that the four had authority to bind the church, is no evidence of title, when offered against a stranger to the deed, who is in possession, by one who fails to show that either he or any one through whom he claims ever had possession.

(Syllabus by the Court.)

Error from District Court, Harper County; P. B. Gillett, Judge.

Action by Joseph R. Robertson against the Rock Island Lumber & Manufacturing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Sam S. Sisson and G. W. Appley, for plaintiff in error. Fred Washbon and Dale & Amidon, for defendant in error.

MASON, J. Joseph R. Robertson brought action against the Rock Island Lumber & Manufacturing Company for the possession of a city lot. The pleadings were an ordinary petition in ejectment and a general denial, admitting possession. A trial was had at which the plaintiff, having shown that title had been conveyed to seven persons as trustees of the "1st M. E. Church of Harper," introduced in evidence a deed made about a year later to John B. Carey, signed by two of the individuals named as such trustees in the prior conveyance and by two other persons, these four being described in the deed to Carey as trustees of the "M. E. Church of Harper," and professing therein to act for such church. He then proved by a series of deeds that he had succeeded to whatever title Carey had held, and rested. The court sustained a demurrer to this evidence, and the plaintiff prosecutes error.

For the purpose of establishing that the church referred to in the deed to Carey was presumptively the organization named in the prior conveyance, the plaintiff in error contends that the same designation is in fact employed in each case—that the marks occurring in the conveyance to the trustees preceding the words "M. E. Church," which in the foregoing statement are assumed to be "1st," or the equivalent of the word "First," are in reality meaningless or unintelligible. To enable the court to judge of the force of this contention a photographic copy of the original instrument is incorporated in the record. From an examination of this copy it seems beyond question that the interpretation already adopted is the correct one. The variation in the name is trifling, and certainly no great amount of evidence would have been required to show that the same church was in fact intended. But whether from the similarity of names employed, and from the partial correspondence in the designation of trustees, a presumption to that effect can be deemed to arise in favor of one who is out of possession, and who does not show that either he or any one through whom he claims ever had possession, and against one who is in the present occupancy of the lot, is at least doubtful.

However, this question need not be determined. Granting that the same church was intended, plaintiff's showing of title failed at another place. The record does not indicate whether the church was a corporation or a mere voluntary association; but in either case the title was vested in trustees for its benefit, and could not only be divested by the action of persons who were in fact its trustees. Two of the persons who signed the deed to Carey were sufficiently proved to be trustees of the church by their having been so designated in the conveyance to the church, or to the trustees for the church. But there is no evidence whatever that the other two signers were such trustees, or that the four together had any authority to pass the title. The recitals of the deed constituted no evidence, for the defendant was a stranger to it. 16 Cent. Dig. c. 327; 20 Cent. Dig. c. 1976. If the plaintiff had been in possession under the deed, or if any fact had been shown from which the authority of the grantors might have been inferred, a different question would be presented.

The judgment is affirmed. All the Justices concurring.

#### LEVERTON v. RORK et al.

(Supreme Court of Kansas. June 9, 1906.)

#### APPEAL—SUFFICIENCY OF EVIDENCE.

Though the evidence to warrant the finding of a deed absolute in form to be a mortgage should be clear, cogent, and convincing, such a finding by the trial court, when supported by substantial evidence, is conclusive on the reviewing court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3971.]

Error from District Court, Atchison County; B. F. Hudson, Judge.

Suit between G. W. Leverton and Daniel Rork and others. Judgment was adverse to Leverton, and he brings error. Affirmed.

W. W. & W. F. Guthrie, for plaintiff in error. T. A. Moxcey and A. B. Crockett, for defendants in error.

**PER CURIAM.** In this case the findings of fact are supported by the evidence, and justify the judgment of the court. The principal question was whether certain transactions, including the giving of instruments in the form of deeds was intended as a transfer of the title to land, or only as security for money loaned. The court found, upon substantial testimony, that deeds absolute on their faces were mortgages.

It is insisted that the evidence in such cases should be clear, cogent, and convincing; that the testimony produced was not up to that standard; and that this court should now review and reweigh the evidence to determine its sufficiency. The district court was the trier of the facts and presumably did apply the proper test in weighing the evidence. Its findings, when supported by substantial testimony, are binding upon this court. The existence of the rule requiring clear and convincing proof does not authorize this court to retry the facts. In this case, as in any other civil case, the credibility of the witnesses, and the weight of the testimony belongs to the trial court, and its finding will not be disturbed although we might arrive at a different conclusion from the evidence. Even in a criminal case, where the guilt of the defendant must be proven beyond a reasonable doubt, a verdict supported by substantial testimony is conclusive upon the reviewing court.

There is nothing substantial in the objections to the rulings upon evidence, nor do we find any ground for the reversal of the judgment.

Judgment affirmed.

#### STATE v. SWEIZEWSKI.

(Supreme Court of Kansas. May 12, 1906.)

#### CRIMINAL LAW—EVIDENCE—ILLEGAL SALE OF INTOXICATING LIQUORS.

In a trial on the charge of a violation of the prohibitory liquor law, as well as in the trial of any other criminal charge, circumstantial evidence may be considered by the jury; but as in all other criminal cases, before a jury is justified in convicting the defendant upon circumstantial evidence alone the circumstances proven must not only all be consistent with the theory of the defendant's guilt, but they must be so strong as to exclude any other reasonable hypothesis.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1259-1262.]

(Syllabus by the Court.)

Appeal from District Court, Allen County; Oscar Foust, Judge.

Andy Sweizewski was convicted of an illegal sale of liquor, and appeals. Reversed.

Gard & Gard, and Hazen & Gaw, for appellant. C. C. Coleman, Atty. Gen., and Burton E. Clifford, for the State.

SMITH, J. The appellant was indicted on eight counts for selling intoxicating liquors in violation of law, and on one count for maintaining a common nuisance by a grand jury of Allen county, and, upon being brought to trial in the district court, the case was dismissed as to all but three counts for unlawful sales, and the one count for maintaining a nuisance. On the trial the jury found the appellant guilty on the three counts for unlawful sales, and not guilty upon the charge of maintaining a nuisance. The appellant filed his motion for a new trial, on the ground that the verdict was not sustained by the evidence, which motion was overruled, and he was sentenced and now appeals to this court.

The county attorney admits that there was no evidence to show that the appellant by himself, or through any agent or employé, made the sales upon which he elected to rely for conviction, and, indeed, it does not appear from the record that the witnesses who testified to buying intoxicating liquor were even asked on the part of the state from whom they made the purchases. If it be assumed that the witnesses knew from whom they made the purchases, the examination would indicate that there was no real attempt made to convict the appellant. It is contended, however, on the part of the state that the evidence did disclose these facts, to wit: "(1) That this defendant conducted a barber shop on North Washington avenue in Iola City, in a rear room of which liquor was sold. (2) That this defendant was frequently in said back room, as often as two or three times a day. (3) That persons going to and from this back room would go through defendant's barber shop."

It is further said, as the court correctly instructed the jury, that if they should believe beyond a reasonable doubt that the defendant knowingly and intentionally aided or abetted in the commission of the alleged sales, then they would be warranted in finding the defendant guilty; that the facts above recited are sufficient to sustain the verdict of the jury. These facts are purely circumstantial. Before a jury is justified in finding a defendant, in a criminal action, guilty upon circumstantial evidence alone, the circumstances must be so strong as not only to be consistent with the theory of the defendant's guilt, but must also exclude every reasonable hypothesis which the evidence suggests, except that of the guilt of the defendant. The facts above relied upon do not exclude every reasonable hypothesis save that of the defendant's guilt, but do suggest that the defendant for numerous reasons may be entirely innocent.

The motion of the appellant for a new trial

should have been sustained, and the judgment of the court below is reversed, with instructions to grant a new trial. All the Justices concurring.

#### TOPEKA RY. CO. v. CASSON.

(Supreme Court of Kansas. June 9, 1906.)

##### APPEAL—CONFLICTING EVIDENCE.

The weight of oral conflicting evidence, there being evidence tending to support the verdict, cannot be reviewed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3935.]

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action by Agnes H. Casson against the Topeka Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Ferry & Doran, for plaintiff in error. R. B. Welch, Chas. D. Welch, and Thos. G. Ayres, for defendant in error.

PER CURIAM. Kansas avenue in the city of Topeka runs north and south. The Topeka Railway Company has double tracks, occupying the center of the street, which are about six feet apart. Ninth street crosses Kansas avenue at right angles. The defendant in error was driving one horse, attached to a canopy top buggy, going north on Kansas avenue, about eight or ten feet west of the west tracks. When she arrived at the south side of Ninth street she saw, approaching her from the north, an express wagon and other vehicles. She concluded she could proceed faster if she crossed to the east side of Kansas avenue, and attempted to do so. She testified that before she went on to the west track she looked out of her buggy to see if a car was approaching, and saw none; that just as she reached the east track a car going north struck her horse throwing him back on the west side of the track, and throwing her forward against the dashboard and then backward on the buggy seat causing her serious injury.

The negligence charged against the defendant is that the car which struck plaintiff was negligently propelled at the rate of about 25 miles an hour in violation of a city ordinance which, by its provisions, limits the rate of speed of electric cars to eight miles an hour; that defendant's agents and employes negligently failed to sound the gong on the car, or give other notice of its approach until the car had collided with plaintiff's horse and buggy; that the defendant's servants negligently omitted to stop the car after they discovered the plaintiff was attempting to cross its track, and in danger, as it could have done by the exercise of proper care. The answer was a general denial and for the second defense alleged that: "If said plaintiff suffered any injuries at the time and place mentioned in said petition, the same were caused by the

careless, negligent, and reckless acts of said plaintiff, and the same would not have occurred but for the careless, negligent, and reckless acts of said plaintiff." When the plaintiff had introduced her evidence and rested, defendant demurred thereto, which demurrer was overruled. It then introduced its evidence and upon a general verdict for plaintiff a judgment was entered. The defendant prosecutes this proceeding to reverse this judgment. The errors assigned that require his attention are the overruling of defendant's demurrer to plaintiff's evidence, and the giving of certain instructions.

This court cannot weigh oral evidence. Whenever it appears that there is substantial testimony tending to prove all material questions of fact involved in a given controversy, and the jury have weighed and determined upon which side it preponderates, and their judgment is concurred in by the trial court, this court will not further review the evidence. The jury, in weighing evidence, may believe one witness and disbelieve another. Whether their judgments and conclusions are correct or incorrect this court will not decide. In this case there was evidence tending to support the allegations of the plaintiff's petition, therefore, we cannot say that the court committed error in overruling the demurrer.

The second contention is that the court committed prejudicial error in stating the law of the "last clear chance" to the jury. No contention is made that the law was incorrectly stated, but that such principles had no application to the facts of this case. This conclusion is based upon the assumption that the plaintiff was guilty of contributory negligence in going upon the tracks as she did, and that her negligence was continuing up to the time the car collided with her horse. The specific claim is that the law of the "last clear chance" can never be applicable where the plaintiff is guilty of continuing contributory negligence. The result of plaintiff in error's argument is that, admitting its negligence in not stopping its car after discovering the dangerous position of plaintiff, she was also negligent in not extricating herself from her perilous position after she discovered it and before the car collided with her; that where two parties are equally negligent and damage results to one, the other cannot recover; that if two persons were driving in opposite directions on a public highway with equal opportunity to avoid a collision neither wishing to give any part of the traveled track to the other and they collide, neither could recover from the other for any injuries sustained because both were equally guilty. The argument of plaintiff in error upon this point is based upon the assumption that plaintiff was guilty of contributory negligence in going upon the track, and was also guilty of continuing negligence in not pulling her horse off the track after she discovered her danger, and before she

was injured. The findings of the jury conclusively deny these assumptions of plaintiff in error. The result of the general verdict of the jury is conclusive that plaintiff was not negligent in going upon the track, and was not negligent in pursuing her course. It is conclusive upon the defendant that it was negligent in driving the car at a too high rate of speed; and that the motorman saw plaintiff's danger, or by the exercise of proper care should have seen it, in time to have stopped the car before the collision occurred. The record presents nothing but a question of fact. The argument of counsel against the applicability of the instruction is based entirely on a statement of facts which the jury, by its general verdict, found did not exist.

The judgment must therefore be affirmed.

#### KANSAS CITY, M. & O. RY. CO. v. ROCKWELL.

(Supreme Court of Kansas. June 9, 1906.)

#### RAILROADS—KILLING ANIMALS—NEGLIGENCE.

Evidence, in an action for the killing, by a train at a crossing, of plaintiff's horse, which had escaped and was running along the road, held sufficient to sustain a finding of negligence on the part of the trainmen.

Error from District Court, Harper County; P. B. Gillett, Judge.

Action by J. N. Rockwell against the Kansas City, Mexico & Orient Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

John A. Eaton and Fred Washlon, for plaintiff in error. E. C. Wilcox, for defendant in error.

PER CURIAM. The plaintiff in error ran its train over and killed a horse belonging to the defendant in error, who recovered therefor in the district court of Harper county. The railway company brings the case here for review, and claims that the verdict is contrary to the evidence and that the evidence does not tend to establish the negligence alleged in the petition.

The record shows, in substance, that the railroad runs through the farm of the defendant in error from the northeast to the southwest. His residence is located north of the track, and on a public highway running north and south across the railroad. On the day of the injury the defendant in error was plowing south of the railroad, near the highway. At noon he unhitched his team to go home for dinner. While doing so one of the horses got away, and started up the highway toward the railroad track. The defendant mounted the other horse, and tried to overtake and catch the loose horse, but did not succeed, and as the loose horse was crossing the railroad track on the highway it was struck by a train coming from the northeast, and killed. North of the crossing about 10

feet was a mail crane, where the mail for the post office of Ruby was taken and received. The postmistress, Miss Minnie Belding, was at the mail crane at the time the train passed. The ground in the vicinity of the crossing is level, and nothing intervened to prevent the engineer or fireman from seeing the horse as it approached the crossing, except the mail pouch hanging on the crane. Miss Belding saw the situation, and stepped out onto the track and waved her sunbonnet to attract the attention of the trainmen. She began this movement when the train was about 1,300 feet from the crossing and the horse about 60 feet therefrom, and continued until the train was within 25 feet of her. The engineer sounded the whistle when about 80 rods from the crossing for the purpose of warning the postmistress, but no further or other whistling was done. The train was two hours behind time, and running at a rate estimated to be 15 miles an hour. No effort was made to check the speed of the train, or to avoid striking the horse. The engineer had his face turned south, and apparently was not looking in the direction of the crossing. The fireman was shoveling coal into the firebox. The negligence charged in the petition was failure to keep proper lookout, failure to check speed of the train, failure to sound the whistle at the crossing or to give other warning. The train was running upon a slight upgrade, such that the train might have been stopped within 100 feet. There was other evidence in the case, amply sufficient to have exonerated the railway company from liability, if the jury had accepted it as the truth. The jury is the exclusive judge of the evidence, and when as in this case, it is conflicting, this court cannot disturb the verdict. There is evidence in the case which supports several of the averments of negligence in the petition, and sufficient to justify the verdict.

The judgment is affirmed.

#### STATE v. ROSE.

(Supreme Court of Kansas. June 9, 1906.)

##### 1. CONTEMPT — JURISDICTION OF SUPREME COURT.

The Supreme Court has inherent power to punish for contempt, and to determine whether a contempt has been committed.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, § 102.]

##### 2. SAME — PROCESS TO BRING PARTY INTO COURT.

Under Gen. St. 1901, § 1983, providing that on the return of an officer on process or on an affidavit showing a person guilty of indirect contempt, a writ of attachment or other lawful process may issue, and such person be arrested and brought before the court, and thereupon a written accusation setting forth the facts alleged to constitute the contempt shall be filed, it is not necessary that an attachment issue and an arrest be made to bring a person into court for contempt proceedings, but a citation is sufficient process.

Quo warranto by the state against W. W. Rose. Contempt proceedings were instituted against Rose, and he moves to quash. Denied.

C. C. Coleman, Atty Gen., for the State. C. F. & S. D. Hutchings, John H. Atwood, E. S. McAnany, and Nathau Cree, for defendant.

PER CURIAM. On the rule to show cause why the respondent should not be punished for contempt of the judgment of this court he makes a special appearance, and insists that the citation served upon him is not legal process, and that jurisdiction over him can only be acquired by the issuance of a writ of attachment and an arrest under it. Gen. St. 1901, § 1983.

The Supreme Court is a constitutional tribunal, and has inherent power to punish for contempt and to determine whether a contempt has been committed. Assuming, however, that the statute relating to indirect contempts controls, the issuance of an attachment and the arrest of a defendant under it is not necessary to initiate the proceedings, nor to give jurisdiction. When it is brought to the attention of the court that a person is guilty of contempt the court may issue such process as the circumstances of the case may require. An attachment, may issue, but its issuance is not an absolute requirement as the statute provides that other legal process may issue. A citation is an appropriate process which has the sanction of long usage, and may be fairly regarded to be such legal process as will bring the respondent into court. The essential thing is that the respondent shall have notice and opportunity to explain or purge. The initial step, whether by attachment or citation, is only preliminary to a formal accusation, to which respondent is required to answer, and upon issue thus joined trial is to be had. An arrest is a harsh proceeding, one which may be wholly unnecessary, and is a method which should never be employed unless required by the circumstances of the case.

We think that a citation is legal process within the meaning of the statute, and therefore the motion to quash the rule to show cause is denied.

#### CHICAGO, R. I. & P. RY. CO. v. LOST SPRINGS LODGE, NO. 494,

I. O. O. F.

(Supreme Court of Kansas. June 9, 1906.)

##### 1. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Though, in an action for fire set by a train, there was evidence of the accumulation of combustible material on plaintiff's property, so that the court might well have given an instruction referring expressly to that matter, to the effect that if plaintiff allowed dry grass and weeds to remain on its premises, so that fire could readily start therein, that could be considered as a circumstance tending to prove contributory negligence, yet the refusal of this was harmless;

the jury having been told in general terms that any contributory negligence of plaintiff—any negligence in its management and control of its premises by reason of which the fire was communicated thereto—would bar recovery, and there having been no suggestion that plaintiff could have been negligent in any way affecting the case, except by permitting said accumulations.

**2. TRIAL—QUESTIONS FOR SPECIAL FINDINGS.**

That questions for special findings are propounded in a negative and leading form justifies the court in rejecting them.

**3. APPEAL—HARMLESS ERROR—INSTRUCTIONS.**

The giving of instructions broadening the issues presented by the pleadings with regard to the character of the negligence charged against defendant is harmless, the jury having specially found the existence of a form of negligence alleged in the petition.

Error from District Court, Marion County; R. L. King, Judge.

Action by Lost Springs Lodge, No. 494, Independent Order of Odd Fellows, against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

M. A. Low, W. F. Evans, and Paul E. Walker, for plaintiff in error. C. M. Clark, for defendant in error.

**PER CURIAM.** An Odd Fellows lodge, owning a cemetery the trees in which were injured by a fire, sued the Chicago, Rock Island & Pacific Railway Company for the amount of damage so occasioned, alleging that the fire was caused by the company's negligence, and recovered a judgment, from which the defendant prosecutes error.

Complaint is made of the refusal to give an instruction requested by the defendant to the effect that if the plaintiff allowed dry grass and weeds to remain on its premises so that fire could readily start therein, that should be considered as a circumstance tending to prove contributory negligence. There was some evidence of the accumulation of combustible material in the cemetery, and the court might well have given an instruction referring expressly to that matter. This was not done, but the jury was told in general terms that any contributory negligence of plaintiff—any negligence in its management and control of the cemetery by reason of which the fire was communicated thereto—would bar a recovery. There was no suggestion that the plaintiff could have been negligent in any way affecting the case except by permitting the accumulations referred to, and the jury must have understood the instructions to relate to this feature of the evidence. Under the circumstances it cannot be said that material error in this regard is shown.

Error is also assigned on account of the refusal to submit to the jury a number of questions for special findings. All but two of these questions were propounded in a negative and leading form, a fact which of itself justified the court in rejecting them. A., T. & S. F. Railroad Co. v. Butler, 56 Kan. 433,

43 Pac. 767. The two exceptional instances were rendered unimportant by a finding that was made in answer to another question. Complaint is further made that the instructions broadened the issues presented by the pleadings with regard to the character of the negligence charged against the defendant. This is immaterial, if true, for the jury specially found the existence of a form of negligence that was alleged in the petition.

The judgment is affirmed.

**AMERICAN SMELTING & REFINING CO.  
v. HOKE.**

(Supreme Court of Kansas. June 9, 1906.)

**TRIAL — CONFLICT BETWEEN VERDICT AND SPECIAL FINDINGS.**

The special findings, in an action for injury to an employé from the falling of a platform on which he was working, the negligence alleged being the removal of a burr beneath it, showing that there was a conspicuous danger, and therefore contributory negligence, in going on the unsupported end of the platform, and removing one of its sustaining parts, even if the burr had been in place, will control the general verdict for plaintiff.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 857, 860.]

Error from District Court, Wyandotte County; J. McCabe Moore, Judge.

Action by Emery Hoke against the American Smelting & Refining Company. Judgment for plaintiff. Defendant brings error. Reversed and remanded.

Harkless, Crysler & Histed and A. L. Berg-er, for plaintiff in error. M. J. Reitz and Jos. Taggart, for defendant in error.

**PER CURIAM.** The plaintiff recovered damages for injuries occasioned by the collapse of a wooden "runway" suspended by iron rods from the ceiling of a building forming a part of the defendant's smelting plant. Originally a runway along the south side of the building and another along the west side of the building met in such a manner as to permit access from one to the other. The runways were built in sections, and a portion of the south section of the west runway had been sawed out to permit the dismantling of some machinery in the plant. Plaintiff was engaged in removing the handrails of the west runway when it fell. The only ground of negligence on the part of the defendant submitted to the jury was that a burr beneath a sleeper of the runway was gone from one of the hanging rods. The jury returned a general verdict in favor of the plaintiff.

The defendant charged the plaintiff, in general terms, with contributory negligence. This question the court submitted to the jury in the following broad instruction: "It was the duty of the plaintiff to exercise all reasonable and ordinary care to avoid injury to himself and to guard himself from any and all danger of injury from any cause of which he had notice, or could have known

by the exercise of reasonable care and prudence on his part, and, if he failed in this respect and was injured thereby, then he cannot recover for any injuries so received by him." Special findings were returned as follows: Question No. 1: "What was the south end of the West runway fastened to?" Answer: "6 x 6 timber bolted to wall of engine room." Question No. 2: "How far north of the South runway was the first set of hanging rods on the West runway?" Answer: "16 feet." Question No. 3: "State whether a portion of the first section of the West runway north of the South runway had been sawed out." Answer: "Yes." Question No. 4: "About what length of the section referred to in question No. 3 was left standing after the portion was cut out?" Answer: "About 9 feet." Question No. 5: "How long before this accident was the South end of the West runway cut out?" Answer: "10 days or two weeks." Question No. 6: "What support remained to sustain that portion of the first section of the runway not cut out?" Answer: "Uprights, braces and handrails." Question No. 7: "State if the section of the runway fell when Hoke first went upon it and tested it?" Answer: "No." Question No. 8: "State if Hoke pried both of the rails loose before the section of the runway fell?" Answer: "Pried one loose, and was prying the second loose when he fell." Question No. 9: "State if it was the remainder of the section of the West runway between the hanging rods and South runway which had not been sawed out that fell?" Answer: "Yes." Question No. 10: "Did the section on the West runway north of the first pair of hanging rods from the south, or any portion of said section, fall?" Answer: "No." Question No. 11: "Was plaintiff standing on the portion of the runway that fell just prior to its falling?" Answer: "Yes." These findings show that the first pair of hanging rods was nine feet north of the sawed end of the section which fell, and upon which plaintiff was standing when it fell; that the only support of that part of the runway was its own uprights and the handrails which the plaintiff undertook to remove, and that the part of the runway north of the first pair of hanging rods did not fall. While the general verdict finds that by the negligence of the defendant the burr in question was gone, the special findings exhibit a conspicuous danger in going upon the unsupported end of the mutilated platform and removing one of its sustaining parts, even if the burr had been in place. Contributory negligence of this kind was covered by the instruction quoted. The special findings cannot be reconciled with the general verdict, and under the statute they are controlling.

The judgment is reversed, and the cause is remanded, with instruction to enter judgment in favor of the defendant for costs.

KANSAS CITY et al. v. SILVER et al.

(Supreme Court of Kansas. June 9, 1906.)

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENT—CURATIVE ACT.

Laws 1903, p. 207, c. 122, § 129, providing that if a city levy an assessment for a public improvement, which assessment is informal, illegal, irregular, or void for want of sufficient authority to make or levy the same, or for any cause whatever, the city may relevy the same in the manner provided, cures the proceedings for the improvement, void because the petition therefor was not signed by enough to give jurisdiction.

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by Silas B. Silver and others against the city of Kansas City and others. Judgment for plaintiffs. Defendants bring error. Reversed and remanded.

J. W. Dana, T. A. Pollock, E. S. McNany, and Ralph Nelson, for plaintiffs in error. W. S. Carroll, C. F. Hutchings, Samuel Maher, and Kepfinger & Trickett, for defendants in error.

PER CURIAM. The city of Kansas City undertook to pave one of its streets and to assess the cost upon the property specially benefited. The defendants in error enjoined the assessments against their property, the original petition for the improvement having lacked the required number of signatures. The Legislature then passed the general curative act embodied in section 129, c. 122, p. 207, Laws 1903, which reads as follows: "In case the mayor and council of any city shall have heretofore levied or shall hereafter levy any special assessment for any public improvement in said city, which special assessments are or may be informal, illegal, irregular, or void for the want of sufficient authority to make or levy the same, or for any cause whatsoever, the mayor and council of such city may at any time relevy any such special assessments in the manner provided, and against the property liable for assessment for such improvement at the time of the making thereof; provided, that in all cases where informal, illegal, irregular, or void special assessments levied for any improvement against any lot or piece of land shall have been paid, in whole or in part, such lot or piece of land shall not be reassessed for the assessment of the part thereof so paid."

Afterward the city, by ordinance, relieved the special assessments upon the property liable therefor, and was again enjoined. To review the second judgment this proceeding in error was commenced. The statute was intended to cure proceedings void for want of a sufficient petition; that is, void for want of jurisdiction, as in this case. A petition might have been dispensed with by the Legislature in the first instance and hence the curative statute was within the constitutional power

of the Legislature to enact. The act is, of course, to be construed as applicable to defects within the power of the Legislature to remedy, and the defendants in error can complain of no invalidity in the law which does not affect them. The extent of the restrictions to be placed upon the taxing powers of cities is a legislative and not a judicial question. The curative act by express terms authorizes a reliev, and not a doing over of the whole process including a reappraisalment, reassessment, etc. The method "provided" for reliev is by ordinance as in other cases, and the property "liable" is the property benefited when the improvement was made. The argument that there was no law for doing what the city did is answered by the statute book. The reliev having been made under the new statute the former judgment creates no estoppel.

No new question of law is presented. The principles involved are fully covered by former decisions of this court. *Hines v. Leavenworth City*, 3 Kan. 186; *Emporia v. Norton*, 13 Kan. 569; *City of Emporia v. Norton*, 16 Kan. 236; *City of Emporia v. Bates*, 16 Kan. 495; *Newton v. Atchison*, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486; *Mason v. Spencer*, 35 Kan. 512, 11 Pac. 402; *Newman v. Emporia*, 41 Kan. 583, 21 Pac. 593; *Manley v. Emlen*, 46 Kan. 655, 27 Pac. 844; *Kansas City v. U. P. Ry. Co.*, 59 Kan. 427, 53 Pac. 468, 52 L. R. A. 321; *State v. Smiley*, 65 Kan. 240, 69 Pac. 199, 67 L. R. A. 903; *Leavenworth v. Water Co.*, 69 Kan. 82, 76 Pac. 451; *Tarman v. Atchison*, 69 Kan. 483, 77 Pac. 111.

The judgment of the court of common pleas is reversed, and the cause remanded, with instructions to render judgment for the city on the agreed facts.

#### KEMPF et al. v. KOPPA et al.

(Supreme Court of Kansas. June 9, 1906.)

##### 1. EVIDENCE—MENTAL CAPACITY.

A wide range of testimony is allowed in cases involving mental capacity, and, as a general rule, any and all conduct of the one whose sanity is in question is admissible in evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 167; vol. 40, Cent. Dig. Wills, § 712.]

##### 2. SAME—OPINION EVIDENCE.

An unprofessional witness, who has had adequate opportunities to observe the conduct, declarations, and appearance of a person alleged to be insane, is competent to form and express an opinion as to the mental condition of such person.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2242; vol. 49, Cent. Dig. Wills, § 116.]

##### 3. SAME.

The qualifications of a witness examined, and it is held that his opportunities and powers of observation were such as to make his opinion admissible.

(Syllabus by the Court.)

Error from District Court, Atchison County; B. F. Hudson, Trial Judge.

Action by Katherine E. Kempf and others against William Koppa and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Jackson & Jackson and Means & Archer, for plaintiffs in error. Waggener, Doster & Orr, for defendants in error.

JOHNSTON, C. J. Christian Deuhn and Cecella Deuhn, who were advanced in years, entered into a contract with William Koppa, by which they conveyed to him a tract of land, the consideration being that he should assume and pay a mortgage on the land and should pay to them \$400 per year during their lifetime, or pay that amount during the lifetime of either of them. The Deuhns had no children, and after both had died some of their heirs brought this action, attacking the validity of the deed and contract upon the ground that, at the time of their execution, Mrs. Deuhn was mentally incapable, and did not understand the nature and effect of her acts. In trying this issue the court called a jury submitted to it the single question, "Was Cecella Deuhn, on the 19th day of November, 1903, at the time said contract and deed were made and executed, mentally competent to know and understand the business or transaction in which she was engaged when making said contract and deed?" To this question an affirmative answer was made. The court took the same view of the facts and found that Mrs. Deuhn was sane and capable when she executed the instruments, and accordingly gave judgment against the plaintiffs.

The principal question presented here arises on the ruling permitting J. P. Adams to express an opinion as to the mental capacity of Mrs. Deuhn. The witness is an attorney who had an acquaintance with the Deuhns, and had transacted business for them. When the condition of Mrs. Deuhn's mind became a question, Adams visited and conversed with her, observed her acts, declarations, and manner, and later expressed the opinion in court that she was mentally capable. In addition he testified as to her conversation with him and her conduct in his presence. A wide range of testimony is allowed in cases where mental capacity is in question. It is a general rule that any and all conduct of the person is admissible in evidence. 1 Wigmore on Evidence, § 228. About the time of the execution of the deed in question the witness was with Mrs. Deuhn at dinner and talked with her about two hours. He related her conversation with him and testified in regard to her acts and statements at that time, as well as on other occasions when she was in town and called on him at his office. All this was competent testimony, and at the same time it served to show the opportunity which the witness had of observing and judging of Mrs. Deuhn's mental condition. An unprofessional observer is competent to form a judgment and express an opinion on the

sanity or insanity of one he knows. A fundamental qualification is that the witness shall have had adequate opportunities of observation of the conduct, declarations, and appearance of the person whose sanity is in question. The weight and force of the testimony will depend upon the extent of the opportunity, as well as the power and habits of observation possessed by the witness, and a consideration of all the circumstances under which his opinion was formed. The courts do not undertake to lay down a definite rule as to how closely the witness must have observed the person whose sanity is the subject of inquiry in order to be qualified as a witness, as even a casual observer may discover mental manifestations that would make his testimony valuable. Whether there is a fair basis for an opinion by a witness must be left largely to the trial court, and the jury taking note of the opportunity and powers of observation of the witness, must then decide what weight and effect shall be given to his opinion. *Baughman v. Baughman*, 32 Kan. 538, 4 Pac. 1003; *State v. Beuerman*, 59 Kan. 586, 53 Pac. 874; *Grimshaw v. Kent*, 67 Kan. 463, 73 Pac. 92. The visit of Adams to the home of Mrs. Deuhn, his conversation with her, after his attention had been called to her mental condition, his study of her mental manifestations at that time and on other occasions, warranted him in giving his judgment as to her mental condition.

The contention that he formed his opinion from what he learned from others, and not from personal observation, is not justified by the record. He expressly stated that he formed his opinion from his observation of and experience with her. Incidentally he did state that he had conversed with some of her neighbors at the time of his visit, but when pressed for the basis of his opinion he said that it had been formed from his conversation with her.

Other errors were assigned, but they were not argued, and hence are not entitled to consideration.

Judgment affirmed. All the Justices concurring.

#### STATE v. COLE.

(Supreme Court of Kansas. June 9, 1906.)

#### CRIMINAL LAW—BILL OF EXCEPTIONS—SETTLING—EXTENSION OF TIME.

Where, in a criminal case, the trial court extends the time for settling and signing a bill of exceptions beyond the term, the order must fix the time definitely within which it shall be settled and signed, and an order of extension which leaves the time when it shall be settled and signed to depend upon a five days' notice by either party to the other will not extend the time beyond the term.

(Syllabus by the Court.)

Appeal from District Court, Decatur County; A. C. T. Geiger, Judge.

Newt Cole was convicted of an illegal sale

of intoxicating liquors, and he appeals. Dismissed.

J. F. Peters, for appellant. C. C. Coleman, Atty. Gen., and F. S. Jackson, for the State.

GREENE, J. The defendant was convicted on three counts charging illegal sales of intoxicating liquor, and on one count charging him with maintaining a nuisance in violation of the prohibitory law. Judgment was rendered against him, to reverse which he prosecutes this appeal.

The state challenges the jurisdiction of this court to investigate or determine any question involved in the merits of this appeal. It appears that on November 10, 1905, the court extended the time for the defendant to prepare and serve his bill of exceptions to include December 11, 1905; that the state was allowed 10 days thereafter to suggest amendments; and that the bill of exceptions was to be settled and signed upon 5 days' notice. The bill of exceptions and suggested amendments were served within the time allotted. Notice was given, and the bill of exceptions was settled and signed December 28, 1905.

Prior to the enactment of chapter 275, p. 502, of the Laws of 1901 (section 4753, Gen. St. 1901), a bill of exceptions in a criminal prosecution could be settled only at the term of court at which the trial was had. By the provisions of this act authority was conferred upon the court to extend the time beyond the term for settling and signing a bill of exceptions. Before the passage of this act the time for settling and signing the bill of exceptions was definite and certain; namely, the term of court at which the trial was had. By this act, although the court may extend the time, yet the order of extension must be as definite and certain as to the time within which the act shall be performed as before the passage of the act. In making the order of extension in this case the court omitted to observe this requirement as to fixing the time when the bill of exceptions should be settled. The order is that the bill of exceptions shall be settled and signed upon five days' notice after it and the amendments thereto have been served. This leaves it for either of the parties to fix the time for settling and signing the bill of exceptions by serving five days' notice upon the other. This is not in compliance with the statute, and is ineffectual to extend the time beyond the term of court. This court is therefore without jurisdiction.

Were we permitted to examine the record, we would find that under the extension order the time for serving the bill of exceptions and suggesting amendments expired December 21, 1905, and by giving to the order the effect which would be contended for by appellant, that the time could be made definite by adding to this period five days, which was the time for notice, making the time ex-

pire December 26, the appellant's position would be no better, because the bill of exceptions was not settled and signed until December 28th, two days after the expiration of the time contended for.

The cause must therefore be dismissed. All the Justices concurring.

#### STATE v. STONE.

(Supreme Court of Kansas. June 9, 1906.)

##### RAPE—STATUTORY CRIME—EVIDENCE.

Defendant was convicted of carnally knowing a female under the age of 18 years. *Held* that under all the correlated circumstances of the case, no abuse of the trial court's discretion is shown by the admission of evidence of an act of sexual intercourse between the defendant and the prosecutrix occurring 15 months after the one charged, of a succeeding attempt at abortion, of renewals of a previous promise of marriage, of the flight of the defendant, and of the birth of a child as a result of the second carnal act.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, §§ 54, 64.]

(Syllabus by the Court.)

Appeal from District Court, Montgomery County; Thos. J. Flannelly, Trial Judge.

Roy M. Stone was convicted of crime, and appeals. Affirmed.

O. P. Ergenbright and J. B. Tomlinson (J. R. Charlton, of counsel), for appellant. C. C. Coleman, Atty. Gen., and T. E. Wagstaff (S. H. Piper, of counsel), for the State.

BURCH, J. Appellant was convicted of the crime of carnally knowing a female under the age of 18 years.

The principal errors assigned are that, in his opening statement to the jury, the county attorney related facts which he expected to prove concerning the relations of appellant and the prosecutrix occurring subsequent to the date of the crime charged and involving other punishable offenses, that evidence of the character outlined in the opening statement for the prosecution was introduced, that the cross-examination of appellant as a witness in his own behalf was unduly extended, and that the evidence was insufficient to support one of the material allegations of the information. If the evidence itself was proper, the statement of it to the jury was proper. Therefore the first two propositions present but one legal question. The evidence need only be sketched. It discloses an agreement between two young people to marry; a lustful desire on the part of the appellant to enjoy his betrothed, which was gratified on the night of May 10, 1902, a month before she was capable, in law, of giving her consent; temporary grief and seeming repentance for the act, and a vow against its repetition; Sunday visits, evening calls three or four times a week, attendance upon church and balls together, and otherwise intimate relations until August, 1903, when another act of sexual intercourse

occurred; pregnancy of the prosecutrix, her submission to an attempt at an abortion with medicine procured by appellant, renewed promises to marry, and statements on his part concerning preparations for a place for them to live; his flight to the state of Washington, and the birth of her babe in May, 1904.

Counsel for appellant insist upon discussing the case as if it were within the rule that one crime cannot be proved by other disconnected offenses, and the authorities for that rule are presented with much unction. Such cases are distinguished by this court in the case of *State v. Borchert*, 68 Kan. 360, 74 Pac. 1108. It is argued with great vigor that acts of sexual intercourse subsequent to the one charged in the information have no relevancy. Upon this question the courts are divided. This court, in the case just cited, came to the conclusion that such conduct may, under certain circumstances, evidence previous acts of the same kind. Such is the rule in the majority of the states. It is approved by a majority of the text-writers, and will be adhered to in this case.

It is further contended that other of the facts recited occurring subsequent to May 10, 1902, had no tendency to prove the incident alleged to have taken place on the night of that day. On the morning of May 11, 1902, these young people possessed, so far as the record shows, all virtues but that of chastity. It is not probable that they could have met as strangers, suddenly sinned, and parted. Their downfall resulted from a relation of intimacy giving opportunity for the display of overmastering passion. It is known of all men that some length of time is usually occupied in the formation of such relations between virtuous persons, and when once they are shown to exist it may be concluded with safety that they have persisted through an appreciable period of the past. Subsequent intimacy does illustrate the prior dispositions of individuals of opposite sex toward each other, and the question is how far derivable inferences may be carried backward. Manifestly this is, in the main, a question of weight, and not of relevancy. In the case of *Keller v. Donnelly*, 5 Md. 213, 219, an action for seduction, it is said: "Whilst what occurred when the girl was 23 years of age could not give a cause of action, it might serve to illustrate and explain what took place five years previously."

The question here involved is discussed in all its phases in a learned and philosophical way by Prof. Wigmore in his epoch-making work on Evidence (volume 1, §§ 216, 394-402), where the leading authorities are collated. His conclusion is stated as follows: "The limits of time over which the evidence may range must depend largely on the circumstances of each case, and should be left to the discretion of the trial court. A subsequent existence of the desire is equally relevant with a prior one. It is true that the

contingencies of error are different—i. e., in the former case the desire may have been first induced by intervening circumstances; in the latter it may have been ended by them; but the strength of these contingencies is no greater in one instance than in the other. If, for example, the parties have been intimate during the entire year 1890, and an act of adultery is charged on July 1st, an adulterous desire on December 31st carries no less persuasive weight than an adulterous desire on January 1st. That there is any distinction is generally repudiated." The perturbation of the young people upon the discovery of the girl's pregnancy, the resort to drugs, his flight when her shame could no longer be concealed, and the birth of the child, are all as inseparably connected with the second act of intercourse, so far as evidential value is concerned, as if they had all occurred in a single day. In the light of the full description given of the relations of the parties prior to August, 1903, their mutual passion for each other then, which appellant admitted, rendered probable the crime charged in the information. No doubt proper limitations were placed upon the evidence complained of, since no error is assigned relating to the instructions to the jury.

This court has many times announced rules of great liberality respecting the cross-examination of defendants who take the witness stand in their own behalf. To apply them to each specific question and answer assigned as error is unnecessary. The court has read the evidence, and is satisfied that the limits of the trial court's discretion were not transgressed, and that no substantial right of the defendant was invaded. The evidence relating to the continuous absence of the defendant from the state was sufficient.

The judgment of the district court is affirmed. All the Justices concurring.

(74 Kan. 836)

# GIBBONS v. WOOLLEY.

(Supreme Court of Kansas. June 9, 1906.)

## APPEAL—CONFLICTING EVIDENCE.

Judgment for plaintiff on conflicting evidence, in an action for breach of contract to marry, will not be disturbed, though the trial court, in refusing a new trial, while expressing its belief that any jury would reach the same conclusion, intimated that the court might have found differently.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3948, 3949.]

Error from District Court, Sedgwick County; T. O. Wilson, Judge.

Action by Eudora Woolley against H. Gibbons. Judgment for plaintiff, and defendant brings error. Affirmed.

Adams & Adams, for plaintiff in error. Henry C. Sluss, for defendant in error.

**PER CURIAM.** This action was brought in the district court of Sedgwick county by

the defendant in error, to recover damages for the breach of a contract of marriage alleged to have been made with her by the defendant. She obtained a verdict and judgment for \$1,000. The defendant is not satisfied and has brought the case here for review.

He insists that the verdict is contrary to the evidence. The evidence produced on the trial consists of the oral testimony of each party, and the correspondence between them, both before and after the contract is claimed to have been entered into. The plaintiff testified fully to the contract of marriage, and gave a history of the tender and endearing circumstances which attended the exchange of nuptial vows. Her story is consistent, natural, and bears the impress of truth. On the other hand, the defendant denies the contract of marriage, but on cross-examination admits the existence of a relation between himself and the plaintiff which suggests marriage as an appropriate and highly proper supplement thereto. His story indicates that he must have known that she was deeply infatuated with him, and believed their marriage a certainty. His statement as a witness is open to the construction that he did not intend at any time to marry the plaintiff, and never promised to do so, but indulged and encouraged her in the belief that he intended to make her his wife. That she sat upon his lap for hours and yielded herself to his caresses, in full expectation of a speedy marriage, while he held her in his arms and fondled over her with intentions wholly foreign to matrimony. Both parties agree that their amatory demonstrations did not at any time reach the point where they could be called improper. These two views were presented to the jury by the statements of the parties on the witness stand. The letters introduced in evidence, when considered apart from the intimate relations of the parties as shown by their oral testimony, do not disclose anything that would suggest a marriage contract, but, on the contrary, convey the impression that none existed. When read in the light of these amatory relations, they appear to be consistent with, even though not very strongly supporting, the view that a contract of marriage was entered into. We do not think the letters affect the case very much either way. Under the evidence a verdict for the defendant would not have been open to serious criticism. The question to be decided was one eminently appropriate for the consideration of a jury. Each juror had an opportunity to see the parties while on the witness stand, and to note the manner in which their testimony was given, and to generally compare the two witnesses and determine which was the most credible. There is nothing in the record which indicates passion or prejudice on the part of the jury, and as there is evidence in the case which supports the verdict, we cannot disturb it.

It is further claimed that the district court did not approve the verdict, but made use

of language, at the time the motion for a new trial was denied, which amounts to a disapproval thereof. The language referred to reads: "Gentlemen, this is one of the cases where it is just possible that, if the case had been tried by the court, a different conclusion might have been reached, so far as determining the question of contract. If tried by the court, he might have found a great deal of difficulty in reaching the same conclusion that the jury did. But I believe this is also true that, if new trials in this case were granted, each successive jury would reach the same conclusion that this jury did, and find a verdict for the plaintiff." We do not regard this as equivalent to a disapproval. The verdict was approved by refusing to grant the new trial, and the most that can be said of the court's remarks is that in its judgment all juries would reach the same conclusion, while the court might possibly have found differently. This falls short of a statement that the verdict was wrong, or that the court would have reached a different conclusion.

The judgment is affirmed.

(74 Kan. 111)

#### PARKER v. CONRAD.

(Supreme Court of Kansas. June 9, 1906.)

##### 1. QUIETING TITLE—PETITION.

A statement in a petition in an action to quiet title that the plaintiff is the owner in "fee simple," and in actual possession, sets forth the plaintiff's title with sufficient certainty.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, § 73.]

##### 2. SAME—ANSWER.

In such an action, if it is alleged that the defendant asserts an interest or estate in the lands adverse to the plaintiff, and that the plaintiff does not know the nature or character of such interest or estate, he may have discovery, and the defendant is thereupon required to plead the facts upon which such interest or estate is based.

(Syllabus by the Court.)

Error from District Court, Saline County; R. R. Rees, Judge.

Action by Emily E. Conrad against Ann Amelia Parker. Judgment for plaintiff, and defendant brings error. Affirmed.

Terry Parker, for plaintiff in error. C. W. Burch, for defendant in error.

GREENE, J. This was an action to quiet title. The petition states that plaintiff is the owner in fee simple and in the actual possession of the property, describing it, and that "the defendant claims an estate or interest in said real estate adverse to the plaintiff, the exact nature of which is unknown to plaintiff, and for that reason cannot be set forth herein, but plaintiff alleges that any such claim, estate, or interest of the defendant is invalid as against plaintiff." The petition then asks that defendant be required to set up her claim upon said premises, and for

a judgment determining such interest to be inferior to that of plaintiff's, and that plaintiff have a judgment decreeing her to be the owner in fee simple, and for the cancellation of defendant's claim. To this petition the defendant demurred. The demurrer was overruled, and, the defendant choosing to plead no further, the cause was tried by the court, and judgment rendered for plaintiff in accordance with the prayer of the petition.

The defendant now complains that the court erred in overruling her demurrer, first, because the petition does not state with sufficient certainty plaintiff's title to the land in controversy, and, second, it does not state with sufficient certainty the exact nature and extent of the defendant's pretended title or claim of title. The argument is that if this were done the court would be enabled to determine from the petition whether the defendant's claim did in law cast such a cloud upon plaintiff's title as would justify the interference of a court of equity.

The petition stated that the plaintiff was in actual possession and was the owner in "fee simple." "Fee simple" or "fee simple absolute" are equivalent terms and well-defined legal expressions. An estate in "fee simple" is the greatest that one can possess. When the pleader said that the plaintiff was the owner in "fee simple," it implied an unlimited estate of inheritance. If the plaintiff claimed an estate less than a fee simple, it might not be improper in some cases to require him to plead his limited estate, but certainly he should not be required to plead the evidence of his title where he claims the entire estate. From the petition the court knew just what the plaintiff claimed for himself.

The second contention is that the petition did not set out with sufficient certainty the claim which the defendant made to the lands in controversy, so that the court might be advised whether such a claim cast a cloud on plaintiff's title. The pleader relieved himself of this duty by showing that he did not know the exact nature or extent of the defendant's claim; therefore the duty was put upon the defendant to state her claim, whatever it might be. It was held by this court in *Bowditch v. Metzger* (Kan.) 81 Pac. 484, that "equity permits a suit for discovery and relief. Therefore, where the petition in a suit in equity to remove a cloud and quiet title to real estate is sufficient, except that it does not plead the title under which the defendants claim, but states that the nature, character, and extent of such title is unknown, and prays that defendants be required to disclose such title in their answer, held, that the petition states a good cause of action for discovery and relief." Upon the authority of that case, the petition in this case is sufficient, so far as the last contention is concerned.

Some other errors are argued, but, as they were not assigned as errors in the motion

for a new trial nor in the petition in error, we cannot consider them.

The judgment is affirmed. All the Justices concurring.

# CUDAHY PACKING CO. v. HAYS.

(Supreme Court of Kansas. June 9, 1906.)

## 1. MASTER AND SERVANT—INJURY TO EMPLOYÉ—DEFECTIVE APPEARANCES—NOTICE.

In an action to recover for injuries sustained by an employé of a corporation because of a defective appliance, the knowledge of a representative of the corporation (a foreman in charge of the department where the defective appliance was used) of the defect is the knowledge of the corporation; and testimony of an admission made by such foreman, in connection with the management of such business, that he knew of the defect, is admissible to show the knowledge of the corporation.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 251.]

## 2. APPEAL—OBJECTIONS TO EVIDENCE.

Where the answer of a witness to a proper question is in part irrelevant and improper, a motion to strike out the objectionable part should be made; and, if it is not brought to the attention of the trial court, its reception is not available error on review.

## 3. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Before a new trial will be awarded on the ground of newly discovered evidence, there must be, among other things, a clear showing that by the exercise of reasonable diligence on the part of the applicant it could not have been procured for the trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 210-214.]

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; Win. G. Holt, Judge.

Action by Robert Hays against the Cudahy Packing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Warner, Dean, McLeod, Holden & Timmonds and McFadden & Morris, for plaintiff in error. S. C. Miller and W. M. Whitelaw, for defendant in error.

JOHNSTON, C. J. This was an action by Robert Hays against the Cudahy Packing Company to recover damages for personal injuries sustained by Hays by reason of the alleged negligence of the company. Hays was an employé of the company, whose principal duties were performed on the second floor of a smokehouse, and who was sometimes employed to remove ham racks from the third to the second floor of that house. On the occasion of his injury he was directed by the foreman to go to the third floor, and bring down some meat racks. These meat racks were suspended from an overhead iron rail system, which included switches by which the racks could be moved to the different apartments of the smokehouse. When Hays went to this room on this mission, he claims to have inadvertently touched a heavily loaded meat rack, and that it fell and injured his foot. The reason it fell, as

he alleges, was that a bolt supporting the end of a rail was out of place, allowing the rail to sag down at a sharp incline, and, the switch being open at the time, the meat rack when moved, ran down the incline and upon his foot. As the room was somewhat dark at the time, Hays did not discover the defect in the rail. The jury found in his favor, and awarded him \$450 for the injury sustained.

A ruling on the admission of testimony is the first complaint of the company. Bailey was the foreman in charge of the department in which Hays was working. While giving the circumstances of the injury, Hays was asked: "What, if anything, Mr. Bailey, the foreman, said to you immediately after the accident in regard to his knowing that this switch was out of order?" The answer was: "He says to me, after I and him goes up there, he says, 'I went myself about two or three days ago, and told the millwright to have the fellows come right away and fix this switch.' He says, 'I told him two or three days ago to come and fix it,' and he says, 'if they had come and fixed this switch,' he says, 'this never would have occurred.'"

A proper objection was made to the question, but none was made to the answer, nor was there any motion to strike out any portion of it. Having shown the defect which occasioned the injury, it became necessary for Hays to prove either that the company had knowledge of its condition, or that it had existed so long that knowledge of its condition will be implied. The inquiry was as to what was said by Bailey immediately after the injury in regard to his knowledge of the defect, and, while the answer was much broader than the question, it elicited testimony of an admission that Bailey had known for several days that the appliance was out of order, and of a statement which was to some extent explanatory of the existing condition of the appliance. Bailey was the foreman in charge of the department, the representative of the company, and his knowledge was the knowledge of the company. The corporation could only act through its managing agents, and, as Bailey was the manager of that department, he stood in the shoes of the company, and his knowledge is legally imputable to the company. The knowledge which a corporation has of its operations is that acquired by its representatives and managing agents. When such a representative has knowledge of the condition of an appliance in use, the corporation may be said to have that knowledge, and his admission of such knowledge, made in connection with the business he is managing, may be treated as the principal's admission. It is not an admission that an employé of the company failed in his duty, nor that the company was negligent. The virtue of the admission is not so much that it was made immediately after the time of the injury, as that it was made by

a representative of the company, whose knowledge is necessarily that of the company itself. *Railroad Co. v. Weaver*, 35 Kan. 413, 11 Pac. 408, 57 Am. Rep. 176; *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338; *Abbott v. Seventy-Six Land & Water Co.*, 87 Cal. 323, 25 Pac. 693; *Halsey v. Railroad Co.*, 45 N. J. Law, 26; 2 Wharton on the Law of Evidence, § 1170; 3 Wigmore on Evidence, § 1797. The question itself was not improper. It is true the answer of the witness was wider in its scope than the question, and a part of it was neither responsive nor competent. But the attention of the court was not called to the answer by an objection, and, as no motion was made to eliminate the objectionable part, the company is not in a position to complain of that feature. The way to get rid of an improper answer to a proper question is by a motion to strike out that which is objectionable.

The other objections to rulings admitting testimony are not deemed to be material.

No error was committed in overruling the demurrer to the evidence of the plaintiff below. It is said that there is no showing that the company knew, or should have known, of the defect in the appliance; but, as already seen, there is the direct testimony of an admission by the foreman that he had knowledge of the defect.

We find no error in the rulings charging the jury. The instruction asked by the company, to the effect that under the pleadings the sole ground of the negligence was the insufficiency of the light, was properly refused. The principal ground upon which a recovery was sought was the defective appliance, and the averments regarding the insufficiency of the light were manifestly made to account for the fact that Hays did not observe the defect, and to avoid the implication of contributory negligence. The instructions given state the law correctly, and are not open to the charge of broadening the issues.

A new trial was asked on the ground of newly discovered evidence. The new testimony alleged to have been discovered since the trial appears to be largely contradictory of that given by Hays. If it be granted that the testimony proposed is material, and not merely cumulative or contradictory of that given on the trial, the showing of diligence to produce it at the trial is not sufficient. An affidavit is made by one of the counsel for the company to the effect that an effort was made by him to discover this evidence, and that it was impossible, but no good reason is shown why the names and locations of the employes working with, and who were near to, Hays when the accident occurred could not have been ascertained by the exercise of reasonable diligence. Before a new trial is granted on this ground, a strong showing of diligence is necessary, and if the diligence used since the trial, and which appears to have been no more than

reasonable, had been exercised before the trial, the testimony might have been procured.

We discover no prejudicial errors in any of the rulings of the trial court, and its judgment will therefore be affirmed. All the Justices concurring.

#### SLOAN et al. v. PIERCE.

(Supreme Court of Kansas. June 9, 1906.)  
ASSAULT AND BATTERY—CIVIL ACTION—FINDINGS—CONSTRUCTION.

In an action to recover damages for an assault and battery, where the defendant seeks to justify his conduct upon the ground that he had reason to believe and did believe that it was necessary to protect his father from injury, a finding that the danger to his father was not such as to induce a person exercising reasonable and proper judgment to interfere in order to prevent the consummation of such injury is open to a construction that gives the word "danger" the force of "apparent danger"; and held, that this is the proper construction of such a finding in the present case.

(Syllabus by the Court.)

Error from District Court, Atchison County; B. F. Hudson, Judge.

Action by William H. Pierce against Edward I. Sloan and Harry J. Sloan. Judgment for plaintiff, and defendants bring error. Affirmed.

T. A. Moxcey and Waggener, Doster & Orr, for plaintiffs in error. Means & Archer, for defendant in error.

MASON, J. William H. Pierce sued Edward I. Sloan and Henry J. Sloan for damages alleged to have been occasioned by their assaulting and shooting him. The defendants filed answers which, besides denying the plaintiff's allegations, presented in detail their version of the conflict out of which the litigation grew, which was in effect that Pierce, his wife, and son, made an unjustifiable attack upon Henry J. Sloan, and that whatever the latter did was in self-defense; that Edward I. Sloan, the son of his codefendant, interfered to protect his father; and that whatever he did was in defense of himself or of his father. Plaintiff recovered a judgment, from which the defendants prosecute error.

Complaint is made that the instructions of the trial court did not sufficiently advise the jury of the nature of the defense relied upon. If error was committed in this regard, it was rendered immaterial by the fact that special findings were made which were entirely destructive of the defendant's claims. *Mfg. Co. v. Nicholson*, 36 Kan. 383, 13 Pac. 597; *City of Kinsley v. Morse*, 40 Kan. 577, 20 Pac. 217. The assignment of error chiefly argued is the refusal of the court to give an instruction reading as follows: "If you find from the evidence that the defendant, Edward Sloan, at the time he shot at said Pierce through the south window of said

dwelling house, said Edward in the exercise of reasonable and proper judgment, in order to prevent the consummation of injury to his said father, believed it was necessary to fire such shot, then said Edward was justified in firing the same, and it was not necessary that his said father should have been in real danger of great bodily harm to justify such shooting; and if the jury believe from the evidence that the danger to said Henry was such as to induce a person, exercising a reasonable and proper judgment, to interfere in order to prevent the consummation of such injury and to shoot at or shoot said Pierce, your verdict should be for the defendant, Edward Sloan." The answer of the defendant Edward I. Sloan showed that his contention was that when he fired the shot referred to he had good reason to believe and did believe that such act was necessary for the protection of his father, and to prevent his father's being injured by the plaintiff and others. Upon this branch of the case the jury made the following finding: "Was the danger to said Henry Sloan, at the time said Edward shot through said south window, such as to induce a person, exercising reasonable and proper judgment, to interfere in order to prevent the consummation of such injury? A. No." If this is, in substance, a determination by the jury that the situation, as it was presented to Edward Sloan at the time he fired the shot in question, was not such as to warrant him in believing that his interference was necessary to prevent injury to his father, the court's omission to give the instruction requested became entirely immaterial. A judgment cannot be reversed for the failure of the court to instruct the jury as to the effect of a condition which they find never existed.

But plaintiffs in error maintain that the finding is not open to this construction; that it is not inconsistent with Edward's claim that he acted in the reasonable belief that his succor was necessary to prevent injury to his father, although in fact there was no real danger. Clearness would have been promoted by the insertion of the word "apparent" before the word "danger"; but under the circumstances of this case the meaning must be held to be the same. The reference in the finding to the exercise of a reasonable and proper judgment plainly has regard to the use of that faculty in deciding the reality of a danger, as well as in estimating the severity of its possible consequences. The question submitted to the jury was prepared by the defendant's counsel, and followed literally the language of the rejected instruction. This language was manifestly borrowed from that employed in 3 Cyc. 1075, in discussing among other things the right of one whose relative is assailed to act upon appearances. It is there said: "A person is justified in using sufficient force to protect his wife, children, or other members of his

family, though the danger must be such as to induce one exercising a reasonable and proper judgment to interfere to prevent the consummation of the injury." This text was evidently borrowed in turn from Hill v. Rogers, 2 Iowa, 67, where the context shows beyond question that the word "danger" is used with the force of "apparent danger." The second paragraph of the syllabus, substantially following the opinion, reads: "In order to justify an assault by the father, in the defense of his son, or the protection of his own property, it is not necessary that such son shall be in real danger of great bodily harm, or that such property be in actual danger of material injury; but if the danger is such as to induce a person, exercising a reasonable and proper judgment, to interfere, in order to prevent the consummation of the injury, it is sufficient." It is thus seen that the language of the finding under consideration has been used by careful writers to express the thought that a person's conduct is to be judged by his situation as it reasonably appears to him. To give it a different meaning here—to interpret it as referring to an actual rather than to an apparent danger—would be to construe it too narrowly.

Other rulings relating to instructions given and refused are challenged. They have been examined and are found not to be materially erroneous. Complaint is also made of the rejection by the court of evidence offered by the defendants to show the circumstances of a previous encounter between Henry Sloan and his daughter, who was Pierce's wife. So far as the questions ruled out indicate the nature of the evidence sought to be elicited by them the error, if any, seems to have been cured by permitting the substance of it to get before the jury at other times. No offer of proof was made otherwise than by asking these questions, and it cannot be said that any important right was denied the defendants in this regard.

The judgment is affirmed. All the Justices concurring.

(74 Kan. 70)

#### EVANS v. CITY OF CONCORDIA.

(Supreme Court of Kansas. June 9, 1906.)

#### MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—ICE AND SNOW.

In an action against a city for injuries from a fall upon a sidewalk covered with ice and snow, where it appears from plaintiff's opening statement that the ice, which accumulated from natural causes, was less than an inch in thickness, and plaintiff knew when he went upon it that the ice was smooth and slippery, and he fell by reason of its smooth and slippery condition, and no other defect is claimed, a judgment for costs against plaintiff in favor of the city will be upheld.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1627; vol. 46, Cent. Dig. Trial, §§ 367, 388.]

(Syllabus by the Court.)

Error from District Court, Cloud County; W. T. Dillon, Judge.

Action by Silas S. Evans against the city of Concordia. Judgment for defendant, and plaintiff brings error. Affirmed.

Theodore Laing, for plaintiff in error. A. L. Wilmoth and Earl V. D. Brown, for defendant in error.

PORTER, J. In an action for damages for injuries received in a fall upon an icy sidewalk, the trial court rendered judgment in favor of the city and against plaintiff in error for costs, upon the opening statement to the jury of the facts which plaintiff in error expected to prove. Error is predicated upon this ruling of the court.

In his statement plaintiff in error followed the averments of his petition, which were, in substance, that on the night of January 19, 1904, and on the following day, as the result of rain, sleet, and snow flurries, the walks of the city became covered with a sleety ice to the depth of less than an inch and more than half an inch, which was then, and continued to be, smooth and slippery and difficult and dangerous to walk upon; that the walks were permitted by the city to remain in this condition until on the evening of the 25th of January, when plaintiff, who was walking with due care because he knew that the sidewalk was icy, slipped and fell by reason of the icy, slippery condition of the sidewalk in that particular place. When ice and snow accumulate from natural causes upon the sidewalks of a city, and a person is injured by a fall occasioned by its smooth and slippery condition, is the city liable in an action for damages? This is the sole question in the case. No other defect in the sidewalk is claimed. The same question has frequently been before the courts, and with almost entire unanimity it has been held that, where the injuries were caused wholly by reason of the smooth and slippery condition of the ice and snow, there was no liability for negligence on the part of the city. A distinction has been observed in many cases where the ice or snow has been allowed to form in ridges or uneven places in the walk amounting to an obstruction; but smoothness and slipperiness, being natural conditions, have almost universally been held not sufficient to cast responsibility upon the city. The reasons for the distinction are well stated in *Smyth v. Bangor*, 72 Me. 249 as follows: "In this cold climate, where ice and snow cover the whole face of the earth for a considerable portion of the year, such an inconvenience ought not, and rightfully cannot, be regarded as a defect. No amount of diligence can keep our streets and sidewalks at all times free from ice and snow, and the latter, when trodden smooth and hard, is nearly, and sometimes quite, as slippery as ice, and travelers will often slip and fall when no one is to blame. To hold towns and cities responsible for such accidents

would practically make insurance companies of them. A block of ice may constitute a defect the same as a block of wood or stone. So a ridge or hummock of ice, may constitute a defect the same as a pile of lime, or sand, or mortar, upon the sidewalk would. But we regard it as now well settled that mere slipperiness of the surface of a highway or sidewalk, caused by either ice or snow, is not a defect for which towns and cities are liable." In *Gilbert and Wife v. City of Roxbury*, 100 Mass. 185, a case like the one at bar, the action of the trial court in directing a verdict was sustained. In *Stone v. Inhabitants of Hubbardston*, 100 Mass. 49, it was held that mere slipperiness of surface of a highway properly constructed, and of no unusual slope, was not a defect which would render the municipality liable any more than moisture or mud upon a flagstone or sidewalk. It was said in this case: "But ice, which by reason of constant or repeated flowing of water, trampling of passengers, or any other cause, assumes such a shape as to be an obstacle to travel, may constitute such a defect." To the same effect see *Chamberlain v. City of Oshkosh*, 84 Wis. 289, 54 N. W. 618, 19 L. R. A. 513, 36 Am. St. Rep. 928, and cases cited in note; *Grossenbach v. City of Milwaukee*, 65 Wis. 31, 26 N. W. 182, 56 Am. Rep. 614; *Luther v. City of Worcester*, 97 Mass. 268; *Stanton v. City of Springfield*, 12 Allen (Mass.) 566; *Borough of Mauch Chunk v. Kline*, 100 Pa. 119, 45 Am. Rep. 364; *Kinney v. City of Troy*, 108 N. Y. 567, 15 N. E. 728; *Harrington v. City of Buffalo*, 121 N. Y. 147, 24 N. E. 186; *Chase v. City of Cleveland*, 44 Ohio St. 505, 9 N. E. 225, 58 Am. Rep. 843; *Broburg v. City of Des Moines*, 63 Iowa. 523, 19 N. W. 340, 50 Am. Rep. 756. Most of these cases are from the extreme northern and eastern states, where the conditions which usually obtain illustrate more forcibly the manifest propriety of the rule. It is urged by plaintiff in error that the mildness of the winters in Kansas requires a distinction to be made, which has been recognized by some courts, based upon climatic conditions; that, where the winters are so mild that ice and snow are comparatively infrequent, the municipality should be held to a higher degree of diligence. Thus it was said, in *Scoville v. Salt Lake City*, 11 Utah, 60, 39 Pac. 481, cited by plaintiff in error: "Differences of climate and locality are to be considered in determining the liability of municipalities for their failure to exercise care in removing ice and snow from their walks. Each case must be considered with reference to the climate of the place. In Minnesota, where ice and snow exists almost constantly through the winter season, to require municipalities to keep their walks absolutely free of ice and snow would be highly unreasonable. But in other localities, and in a warmer climate, like Utah, where snow and ice, although not unusual, are by no means continuous, to require the municipali-

ties to keep their walks free of ice and snow, especially in particular localities, is by no means unreasonable."

An examination of this case discloses, however, that the decision is not placed upon the reasons stated in the excerpt. It appeared that the ice in question was not formed by natural causes, but by water discharged upon the sidewalk by means of a defective conductor, and that the city had permitted the ice to remain for an unreasonable length of time in a rounded and uneven condition, so the portion of the opinion relied upon seems not to have been necessary to the decision. On the other hand, the Supreme Court of Missouri, in *Reedy v. Brewing Ass'n and City of St. Louis*, 161 Mo. 523, 61 S. W. 859, 53 L. R. A. 805, a recent and parallel case, arising in a locality not more subject to the natural accumulation of ice and snow than the city of Concordia, Kan., if we may take notice of the weather reports, recognizes the force of the rule established in the northern and eastern states, although affirming a judgment against the city upon other grounds. It was held that smooth and slippery ice covering a sidewalk at one place, which formed from water running off the roof of an abutting building on account of a leak in a water pipe, is a dangerous obstacle which the city is bound to remove within a reasonable time after notice, where it was not shown that there was any other ice or snow in the city. The court refers to the well-established doctrine that a city is not liable for injuries caused by smooth and slippery ice, where it has formed generally upon the streets and walks, and where no special defect is shown, and mentions two well-founded reasons for it: First, it is not one of the law's reasonable requirements that a city should remove from the many miles of walks the natural accumulation of ice and snow because such a requirement is impracticable from the nature of things; second, because when these conditions exist generally they are obvious, and every one who uses the sidewalks at such times is on his guard, warned by the surroundings and the danger of slipping at every step. These reasons meet with our approval. To hold otherwise would cast upon cities a burden for which they are not responsible and greater than their ability to provide for. This rule has reference to a general accumulation of ice or snow from natural causes, where no other defect in the walk is shown, except the natural slippery condition of the ice or snow.

The judgment will be affirmed. All the Justices concurring.

ROBBINS v. PHILLIPS et al.

SAME v. BROWER.

(Supreme Court of Kansas. June 9, 1906.)

TAXATION—TAX DEED—CONSIDERATION—RECITALS.

The statutory form of tax deed does not require that the source of the consideration for

an assignment of a certificate of sale for land bid in by the county shall be shown by recitals preceding the granting clause; and in construing a tax deed which has been of record more than five years a sum much greater than the sale price, with interest, stated as the consideration for such an assignment, will be deemed to be the cost of redemption at the date of the assignment, unless other recitals of the instrument prove the contrary.

(Syllabus by the Court.)

Error from District Court, Kiowa County; E. H. Madison, Judge.

Action between Edward D. Robbins and C. W. Phillips and by Edward D. Robbins against D. M. Brower. From the judgments, Robbins brings error. Affirmed.

J. W. Davis, for plaintiff in error. I. M. Day, for defendant in error.

BURCH, J. The question in this case is if a tax deed is valid upon its face, no attack having been made upon it within five years from the date of its record. The deed is in the following form: "Know all men by these presents, that whereas, the following described property, viz.: Northwest quarter of section one (1), township twenty-seven (27) south, range nineteen (19) west of the sixth principal meridian, situated in the county of Kiowa and state of Kansas, was subject to taxation for the year A. D. 1893; and whereas, the taxes assessed upon said real property for the year aforesaid remain due and unpaid at the date of the sale hereinafter mentioned; and whereas, the treasurer of said county did on the 4th day of September, 1894, by virtue of the authority in him vested by law, at the sale begun and publicly held, on the first Tuesday of September, 1894, expose to public sale, at the county seat of said county, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described, for the payment of taxes, interest and costs then due and remaining unpaid upon said property; and whereas, at the place aforesaid said property could not be sold for the amount of tax and charges thereon, and was therefore bid off by the county treasurer for said county for the sum of \$11.24, the whole amount of tax and charges then due on the whole of the above-described property; and whereas, for the sum of \$67.07, paid to the treasurer of said county, on the 24th day of May, 1898, the county clerk did assign the certificate of sale of said property and all the interest of said county in said property to D. M. Brower of the county of —; and whereas, the subsequent taxes of the year 1897, amounting to the sum of \$6.95, have been paid by the purchaser as provided by law; and whereas the subsequent taxes of the year 1—, amounting to the sum of \$—, have been paid by the purchasers, as provided by law; and whereas, three years have elapsed since the date of said sale, and the said property has not been redeemed therefrom as provided by law: Now, therefore, I, E. A. Northrup,

county clerk of the county aforesaid, for and in consideration of the sum of \$74.02, taxes, costs, and interest due on said land for the years 1893, 1894, 1895, 1896, and 1897, to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said D. M. Brower, his heirs and assigns, the real property hereinbefore described, to have and to hold unto him, the said D. M. Brower, his heirs and assigns, forever, subject, however, to all rights of redemption as provided by law. In witness whereof," etc. The objections urged against this deed are want of authority on the part of the treasurer to execute and of the county treasurer to assign the tax sale certificate, the failure of the deed to show the correct amount of taxes and charges due on the land when the certificate was assigned, and the failure to include the taxes for the year 1897 in the amount for which the certificate was assigned.

The first objection is pressed no further than to say that the officers had no right to act except with reference to correct amounts. The proposition presented in the last objection was determined adversely to the plaintiff in error in the case of *Gibson v. Trisler* (decided April 7, 1906) 85 Pac. 413. The decision of the controversy turns, therefore, upon the consideration for the assignment of the tax sale certificate. The form for tax deeds prescribed by the statute does not require that the amount paid for the assignment of a tax sale certificate after land has been bid in by the county shall be itemized, or that the sources of the consideration be stated. The following is all that is necessary: "And whereas, for the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, paid to the Treasurer of said county on the \_\_\_\_\_ day of \_\_\_\_\_, the county clerk did assign the certificate of sale of said property, and all the interest of said county in said property to said E. F., of the county of \_\_\_\_\_ and state of \_\_\_\_\_," Gen. St. 1901, c. 107, § 138. The amount to be inserted is the cost of redemption at the time the as-

signment is made. This amount may be the sale price, with interest, or it may also include the taxes and charges for subsequent years, if the taxes for such years have not been paid. Taxes paid by the assignee subsequently to his acquisition of the certificate of sale are to be stated independently of the consideration for the assignment as indicated by other parts of the form.

Analyzing the consideration stated in the foregoing deed, it clearly includes the taxes for the year 1897 in the sum of \$8.95. Deducting this amount from the total consideration, the remainder is the sum stated by the deed to be the consideration for the assignment of the certificate, \$67.07. There is nothing on the face of the deed to show that this was not the actual cost of redemption on May 24, 1898, and the deed is not to be presumed to be irregular. Of the sum stated, the original sale price of the land, with interest computed according to the statutory rule amounts to \$17.67. The remainder, \$49.40, is cost of redemption for years other than 1893 and 1897. That there were other years in which taxes accrued is shown by the recital immediately preceding the grant of the land; that is, the years 1894, 1895, and 1896. If the statutory form rendered it necessary to show how the consideration for the assignment of a certificate is in any case derived the objection of the plaintiff in error might be more serious; but since every matter required by the statute to be stated in the deed duly appears in the prescribed order, and other recitals do not impeach the correctness of the consideration stated, the deed is valid on its face. The record shows that other objections to the deed in question, argued in the briefs and at the bar, were not presented by plaintiff in error to the trial court, and that tribunal will not be reversed for something which it had no opportunity to consider.

The judgment of the district court is affirmed. The same questions are presented in case No. 14,630, *Robbins v. Phillips*, and the judgment of the district court in that action is likewise affirmed. All the Justices concurring.

ATCHISON, T. & S. F. RY. CO. v.  
HERMAN.

(Supreme Court of Kansas. June 9, 1906.)

1. WATERS AND WATER COURSES—RAILROADS  
—CONSTRUCTION — BRIDGES—OBSTRUCTION  
OF STREAM.

If a railroad company, in building a bridge across a stream, fails to leave ample passageway for so much water as might reasonably have been anticipated would flow in the stream, and the bridge dams the water back upon the riparian owner, to his injury, the railroad company will be liable for the resulting loss.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 216.]

2. SAME—DUTY OF COMPANY.

In one instruction, advising the jury that, in building a railroad bridge across a stream, railroad companies were required to leave openings sufficient to afford an outlet for all water that might reasonably be expected to flow in the stream, there was added the statement that they should also provide for such unusual and extraordinary freshets as might reasonably be expected to occur. *Held*, that the words "unusual and extraordinary, although not aptly used, were so limited and explained in other parts of the charge as not to be prejudicial.

Burch and Graves, JJ., dissenting.

(Syllabus by the Court.)

Error from District Court, Osage County; Robert C. Helzer, Judge.

Action by William Herman against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. R. Smith, O. J. Wood, and Alfred A. Scott, for plaintiff in error. Thomson, Stanley & Price, for defendant in error.

JOHNSTON, C. J. In this action William Herman sought to recover damages from the Atchison, Topeka & Santa Fé Railway Company for the destruction of personal property which resulted from an overflow of water on his land. He alleged that Switzer creek, a natural water course, was negligently bridged by the railroad company; that the bridge was faulty in construction, and that the company, in an attempt to strengthen it, built a web of supporting timbers underneath it in such a way as to impede the flow of water and operate as a dam of the stream. In May, 1904, there was a heavy rainfall which caused an overflow of the stream, and which Herman alleges was due to the improper construction and maintenance of the railroad bridge. The jury awarded Herman \$229.95 as damages, which by remission was reduced to \$200.

The giving of an instruction is the principal error assigned. It reads: "You are instructed that railroad companies, in the construction and maintenance of their roads over water courses, are required to leave such waterways or openings as are sufficient to afford an outlet for all water that may reasonably be expected to flow through such water courses, and this must be with reference to such unusual and extraordinary

freshets as might reasonably have been expected, after careful inspection of the size of the stream, the width of its bottom, the height of its banks, its capacity for carrying water, and the surface of the country contributing to its flow, and, if they fail to do so, they are liable in damages to the full injury occasioned thereby." The use of the words "unusual and extraordinary freshets," it is said, is a departure from the true rule of the law, and that the latter part of the instruction, at least, was misleading and erroneous. In the same connection the court further instructed the jury: "A railroad company, however, is not bound to anticipate extraordinary changes of seasons, nor such unusual freshets, or heavy fall of water, as could not be detected by a skillful engineer after taking carefully the observations to which I have just referred, nor to guard against every possible contingency, so that if you find that the damages sustained by the plaintiff, if any, were the result of such extraordinary rainfalls or freshets or inundations, as could not be apprehended in the manner hereinbefore referred to, and if you also find that the defendant was not otherwise at fault, the plaintiff cannot recover, and your verdict should be for the defendant. It was the duty of the defendant railroad company to keep the bridge in question in such condition as to provide for the free flow of such an amount of water as might have reasonably been anticipated to flow in said stream, and if, by reason of the failure of said defendant company to perform such duty, the plaintiff sustained loss and injury, the defendant would be liable therefor. You are instructed, gentlemen, that by the term, 'act of God,' is meant those events and accidents which proceed from natural causes, and which cannot be anticipated or guarded against or resisted, such as unexampled freshets, violent storms, lightning, and frosts. For losses occurring by any of these means individuals and corporations are not liable, provided they have not been guilty of any want of ordinary and reasonable care to guard against such loss."

There is no real dispute between the parties as to the law governing the obstruction of streams, nor in regard to the floods or flow of water which must be provided for in bridging water courses. Both agree that it is only such a flow of water as may naturally and reasonably be expected to pass through the channel. No one is required to provide for an unprecedented flood—a phenomenal one—which could not have been reasonably foreseen. The instructions, as a whole, indicate that the trial court held the same view, but its reference to the term "unusual and extraordinary" was not happy, and approached close to the danger line. The trouble with the use of these words, in defining the duty and responsibility of the railway company, is that they require definition and limitation. It should be noted, however, that the instruc-

tions given are an exact reproduction of those given and sanctioned in *Union Trust Co. v. Cuppy*, 26 Kan. 754. It is natural that the trial court should have thought that the instructions which had received the express approval of this court might be safely used in a similar case. The test of liability, however, is not whether the rainfall was unusual or extraordinary, but whether it was such as might have been reasonably foreseen by bringing to the building and maintenance of the bridge such engineering knowledge and skill as is ordinarily applied to such work. In the minds of some a freshet is neither usual nor ordinary, and since they do occur occasionally, and may reasonably be expected to occur again, provision should be made for them. In *Kansas City v. King*, 65 Kan. 64, 68 Pac. 1093, it was contended that a flood which was unusual was not to be anticipated by the city. In the opinion it is remarked: "It is true that the flood of 1892 may be said to have been an unusual one, but although unusual it was such as had occasionally occurred, and which the city should have provided against. The testimony shows that such floods had occurred at irregular intervals, and that they would again occur might reasonably have been expected. It is true that floods unprecedented and so extraordinary as to have been beyond reasonable anticipation are not to be provided against, but while floods like the one which occasioned the injury were of rare occurrence in that vicinity, they had occurred so often in the past as to warrant the belief that the region was subject to them, and that under the laws of nature they would occur again." In text law and in decisions we frequently find recognition of degrees of the unusual and the extraordinary in freshets and floods, but always qualified by the limitation that there can be no liability unless they are such as should have been reasonably anticipated. The instruction complained of, as limited and explained by other language of the charge, cannot be said to have been misleading or prejudicial. As will be observed, the court, in the instruction itself, expressly tells the jury that the railroad company was only to provide outlets for such unusual and extraordinary freshets as might have been reasonably expected, and in the following instructions emphasizes the view that the defendant is not liable for the result of such extraordinary rainfall or freshets as could not have been reasonably anticipated.

Attention is called to the features of the instructions which the court said must be noted by the engineers in determining the flow of water for which provision should be made. Although the court might very properly have included something as to the history and habits of the stream, the elements enumerated are those ordinarily laid down in the books and fairly include the principal considerations. The jury were expressly admonished that in any event it was only

such as might reasonably be expected, and that this must be determined "after careful inspection of the size of the stream, the width of its bottom, the height of its banks, its capacity for carrying water, and the surface of the country contributing to this flow." In *Railway Co. v. Gilleland*, 56 Pa. 445, 94 Am. Dec. 98, cited by plaintiff in error, the elements which entered into the determination of what provision should be made for the flow of water were stated, and are substantially the same as those named by the trial court: "The apparent facts indicated the duty. The stream, though small, must find a vent, or overflow the adjacent land and undermine the railroad. Its size, the character of its channel, and the declivity of the circumjacent territory which forms the watershed, indicated the probable quantity of water to be passed through. Proper engineering skill should observe these circumstances and supply the means of avoiding the injury which would result from locking up the natural flow or obstructing its passage so as to cause a reflux in the times of ordinary high water." There is a suggestion that the overflow of the stream is to be treated as surface water, and that the company cannot be held liable for injury resulting from such water. If the water was thrown back upon the riparian owner because of the obstruction of the channel of the stream, it is immaterial by what name it is designated. The party who obstructs the flow and causes the injury is responsible. The testimony tends to show that the flooding of Herman's property was due to the narrowing of the passageway for the water, and when the bridge timbers were carried away and the obstruction removed the water quickly subsided, although the rainfall continued unabated for some time afterwards.

Seeing no prejudicial error in the instructions given to the jury, nor in the other rulings of which complaint is made, the judgment will be affirmed.

GREENE, MASON, SMITH, and PORTER, JJ., concur.

BURCH, J. (dissenting). When the court instructed the jury that the railway company was required to leave waterways or openings sufficient to afford an outlet for all water that might reasonably be expected to flow through them, it expressed the full measure of the defendant's duty. When the court introduced the element of the unusual and extraordinary—the rare, the unwonted, the remarkable, the strange—it exceeded that measure. When the court then undertook to compress within the necessary limits that which extends beyond the compass of reasonable foresight—when, after leaving the field of the defendant's legal duty, it marched up the hill and then marched down—it confused the law of the case. Besides this, the railway company was held to a reasonable appre-

hension of unusual and extraordinary floods from what are at best but uncertain indicia of usual and ordinary high water. The history of the stream, which is the really reliable guide, and which controlled the decision in *Kansas City v. King*, 65 Kan. 64, 68 Pac. 1093, was excluded, and the jury was, in effect, told how railway engineers should predict unprecedented floods from the common features of all water courses. In the case of *Union Trust Co. v. Cuppy*, 26 Kan. 754, from which the instructions were faithfully copied, the natural channel of a stream 100 feet wide was filled up and the water was diverted through a culvert 30 feet wide constructed south of the water course. There an engineering problem was presented—the computation of an equivalent for the old channel to be made from the width of its bottom, the height of its banks and the factors contributing to velocity, etc. Was the culvert big enough to do the work of the creek? No such question is presented here. Besides, this court did not approve the obtrusion of the unusual and extraordinary into that case. An investigation of the record disclosed ample evidence to prove that the culvert was manifestly incapable of taking care of the water of the stream. Hence, the verdict was allowed to stand; not because the instruction was good law, but because it could not be said to be prejudicially erroneous.

In this case the railroad company was entitled to a complete, correct, and unambiguous instruction defining its duty under the facts of its own case, and a new trial should be awarded in order that it may enjoy that opportunity.

GRAVES, J., concurs in the above dissent.

# BYRNES et al. v. JOHN DEERE PLOW CO.

(Supreme Court of Kansas. June 9, 1906.)

## EXEMPTIONS—FOOD FOR CATTLE.

Under subdivisions 5 and 6 of section 3018, Gen. St. 1901, which read:

"Fifth. Two cows, ten hogs, one yoke of oxen, and one horse and mule, or in lieu of one yoke of oxen and one horse or mule, a span of horses or mules.

"Sixth. The necessary food for the support of the stock mentioned in this section for one year, either provided or growing, or both, as the debtor may choose."

—A person who is not the owner of all or some portion of the stock mentioned in subdivision 5 is not entitled to the benefit of subdivision 6. When a person, who is the owner of a part of said stock, is entitled to the benefit of subdivision 6, the exemption of food will be limited to the amount necessary for the support of so much of such stock as may be owned by such person.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Exemptions, § 43.]

(Syllabus by the Court.)

Error from District Court, Pottawatomie County; Robert C. Helzer, Judge.

Action by the John Deere Plow Company against T. J. Byrnes and Paul Huyke. Judgment for plaintiff, and defendants bring error. Affirmed.

W. F. Challis and B. C. Mitchner, for plaintiffs in error. B. H. Tracy, for defendant in error.

GRAVES, J. M. L. Stalker, one of the plaintiffs in error, owned a crop of corn upon which he gave a chattel mortgage to the defendant in error. Afterwards he sold and delivered the corn to his coplaintiffs in error, who converted it to their own use. The defendant in error then commenced this suit to recover the value of the lien which it had on the corn by virtue of the chattel mortgage.

The plaintiffs in error claim that the corn when mortgaged was exempt under section 3018, Gen. St. 1901, and, the wife of Stalker not having joined in the mortgage, no lien was created thereby. The statute under which the exemption is claimed reads: "Every person residing in this state, and being the head of a family, shall have exempt from seizure and sale upon any attachment, execution or other process issued from any court in this state, the following articles of personal property: \* \* \* Fifth. Two cows, ten hogs, one yoke of oxen, and one horse and mule, or, in lieu of one yoke of oxen and one horse or mule, a span of horses or mules. Sixth. The necessary food for the support of the stock mentioned in this section for one year, either provided or growing, or both, as the debtor may choose." The defendant in error claims that the corn was not exempt for the reason that the mortgagor did not own the stock mentioned in the fifth subdivision of the statute, when the mortgage was executed. The plaintiffs in error insist that the exemption of the food mentioned in the sixth subdivision of the statute is absolute and does not depend upon the ownership of the stock mentioned in the preceding subdivision. The trial court held that the corn was not exempt. Whether this ruling of the court was erroneous or not is the only question presented. We think the court was correct.

Under the seventh subdivision of this section, which reads: "The grain, meat, vegetables, groceries and other provisions on hand necessary for the support of the debtor and his family for one year, and also all the fuel on hand necessary for their use for one year"—it was held in the case of *George v. Hunter*, 48 Kan. 651, 29 Pac. 1148, 30 Am. St. Rep. 325, that a debtor who had an abundance of grain, but none of the other articles named, could not retain any part of the grain above the amount necessary for the support of his family for one year for the purpose of buying the articles which he did not have. It was contended in that case that the word "support," as used in the subdivision being considered, meant enough to support the

family generally, and not merely sufficient to supply it with bread for the time stated. It was held, however, that the more limited meaning was proper. It seems that the purpose of subdivision 6 must be to exempt the food therein mentioned, only in cases where it is made necessary, because the debtor has the stock to be supported. The exemption of the stock suggests that provision must be made for its support, otherwise the exemption would be a burden rather than a favor. This precise question was decided by the Supreme Court of Michigan in the case of *King v. Moore*, 10 Mich. 538. The statute of that state was, in substance, the same as the statute of Kansas. It was there decided that the food exempt for the support of stock only applied when the debtor had the animals mentioned. In Wisconsin the statute is almost in the same language as that of this state, and it was there held, in the case of *Cowan v. Main*, 24 Wis. 569, that the food was not exempt where the debtor did not have the animals. In the opinion, the court cited and followed the case of *King v. Moore*, supra, and quoted therefrom as follows: "We are all clearly of opinion that this exemption cannot extend beyond what is sufficient to keep such of the animals as the defendant may have at the time of the levy. This exemption is given to render that of the animals practically beneficial, as it would be of little use to exempt the animals if the food necessary for their sustenance were liable to be taken from the owner. But, if the debtor have none of the animals specified, the reason for exempting the food for them wholly fails. If he has none of the animals which the statute exempts, there is nothing upon which this exemption of animals can operate, and the exemption of feed for such animals, which is dependent upon it, falls with it. If the statute, in cases where the debtor has not the full amount of the property exempted by this section, had provided an exemption of money or other property for the purpose of enabling him to purchase enough to make up the deficiency, there might be good reason for holding the feed for the animals exempted, though he had not the animals at the time of the levy; but the statute has adopted no such principle." The case of *Foss v. Stewart*, 14 Me. 312, is to the same effect. The only case cited which holds to the contrary is *Olin v. Fox*, 79 Minn. 459, 82 N. W. 858. This case gives a contrary construction to a statute almost identical with that of this state. It cites and seems to base the decision upon the case of *Kimball v. Woodruff*, 55 Vt. 229, but the decision of that case was placed upon the peculiar language of the Vermont statute, which materially differs both with the Minnesota and Kansas statutes. The Minnesota court was divided, and Justice Lewis filed a dissenting opinion, from which we quote the following: "It is true that exemption laws should be construed lib-

erally, so as to carry out the legislative intent. Such statutes are founded upon the benevolent purpose of guarding debtors from want, who have suffered from misfortune or improvidence. And, if a strict and literal rendering of such a statute leads to a conclusion out of harmony with its spirit, sufficient latitude should be granted to still preserve its purpose. The exemption laws of this state in reference to personal property are based upon a logical system. First, there is a class of exemptions, found in the first five subdivisions, common to all debtors: The family Bible, books, musical instruments, church pew, burial lot, family wearing apparel, and household goods, and, by the amendment of 1868, the sewing machine. Then the statute deals with debtors with reference to their business or employment, the tools and implements of a mechanic, the library of a professional man, the outfit of the printer or publisher, the wages of the laborer, and the stock enumerated in the sixth subdivision, and the necessary food for the same for one year's support. While this section applies to all debtors possessing the stock, yet the Legislature must have contemplated that the owners of the stock thus exempted were to some extent dependent upon it as their means of living. The object in exempting the food is to give full force and effect to the exemption of the stock. It would be a serious matter to leave the owner with his stock, but no food for them. Hence the exemption of the stock is made effective by providing the food. There is no object in exempting the food if there be no stock to consume it. If it had been the intention of the Legislature to exempt the food without reference to the stock, how simple a matter to state it so." In the Wisconsin Case the court was of the opinion that, if the debtor did not have the stock at the time of the levy upon the food, but had a present bona fide intention of immediately acquiring such animals, the food would be exempt. No such condition existed, however, in that case, and none such is presented here.

On the whole case, we conclude that, as the mortgagor did not have the stock mentioned in the statute at the time the mortgage was executed, the corn was not exempt, and the signature of the wife was not essential to the validity of the mortgage, and the mortgagee acquired a lien upon the corn, and may recover the value thereof from the plaintiffs in error.

The judgment is affirmed. All the Justices concurring.

#### ATCHISON, T. & S. F. RY. CO. v. BOURDETT.

(Supreme Court of Kansas. June 9, 1906.)

#### CARRIERS—REFUSAL TO DELIVER FREIGHT.

A railway company received shipment of freight with the freight charges paid in advance. At the point of delivery its local agent demand-

ed payment by the consignor of additional freight charges under a different classification, and also payment of a former freight bill, which he conceived to be due the company from the same consignor for a previous shipment of the same article, and refused to deliver the shipment unless these additional sums were paid. After withholding possession for seven days, the company made delivery without requiring payment of either claim. *Held*, in an action for damages, that the demand for payment of charges for a former shipment and refusal to deliver unless such demand was complied with render the withholding unlawful, and preclude any inquiry into the merits of the other demand, and the company is liable for the value of the use of the shipment for the time it was unlawfully withheld.

(Syllabus by the Court.)

Error from District Court, Cowley County; C. L. Swarts, Judge.

Action by Douglas Bourdett against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Douglas Bourdett brought this action against the railway company to recover damages on account of the willful and unlawful withholding of a freight shipment. He was employed in the business of drilling wells for gas and oil, and operated a well-drilling outfit in Cowley county. On July 2, 1904, the drill was broken, and for the purpose of having it repaired he delivered it to the railway company at Winfield for shipment to Independence, consigned to Bovaird & Co., a firm doing general repair work at that place, and prepaid the freight charges thereon. Upon the arrival of the drill at Independence, Bovaird & Co., having been notified, had their fires and men ready to begin work at once upon the repairs, expecting to complete the same within five hours and reship to Bourdett. They demanded the drill and were in the act of unloading it from their side track, when informed by the agent of the railway company at Independence that it would not be delivered until an additional sum was paid, amounting to \$38.20. A bill was presented to them by the agent's clerk for this amount, made up of two separate items, one of \$18.80 additional freight charges, and one of \$19.40 which the agent claimed was due on a prior shipment of the same drill. As soon as he was notified by Bovaird & Co. of the refusal to deliver the shipment, Bourdett saw the railway agent at Winfield about the matter, who informed him that the agent at Independence had exceeded his authority, and that he would write him to release the shipment. After a second letter from Bovaird & Co., he again called upon the Winfield agent and was told that the agent at Independence was inclined to be stubborn; that he had repeatedly wired him, but could get no answer. The railway company held the shipment from the morning of July 5th to the afternoon of July 11th, and then the agent at Independence released it upon a telegraphic order from the auditor to deliver the shipment as if it had been loaded in a

box car and without demanding the extra charges. It was repaired on the 12th of July and reshipped to Winfield on the same flat car and at the same rate. It appeared that the railway company was informed of the purpose of the shipment at the time it was received at Winfield and during the time it was withheld at Independence.

In the petition it was alleged: "That the defendant, without any legal reason or excuse therefor, but for the purpose of annoying, delaying, and injuring this plaintiff, and after having received in advance the full freight charges for said shipment, and after having been informed and well knowing that said shipment was made for the purpose of having the same repaired, and that any delay upon its part would cause the plaintiff annoyance and damages, willfully withheld the possession thereof, and refused and prevented the said Bovaird & Co. the possession of said shipment for the period of eight days. That the said Bovaird & Co. were ready, willing, and able to repair said shipment and reship the same to plaintiff within five hours after its receipt. That by said wrongful and unlawful acts of the defendant this plaintiff was deprived of the use of said shipment, and that its use was worth the sum of \$20 per day, and that by reason thereof this plaintiff has been damaged in the sum of \$160." It was also alleged that the failure to deliver the drill caused defendant in error to lose the well upon which he was at work at the time the drill broke. Upon the trial the jury returned a verdict in favor of defendant in error for \$200, and found in answer to special questions that the damages to the well amounted to \$60, and the value of the use of the drill for the time it was withheld was \$140. Defendant in error remitted the amount of damages allowed for the loss of the well, leaving only the damages for loss of the use of the drill in controversy.

Wm. R. Smith, O. J. Wood, and Alfred A. Scott, for plaintiff in error. O. P. Fuller, for defendant in error.

PORTER, J. (after stating the facts). Plaintiff in error demurred to the evidence, which was overruled. It also asked for a peremptory instruction, which was denied. Error is assigned upon these rulings of the court, and it is contended that defendant in error failed to make a prima facie case, because there was a failure of proof of the allegation in the petition that the company willfully and without any legal reason or excuse withheld the shipment from the consignee at Independence. It is urged that plaintiff's evidence shows that the shipment was not delivered because of refusal to pay the additional freight charges demanded; that as a matter of law it devolved upon plaintiff below to prove that the charges were extortionate, illegal, unreasonable, or in excess of the regular tariff rate charged oth-

er persons for like shipments. The railway company on the trial sought to excuse its demand for the additional freight charges on the ground that, as the stem of the drill was too long to go in a box car with side doors, it was shipped on a flat car, and thereby became subject to a minimum charge equal to the charge for 5,000 pounds at first-class rate under the Western Classification, which made the charges amount to \$23, and that the difference between this and the \$4.20 prepaid was the \$18.80 demanded by the agent at Independence.

Plaintiff in error insists that it is the law that the shipper must tender the freight charges before he is entitled to possession; that if he believes the charges extortionate or unreasonable he may pay under protest and sue to recover the excess, or, it is said, he may bring his action in replevin to recover the possession; and, because defendant in error pursued neither of these remedies, it is argued that he cannot maintain an action for damages for withholding the possession. If, before he is entitled to possession, he must tender the freight charges, his action in replevin would fail, because tender had not been made. Again, if it be true that he can maintain an action in replevin, he could, in the same action, recover damages for the unlawful withholding; and it is argued by defendant in error that, having obtained possession without replevin, he should be allowed to maintain an action for damages alone. It is assumed in the argument of plaintiff in error as well as in the entire brief that, as a matter of fact, the drill was withheld by the agent at Independence for refusal to pay \$18.80 freight charges. The evidence of defendant in error was that the agent's clerk notified Bovaird & Co. that the drill would not be delivered until \$38.20 was paid, including not only the extra freight which the company claimed as due under the Western Classification, but an old account of \$19.40, which the agent said was due from the consignor for shipping the same drill several months previously.

The jury in their answers to special questions found this to be the fact. It will not be necessary in our view of the case to consider the questions suggested by plaintiff in error as to the relative rights of the parties, and the remedies of a consignor of freight in a case where the refusal to deliver was for the failure to pay freight charges, nor to inquire what effect the prepayment of the freight charges demanded at the point of shipment had upon the rights of the consignor to immediate delivery. Under any theory which might be taken of these questions, the fact remains that the agent of the railway company at Independence included in his demand and insisted upon payment of a claim which did not arise out of the contract for shipment and which had no possible connection with it. With as much propriety

he might have withheld delivery until a claim of the passenger department, which he conceived to be due the company, or a board bill of his own against the consignor, was paid. In view of the arbitrary conduct and unreasonable delay of the railway company, every presumption should be indulged in favor of the judgment in this case.

It is attacked as an allowance of speculative damages, as not supported by any evidence showing actual loss of the use of the drill for seven days, and because it is said the wages of the men employed by defendant in error was considered by the jury in determining the value of the use. There was some evidence that the use of the drill to defendant in error was worth \$20 per day, and that the delay in the delivery of it occasioned the loss of at least seven days' use, under the circumstances, sufficient, we think, to support the verdict. It is immaterial, therefore, that the jury disregarded the evidence in their special finding in reference to the usual and ordinary freight charges for similar shipments, and in answer to the question whether the railway company used in its business a book known as the "Western Classification." The action of the company in withholding delivery for refusal to pay a claim wholly disconnected with the contract of carriage precludes an inquiry into the merits of its other demand.

We have examined the other errors suggested, but find nothing requiring a reversal.

The judgment therefore will be affirmed. All the Justices concurring.

#### ATCHISON, T. & S. F. RY. CO. v. BAUMGARTNER.

(Supreme Court of Kansas. June 9, 1906.)  
RAILROADS—ACCIDENT AT CROSSING—PRESUMPTIONS.

In an action for damages by the administrator of a deceased person who was killed while driving a team over a railway crossing, where there is no testimony showing what deceased did immediately before and at the time he went upon the crossing, it is presumed that he was in the exercise of proper care, and that before going upon the crossing he both looked and listened for an approaching train, and from this presumption the jury may so find; but, in the absence of any testimony showing what happened, the jury is not warranted in assuming, in order to account for his going upon the crossing that his team became frightened and that he lost control of them. One presumption of fact cannot, in law, become the basis of another presumption of fact.

[Ed. Note.—For cases in point see vol. 41, Cent. Dig. Railroads, §§ 1121, 1122.]

(Syllabus by the Court.)

Error from District Court, Harvey County; P. J. Galle, Judge.

Action by W. C. Baumgartner against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, defendant brings error. Reversed and remanded.

Wm. R. Smith, O. J. Wood, and Alfred A. Scott, for plaintiff in error. Branine & Branine, for defendant in error.

PORTER, J. The administrator of the estate of A. Baumgartner recovered damages of \$3,000 for the death of his intestate who was killed by a train of plaintiff in error at a highway crossing. The railway company brings error.

The petition alleged, as negligence of defendant, in substance: (1) That defendant negligently constructed the highway crossing in such a manner as to make it unsafe and dangerous. (2) That, in view of the dangerous nature of said crossing, defendant was running its train at an excessive and dangerous rate of speed. (3) That defendant failed to sound the engine whistle for such crossing. (4) That when deceased was approaching the crossing, his team became frightened and unmanageable because of the sudden approach of the train from their rear, without the whistle of the engine being sounded, and were beyond his control, running along the highway and approaching the crossing; that the engineer and fireman upon the engine of said train discovered and saw the danger and imminent peril of the deceased caused by their failure to sound the whistle, and the sudden and uncontrollable fright of his team, in ample time so that, by the exercise of reasonable care, the control of the engine could have been had, and its speed slackened so as to have protected and saved the life of the deceased, but that the engineer and fireman negligently failed to perform such duty. The answer of defendant was a general denial, and that the deceased was guilty of failure to exercise proper care by driving his team upon the track immediately in front of an approaching train.

Mr. Baumgartner, the deceased, lived on a farm in Harvey county. In December, 1903, he was traveling from Hutchinson with a wagon load of salt, drawn by a team of horses, and reached the crossing, where he was killed, at about 11 o'clock in the forenoon. He was 68 years of age and in the possession of all his faculties. It was a clear day, somewhat chilly, with a wind from the north. He was driving east along the section line road, about 14 miles from the neighborhood where he lived, and the train which struck him was going in an easterly direction. The railway runs a little south of east, almost parallel with the highway for a mile and intersects the highway at an acute angle. About 15 rods west of the crossing the beaten track of the public road bears off to the south side of the road and then curves back to the north in order to cross the railway track at right angles. No one who testified saw the deceased when he was struck or immediately before he went upon the crossing. One witness, Mr. Howell, going west with a team, passed him about 300 yards west of the crossing and said that

he was sitting on the spring seat, driving along in the usual way with his horses in a walk. This witness, soon after passing the deceased, looked ahead, saw and heard the train coming from the west nearly a mile away. He testified that afterwards he turned and looked once at Baumgartner and thought the latter was then about entering the curve in the road to the south, which was about 250 feet from the crossing; that he could not tell exactly what the team was doing, but the last he saw of them they were either running or going out of a walk. This witness was then more than a quarter of a mile from the deceased, and the train was somewhere near the whistling post. Two other witnesses who drove past Mr. Baumgartner west of the crossing testified. They had barely time to make the crossing themselves ahead of the train, and did not look back, and therefore knew nothing of what deceased was doing at the time he came to the crossing. When they passed him he had control of his team and the team was going in a quick walk. Here the direct evidence as to what occurred ends. The jury, in answer to special questions, found that the train was running at 45 miles per hour; that deceased looked or listened for the approach of a train before going on the crossing; and also found that by looking he could have seen an approaching train for the distance of a mile. Although there was a conflict in the evidence as to whether the train whistled at the post, 1,340 feet west of the crossing, the general finding was against the railway company, and there was evidence to support the finding. There was no evidence that deceased looked or listened for an approaching train before he went upon the crossing, but, in the absence of any evidence on this point, the law presumes from the natural instinct of self-preservation that he both looked and listened. *Dewald v. K. C., Ft. S. & G. R. Co.*, 44 Kan. 586, 24 Pac. 1101; *C. & R. I. & P. Ry. Co. v. Hinds*, 56 Kan. 758, 44 Pac. 993; *Railroad Co. v. Hill*, 57 Kan. 139, 45 Pac. 581; *Railroad Co. v. Gallagher*, 68 Kan. 424, 75 Pac. 469, 64 L. R. A. 344. It was claimed on the trial that the noise of the train suddenly approaching from the rear, and the sound of the whistle just before the train reached the crossing, frightened the team; that the deceased lost control of them; and that this accounted for his presence on the track.

Counsel for defendant in error argues here, as he doubtless urged upon the jury, that there is no other reasonable explanation of the conduct of the deceased except to assume that he lost control of his team. Otherwise, it is said, he would not have been upon the crossing, for he looked and listened, and could see and appreciate the obvious danger of attempting to cross. Upon the presumption of the law, that, in the absence of all evidence of what deceased did, he is held to have exercised proper care and caution, coun-

sel seeks to base another presumption, and to argue that, under the circumstances of this case, it must be presumed that deceased lost control of his team. But if this was the fact it must be established by proof. The law will not presume in the absence of all proof that any particular thing caused the deceased to go upon the crossing. When facts are proved or admitted, it is proper to draw from them all reasonable inferences in order to sustain a verdict; but the law requires that the facts from which presumptions are to arise must be established by direct evidence. *Starkie on Ev.* p. 57. The jury were properly instructed that they might presume, in the absence of any evidence as to the conduct of deceased when he went upon the crossing, that he both looked and listened for an approaching train, but this presumption is not a circumstance in proof nor does it furnish legitimate foundation for a second presumption. *Railway Co. v. Rhoades*, 64 Kan. 553, 68 Pac. 58; *Phila. City Pass. Railway Co. v. Henrice*, 92 Pa. 431, 37 Am. Rep. 699; *Morris v. I. & St. L. R. R. Co.*, 10 Ill. App. 389; *Lawson on Presumptive Ev.* (2d Ed.) p. 652, rule 118; 22 A. & E. Enc. of Law, p. 1236.

The case must therefore be reversed, and a new trial granted, for failure of proof. There was no proof whatever in reference to this matter, and yet it is apparent that the jury in the general verdict adopted the theory of defendant in error. In his oral argument, counsel practically concedes that there is no evidence in the record which supports such a finding; but it is argued that, in the opening statement of counsel for defendant below, certain things were said which amounted to an admission that deceased, just before going upon the crossing, lost control of his team. It becomes necessary, therefore, to examine this statement. Counsel for the railway company stated in substance that: The engineer and fireman, after the engine passed the whistling post, both saw Mr. Baumgartner away down near the crossing. The team was walking and the engineer gave the alarm whistle. The man did not turn and the team started from a walk. The engineer applied the brakes. When the team started he could not tell whether the man was trying to drive across in front of him or whether the team merely heard the whistle and started. The evidence will show that the road first turns south and then makes a turn and comes north, and as the team turned to the south he felt relieved. The team then whirled and went upon the crossing, and he struck the team and wagon and killed the man. Neither the engineer nor the fireman testified. There is no admission in this statement that the team became unmanageable or that deceased lost control of them. It is plain that the use of the words "turned" and "whirled," in connection with the turn in the wagon road, meant no more than that the engineer saw

that they suddenly turned, which the sudden turn in the road would have required if they had merely followed the wagon road, going in a trot or out of a walk. The team might have turned and whirled first to the south as the road turned, and then to the north, and the deceased have had perfect control of them. It is probable that the jury gave to this statement an effect not warranted by the language used, and upon it based a finding that the team became unmanageable. To support such a finding, there must be proof or an admission of the fact. In the absence of all proof, as observed, the law makes no presumption of what the facts were.

The cause will be reversed, and remanded for another trial. All the Justices concurring.

### ELECTRIC PLASTER CO. v. REEDY.

(Supreme Court of Kansas. June 9, 1906.)

#### 1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

In an underground gypsum mine, not operated under the mining laws of the state, the superintendent, whose duty it was to direct the operation of the miners and to locate where shots should be placed, ordered the deceased and others immediately before a shot was fired to go for safety to a room directly opposite a thin wall where the shot was located, under the belief that the wall or pillar was much thicker than it actually was, and that the force of the shot would therefore break into another part of the mine, instead of breaking through where it did, resulting in the death of the deceased. *Held*, that it was the duty of the superintendent to know the actual thickness of the pillar and the probable consequences resulting from the shot being so placed, and that the risk was not one which deceased had assumed.

#### 2. APPEAL—REVIEW—QUESTIONS OF FACT.

In such case the question of the contributory negligence of deceased is one of fact, which, having been fairly presented in the instructions, is determined by a general verdict in favor of plaintiff in an action against the mining company for wrongful death.

(Syllabus by the Court.)

Error from District Court, Marshall County; Sam Kimble, Judge.

Action by Mary F. Reedy, administratrix of William R. Reedy, against the Electric Plaster Company. Judgment for plaintiff, and defendant brings error. Affirmed.

In an action for the benefit of herself and minor child, defendant in error recovered a judgment of \$5,000 for the death of her husband, William R. Reedy, who was injured March 24, 1904, by the explosion of a blast in plaintiff in error's mine. His death occurred two days after the accident. The plaster company brings error. Plaintiff in error is engaged in mining gypsum at Blue Rapids, and in the manufacture of gypsum plaster. The mine is what is known as a "drift" or "tunnel" mine. A long corridor or main tunnel runs in a northerly direction from the main shaft at the south, and there are a number of air shafts. The gypsum is mined from rooms off from the main tunnel. The en-

trances into these rooms are made at intervals, generally leaving, as supports to the roof pillars, 25 or 30 feet in thickness between the main tunnel and the rooms. The method of making the rooms is to drift in from the side of the main tunnel a distance of 25 or 30 feet and then to extend the opening in a direction parallel to the main tunnel, where another opening is made into the main tunnel, leaving the partition or pillar. Some of the miners worked by the ton in rooms assigned to them individually, and each of these rooms was known by the name of the miner who worked in it at the time. Others worked by the day in the main tunnel or in rooms known as "Company Rooms," generally two miners, together with an expert miner, who directed or "spotted" the shots or blasts after the holes were bored. the gypsum mines are not operated under the mining laws of the state, but the rules of the company required that warning be given of all shots in time for the men to seek a place of safety, and this regardless of whether they were working in separate rooms or in the main entry or tunnel, or in "Company Rooms." The deceased, William R. Reedy, at the time of the accident was employed by the day at the mine, and was at work on the afternoon of that day in the "Marcy Room," laying track. Previously he had been at work in what was known as the "Blossom Room." He had laid track in the "Blossom Room" in the forenoon. He was an expert miner, and his duties had included the location or spotting of shots and firing them. The superintendent of the plaster company was Al Shinn, who was in charge of the mine. Among other things it was his duty to direct the men in their work, to locate where the shots were to be placed, and to give orders as to what direction the rooms and openings should take. He also directed the men where to go for safety when shots were to be fired. On the east side of the main tunnel the "Blossom Room" was being projected, at first in a northeasterly direction, parallel with the main tunnel and distant therefrom about 25 feet. As the work in this room progressed, its direction was changed gradually toward the west or northwest. It was claimed by plaintiff below that the superintendent was not aware of the actual direction it was being pushed, and that he supposed and led the workmen under him to believe that it was being extended parallel with the main tunnel, and that it would break into the "Marcy Room," which was then being opened at a point north of it. As a matter of fact, it had been extended so far in a northwesterly direction that it approached very near to the main tunnel. The shot which caused the accident was placed in that room where the pillar was only  $4\frac{1}{2}$  feet from the east side of the tunnel, and in a hole drilled probably 3 or 4 feet nearer the wall of the tunnel, at a point directly opposite the en-

trance into the "Company Room." The "Marcy Room," which had been started on the east side of the main tunnel north of the "Blossom Room," was at this time fully 35 or 40 feet distant, and had been opened only about 20 feet east of the main tunnel. On the day of the accident Al Marcy was at work there. When the shot was ready to be fired Shinn, the superintendent, ordered him out of the "Marcy Room" into the "Company Room," and also ordered all the other men at work in that part of the mine into the "Company Room" for safety, and went there himself. Blossom, who gave the signal and then fired the shot, had been ordered to go to the same place, and ran out, intending to go there, but stumbled and fell in the main tunnel and escaped injury. Reedy, the deceased, and another miner who were laying track in the "Marcy Room," in obedience to the orders of Shinn, had gone to the "Company Room" as soon as Blossom signaled, and Reedy was standing about 18 feet inside the entrance near Marcy. The "Company Room" opened off on the west side of the main tunnel and was probably 35 feet across at its widest place and pear-shaped; the narrow portion being the entrance. The explosion broke through the narrow space into the main tunnel and threw a mass of rock and stones directly into the "Company Room," some of which, striking Reedy, caused the injuries resulting in his death.

Upon the trial the company claimed and sought to prove by the superintendent that he knew the direction the "Blossom Room" was being pushed; that it was the intention originally to have it meet the "Marcy Room," but that the plans had been changed; and that for the purpose of giving proper circulation to the mine it was concluded to have it break into the main tunnel, where the shot actually opened it. It was claimed that the men knew of this change in the plans; that Reedy, being an expert miner who, until the day of the accident, had worked in the "Blossom Room," knew the direction it was going; that he was in the "Blossom Room" a few moments before the shot was fired and after it had been placed, and knew or should have known fully the probable effect it would have, and that he was guilty of contributory negligence in failing to take a position of safety near the sides of the "Company Room," where it seems some of the miners stood and were not injured. There was some dispute as to the shape of the "Company Room"; plaintiff in error claiming that the main body of it was circular, leaving shoulders where it widened out from the entrance, and that behind these shoulders the deceased could have stood in safety. The contention on the other hand was that the entrance to this room was so wide in comparison to the width of the room itself as to leave no abrupt shoulders, and that the shot which caused the accident was placed at a point directly across the

main tunnel from the entrance to the "Company Room," and that neither the miners nor the superintendent supposed that the shot would break through where it did, and that the deceased was therefore guilty of no contributory negligence. When the shot was fired, the shower of rocks fell all over the "Company Room," and some of the others who stood near Reedy were knocked down by the explosion. Two maps were offered in evidence, one drawn by the officers of the plaster company several weeks after the accident, which sustained to some extent the contentions of the company as to the shape of this room and of the "Blossom Room;" and another map made immediately after the accident by the miners, who identified it as correct, and which sustained the claims of plaintiff below as to the shape and direction of the rooms. Plaintiff below charged defendant company with negligence in permitting the "Blossom Room" to be curved to the northwest so as to leave the pillar or rib between it and the main tunnel so thin that a shot would break through into the main tunnel where it did, and in ordering the miners into the "Company Room" directly in front of the place where the shot broke through.

H. A. Russell, for plaintiff in error. J. G. Strong and W. W. Redmond, for defendant in error.

PORTER, J. (after stating the facts). The contention of plaintiff in error, that the court should have rendered judgment upon the opening statement of counsel for defendant in error, and that the objection to the introduction of any testimony under the petition should have been sustained, will be considered together with the claim that the court erred in overruling the demurrer to the evidence. These three contentions all revolve about the proposition that the deceased was guilty of contributory negligence which prevented defendant in error from recovering. It is urged that, being an experienced miner, and familiar with the surroundings and situation, he knew or should have known the thinness of the wall in the "Blossom Room," the location of the shot and its probable consequences, and, being charged with the knowledge, he should have sought a place of safety near one of the sides of the "Company Room" and away from the front of the entrance. The testimony of the experienced miners was to the effect that in an underground mine like this, where impenetrable darkness prevailed everywhere except as dispelled for a short distance by the smoky lamps carried in the miners' caps, it was impossible for any one, without the use of a compass and frequent measurements, to know with any certainty the direction a tunnel or room was being worked. None of them ever used a compass, because, as appears from the evidence, it was the duty of the superintendent, Shinn, to give the orders to the others, including deceased, as to where and

in what manner the work should be done. It was his duty, as a matter of law, to ascertain and know the thickness of the pillars, and to take reasonable precautions for the safety of the men. It was the duty of the superintendent to know the direction the "Blossom Room" had been extended and the danger which would probably result to the men in the "Company Room" when the shot was fired. He represented the company. *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 632; *Mining Co. v. Robinson*, 67 Kan. 510, 73 Pac. 102; *Brick Co. v. Shanks*, 69 Kan. 306, 76 Pac. 856. The testimony of several of the miners was that the superintendent had told them that the "Blossom Room" was being extended so as to break into the "Marcy Room" on the north, and, indeed, every circumstance in the case warranted the jury in finding that this was true, and that no one was more astonished than Shinn himself when the shot broke through where it did. John Marcy, one of the miners, testified that the superintendent remarked, when the accident occurred, and Reedy was found to be injured: "The company will just raise hell with me. I ought to know the strength of that pillow. \* \* \* Q. What did you understand Mr. Shinn to mean by that pillow? A. Why, that pillow where the shot came through; said he ought to know the strength of it." It is incredible that the superintendent would have ordered the men to go into the "Company Room" directly across the main tunnel from where the shot was placed, and expose them and himself to a danger so apparent, if he had supposed the rib between the "Blossom Room" and the main tunnel was so thin. He evidently thought the "Marcy Room" was the point of danger for he warned Marcy out of that and ordered him to a place of great danger. Marcy, when the explosion came, was standing beside Reedy, and was knocked down by the force of the explosion. The room he had just been ordered out of was, in fact, a place of safety. The evidence on the part of plaintiff was sufficient to support all the material allegations of the petition, and it is unnecessary to discuss the claim that the petition stated no cause of action.

We find no ground for the contention that there was error in the instructions. The court instructed the jury quite fully upon the question of the contributory negligence of the deceased, and the complaint that instructions 1 and 3, requested by plaintiff in error upon that question, were refused, has no force. The same may be said of requested instruction number 2, which referred to the knowledge of deceased of the thinness of the wall. The sixth instruction given by the court stated the law more favorably to plaintiff in error. Requested instruction number 4 was properly refused. A portion of it reads as follows: "That at the best the employment is a dangerous one, and the safety of the employment depends, possibly,

more largely upon their own care and caution than the perfect condition of the mine." There was no contention that the company was required to keep its mine in perfect condition; in fact, the condition of the mine was not involved. The question of whether plaintiff in error was negligent in the operation of the mine, and whether that negligence was the proximate cause of the death of Reedy, was involved; and, even if the condition of the mine had been the principal question in the case, there could have been no occasion for the court to draw a comparison showing the relative importance of those things which make for the safety of one employed in the dangerous business of mining. The general rules of negligence which apply to master and servant employed in any hazardous business apply to this case.

The theory of defendant in error was that the place where deceased stood in the "Company Room" would have been a place of absolute safety if the shot in the "Blossom Room" had broken toward the "Marcy Room." That the force of the explosion would have been in that direction, if the "Blossom Room" was being pushed in the direction every one had been led to believe it was, is clearly established by the evidence. The question of contributory negligence was one of fact, and this defense was fairly presented. The jury had before them abundant evidence to warrant the finding which is involved in this general verdict, to the effect that deceased was not guilty of contributory negligence. By their verdict they also found that the company failed to discharge a positive duty which it owed the deceased to provide him a safe place in which to work, and that this negligence of the company was the proximate cause of his death. The doctrine of assumed risk, therefore, has no application to the facts in the case. *Emporia v. Kowalski*, 66 Kan. 64, 70, 71 Pac. 232; *Schwarzschild v. Drysdale*, 69 Kan. 119, 122, 76 Pac. 441.

The judgment will be affirmed. All the Justices concurring.

#### McKIE et al. v. STATE.

(Supreme Court of Kansas. June 9, 1906.)

##### BAIL—AUTHORITY TO TAKE.

A defendant in a felony case was bound over to the district court, and in default of bail was imprisoned in the county jail under a commitment issued to the sheriff according to the provisions of section 56 of the Criminal Code, upon which bail in the sum of \$300 was indorsed. When the district court convened the case was continued, and an order was made and entered upon the journal that the defendant enter into a recognizance in the sum of \$500 for his appearance at the next term, and that in default of bail he should be committed to the county jail. The defendant remained in jail for several months, when he gave a recognizance which the sheriff took and approved, by virtue of which he was released from custody. At the time the recognizance was given the original commitment was not in the sheriff's possession, the

increased amount of bail was not indorsed upon it, and no certified copy of the journal entry of the order of the district court had been delivered to the sheriff. *Held*, the defendant was in lawful custody, and the sheriff was authorized to take his bail.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Bail, §§ 184–186.]

(Syllabus by the Court.)

Error from District Court, Logan County; J. H. Reeder, Judge.

Action by the state against James McKie and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Lee Monroe and E. P. Hotchkiss, for plaintiff in error. C. C. Coleman, Atty. Gen., and W. H. Wagner (Roark & Roark, of counsel), for the State.

BURCH, J. Complaint was made in writing before a justice of the peace charging James Clark with a felony. A warrant was duly issued upon which he was arrested and brought before the magistrate. He waived a preliminary examination and was bound over to the district court. In default of bail the following commitment was issued and executed: "State of Kansas, Logan County, —ss.; The State of Kansas to the Sheriff of said County—Greeting: Whereas, it appearing that the offense of grand larceny has been committed, and there is probable cause to believe that the defendant James Clark is guilty of the commission of said offense; and, whereas, no sufficient bail has been offered in said defendant's behalf, for his appearance at the next term of the district court of said county, to answer said charge alleged against him: You are therefore commanded to take and commit the said defendant to the jail of Logan county, there to remain until he shall be discharged by law. And deliver this writ to the jailer thereof. Witness my hand," etc. On the back of this writ was indorsed the following: "Bail required, \$300.00."

The accused remained in jail until the next term of the district court, when he waived arraignment and pleaded not guilty to an information which in the meantime had been filed. On the next day after these proceedings the district court made the following order, which was duly entered upon the journal: "And now on this 15th day of April, 1903, it being the succeeding day of said term, this cause comes on again for hearing, and is upon the application and consent of both plaintiff and defendant continued until the next regular term of this court, the defendant is ordered to recognize in the sum of five hundred dollars for his proper appearance at said term of said court, and in default thereof to be committed to the county jail of said Logan county." The sheriff continued to keep the accused confined in jail until July 8, 1903, when his release was procured by giving to the sheriff the following recognizance (formal parts omitted):

"Whereas, upon good cause shown, the above-entitled action is this 15th day of April, 1903, continued for trial unto the next term of the district court for Logan county: Now we, the undersigned, residents of Logan county, Kansas, bind ourselves to the state of Kansas, in the sum of five hundred dollars that said James Clark shall be and appear before the judge of the district court for Logan county to answer the information in said cause presented and filed against said James Clark and abide the judgment of the above-named court, and not depart the same without leave. James Clark, Principal. B. O. McKie, James McKie, Jane E. Daykins, Sureties.

"Approved by me this 8th day of July, 1903. J. E. Nollnd, Sheriff of Logan County."

The recognizance was duly certified to the clerk of the court and recorded in the recognizance docket. The original commitment was filed with the justice of the peace who issued it and by him transmitted to the district court with the other papers in the case. Apparently a certified copy of the journal entry of April 15, 1903, was not delivered to the sheriff and at the time the recognizance was taken he had in his possession no written document commanding the detention of the prisoner. The accused did not appear, the recognizance was duly forfeited, and in an action against the sureties it was claimed the foregoing facts show the principal in the recognizance was not in legal custody when it was given, that the sheriff had no authority to take it, and hence that it created no liability. Judgment was rendered for the state, and the same propositions are urged in this proceeding in error.

The authority of the sheriff to take bail may be rested upon the provisions of section 143, art. 9, of the Code of Criminal Procedure, which reads as follows: "A sheriff or other officer arresting a person under a warrant or other process, or holding a person in custody under a mittimus in or upon which warrant or mittimus it shall appear that the person is to be admitted to bail in a specified sum, may take the bail and discharge the person from actual custody." Gen. St. 1901. § 5585. The original commitment was issued in strict compliance with section 56 of the Code of Criminal Procedure, which reads as follows: "If the defendant is committed to jail, the magistrate shall make out a written order of commitment, signed by him, which shall be delivered to the jailer by the officer who executes the order of commitment. He shall indorse upon the order of commitment the sum in which bail is required." Gen. St. 1901. § 5496. That instrument contained a command to keep the accused in custody until he should be discharged by law, and constituted continuing lawful authority to hold the prisoner until it was supplanted by something sufficient for the purpose. If it be true that the order of the district court did not ipso facto create a new and paramount au-

thority for the detention of the prisoner, and could not do so until a copy of it under seal was placed in the sheriff's hands, then the original writ was not superseded and custody by virtue of it continued to be lawful.

The case is quite like that of *State of Mississippi v. Brown*, 32 Miss. 275. After indictment found the accused was arrested upon a capias, and held in custody. A mistrial ensued and an order was entered of record that the sheriff admit to bail in a sum named, with good security. The sheriff took a recognizance, which was broken, and, in reversing a judgment discharging the sureties, the court said: "It was held in *Pace v. State*, 25 Miss. 54, that, under the provisions of the act of 1822 (Hutch. Code, p. 444, c. 28, art. 3, § 13), the sheriff is only authorized to take a recognizance of bail from a party whom he may arrest on the process of a circuit court. In this case it appears that the accused had been arrested under such process, and for aught that appears in the record, was in custody under that arrest at the time of the mistrial. He must be considered as in custody under the original arrest, until it be shown that he was duly discharged. The order made by the court after the mistrial, was in effect an order of recommitment until the defendant should give bail; and he was not discharged until he was bailed in virtue of the recognizance taken by the sheriff. He was in the meantime in custody under the original arrest by virtue of the process from the circuit court, and in such cases the sheriff has authority by the act above mentioned to take recognizances."

The commitment described in section 56 of the Criminal Code is in fact a common-law mittimus and is within the purview of the language of section 143. The fact that the order of the district court was effectual from the time of its making to increase the amount of bail and that the larger sum was not indorsed upon the mittimus did not change the character of the custody or deprive the sheriff of authority to take bail. Such an omission is a mere irregularity within the meaning of section 154 of the Criminal Code, which reads as follows: "No action upon a recognizance shall be defeated, nor shall judgment thereon be arrested, on account of any defect of form, omission of recital, condition of undertaking therein, neglect of the clerk or magistrate to note or record the default of any principal or surety at the term when such default shall happen, or of any other irregularity, so that it be made to appear that the defendant was legally in custody charged with a public offense, that he was discharged therefrom by reason of the giving of the recognizance, and that it can be ascertained from the recognizance that the sureties undertook that the defendant should appear before a court or magistrate for examination or trial for such offense." Under this statute a recognizance would be good if, after bail had been fixed,

no indorsement whatever of the amount were made upon the writ of detention.

In the case of *Trimble v. State*, 3 Ind. 151, a statute similar in terms to the one just quoted was relied upon to sustain a judgment upon a recognizance. The report of the decision reads: "The sheriff has no power to fix the amount of bail; and a recognizance wherein said amount was fixed by him, would, therefore, probably be void. But the sheriff has a right to take a recognizance in a sum fixed by the court, or an associate judge; and when he does take one in such a sum, we do not think it void by reason of an omission, in the proper officer, to indorse such sum upon the writ. The plea, in this case, did not deny that the amount of bail had been fixed by the proper authority, nor that the sheriff took it in the amount fixed; but it simply denied that the amount had been indorsed upon the writ, and was, therefore, as we think, insufficient." In the case of *State v. Creech*, 69 Mo. App. 377, 381, it is said: "It further appeared that the amount of the bail bond was fixed by an order of the court. This authorized the sheriff to take the bond, although there was no specification of said amount on the warrant. *State v. Jenkins*, 24 Mo. App. 433." The opinion in *State v. Jenkins* reads thus: "This was, accordingly, a case where the sheriff had the defendant, Jenkins, in custody 'under warrant of commitment on account of failing to find bail,' within the language of section 1832, Rev. St. 1879, and he accordingly had the power to take the recognizance under the terms of the statute, unless we are to hold that he had no such power because the amount of bail required, instead of being 'specified on the warrant,' as the statute recites, had been fixed by an order of court entered of record. So to hold would be to stick in the bark of the statute." In the case of *George v. State*, 3 Kan. App. 566, 43 Pac. 850, the syllabus correctly states the law as follows: "When a prisoner is legally in custody, charged with a public offense, and the justice of the peace has ordered that he be released from such custody upon furnishing a sufficient recognizance in the sum of \$300 for his appearance at the next term of the district court, and such a recognizance is furnished and is approved by the sheriff, and the prisoner is discharged from custody and given his liberty by reason of giving such recognizance, held, that upon a forfeiture of such recognizance a recovery thereon cannot be defeated because the justice of the peace neglected to indorse upon the order of commitment the amount of bail required."

The fact that the sheriff did not retain personal possession of the commitment did not destroy his authority. The document was easily accessible, and could have been produced at any time in jurisdiction of his conduct. Its preservation was a matter of importance, but the prisoner was in law-

ful custody under it, and bail might have been taken by virtue of it, even if it had been lost, or if the sheriff had destroyed it. "The sheriff undoubtedly derives his power to take the recognizance, under section 2788 of the Revised Code of 1871, from the judgment of the justice of the peace making the commitment; and his action must strictly conform to the requirements of the judgment. This judgment is certified to him by the mittimus, but the loss of the certificate does not vacate the judgment, nor deprive the sheriff of the authority to take bail. If, notwithstanding its loss, he does take a recognizance in exact conformity with the judgment of the court, as set forth in the missing mittimus (as is affirmatively shown to have been done in the case at bar), the obligation will be valid and binding upon the principal and his sureties." *Cornwell v. State*, 53 Miss 385.

The case under consideration is clearly distinguishable from that of *State v. Beebe*, 13 Kan. 589, 19 Am. Rep. 93, the syllabus of which reads: "Where a person charged with the commission of a criminal offense is at liberty on bail, and his sureties, with his consent, but without any copy of the recognizance, deliver him to the sheriff, taking his receipt therefor, held, that the sheriff, without having any copy of the recognizance, cannot lawfully hold the accused in custody against his will; and therefore that the accused in such a case may escape from the custody of the sheriff without committing a felony; and also that any other person may assist him to escape without committing a felony." When bail has been given and a prisoner discharged, all process for his detention becomes *functus officio*, and if the sureties afterward return him to custody the sheriff must have new authority for holding him. The statute makes express provision for such cases as follows: "The bail must deliver a certified copy of the recognizance to the sheriff, with the principal; and the sheriff must accept the surrender of the principal and acknowledge it in writing." Cr. Code, § 150, Gen. St. 1901.

In view of this statute the court rightly observed: "There is no authority anywhere given to the sureties on a criminal recognizance to arrest their principal, or to hold him in custody, or to deliver him to the sheriff, without a copy of the recognizance; and there is no authority anywhere given to the sheriff to receive such principal, or to retain him in custody, unless he is also furnished with a copy of the recognizance. If the sheriff can hold a person in custody under such circumstances, without such copy, it is by virtue of some authority not found in the statutes. Where a person has been arrested on a criminal charge, and afterwards set at liberty on a recognizance, then he is as much entitled to his liberty as he ever was before, and cannot again be deprived of his liberty except by following the law. There can be

no excuse for again arresting him, or holding him in custody, without written authority." *State v. Beebe*, 13 Kan. 580, 19 Am. Rep. 93. The case of *State v. Hollon*, 22 Kan. 580, has no application to the facts of this controversy. The only authority which can be given to a sheriff to execute a sentence is a certified copy of the judgment of the court pronouncing it. Code Cr. Proc. § 256; Gen. St. 1901, § 5701. In such a case the full jurisdiction of the court has been exercised. The prisoner is no longer held as a subject of its order to be made from time to time. Detention for lack of bail is at an end. A new and affirmative step is to be taken which nothing but the statutory kind of process can justify. Hence, as the court held, if a person sentenced to confinement in the penitentiary break away from a sheriff who is attempting to convey him there without possessing a certified copy of the journal entry of the judgment, he is not guilty of an escape.

In this case Clark was, at the beginning, rightfully imprisoned by the sheriff under a mittimus duly issued upon which bail in a specified sum was indorsed. Lawful at its inception, the custody could not become unlawful until something occurred producing such result; and once in existence, the power to take bail continued until some new fact revoked it. The order of the district court was a further command of record to continue to keep the prisoner in custody until bail in an amount specified should be furnished, and since the prisoner was already in proper confinement it is difficult to perceive what function of substance a certified copy of the order had to perform. "The record of the common pleas shows the order to commit made in open court. In such case a mittimus is not necessary—the order in court to the sheriff, is his authority, and the evidence of it being preserved of record, no writ or copy of the order was necessary." *State for Webb v. Heathman, Wright* (Ohio) 690, 691. "A prisoner who has been properly and legally sentenced to prison cannot be released simply because there is an imperfection in what is commonly called the mittimus. A proper mittimus can, if needed, be supplied at any time, and if the prisoner is safely in the proper custody, there is no office for a mittimus to perform." *People ex rel. v. Baker*, 89 N. Y. 460, 465. "But it is said further that the sheriff did not hold the prisoner under such authority as authorized the sheriff to take the bail. It fully appears that the sheriff held the prisoner under the judgment of this court reversing and remanding the cause and the specific direction therein to commit the prisoner to the Lincoln jail and the keeper thereof to await the action of the circuit court. No higher or greater authority is required by the law. The circuit court fixed the bail, and under these circumstances the sheriff, being in charge, accepted the bail. This is enough. Section 4380, Rev. St. 1889, provides that it is sufficient if 'it be made to

appear from the whole record or proceeding that the defendant was legally in custody, charged with a criminal offense, that he was discharged therefrom by reason of the giving of the recognizance, and that it can be ascertained from the recognizance, that the sureties undertook that the defendant should appear before a court or magistrate at a term or time specified for trial.' *State v. Morgan*, 124 Mo. 479, 28 S. W. 17. All of which amply appears in this record, and the statute answers all the points made against the judgment. It is a wise and wholesome piece of legislation and should be enforced in the spirit of its enactment. There was no error in permitting the sheriff to testify he received the prisoner from the marshal of the Supreme Court and held him under the judgment of this court." *State v. Austin*, 141 Mo. 481, 487, 43 S. W. 165.

This court has remarked upon several occasions the sweeping effect of section 154 of the Criminal Code upon the old law relating to recognizances. It creates a statutory estoppel against the pleading by the obligors in such instruments of any but the most substantial defenses. As the Supreme Court of Arkansas has well said: "This is not a criminal prosecution, but a common suit upon a bond for money, an action to enforce a civil contract between these sureties and the state. And we know of no rule requiring any greater strictness in construing this law than any other legislative act upon civil contracts, and instead of adhering to the utmost strictness as in prosecutions for high crimes, we must give the law a fair and liberal construction to carry out the provisions of the statute and enforce the contract in the spirit of the law, and as it was understood between the parties, and such construction is clearly what was intended by the Legislature, as shown by section 80 of the Criminal Code, in which it is enacted that no 'irregularity, so that it be made to appear that the defendant was legally in custody charged with a public offense, and that he was discharged therefrom by reason of the giving of the bond or recognizance, and that it can be ascertained from the bond or recognizance that the bail undertook that the defendant should appear before a magistrate for the trial thereof, etc., shall render the bail bond or recognizance invalid.'" *Pinson et al. v. State*, 28 Ark. 397.

The sheriff is an officer who has authority to take bail. Assuming the order of the district court to be of a higher character than the writ issued by the justice of the peace, it properly may be regarded as a precept of commitment in which bail in a specified sum appeared; and if strict formality required that a copy of it be issued to the sheriff, the failure to do so was an irregularity merely, the prisoner continued to be in lawful custody and the sheriff had authority to take bail and discharge him. The time and place of holding the next term of the district court of Logan county after April 15, 1903, were

fixed by law, and all the matters specified by section 154 of the Criminal Code sufficiently appear in the recognizance.

No injury is shown to have resulted from the overruling of an objection to the admission of certain depositions because, though in the custody of the clerk, they had not been marked filed one day before the trial. Hence the error, if any were committed, was not prejudicial. If the defendants had been misled or overreached in any particular, a different ruling might have been required. True, it was the duty of the clerk, when he received it, to have marked it filed (Code, §§ 710-712); but it was a purely formal act, which, having been omitted, the court should have ordered done at once. The omission of the clerk to note the fact of filing should not deprive the party of the right to use this testimony. *Hogendobler v. Lyon*, 12 Kan. 276.

One of the defenses to the action was that the principal in the recognizance was killed by accident in the city of Omaha, Neb., before forfeiture, and evidence to that effect was introduced. On the part of the state various officials of the city of Omaha and of Douglas county, Neb., on which it is situated, testified to keeping, by virtue of city ordinances and state laws, records of deaths by accident in the city and county, upon which records the death of Clark did not appear. It is urged that the official character of the records was not proved by competent evidence. The legal authority for the records was a collateral matter. The fact that records actually were kept was the important thing, and furnished a basis for the testimony to which objection is made. The weight of the evidence was materially increased because the witnesses believed they were acting under the compelling force of valid statutes and ordinances. If, however, those enactments had been, in fact, invalid because, for example, they were unconstitutional, the evidence could not be rejected on that ground.

The judgment of the district court is affirmed. All the Justices concurring.

#### ASHTON v. GARRETSON.

(Supreme Court of Colorado. June 4, 1906.)

##### VENUE—CHANGE—DEFENDANT'S RESIDENCE.

Mills' Ann. Code, § 27, provides that an action shall be triable in the county in which the defendant resides but that action on notes shall be tried in the county where payable, and section 29 provides that the court may, on good cause shown, change the place of trial when the county designated in the complaint is not the proper county. *Held*, that where a defendant sued on his note resided in a county other than that in the district court of which the action was commenced, and the note was not payable in such county, it was error to refuse his timely application for a removal.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, § 15.]

Error to District Court, Arapahoe County; Frank W. Owers, Judge.

Action by Phillip Garretson against Scott Ashton. Judgment in favor of plaintiff, and defendant brings error. Reversed.

This action was commenced in the district court of Arapahoe county July 5, 1891, upon two promissory notes dated and executed at the town of Victor, Teller county, Colo. Summons was served upon plaintiff in error, the defendant below, the 15th day of July, 1891, at Victor, in the county of Teller, state of Colorado. On August 2d the defendant filed an answer, and at the same time an application for change of venue, supported by affidavit, to the effect that the notes sued on were executed at the town of Victor, and county of Teller, and that the defendant at the time of the service of the summons was a bona fide resident of said county. On March 10, 1892, the application was denied, and thereafter judgment rendered against defendant upon the pleading. Section 27 of Mills' Ann. Code provides, *inter alia*, "In all other cases the action shall be tried in the county in which the defendants, or any of them may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county; \* \* \* actions upon notes or bills of exchange in the county where the same are made payable." Section 29 provides: "The court may, on good cause shown, change the place of trial in the following cases: First, when the county designated in the complaint is not the proper county."

Ralph Hartzel and James C. Starkweather, for plaintiff in error. Bicksler, McLean & Bennett, for defendant in error.

GODDARD, J. (after stating the facts). The jurisdiction of our district courts is co-extensive with the state; but when an action is brought in a county other than that in which it should be tried, the defendant may avail himself of his right to change the venue to the proper county. *Fletcher et al. v. Stowell*, 17 Colo. 94, 28 Pac. 326; *Wasson v. Hoffman*, 4 Colo. App. 491, 36 Pac. 445. And upon a proper showing the duty of the court is mandatory, and its jurisdiction is divested except for the purpose of making the order of removal. *D. & R. G. R. R. Co. v. Cahill*, 8 Colo. App. 158, 45 Pac. 285; *Smith v. The People*, 2 Colo. App. 99, 29 Pac. 924; *Pearse v. Bordelean*, 3 Colo. App. 351, 33 Pac. 140. The language of section 27 above quoted expressly provides that all cases, unless otherwise provided, shall be tried in the county of defendant's residence, unless service of summons is made upon defendant in the county where plaintiff resides, with an exception among others that actions upon notes or bills of exchange may be tried in the county where the same are made payable. The notes in question were not made payable in the county of Arapahoe,

and therefore did not come within the exception last mentioned.

In the circumstances of this case, the defendant, having made his application in apt time, had the right to have the action tried in the county of his residence, and the court erred in denying his application for removal. *People v. District Court*, 30 Colo. 123, 69 Pac. 597. The cases cited and relied upon by counsel for defendant in error involved the construction of section 24 of the Code of 1877, and section 28, c. 62, of the Code of 1883, which were materially different from the present provision on the subject, and are not applicable to the case in hand.

It is unnecessary to consider the other assignments of error since, for the reasons given, the judgment must be reversed and the cause remanded, and it is so ordered.

Reversed.

GABBERT, C. J., and BAILEY, J., concur.

#### TEMPLE v. MAGRUDER.

(Supreme Court of Colorado. April 2, 1906.)

##### 1. EVIDENCE—RECORDS—BOOKS OF ORIGINAL ENTRY—PRELIMINARY PROOF.

A physician's account book, though a book of original entry, is inadmissible to prove charges entered therein, without the preliminary proof required by Mills' Ann. St. § 4817, that the entries therein were made by the physician and were true and just.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1628-1637.]

##### 2. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED PERSON.

Under Mills' Ann. St. § 4816, providing that no party to a civil action or proceeding, or person directly interested in the event shall testify in his own behalf, when any adverse party sues or defends as the executor or administrator of any deceased person, unless when called as a witness by such adverse party so suing or defending, a physician in a proceeding to establish a claim for medical services against a decedent's estate was not qualified to testify, against the administrator's objection, on any matter or at all.

Appeal from District Court, Teller County; Louis W. Cunningham, Judge.

Proceeding by C. A. Magruder to establish a claim for medical services against W. O. Temple, as administrator of the estate of Thomas Keating, deceased. From a judgment in favor of plaintiff, the administrator appeals. Reversed.

J. M. Brinson, for appellant. Charles F. Causaul and David P. Wilder, for appellee.

GODDARD, J. On March 13, 1901, C. A. Magruder, the appellee, presented to the county court of Teller County a claim against the estate of Thomas Keating for \$333 for medical services rendered said Keating. The court allowed \$100 and disallowed the remainder. From this judgment Magruder appealed to the district court. On January 7, 1902, the cause was tried to the court, and

judgment rendered in favor of Magruder for \$333 against the estate. The administrator brings the case here for review. The principal errors assigned and discussed are the following: First, admitting in evidence the account book of appellee; second, in permitting the appellee to testify of his own motion over the objection of appellant.

1. The reasons assigned in support of the first objection are that the book is not a book of original entry, and was admitted without making the preliminary proof required by statute. Under the ruling in *Plummer v. Struby-Estabrooke Co.*, 23 Colo. 190, 47 Pac. 294, the book in question must be held to be a book of original entry, and would have been admissible in evidence had the preliminary proof required by the statute been made. Mills' Ann. St. § 4817. There was no compliance with the statute in this respect, and the book should not have been admitted in evidence.

2. It was clearly error for the court to permit the claimant to testify in the case. Section 4816, Mills' Ann. St. provides that "no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein, of his own motion, or in his own behalf, \* \* \* when any adverse party sues or defends as the \* \* \* executor or administrator \* \* \* of any deceased person \* \* \* unless when called as a witness by such adverse party so suing or defending." By the plain and positive provision of this statute, the appellee was incompetent to testify in the cause of his own motion, and over the objection of appellant, upon any matter, or at all. That this is the purpose and meaning of this statute is settled by previous decisions of this court and of the court of appeals, among them: *Whitsett v. Kershow*, 4 Colo. 419; *Gilham v. French*, 6 Colo. 196; *Palmer v. Hanna*, 6 Colo. 55; *Jones v. Henshall*, 3 Colo. App. 448, 34 Pac. 254.

We have read the entire testimony set out in the transcript of the record, and are unable to find sufficient competent evidence to support the judgment. The foregoing errors, therefore, necessitate a reversal. Judgment reversed, and cause remanded for a new trial.

Reversed.

GABBERT, C. J., and BAILEY, J., concur.

#### COVINGTON v. PEOPLE.

(Supreme Court of Colorado. April 2, 1906.)

##### 1. CRIMINAL LAW—MOTION IN ARREST—DEFECTS IN INFORMATION—GRAMMATICAL MISTAKE.

Under Mills' Ann. St. § 1433, providing that no motion in arrest of judgment shall be sustained for any matter not affecting the merits of the offense charged, an information charging that accused did "in and upon the body of one Winnie Adams feloniously \* \* \* and of his

malice aforethought commit an assault, and she, the said Winnie Adams, then and there feloniously \* \* \* and of his malice aforethought did kill and murder," though grammatically incorrect by reason of the word "she," charges that defendant killed Winnie Adams, and is sufficient as against a motion in arrest.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2458; vol. 27, Cent. Dig. Indictment and Information, §§ 209-213.]

## 2. HOMICIDE — EVIDENCE — CIRCUMSTANTIAL EVIDENCE—STATUTES—INSTRUCTIONS.

At a trial for homicide it appeared that a witness and accused were outside of a house talking, when decedent stepped out and called to the witness, who walked away four or five steps, when accused fired his pistol, killing decedent. Before the witness walked away, he saw the accused with his hand on his pistol. Another witness testified that when decedent came into the house she said that she was shot and that accused had shot her. *Held*, that the evidence was not circumstantial, within Mills' Ann. St. § 1176, as amended by Laws 1901, p. 153, c. 64, which provides that no person shall suffer the death penalty who shall be convicted on circumstantial evidence alone; and the court properly charged the jury that the death penalty might be inflicted.

## 3. SAME—MURDER IN SECOND DEGREE—INSTRUCTIONS.

An instruction, on a trial for homicide, stating that the jury might presume that accused intended the usual and ordinary consequences as the result of his act, and if they found that accused intentionally fired a pistol at decedent, and that the bullet struck decedent, inflicting on her a mortal wound, they might imply that accused feloniously and of his malice aforethought murdered decedent, authorizing a verdict of guilty of murder in the second degree, was not erroneous, for it left to the jury to determine whether accused intentionally fired the fatal shot.

## 4. CRIMINAL LAW — INSTRUCTIONS—REFUSAL OF REQUESTS.

It is not error to refuse requested instructions, embodied in those given.

## 5. SAME—APPLICABILITY OF INSTRUCTIONS TO EVIDENCE.

Where, on a trial for homicide, there was no evidence that the killing was the result of accident or of carelessness in the handling of a pistol by defendant, who denied all knowledge of the shooting, instructions directing the jury to acquit, if the killing was accidental, were properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1982-1985.]

## 6. SAME—ARGUMENT OF COUNSEL—COMMENT ON EVIDENCE.

Where, on a trial for homicide, the evidence showed that some time previous to the shooting accused was engaged in another shooting affray; that he owned and carried a gun in a peaceable community without any legitimate excuse; that he had on the night of the killing drawn a gun on a third person, and later, in order to enforce a certain demand, had fired into the air; that on the same night he was seen outside of his own house with a gun in his hand while carrying a bucket of coal—it was not error for the prosecuting attorney to say in his argument that defendant might have had a good reputation, but that he had gone wrong and had established a reputation "for being a gun man."

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1670, 1674.]

Error to District Court, El Paso County; Robert E. Lewis, Judge.

Henry Covington was convicted of murder in second degree, and he brings error. Affirmed.

T. J. Black, for plaintiff in error. N. C. Miller, Atty. Gen., and I. B. Melville, Asst. Atty. Gen., for the People.

GODDARD, J. The plaintiff in error, defendant below, was convicted of the crime of murder in the second degree and sentenced to the state penitentiary for a term of from 10 to 12 years at hard labor.

Upon the overruling of a motion for a new trial, counsel for defendant interposed a motion in arrest of judgment, for the reason that the information does not state facts sufficient to constitute murder in either degree. The information charges that: "Henry Covington, on the 4th day of January, A. D. 1905, at the said county of El Paso, did then and there in and upon the body of one Winnie Adams feloniously, unlawfully, willfully, and of his malice aforethought commit an assault, and she, the said Winnie Adams, then and there feloniously, unlawfully, willfully, and of his malice aforethought did kill and murder." It is contended that by using the pronoun "she" the pleader charges the deceased with the commission of murder, and that the defendant is simply charged with an assault. While the information is subject to criticism because of the wrongful use of the pronoun, it at most amounts to only a grammatical error, and there is no doubt that, when taken in connection with the other averments, the information charges that the defendant killed Winnie Adams. It is well settled that grammatical errors should be disregarded if the real intention and meaning of the information is not obscured thereby. In *Dickson v. State*, 62 Ga. 589, the court, in considering an indictment where the gender and number of two persons were involved, thus disposed of a like objection: "This is an unsightly literary blemish, but not a grave legal infirmity. In school the composition would not pass, but it may be tolerated in the courthouse. The meaning is clear, though the verbal inaccuracy is glaring. We may regret that those who write affidavits and warrants guard their pronouns with so little vigilance, but we cannot hold, as matter of law, that their bad grammar vitiates the documents." Section 1433, Mills' Ann. St., provides that: "No motion in arrest of judgment or writ of error shall be sustained for any matter not affecting the real merits of the offense charged." The use of the wrong pronoun did not affect the real merits of the offense charged. The defendant was in no way misled or prejudiced by the use thereof. The court did not err in overruling the motion.

It appears from the undisputed testimony that while somewhat under the influence of liquor the defendant, on the evening of the 4th of January, 1905, visited the house of Winnie Adams, the deceased, where were present Samuel Terry, Fred Hopkins, Bailey Trimble, and the deceased; that upon his entering the house Hopkins advanced to shake

hands with the defendant, who drew a revolver and said, "Don't come any nearer me, I will shoot you," whereupon Hopkins backed off, and the defendant added, "No, I don't mean to hurt you or anybody," and threw his gun upon the floor, saying: "I don't mean to hurt anybody. I want to show you that it is a safety. It is as safety a gun as a man can carry." Hopkins picked the gun up and placed it upon the table or dresser. After remaining there some time the defendant said: "I believe I will go home. Give me my gun." That he (Hopkins) gave the defendant the gun, and defendant started to go and said to Terry, "I want to see you." Terry went out of the house with him, and while outside talking the deceased went out to get some coal. What occurred when she stepped out of the door is described by Terry as follows: "Then Winnie Adams she comes out the door. When she throws the door open the light was right on us, you know. Well, she calls me, 'Step here a minute, Sam,' and I said, 'Excuse me, Mr. Covington,' so I turns my back off and walks about four steps or five. He fired this gun just like that, bang! and she hollered and had the gun pointed just like that. Q. Now, where were you and Winnie Adams? A. Well, I was standing, like she come out the door here, and I was standing something like this, and he was right over there, and he had the gun on me like that. She hollered, 'Oh, I am shot! I am shot!' and ran on in the house. Well, I goes on in behind her. \* \* \* Q. Did the bullet hit you? A. Yes, it glanced my finger right there, and then he said like this, 'Close that door.'" Upon cross-examination: "Q. You say, just as you turned your back to them, the shot was fired? A. Yes, sir. Q. As you turned your back to Covington? A. Yes, sir. Q. You weren't looking at him, then, when the shot was fired? A. No, sir; I didn't exactly have my back turned on him when he fired. Q. But you didn't see him at the time the shot was fired? A. No. Q. You heard but one shot? A. That is all. \* \* \* Q. Where did you say the bullet struck you? A. I said it glanced my finger. Q. Just point out to the jury the fingers or the finger that it glanced? A. Right there [showing jury]. Q. The fourth finger of the right hand? A. Yes, sir. Q. How were you standing at the time you received the shot? A. Well, I was standing just about at the side, something like this, and he was standing over there; a straight shot. Q. Were you north, south, east, or west of him? A. I was on the side of her here. Q. You were at the side of her? A. Yes, sir. Q. Was she exactly north of you, or how? A. She was exactly, just like me and you, sitting here this way. Q. Were you facing her, or sideways, or how? A. I was going up to her, and stopped sideways to her. She was bending over picking up coal. Q. And you were between her and Covington? A. Yes; sort of angling like, you know. Q. Near what door

was she standing? A. She was standing near the south door. Q. About how far was she from the house? A. Well, she was about two feet, I guess, from the house. Q. How far was Covington away when you last saw him? A. Well, Covington was about six yards off from the door." The defendant testified: That he never had any difficulty or misunderstanding with Sam Terry. Relations with him were friendly. Never had any difficulty or misunderstanding with Fred Hopkins or with Bailey Trimble. "Terry gave me a drink of whisky at about 6 o'clock January 4, 1905. Went to Winnie Adams' house about 8 or half past 8. Drank liquor a good many times. He called it red whisky. Q. Did you have any trouble with anybody there? A. No, sir, not a word. Q. Do you remember of having any trouble with him [Hopkins]? A. No, sir. Q. How long had you been there when he [Hopkins] came? A. When I came over to the house Mr. Hopkins and Miss Adams was standing outside the door talking. Q. How long were they on the outside after you went in? A. About 30 to 45 minutes. Q. Did you have any trouble with Hopkins after he came in? A. No. Q. Were you drunk or sober when Hopkins came in? A. Pretty well tanked up. Q. Do you remember what occurred after Hopkins came in? A. Yes, sir. Hopkins came in and Miss Adams went right behind, and Hopkins walked up to the stove and warmed his hands, \* \* \* and sat down; and after that I don't remember anything else that occurred in the house that night. \* \* \* Q. Did you intentionally fire that gun either at Winnie Adams or Terry, or even intentionally fire it off? A. I haven't fired any at all, not to my knowledge. Spent night of January 4th last at my house. Q. Where did you get your breakfast this morning, January 5th? A. At home. After breakfast went to work in the mines. Saw Terry. I says to him: 'Good morning, Sam. I hear I shot you last night, and Miss Adams. Can it be so?' He said, 'Yes.' I says, 'I am awfully sorry.' Q. When did you first learn that you were charged with the shooting? A. The next morning. Q. Who told you? A. Leftwich. I told him I didn't know anything about it." We have stated the evidence thus fully in order that the merits of the objections to the giving and refusing of certain instructions may be better understood.

Error is assigned upon the giving of instructions Nos. 2 and 5, because therein the jury are told that the death penalty might be inflicted, in contravention of section 1176, Mills' Ann. St., as amended by Laws 1901, p. 153, c. 64, which provides, *inter alia*: "Nor shall any person suffer the death penalty who shall be convicted upon circumstantial evidence alone." It is insisted that there is no direct evidence as to the fact of the shooting, and that Terry's statement that defendant fired the shot is but an inference based upon surrounding circumstances, and not upon

actual observation, and is, therefore, to be regarded as circumstantial evidence within the meaning of the statute. While it is true that the witness testified that he turned and walked towards the deceased, he describes how the gun was fired, and how the gun was pointed. He stated that he did not exactly have his back turned on defendant when he fired, and he then goes on to describe to the jury the position that he was in, and says: "I was standing something like this, and he was right over there, and he had the gun on me like that;" that the bullet glanced his finger. In answer to the question, "How were you standing at the time you received the shot?" he answered, "Well, I was standing just about at the side, something like this, and he was standing over there; a straight shot;" that he was "sort of angling between the deceased and Covington." Furthermore, Hopkins testifies that when Winnie Adams came in the door she screamed that she was shot, and when asked who shot her she said Henry Covington. While it may be that Terry was not looking at Covington at the instant he fired the shot, yet the interval was so short between the time he saw him with his hand upon his gun and the time he heard the report and felt the effect of the bullet on his finger, and from the fact that he saw the position in which Covington held the gun immediately upon the shot being fired, in these circumstances we think it can be said that the witness was cognizant through his senses of the fact that Covington fired the shot, and that his evidence as to that fact is not circumstantial, within the contemplation of the statute.

Instruction No. 6, when taken as a whole, is not subject to the criticism urged against it by counsel for plaintiff in error. While the court at the outset stated to the jury that they might presume that the defendant intended the usual and ordinary consequences as the result of his act, yet immediately following this expression the court used this language: "And if you find and believe from the evidence beyond a reasonable doubt that the defendant intentionally fired a deadly weapon, to wit, a loaded pistol, at Winnie Adams, \* \* \* and that the bullet fired from said pistol struck Winnie Adams, inflicting on her a mortal wound, from which she died the next day, then you are at liberty to imply that the defendant did unlawfully, willfully, feloniously, and of his malice aforethought kill and murder said Winnie Adams, and in that event you will find him guilty of murder in the second degree." This instruction as a whole correctly states the law, and left it to the jury to determine from the evidence whether defendant intentionally fired the fatal shot. It is a well-settled rule that the trial court in its instructions should avoid indicating its opinion as to any material matter of fact, and that any violation of

this rule that influences the jury to the prejudice of the defendant would constitute reversible error. And while it must be conceded that the trial judge used an expression in instruction No. 8 that was improper, in that it assumed that defendant shot deceased, yet, when considered in connection with the context, we do not think it can reasonably be said that the jury understood this expression as intended to convey to them an opinion on the part of the court that defendant fired the shot. That the expression was inadvertently made is evident. The court was instructing the jury as to the degree of intoxication that would relieve the defendant from the extreme penalty of the law and would reduce the homicide from murder in the first to murder of the second degree. It was not the purpose of this instruction to call the jury's attention to the fact of the shooting, but to the condition of defendant at the time—whether he was so deeply intoxicated as to be incapable of forming in his mind a design premeditatedly and deliberately to do the act. And from other instructions theretofore given, and from what follows in this instruction, the jury were clearly advised, and understood, that it was exclusively their duty and province to find from the evidence not only the fact as to whether or not the defendant fired the shot, but as to whether he did so intentionally and of his malice aforethought, and their verdict indicates that they discharged this duty regardless of any intimation of the court.

Counsel for plaintiff in error earnestly insist that the court erred in refusing to submit to the jury certain requests for instructions on behalf of the defendant. After careful consideration of these objections, we are of the opinion that while some of these requests correctly announce the law, and might with propriety have been given, yet, in view of the evidence and the instructions given, we do not think the court committed reversible error in refusing them. In other words, the court in its instructions repeatedly told the jury what was essential to be proved in order to convict the defendant of murder in the second degree, which is the offense for which he was convicted. They were told that if they found and believed from the evidence beyond a reasonable doubt that he had intentionally fired a loaded pistol at, and did willfully, feloniously, and of his malice aforethought kill, Winnie Adams, they might find him guilty of that offense. They were also told that the defendant was presumed to be innocent of any offense, and that before they could convict him the people must overcome that presumption by proving him guilty beyond a reasonable doubt, and if they had a reasonable doubt they must acquit him. These instructions cover and correctly state the law applicable to the evidence in the case, and we think are equivalent to, and fully announce the law as contained in, the defend-

ant's requests numbered 5, 6, 7, 8, 9, 11, 13, 14, 18, and 22. The court, therefore, did not commit reversible error in refusing the latter. "It was competent for the court to reject all the prayers offered, and grant instructions to the jury in its own language; and when these are correct, and cover the whole ground, the judgment will not be reversed, even though some of the rejected prayers might properly have been granted." *McCarty v. Harris*, 49 Atl. Rep. 414; *Deitz v. Regnier*, 27 Kan. 95; *People v. Benc*, 130 Cal. 159, 62 Pac. 404; *City of Boulder v. Fowler*, 11 Colo. 396, 18 Pac. 337.

Requests Nos. 4, 19, and 20 in effect directed the jury to acquit if the killing was accidental. There was no evidence introduced that tended to show that the killing of deceased was the result of accident or of carelessness in the handling of the pistol by the defendant. He denied all knowledge of the shooting, and it is clear that no inference that the shooting was accidental or the result of carelessness is deducible from the facts as detailed by the other witnesses. In these circumstances, these instructions were properly refused.

The objection to the question propounded to the juror Perkins we think was properly sustained for the reason given by the court. It could not be determined at that time what the evidence would develop, and while the remark made by the court to the effect that counsel was "misleading the jury" was, to say the least, ill-advised, since it might have been understood by the jury as a reflection upon the good faith of counsel, and have conveyed to the jury the impression that he was not treating them fairly in his examination, yet we do not think it constitutes a sufficient reason for reversing the judgment.

In addressing the jury the district attorney, referring to the testimony introduced by the defendant as to good character, used the following language: "The defendant may have had a good reputation, but he has gone wrong. He has gone out there and established a reputation for being a gun man." This language was objected to by counsel, and the objection was overruled. It appeared from the defendant's testimony that some time previous to the shooting in question he was engaged in another shooting affray, and on cross-examination he testified as follows: "Q. Did you have your gun when you went there that night? A. When I started over there? Yes, sir. Q. Did you have it in your hand? A. Yes, sir. Q. And you took two shots at the fellow, didn't you? A. Yes, sir." This circumstance, taken in connection with the fact that he owned and carried a gun in a peaceable community without any legitimate excuse for so doing, and had on the night in question drawn it on Hopkins, and later, in order to enforce his demand that the door to Winnie Adams' house be closed and the lights extinguished, fired into the air, and shortly after 9 o'clock

on the same night was seen outside of his own house with the gun in his hand while carrying a bucket of coal, was sufficient to justify the district attorney in drawing the inference that, notwithstanding his former reputation, he had "gone wrong" and established a reputation for being a "gun man." The jury had heard this testimony, and the evidence of defendant's good character, and it was clearly within the scope of legitimate argument for the district attorney to state to them what conclusion. In his judgment, as to defendant's character for peace and quiet was logically deducible therefrom. The remarks of the district attorney were therefore within the record.

After a careful consideration of the record and the able and exhaustive briefs of counsel for plaintiff in error, we are constrained to say that, while some of the objections urged might have been avoided by the exercise of more care and liberality on the part of the trial judge, yet, in view of all the testimony, they occasioned no prejudice to the plaintiff in error that would justify setting aside the verdict, which, in our opinion, is amply supported by the evidence.

The judgment is therefore affirmed.

Affirmed.

GABBERT, C. J., and BAILEY, J., concur.

#### UNION STEEL & CHAIN CO. v. WAGONER.

(Supreme Court of Colorado, April 2, 1906.  
Rehearing Denied May 7, 1906.)

EVIDENCE — CONTRACTS — ACTIONS — EXPRESS CONTRACT — VALUE — SIMILAR EVIDENCE GIVEN BY ADVERSE PARTY.

Where a case was tried on an express contract by defendant to pay plaintiff an agreed price for machinery, both parties ignoring a cause of action on a quantum meruit contained in the complaint, the court committed no error in excluding evidence by the defendant as to the value of the machinery, though similar evidence had been admitted in behalf of plaintiff.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 450.]

Error to District Court, Arapahoe County; Peter L. Palmer, Judge.

Action by John Wagoner against the Union Steel & Chain Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

C. H. Pierce and Henry T. Sale, for plaintiff in error. George P. Steele, for defendant in error.

GUNTER, J. This case was tried upon an express contract by defendant to pay to plaintiff an agreed price for certain machinery; both parties ignoring a cause of action upon a quantum meruit also contained in the complaint. The case was tried to the court, resulting in a finding and judgment for plaintiff, defendant in error here.

As the cause of action concededly proceeded upon was an express contract to pay a stipulated price, the court committed no error in excluding any evidence offered by defendant going to the value of the machinery involved. The mere fact that the court admitted evidence upon this immaterial issue, to wit, the value of the machinery, in behalf of plaintiff, was no reason why it should repeat the error by receiving like testimony from the defendant. The ruling simply excluded immaterial testimony, and was not error. The contract between plaintiff and defendant was effected through an agent. Plaintiff in testifying stated the transaction as reported to him by his agent. It is said this was error. It suffices to say that this testimony was admitted without objection. Plaintiff testified to a conversation with the representative of defendant wherein such representative admitted the contract sued on, and it is said the court refused to permit defendant to give evidence as to this conversation. The facts fail to sustain this contention. There was no effort to show by other witnesses such conversation, and there was no ruling of the court excluding the evidence of other witnesses going to this conversation.

It is further contended that the evidence does not support the finding and judgment of the court. There was evidence for plaintiff which, if credited, made out the cause of action sued on. This being true, there was evidence sufficient to sustain the finding and judgment of the court.

The judgment below is affirmed.

The CHIEF JUSTICE and MAXWELL, J., concur.

# HOBAN v. BOYER.

(Supreme Court of Colorado. June 4, 1906.)

## 1. MINES AND MINERALS—LOCATION—ACTION TO DETERMINE RIGHTS.

In a suit in support of an adverse to a mining claim, a showing that plaintiff's location was made on ground embraced within a prior, valid, subsisting location is a bar to his recovery.

## 2. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The erroneous refusal of a competent offer of proof is reversible error, though the evidence in support of the offer might not have been sufficient to prove it.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4187, 4189.]

Appeal from District Court, Clear Creek County; Frank W. Owers, Judge.

Action by U. W. Boyer against J. J. Hoban in support of an adverse to a mining claim. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

W. A. Williams, for appellant. John J. White, for appellee.

CAMPBELL, J. This is an action in support of an adverse claim filed in the United States Land Office. The controversy is over a strip of ground in conflict between the Golconda lode mining claim, owned by the plaintiff, and the Davidson No. 1 lode, owned by the defendant. The result of the trial was a judgment for the plaintiff, from which the defendant appeals. Two grounds are relied upon for reversal.

1. The defendant maintains that the verdict of the jury was manifestly against the weight of the evidence. Our examination of the record discloses that the evidence was in serious conflict, but was legally sufficient to support the verdict. The verdict is not so manifestly against its weight as to indicate that it was the result of passion or prejudice.

2. The defendant offered to show that at the time the Golconda lode was located the same ground, including the discovery point, was embraced within a prior, valid, subsisting location. This offer of proof was refused by the court on plaintiff's objection that such evidence was incompetent and immaterial and did not tend to prove any issue in the case. The answer denied that plaintiff's location was good; hence this ruling was wrong, and because of it the judgment must be reversed. A valid lode mining location must be upon unoccupied and unappropriated public domain. In a suit in support of an adverse claim, the defendant may show that the plaintiff's location was made upon ground embraced within a prior, valid, subsisting location, and if he succeeds in the same it is a bar to plaintiff's recovery. *Armstrong et al. v. Lower*, 6 Colo. 393; *Girard v. Carson*, 22 Colo. 345, 44 Pac. 508; *Michael v. Mills*, 22 Colo. 439, 45 Pac. 429; *Calhoun Mining Co. v. Ajax Mining Co.*, 27 Colo. 1, 59 Pac. 607, 50 L. R. A. 209, 83 Am. St. Rep. 17; *Kirk v. Meldrum*, 28 Colo. 453, 65 Pac. 633; *Moyle v. Bullene*, 7 Colo. App. 308, 40 Pac. 69; *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; *Del Monte M. Co. v. Last Chance Co.*, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72. Plaintiff does not question the foregoing rule, but denies its applicability to the facts. We fail to perceive the force of appellee's argument. It may be that defendant's evidence might not be sufficient to prove the offer; but, if so, that cannot avail the plaintiff here. It was a good offer, and evidence, if any, in support of it, should have been admitted.

The judgment is reversed, and the cause remanded.

GABBERT, C. J., and STEELE, J., concur.

# **HICKEY v. ANHEUSER-BUSCH BREW- ING ASS'N.**

(Supreme Court of Colorado. April 2, 1906.)

## **1. JUDGMENTS—RES ADJUDICATA—FINDINGS—EFFECT.**

Plaintiff sued on April 3, 1900, to recover a debt and to foreclose a deed of trust securing payment. Pending this suit the debtor died, and, an administrator having been appointed, he was substituted as defendant. On September 23, 1900, plaintiff presented to the probate court a petition alleging the pendency of the foreclosure proceeding, the copy of the note sued on, and praying the allowance of the same, and that plaintiff be permitted to proceed with the foreclosure. On November 19th judgment was rendered in the probate court, in which it was found that "more than six years had intervened between the date the cause of action presented by claimant arose and the time set for the hearing of said claim," wherefor the claim was disallowed. *Held*, that such judgment was not a finding that the debt was barred on the date the foreclosure action was begun, and hence the judgment was no bar to that action.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1131.]

## **2. PLEADING—NEW MATTER—REPLY.**

Where new matter pleaded in an answer did not constitute a defense to the cause of action alleged in the complaint, a reply was unnecessary.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Pleading, § 324.]

## **3. APPEAL—OBJECTION NOT RAISED BELOW.**

Where a motion for judgment on the pleadings was orally made by plaintiff on the denial or defendant's motion for a similar judgment, and defendant's counsel, being present in court, made no objection to the hearing of such motion, because no written notice required by Civ. Code, § 372, had been served, and did not call the matter to the timely attention of the trial court, he was estopped to raise such objection on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 1205, 1209.]

Appeal from District Court, Pueblo County; N. Walker Dixon, Judge.

Action by the Anheuser-Busch Brewing Association against Victor De Carli and another, revived after the death of Carli in the name of Phil J. Hickey, as administrator. From a judgment for plaintiff, defendant appeals. Affirmed.

On April 3, 1900, the appellee commenced this action against Victor De Carli and Max Schwer to recover the sum of \$1,000 and interest upon a promissory note dated April 3, 1893, payable 12 months after date, signed by De Carli, and to foreclose a certain trust deed given by De Carli to Schwer, as trustee, to secure the payment of said note. Summons was issued and served on De Carli. On April 10, 1900, he died. On May 14, 1900, Phil J. Hickey, the appellant, was appointed administrator of his estate. On November 30, 1900, the administrator was substituted as defendant. His demurrer to the complaint was overruled, and on March 6, 1901, he answered, admitting the execution of the note and trust deed by his intestate, and alleged as a special defense that on the 22d day of September, 1900, the appellee presented to

the probate court of the county of Pueblo a petition setting forth the pendency of the foreclosure proceeding in the district court, a copy of the note sued on therein, and asking for an allowance of the same, and that it be authorized to proceed with such foreclosure; that on the 19th day of November, 1900, a judgment was rendered in the probate court, in which it was found that "more than six years had intervened between the date the cause of action presented by the claimant arose and the time set for the hearing of said claim," and the claim was disallowed, and that no appeal was taken from this judgment. Appellee filed its replication to this answer, admitting the facts therein pleaded, alleging that the object of filing said claim was "for the ultimate purpose of enabling plaintiff to participate in the general estate of De Carli to the extent of any deficiency judgment which might be obtained" in the foreclosure suit, and averring that at the time of said hearing the plaintiff exhibited to said county court the files in this action, and further averring "that the effect of said judgment rendered on matters occurring subsequent to the institution of this suit, and with full knowledge of this action, was not sufficient to, and did not, oust this court of jurisdiction in this action, and is no bar to the prosecution of this action, to a final judgment." On the 30th day of July, 1901, appellant filed a motion for judgment on the pleadings, and afterwards, and on the 9th day of November, the court overruled this motion, and on motion of appellee's counsel rendered a judgment and decree in its favor. From this judgment this appeal is prosecuted.

Albert L. Murray (Calvin E. Reed, of counsel), for appellant. John R. Dixon, for appellee.

GODDARD, J. (after stating the facts).

1. Counsel for appellant insist that the judgment of the county court disallowing the claim was res adjudicata, and barred the right to recover on the note in this action. The finding of the court as set forth in the answer is "that the court doth further find as a matter of fact that more than six years have intervened between the date the cause of action \* \* \* arose and the time set for the hearing of said claim," and for this reason disallowed the claim. In order to constitute an estoppel by judgment, the same identical matter must have been in issue in the former suit, and the precise fact determined by the former judgment. *Allen v. Tritch*, 5 Colo. 222; *De Sollar v. Hainscome*, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. Ed. 956. The finding that the note in question was not probable against the estate of De Carli, because barred by the statute of limitations at the time of the hearing in the county court, is in no sense a finding that it was barred on the 3d day of April, 1900, the date this

action was commenced. The judgment of the county court, therefore, constituted no bar to the enforcement of the note in this action, nor in any way precluded the district court from exercising its previously acquired jurisdiction in the foreclosure proceedings.

2. It is unnecessary to consider the objection that the reply "does not deny the new matter set up in the answer," since no reply was necessary, for the reason that the new matter, as we have seen, did not constitute a defense to the cause of action set forth in the complaint.

3. A further error relied on is that the court rendered judgment upon the oral motion of counsel for appellee without written notice of such motion. In support of this objection counsel rely upon section 372 of the Civil Code, which requires written notice of all motions "except those made during the progress of a trial." The record discloses that counsel for appellant filed a written motion for judgment on the pleadings, which, after argument by respective counsel, was overruled. Upon the overruling of this motion, counsel for appellee asked for judgment. This was done in the presence of counsel for the appellant, and upon the close of the argument on the former motion. The counsel for appellant being present in court and asking for judgment in his favor upon the pleadings, and making no objection to the hearing of a similar motion by opposing counsel upon the ground that no written notice had been served, we think should be held to have waived the service of such notice, and he will not now be permitted to avail himself of an error (if it be such) that could have been avoided by calling the matter to the timely attention of the trial court.

For the foregoing reasons the judgment is affirmed.

Affirmed.

GABBERT, C. J., and BAILEY, J., concur.

### GOODYKOONTZ v. IMES.

(Supreme Court of Colorado. April 2, 1906.)

#### 1. APPEAL—FAILURE TO SHOW ERROR—RULING ON MOTION.

Where the record on appeal does not show that a motion to dismiss for alleged failure to file a bond for costs within the time allowed was supported by affidavit or any other form of proof, an order denying the motion cannot be interfered with.

#### 2. SAME—DISMISSAL—FAILURE TO SHOW FINAL JUDGMENT.

Where the record does not show that any final judgment was rendered, the appeal will be dismissed.

Appeal from Montezuma County Court; C. J. Scharnhorst, Judge.

Action by John Imes against Jennie Goodykoontz. A motion to dismiss the action for failure to file a bond for costs was denied, and defendant appeals. Appeal dismissed.

S. W. Carpenter, for appellant. P. G. Ellis, for appellee.

CAMPBELL, J. Upon the application of the defendant below, appellant here, the plaintiff, appellee here, was required by an order of the court, made on the 3d day of June, 1901, to file, by the incoming of court on the first day of the following September term, a bond or security for costs of the action to be approved by the clerk of the court. On the 30th day of August the statutory instrument was filed, though not approved at that time. On the 2d day of the following September, which was the first day of the September term of court, the surety justified, and the bond theretofore filed was approved by the clerk. After the bond was filed in August, but before it was approved on the 2d of September, as the defendant claims, she filed her motion of date September 2 to dismiss the action because the approved security or bond was not filed before the incoming of court on the first day of the September term, though it was previously filed in August and subsequently approved on September 2d, but after court convened on that day. The court overruled the motion, and this ruling is the only error assigned by defendant upon this appeal.

1. The principal contention of appellant seems to be that the court erred in considering the first day of the term as if it was Sunday, and by then adjourning court to the following day. The 2d day of September, which was the first day of the September term, is, by a statute of this state, a legal holiday, called "Labor Day," and the court, it is said, regarded Labor Day the same as the other holidays mentioned in section 416 of the Code, upon which days ordinary judicial business is not transacted, and ruled that the filing of the approved bond on September 2d, nominally the first day of the term, though after the incoming of court on that day, was in time, because, in legal contemplation, the first day of the September term was the next, or 3d, day of that month; the second day being dies non. Since the record is silent as to the ground upon which defendant's motion to dismiss was overruled, we cannot say that the court's action was predicated solely, or at all, upon the ground that the 3d day of September was, in legal contemplation, the first day of the September term, and that, as the bond was filed and approved upon the 2d day of September, it was within the time prescribed in the order. The record does not show that the motion to dismiss was supported by affidavit or other form of proof. While the motion itself apparently states that the approved bond was not filed within the time required by the order, for aught that appears to the contrary, the action of the court in overruling it was proper because of an entire absence of proof that the order of the court was not complied with within the time specified. The rule is

that prejudicial error must be shown by the one who alleges it, and, since there was an absence of any proof of the facts upon which the motion was based, we cannot disturb the ruling of the court upon it. This bond may have been filed and approved before the incoming of court upon the 2d day of September, which, according to defendant, was the incoming, or first, day of the September term.

2. In addition to this, the appellee, by supplemental transcript, has brought up an order of the trial court by which the alleged facts upon which the appellant relies for proof of the grounds set up in his motion of dismissal, as showing noncompliance with the order of June 3d, are stricken from the bill of exceptions, and, if we are privileged to consider this order, appellant's case entirely falls. Appellant, however, makes the point that the abstract falls to show that this order of exclusion was signed by the presiding judge. We do not say that the abstract is thus defective, or that such alleged failure constitutes a defect. But, if so, an objection, of at least as much gravity, may be made to appellant's abstract. The latter does not show that any final judgment was ever entered in the cause. If there was no final judgment, the appeal should be summarily dismissed, for it is only in connection with a review of a final judgment that an assignment of error to rulings made in the case preliminary thereto can be considered at all.

In the state of the record before us, we cannot do otherwise than dismiss the appeal, but the order will be made without prejudice.

Appeal dismissed.

GABBERT, C. J., and STEELE, J., concur.

#### EQUITABLE SECURITIES CO. v. JOHNSON et al.

(Supreme Court of Colorado. April 2, 1906.)

##### 1. CORPORATIONS—TRANSFER OF STOCK.

1 Mills' Ann. St. § 508, requiring an assignment of stock to be entered on the books of the company, the entry to disclose from whom and to whom the shares passed, is satisfied by entry on the books of a memorandum of an assignment showing from whom and to whom an assignment is made.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 486.]

##### 2. SAME.

A transfer of stock is good as against all persons, there being a written assignment of it, though not on the stock certificates, and though the certificates were not transferred, the transferee having presented the assignment to the secretary of the corporation, and requested the necessary transfer on the books, and the secretary having made no objection to the absence of the certificates, but certified on the assignment under the corporate seal that he had made the proper transfer on the books.

##### 3. LIMITATION OF ACTIONS—FRAUD.

An action on a promissory note to recover a personal judgment and incidentally to foreclose a lien on shares of stock, though involving the sufficiency of an assignment from the debtor to plaintiff of stock, a certificate of which was

afterwards issued to another in disregard of such assignment, is not an action for relief on the ground of fraud, within 2 Mills' Ann. St. § 2911, providing a three years' limitation therefor.

##### 4. APPEAL AND ERROR—ASSIGNMENTS OF ERROR.

Sup. Ct. Rule 11 (80 Pac. viii), requiring an assignment of errors in writing at the time of filing the transcript is sufficiently complied with by the printing thereof in the abstract of the record, it being filed at the same time as the abstract.

Error to District Court, Montrose County; Theron Stevens, Judge.

Action by the Equitable Securities Company against Anson B. Johnson and the Iron-Stone Ditch Company. Judgment for defendants. Plaintiff brings error. Reversed.

F. D. Catlin, for plaintiff in error. A. R. King and S. S. Sherman, for defendants in error.

GUNTER, J. This was an action to foreclose a lien upon certain ditch stock. It went off in favor of defendants upon a motion for judgment upon the pleadings. The answer consisted, in effect, of a denial of the material allegations of the complaint, and a plea of the statute of limitations. With the pleadings so framed the motion for judgment upon the pleadings presented two questions: The sufficiency of the facts stated in the complaint to constitute a cause of action; and the sufficiency of the plea of the statute of limitations. Such are the questions here. The following are the facts stated in the complaint: November 13, 1890, The Iron-Stone Ditch Company was a corporation organized under the laws of this state. Defendant Johnson owned six shares of its capital stock, which stood upon the books in his name. Upon that date Johnson, for a valuable consideration, gave his note to the Montrose Investment Company for \$2,400, maturing November 1, 1895, and to secure the same gave a trust deed on certain real estate running to one Bonney as trustee. Upon the same day Johnson assigned his six shares of stock to Bonney, trustee, as further security for said note, and in the writing evidencing this assignment expressly directed "the secretary of the said Iron-Stone Ditch Company to make the necessary transfer on the books of the company in accordance with this agreement. In case of default in any of the provisions of said deed of trust, these shares shall become the property of the said the Montrose Investment Company. But till such default be declared, the rights and privileges belonging to stockholders shall belong to the assignor of these shares." This written assignment was not made upon the certificates of stock held by Johnson, but by a separate instrument, nor were the certificates at any time surrendered to the Montrose Investment Company, or to Bonney, but remained in the hands of Johnson. This assignment was made with the knowledge and

consent of the defendant company, and a request for a transfer of stock upon the books of the company, as provided in the writing evidencing the assignment, was made on the secretary of the company, and a memorandum of such assignment was duly entered on the books of the company by the secretary thereof. Further, the secretary certified on this written assignment that, as directed therein, "I have this date made the necessary transfer of said shares of stock to the said Montrose Investment Company on the books of said company. In witness whereof, I have hereunto set my hand and affixed the seal of the company this 19th day of November, 1890. [Company Seal.] J. C. Brown, Secretary."

November 17, 1890, the promissory note was assigned for value to the Equitable Mortgage Company, and on January 19, 1898, by such company to the plaintiff, the Equitable Securities Company, its present holder. The last mentioned company in March, 1899, foreclosed its trust deed on the land and applied the proceeds of sale upon said note. This, however, left an unpaid balance on said note amounting to several hundred dollars, and the present action was instituted in June, 1899, to foreclose the lien upon said ditch stock created by said assignment, and to obtain a personal judgment against Johnson for any balance unpaid after applying the proceeds of the sale of the ditch stock upon said note. In September 1894, defendant company, with full knowledge of the facts recited as to the assignment of the stock, and that the lien thereon so created still existed, caused an entry to be made on its books canceling said certificates held by Johnson, and reissued the certificates to Halley, the present holder. Defendant company contends: (1) That no sufficient entry of the assignment of Johnson's stock to plaintiff was made upon the books of defendant company; (2) that the failure of Johnson to deliver his stock to plaintiff was fatal to plaintiff's lien; (3) that the three years' statute of limitations was fatal to this action; (4) that no assignment of errors was filed.

Considering these contentions in their order: 1. Johnson defaulted in the payment of his note, which act authorized the holder of the note—the plaintiff—to foreclose the lien, if any, which it held upon the ditch stock in question. Now as to the validity of this lien. This transaction occurred in November, 1890, and its validity must be tested by the statute as it then stood, and as it is found in 1 Mills' Ann. St. § 508. This statute required in the event of an assignment of stock, that such assignment be entered upon the books of the company, it required that the entry on the books should disclose from whom and to whom the shares passed. The written assignment under which plaintiff claims disclosed from whom and to whom the six shares of stock held by Johnson were

transferred. The complaint alleges that a memorandum of this assignment was entered upon the books of the company. If so, the requirements of the statute were observed. Further, if the entry was not on the books, or was not sufficient, this plaintiff should not be prejudiced thereby, because it was the fault of the officers of the company, and not its fault if the entry was not properly made. The transferee, the Montrose Investment Company, had done all that could reasonably be required of it to secure the transfer. It had presented to the proper officer of defendant company the written assignment from the shareholder whereby he assigned his stock for the beneficial use of said company, and requested the entry of the necessary transfer on the books. The secretary made no objection to the absence of the certificates of stock, but certified in writing upon the assignment, and under the corporate seal, that he had made the proper transfer on the books of defendant company. As said in *Weber v. Bullock*, 19 Colo. 214, 220, 221, 35 Pac. 183, 186: "We think that under the facts of this case the defendant in error has shown good reason for failure to procure a transfer of the stock in question to be made upon the books of the company, and has done all he could do to conform to the policy of the law, and that it would not only be inequitable, but a perversion of the true intent of the statute to subject him to the loss of his property solely for the fault of the officers of the company." See, also, *Isbell v. Graybill*, 19 Colo. App. 508, 76 Pac. 550.

2. The written assignment transferred the ownership of the certificates as between the parties, and the entry of this transfer, and the certificate of the secretary to its making, effectuated such transfer as to the defendant company and as to third parties. *Richardson v. Longmont S. Ditch Company*, 19 Colo. App. 483, 490, 76 Pac. 546, and authorities cited.

3. It is said that because this action involves a cancellation of the certificates of stock held by Halley it is an action for relief on the ground of fraud and barred by section 2911, 2 Mills' Ann. St. Fraud is not an essential of plaintiff's cause of action, its case is not dependent upon the proof of fraud. The action is simply one upon a promissory note to recover a personal judgment, and incidentally to foreclose a lien upon certain shares of stock, and is not dependent upon proof of fraud. The case is not within the statute. *Murto v. Lemon*, 19 Colo. App. 314, 319, 75 Pac. 160; 19 Am. & Eng. Ency. of Law (2d Ed.) p. 247.

4. The assignment of errors was printed in the abstract of the record, it had no existence outside of this printed form, and was not attached to the transcript, it was, however, filed at the same time as the transcript. While the usual and perhaps better practice is to file the assignment of errors attached to the transcript, and at the same

time as its filing, we cannot say that the course pursued here was not a compliance with our rule 11 (80 Pac. viii). Further no prejudice was sustained in the departure from the usual practice. *Moynahan v. Perkins*, 17 Colo. App. 450, 68 Pac. 1062; *Home v. Duff*, 5 Colo. 344.

The judgment below should be reversed.  
Reversed.

The CHIEF JUSTICE and MAXWELL, J., concur.

### TRUE v. ROCKY FORD CANAL, RESERVOIR & LAND CO.

(Supreme Court of Colorado. April 2, 1906.)

#### 1. CONTRACTS—CONSTRUCTION—EVIDENCE.

In construing a contract it is proper for the court to consider the subject-matter, the situation of the parties at the time the contract was executed, and all surrounding facts and circumstances.

[Ed. Note.—For cases in point see vol. 11, Cent. Dig. Contracts, § 752.]

#### 2. WATERS AND WATER COURSES—IRRIGATION—RIGHT TO USE WATER—CONTRACT—CONSTRUCTION.

Plaintiff granted a right of way for an irrigating ditch over his land, under a contract providing that he should have the right to the use of water from the ditch in an amount equivalent to 20 shares of the capital stock of the company owning the ditch. At the time the contract was made, each share of the stock carried the right to use a certain amount of water, subject to the duty to prorate among stockholders in the event of a shortage in water. Many years later the ditch company purchased certain priorities, to which it had no title or claim when the contract was made. *Held*, that plaintiff was not entitled to an absolute preferential right to the use of the amount of water at all times to which 20 shares of stock would normally be entitled, but that, in case of shortage it was his duty to prorate with other stockholders, and in doing so he had no right to share in water from the priorities acquired after the contract was made.

Error to District Court, Pueblo County; N. Walter Dixon, Judge.

Action by A. E. True against the Rocky Ford Canal, Reservoir & Land Company. There was judgment for defendant, and plaintiff brings error. Affirmed.

Alfred W. Arrington, for plaintiff in error.  
Devin & Dubbs, for defendant in error.

GUNTER, J. A general demurrer to the amended complaint was sustained, and as the plaintiff stood upon his complaint the action was dismissed. The question here is whether the following facts, which constitute the material allegations of the complaint, present a cause of action: In December, 1889, the defendant was incorporated for the purpose of constructing, owning, and operating an irrigating canal. In May, 1890, in order to secure a right of way for this canal over lands of the plaintiff, a written contract was entered into whereby plaintiff gave the right of way, and defendant agreed to con-

struct a canal of sufficient size and capacity to deliver water to its stockholders, and "that the said Alvin E. True, plaintiff, shall have for the irrigation of the above described lands, exclusively, the right to the use of water from the said ditch in amount equivalent to twenty shares of the capital stock of said company. That the same shall be free and exempt from any and all charges and assessments of any kind or nature, and it is expressly agreed and understood by the parties hereto that in consideration of the grant of right of way as herein provided through and over the lands herein described, that the said right to the use of water be exclusively for said lands and in amount equivalent to twenty shares of the capital stock, and in no way to be transferred to use upon any other lands." At the time of the making of this agreement each share of stock carried the right to the use of .18 cubic feet of water, and 20 shares the right to the use of 3.6 cubic feet, subject to the duty to prorate among shareholders in the event of a shortage in the water carried by the canal. The canal was constructed, and water was distributed among its shareholders, and to this plaintiff, for a number of years. In July, 1899, the defendant purchased 46 cubic feet of water from the Ballow Hill Ditch Company; 16 cubic feet of this purchase being a priority of July, 1869, and 30 feet thereof a priority of June, 1885. This was turned into the canal of defendant and distributed among its shareholders and others. For a time plaintiff was permitted to share in this water, but, since the spring of 1901, defendant has refused to distribute any part of this water (the Ballow Hill water) to plaintiff, and since the same date plaintiff has not received 3.6 cubic feet of water. Plaintiff was not consulted as to the purchase of the Ballow Hill water, nor has he in any manner participated in or contributed to its purchase. This action is to compel the defendant to deliver to plaintiff at all times 3.6 cubic feet of water regardless of the amount of the water in the canal, and the needs of other stockholders; plaintiff claiming an absolute preferential right to the use of that amount of water at all times, and, in the event this claim is denied, plaintiff asks that the contract be construed, and it be held that he is entitled to prorate with the shareholders of defendant in the Ballow Hill water. Whatever the rights of the parties here may be, they are determined by the above contract. If the plaintiff has an absolute preferential right to 3.6 cubic feet of water, it is given by this contract; if he has the right to participate in the Ballow Hill water, it is given him by this contract.

Plaintiff's contention is that he is entitled to receive from the canal, for irrigating purposes, when needed, 3.6 cubic feet of water when the same is in the canal; that this is an absolute preferential right over all shareholders of defendant. And he further

contends that, if the contract be not so construed, and that if it be held that he is required to prorate with the shareholders of defendant, then that a decree be entered entitling him to prorate in the Ballow Hill water. The object to be attained in the construction of a contract is to ascertain and give effect to the intention of the parties. *St. L. & D. L. & M. Co. v. Tierney*, 5 Colo. 582, 584; *Wolff v. Helbig*, 21 Colo. 490, 43 Pac. 133. In making this inquiry, we have a right to examine into the state of things existing at the time, and the circumstances under which, the contract was made. *Canal Company v. Hill*, 15 Wall. (U. S.) 94, 101, 21 L. Ed. 64. "The contract was made in reference to the state of things existing at the time it was made." *Id.* As a guide to a correct interpretation, the law permits the subject-matter of a contract, the situation of the parties at the time of its execution and all surrounding facts and circumstances to be taken into consideration. *St. L. & D. L. & M. Co. v. Tierney*, *supra*.

The defendant was constructing a canal for the purpose of supplying water for irrigating purposes to its stockholders and other consumers. The canal would take a priority through its construction and the application of water by the shareholders of defendant. The only priority for the canal, so far as the complaint suggests, or there is reason to believe was contemplated by the parties at the time of entering into the contract, was that to be acquired through its construction. Such was the only priority for the canal then reasonably within the contemplation of the parties. It certainly then was not within the contemplation of the parties that nine years later the defendant at its own expense or with the aid of plaintiff, would purchase the Ballow Hill priorities, the one 20 years earlier, and the other 4 years earlier than the priority of the canal under construction, and make such purchase priorities of its canal. The priority of the canal under construction was with reasonable certainty known, its capacity was known, also the right to use of water which each share of stock carried. In view of these facts, the contract was made by the parties, and in the light of them it must be interpreted. Plaintiff knew that he would be giving defendant a right of way for its canal through his land, he must have considered what he would receive in return, he must have determined the sufficiency of the consideration he would require for this right of way in the light of the facts as they then existed. When he made his contract he must have been satisfied with the consideration named therein in the light of the then facts. The same is true of the defendant, it must have determined on what it was willing to give for the right of way in view of the facts as they then existed. Unless the parties based their contract on facts as they then were, and intended that it should be in-

terpreted according to such facts, the plaintiff did not know what he was receiving, nor the defendant what it was giving. We think the defendant intended to give, and that the plaintiff intended to receive, the right to the use of water from said ditch in amount equivalent to 20 shares of the stock of said company according to their then value in the right to use of water; the same to be free and exempt from any and all charges and assessments of any kind and nature. The right to the use of water from said ditch in amount equivalent to 20 shares of the stock of said company was the right to use the same amount of water that 20 shares of stock then commanded. Twenty shares of stock did not carry with it the right to any invariable quantity of water, it carried only the right to 3.6 cubic feet of water in the then priority provided the pro rata share of water going to 20 shares amounted to 3.6 cubic feet. In case of a shortage of water, the by-laws of defendant required its shareholders to prorate the water in the canal, and in such event 20 shares of stock would not entitle the holder to any larger amount than a pro rata share of the water in the canal. It follows that he was not entitled to an absolute preferential right to 3.6 cubic feet of water in the canal, and his interest or right to the use of water was measured by the water value or water measure of 20 shares of stock as they stood at the time of the contract. It was not measured by such value after the purchase of the Ballow Hill priorities. It was not within the contemplation of the parties, at the time of making the contract, that the value of 20 shares should be increased or diminished. Unless the standard adopted at the time the contract was entered into was the then value in water of 20 shares of stock, then, should the stock at any time in the future be reduced in value by the action of the company, the plaintiff would suffer, he would be receiving less than that which he contracted for, less than he expected to receive, and the defendant expected to give. On the other hand, if plaintiff was entitled to receive more than the then value of 20 shares of stock measured in water, he would be receiving more than he expected to secure, or than defendant expected to give, and more than defendant was required to give. If plaintiff was entitled to receive an absolute preferential right to 3.6 cubic feet of water, then it is clear that he would be entitled not to a right to use the same amount of water as 20 shares of stock, but be entitled to receive more water than 20 shares of stock, which is not the meaning of the contract. Any question of an oversale in the capacity of the canal is not involved in this action. We think the judgment below was right.

Judgment affirmed.

The CHIEF JUSTICE and MAXWELL, J., concur.

(37 Colo. 193)

**LINCOLN MOUNTAIN GOLD MIN. CO.  
v. WILLIAMS.**

(Supreme Court of Colorado. May 7, 1906.)

**1. CORPORATIONS — ACTS OF AGENTS — AUTHORITY—RATIFICATION.**

Where the officers of a mining company subsequently ratified the acts of its superintendent in employing claimants to examine its mine, and in testifying on behalf of the corporation in certain litigation, it was immaterial to claimants' right to compensation for their services whether the superintendent originally had authority to employ them or not.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1710-1719.]

**2. SAME—CONTRACTS—ULTRA VIRES.**

Pending proceedings in the federal courts against the officers of defendant corporation for sending through the mail fraudulent statements as to the value of the corporation's properties, claimants were employed to examine the property and testify as experts as to its value in order to show that the statements were not false. *Held*, that such contract was not ultra vires, but was within the scope of the powers of the managing officers of defendant corporation.

**3. CONTRACTS—WITNESSES — EMPLOYMENT TO TESTIFY—VALIDITY OF CONTRACT.**

Where, pending suit against the officers of a mining company for sending alleged fraudulent statements as to the value of its properties through the mails, witnesses were employed to examine the property and give expert testimony concerned its true value; such contract was not void as tending to pervert or obstruct public justice.

**4. FRAUDS, STATUTE OF—ORIGINAL OR COLLATERAL PROMISE.**

A contract by which a corporation agreed to pay stipulated fees and expenses of certain expert witnesses employed by the corporation's superintendent to testify in litigation in which the corporation was interested was an original promise, and not a contract to answer for the debt, default or miscarriage of another within the statute of frauds. *Mills' Ann. St. § 2025.*

Appeal from District Court, Teller County; Wm. P. Seeds, Judge.

Action by James H. Williams against the Lincoln Mountain Gold Mining Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Geo. Salisbury and Elwell & Collins, for appellant. Tully Scott, for appellee.

**GUNTER, J.** The complaint contained five causes of action. The first cause of action was to recover the agreed price for services of plaintiff in testifying in behalf of defendants in a suit pending in the United States Court at St. Louis, Mo., against the officers and agents of defendant company. Also for necessary expenses in connection with said services which defendant had agreed at the time of the employment of plaintiff to pay. The services of plaintiff were in testifying in said suit as to the probable extent in value of mineral deposits in certain mining claims located in the Cripple Creek district in this state. The action is to recover for the balance due for the value of services so rendered, and the expenses so incurred. The other causes of action are for

claims of the same nature assigned to the plaintiff. We need consider but the defenses to the first cause of action, as the defenses to the other causes of action are the same. The first defense is a denial. The second defense is intended to present the two questions, that the contract was ultra vires; and that it was void as against public policy. The third defense presents the defense of the statute of frauds; that is, that the contract sued on was a special promise to answer for the debt of another, and was void, because not in writing. *Section 2025, Mills' Ann. St.*

The case was tried to the court, which found for the plaintiff and entered judgment in accordance with its finding.

(1) It is contended that the evidence does not show that defendant company ever made any one of the contracts sued on. This contention is not sustained by the evidence. The gist of the facts is: Defendant company owned mining property in the Cripple Creek mining district, this state; its superintendent of mines, one Wharton, went to all of the claimants, except the one whose account is presented in the fifth cause of action, stated to them that litigation was pending in St. Louis, in reference to the value of the company's property, desired them to examine the properties, prepare themselves to testify as to their value, and further instructed them when notified to go to St. Louis and testify as to such properties in the cause there pending in which the company was interested. The parties so prepared themselves, and by request of defendant's officers, on two occasions went to St. Louis to testify to the matters mentioned. The occasion of going the second time was the failure to try the case at its first setting. On reaching St. Louis, where the general offices of the company were located, they made headquarters at such offices, there met the president, vice president, secretary, and other officers of the company, conferred as to their testimony in the case, and under their direction, and with their knowledge, subsequently testified in the case. Further, certain payments were made to them there by the president of the company upon the contract made with Wharton, and even after the institution of this action the company through its then president recognized its liability upon the contracts. The point relied upon seems to be that the evidence does not show that Wharton expressly or impliedly, as superintendent of the mines of defendant, had any authority to employ the claimants. The case does not rest, however, upon Wharton's express or implied authority to employ the claimants, because the evidence clearly shows that it is immaterial whether Wharton had authority in the first instance to employ the claimants, because the proper officers of the company subsequently ratified his acts, and no question is made but what if they did so the contract was binding upon the company. As

to the fifth cause of action, the facts pertinent to it are not within the contention of appellant, because the employment was by the president of the company, and the services were rendered under the supervision and direction of the president.

(2) It is next contended that the contract made with the claimants was ultra vires. It seems a suit was pending at St. Louis in the United States Circuit Court against defendant's officers for sending through the mails fraudulent statements as to the value of its properties. These witnesses were called for the purpose of showing that the statements were not false, that the property had value as represented in the statements. It is reasonable that it was to the interest of the company to show that these statements were true, and that its officers had not been sending out false statements as to the value of its properties. The claimants were perfectly justified in believing that their employment was within the scope of the powers and duties of the managing officers of the defendant company, and that their services were in the interest of appellant company.

(3) It is contended that the agreement sued on tended to "pervert or obstruct public justice." Counsel has failed to show us wherein the contract is subject to this objection. This suit was pending at St. Louis; these claimants were residents of Colorado; it was desired to have expert testimony as to the value of defendant company's properties; they were requested to take time, examine the property, have assays made, and be able to testify as to what in truth was the value of defendant company's properties. The witnesses acting on this contract informed themselves, and in other particulars rendered the services contracted for. There is no suggestion in the testimony that they were employed to pervert the truth, or to in any manner obstruct the course of justice. We think there was nothing in this objection.

(4) It is said that the contracts were void as in violation of section 2025, supra, of our statute of frauds. The facts do not bring the contract within the statute of frauds. The contract was a direct promise to pay the stipulated fees and expenses by the defendant company, and was not a contract in any nature to answer for the debt, default or mis-carriage of another person.

The judgment is affirmed.

The CHIEF JUSTICE and MAXWELL, J., concur.

GARBANATI v. PATTERSON, County Treasurer.

(Supreme Court of Colorado. May 7, 1906.)

TAXATION — REDEMPTION—UNDIVIDED INTEREST.

Mills' Ann. St. Rev. Supp. § 3908a, declares that any person having or claiming an interest

or lien on any undivided estate may specify such interest and have the same separately assessed, advertised for sale and sold for taxes, and redeemed from such sales, in like manner and with like effect as estates of entireties. Section 3908b provides that any person who has or claims an interest in or lien on any undivided estate or interest in land sold for taxes may redeem such undivided interest or estate by paying into the treasury his proportionate part of the amount required to redeem the whole. *Held*, that the latter section had no application where an undivided interest was separately listed, assessed, and sold, but authorized redemption of a proportionate part of certain land assessed and sold for taxes as an entirety.

Error to District Court, La Plata County; James L. Russell, Judge.

Petition by Henry Garbanati, Jr., against W. J. Patterson, as county treasurer, to compel defendant to execute to petitioners a treasurer's tax deed for a certain mining claim. From an order denying such relief, petitioner brings error. Affirmed.

H. Garbanati, for plaintiff in error. C. T. Morgan, for defendant in error.

CAMPBELL, J. The Luella lode mining claim was assessed for taxation in its entirety and so sold for delinquent taxes. The plaintiff by assignment became the owner of the treasurer's certificate of purchase. Before the time of redemption expired, an owner of an undivided seven-twelfths interest in the lode applied to the county treasurer to redeem that interest, and upon the payment of seven-twelfths of the amount required to redeem the entire lode the treasurer issued to the applicant a certificate of redemption for such fractional interest. After the period for redemption expired, the plaintiff, as the holder of the certificate of purchase, applied to the treasurer for a tax deed of the entire mine. The treasurer refused to comply with the demand, but tendered to the plaintiff the amount of the redemption money on the seven-twelfths interest theretofore received from the redeeming joint owner, and a tax deed for an undivided five-twelfths interest. The plaintiff, declining to accept the offer, brought this action in mandamus to compel the treasurer to issue him a treasurer's tax deed for the entire interest in the mining claim in accordance with what he says his rights are under his certificate of purchase.

The statute governing a case of this kind is found in Sess. Laws 1893, p. 425, c. 140 (Mills' Ann. St. Rev. Supp. §§ 3908a, 3908b). It reads:

"Section 1. Any person who has or claims to have an interest in or lien upon any undivided estate in any piece, parcel, lot or tract of land may specify such estate or interest in his list to be delivered to the county assessor, for assessment for taxes, in like manner and with like effect as estates of entireties are specified in said list; and all such undivided estates or interests so specified shall be assessed, advertised for sale, and sold for taxes, and redeemed from such sales, in like manner

and with like effect as estates of entireties are now assessed, advertised, sold, and redeemed from sales, for taxes in the manner provided by law.

"Sec. 2. Any person who has or claims an interest in or a lien upon any undivided estate or interest in any piece of land sold for taxes may redeem such undivided estate or interest, by paying into the treasury his proportionate part of the amount required to redeem the whole. In such case the county treasurer shall issue to such party a certificate of redemption for his interest in said land as provided by law."

The plaintiff contends that this statute means that unless an undivided interest in land has been separately listed, assessed, advertised, for sale and sold, such interest cannot be redeemed by the owner without redeeming the whole; while the defendant maintains that where land has been assessed, and for the delinquent tax sold, in its entirety, the owner of an undivided interest therein may, nevertheless, redeem such interest, less than the whole, upon payment of the proportionate amount required to redeem the whole interest in the property. We are clearly of opinion that the defendant's interpretation of the statute is right. It is the law that where a statute makes no provision for the redemption of an undivided interest in land the party owning the same can redeem it only by paying the whole of the redemption money. 2 *Desty on Taxation*, 887. Section 1 of our act provides for the separate listing, assessment, advertising, sale, and redemption of an undivided interest in land, and makes applicable thereto the same procedure which applies to an entire estate or interest therein. This section, however, did not give all the relief to which, in the judgment of the General Assembly, a taxpayer is entitled, and so section 2 relates to an entirely different case. It says that any person who has or claims an interest in an undivided estate, or interest in any piece of land, which has been sold for taxes may redeem such undivided interest by paying to the treasurer his proportionate share of the amount required to redeem the whole. Section 2 has no application where an undivided interest has been separately listed, assessed, and sold, for to effectuate a redemption thereof the owner of such undivided interest is obliged to pay the entire redemption money upon that interest. The language "by paying into the treasury his proportionate part of the amount required to redeem the whole" would have no meaning unless the section provides, as we hold that it does, for a redemption by an owner of an undivided interest in land which has been assessed and sold as a whole for the tax due upon the whole estate; for, except in a case of that sort, the expression "proportionate part of the amount" would have no meaning at all. Section 2 does not say, or imply, that a redemption of an un-

divided interest in land can be made only when the same has been separately listed. Ample provision for that kind of case is found in section 1, while section 2 authorizes a redemption of an undivided interest in land where the same has been listed, sold, etc., in entirety.

A second objection argued is that the court, upon plaintiff's motion, should have stricken the unverified answer from the files. The abstract of the record does not disclose that the answer was not verified, and in the absence of an affirmative showing to the contrary, we are justified in assuming that the ruling of the court was right both upon the facts and the law, and that as matter of fact the answer was verified.

The judgment of the district court, being in accordance with the views expressed in the opinion, must be affirmed.

Affirmed.

GABBERT, C. J., and STEELE, J., concur.

#### NUSLY et al. v. CURTISS et al.

(Supreme Court of Colorado. May 7, 1906.)

#### 1. WILLS—GENERAL AND SPECIFIC LEGACIES—DEFINITIONS.

A general legacy is one payable out of the general assets of testator's estate, while a specific legacy is a gift by will of a specific article or particular part of the estate, which is identified and distinguished from all others of the same nature, and is to be satisfied only by the delivery and receipt of the particular thing given.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1939.]

#### 2. SAME—DEMONSTRATIVE LEGACY.

A demonstrative legacy is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund nor to evince an intent to relieve the general estate from liability in case the fund fails.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1947.]

#### 3. SAME—ADEMPTION.

A specific legacy is subject to ademption, but a demonstrative legacy is not.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1979.]

#### 4. SAME—TESTATOR.

Testatrix bequeathed any and all sums that might thereafter be payable to her or her estate, as the proceeds of any insurance on her husband's life to her husband's five sisters, or such of them as should be living at the time such insurance money should be actually collected and received by testatrix' executors, etc. *Held*, that the bequest was a specific legacy, and the insurance having been collected by testatrix in her lifetime and mingled with her property generally, the legacy was adeemed.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1986.]

Error to County Court, City and County of Denver; Ben B. Lindsey, Judge.

Action by Rose C. Nusly and another against Clarence Church Curtiss and others, for the construction of a will. From an adverse decree, plaintiffs bring error. Affirmed.

F. A. Williams, for plaintiffs in error. Wolcott, Vaile & Waterman and H. H. Dunham (Wm. W. Field, of counsel), for defendants in error.

CAMPBELL, J. In this proceeding the plaintiffs in error asked for an interpretation of the second clause of the last will of Eliza C. Gallup, deceased, under which they claim as legatees. It reads: "Second. Any and all sums of money which may at any time hereafter become due and payable to me or my estate, by or under any insurance policy upon the life of my husband, Francis Gallup, which may heretofore have been insured, payable to me or in my favor, I will and bequeath to the five sisters of my said husband or to such of them as may be living at the time any such insurance moneys shall be actually collected, and received by my executors to be divided equally among said sisters or the survivors of them as hereinbefore provided." The facts pertinent to the only question argued on this review are that before the execution of the will an insurance policy for \$5,000 upon the life of Francis Gallup was issued. About a year after its execution he died, and the amount of the policy on his life (\$5,000) was received by the testatrix herself in her lifetime, which she commingled with her other funds, and afterwards reinvested. Not only was this amount not actually collected or received by the executors, but it was not traceable or identified in their hands. At the time of the death of the testatrix, which was more than 11 years after the will was executed, the plaintiffs in error, the five sisters of Francis Gallup who were mentioned in the will, were all living.

The only question raised and decided below, and the only one presented here, is as to the nature of this legacy. The plaintiffs in error say that it is a demonstrative legacy, and therefore it was not adeemed by the testatrix in her lifetime. The defendants in error say that it was a specific legacy, and was subject to be, and as a matter of fact was, adeemed by the testatrix in her lifetime by collecting and commingling it with her other funds. It is sufficiently exact for our present purpose to say that a general legacy is one which is payable out of the general assets of a testator's estate, such as a gift of money or other thing in quantity, and not in any way separated or distinguished from other things of like kind. A specific legacy is a gift by will of a specific article, or a particular part of the testator's estate, which is identified and distinguished from all others of the same nature, and which is to be satisfied only by the delivery and receipt of the particular thing given. A demonstrative legacy partakes both of the nature of a general and specific legacy. It is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent

to relieve the general estate from liability in case the fund fails. A specific bequest is subject to ademption, but such is not true of a general, or a demonstrative, legacy. The trial court held that this was a specific legacy, and was adeemed by the testatrix in her lifetime. Hence it construed the will as passing nothing to the plaintiffs in error as legatees. We are of opinion that the county court was right in its decision. Courts are not inclined to favor a specific bequest. If compatible with the language employed, they are disposed to interpret gifts as general, or demonstrative, legacies, but if the language is clear and unequivocal, and plainly evidences an intent of the testator to create a specific legacy, such effect must be given to that language. In ascertaining the nature of a given legacy, some, but not much, aid is to be derived from the adjudicated cases. The question is one of intent, to be gathered from the language used in creating it, in the light of the circumstances of the testator and the property which he is disposing of in his will. It will be observed that no particular or designated sum of money is mentioned in the clause of the will under consideration. It is a gift of "any and all sums of money which may at any time hereafter become due and payable to me or my estate, by or under any insurance policy upon the life of my husband, Francis Gallup, which may heretofore have been insured." It is only such sums of money that she bequeaths to the five sisters of her husband, or to such of them as may be living when the moneys shall be actually collected and received by her executors to be equally divided among them. This language plainly evidences an intent to bequeath not any particular sum of money to be payable primarily out of the proceeds of the insurance policies, and if the fund, for any reason, should fail, then out of the general assets of the estate; but, on the contrary, the testatrix thereby intended to give to the legatees named only such sums of money as her executors after her death actually collect and receive on certain insurance policies. The language employed negatives an intention to give them anything whatever if the moneys on the policies are received by her in her lifetime, or if the fund, for any other reason, fails or ceases to exist, as such, at her death.

Not only does the language of this will compel this interpretation, but the application of the appropriate principles of law, and the definition of the different kinds of legacies, lead to the same result. It will further be observed that this is not a gift of money "out of" or "from the proceeds of" any insurance policy, but it is a gift of the entire fund itself. It is just the same as if the policy itself had been bequeathed. The authorities clearly sustain the conclusion which we have reached. Many of them are collected in 18 Am. & Eng. Enc. of Law (2d Ed.) 711 et seq. It has been held that a gift

of all the money due on a particular bond is as much a specific legacy as a gift of the bond itself. The same principle is applicable to an insurance policy. A gift of an insurance policy is no more specific than is a gift of all the money due thereon. *Ashburner v. Macguire*, 2 Bro. C. C. 108; *Stout v. Hart*, 7 N. J. Law, 414; *McMahon's Estate*, 132 Pa. 175, 19 Atl. 68. So a bequest of all or part of a specific fund or money which shall be received under decree in a certain suit, or a gift of "all the amount of moneys and interest that may be recovered of and from K. for the sums due me on the purchase of the (described) estate," each was held to be specific. *Gilbreath v. Alban*, 10 Ohio, 64; *Chase v. Lockerman* (Md.) 35 Am. Dec. 277; 2 *Williams on Executors* (Perkins' Notes) 1262 et seq., notes D, H, and M.

In *Byrne v. Hume*, 86 Mich. 546, 49 N. W. 576, though the particular legacy there was held to be a general legacy, the court, *inter alia*, says: "A specific legacy is a particular and specified thing singled out, or a particular fund, and, if this fund fail, or the specific thing bequeathed is not in existence to be carried over to the legatee, the legacy cannot be paid out of the assets of the estate." That remark is peculiarly applicable here, for the entire fund of the insurance policy was given to these legatees, and since it was not in existence at the time the will took effect, but had been collected by the testatrix in her lifetime, it became adeemed.

In *Walls v. Stewart*, 16 Pa. 275, 281, the court says: "Where the gift is of the fund itself, in whole or in part, or so charged upon the object made subject to it as to show an intent to burden that object alone with the payment, it is esteemed specific, and consequently liable to be adeemed by the alienation or destruction of the object." Accordingly in that case it was held that a legacy charged on certain devised lands was specific, and became adeemed when the land was sold by the testator in his lifetime.

In *Smith's Appeal*, 103 Pa. 559, there was a bequest by a testator to one son of \$2,000 out of the sum of near \$4,000 on deposit in a bank, provided the same was collected, and to another son \$1,500 with the same proviso, and the remaining part of the money that might be collected on this deposit was given in equal shares to the two sons. This deposit was collected by the testator, and the court held that the legacies to the two sons, being specific, were adeemed. The following language from the opinion of the court, being peculiarly appropriate to the case in hand, we quote it: "The whole of the money, the entire fund, is given—the money and fund are undistinguishable. When the legacy is so connected with the fund out of which it is payable, that the legacy and fund are the same, it is specific; as if I bequeath to B. the money now owing to me from A. or in the hands of A., or the money due to me on the bond of A., the legacy is specific.

*Welch's Appeal*, 28 Pa. 363. Certain parts of the money due to the testator on the deposit are given to each son, and the money thus given is the whole deposit owing by the bank. The giving to each a certain portion—to both the whole—is indicative of an intent to give that fund—not so much money out of the estate if the fund failed. The phrase, 'I give and bequeath to my son Samuel the sum of \$2,000 out of the sum of near \$4,000 now on deposit in the bank,' by itself, would vest a demonstrative legacy; but the testator added, 'providing the said amount and interest is collected from the assets or stockholders of said bank.' Manifestly, the word 'providing' is used in the sense of 'provided,' and means upon condition, or with the understanding, that said \$2,000 shall be collected out of that debt. Then, if it should not be collected out of the specified debt, it was not to be paid. Here, also, the intention seems to be to limit payment of the legacy to the fund itself."

Let us apply the principles of that case to the one in hand. Mrs. Gallup gave to the legatees the entire proceeds of an insurance policy, provided the money was actually received and collected by her executors. The entire fund, or the policies and the money collected thereon, are given. The legacy and the fund are the same and undistinguishable. Her executors did not collect or receive the money. She herself collected it in her lifetime. The legacies, therefore, were specific and became adeemed. In *Smith v. McKittrick*, 51 Iowa, 548, 2 N. W. 390, \$2,000 which the testator received from the estate of his father was bequeathed to the testator's daughters. It was said to be a specific legacy. Certainly, from the language employed in Mrs. Gallup's will, it could not be successfully contended that if the insurance money had never been collected, the plaintiffs in error would have had any claim upon the general assets of her estate. If that be true, this legacy is specific. There was no gift of any particular or specified amount, but the entire fund, showing an unambiguous intention to confine the gift to the fund itself.

In *Georgia Infirmary, etc., v. Jones* (C. C.) 37 Fed. 750, Wallace, Justice, says: "In determining whether the legacy is specific or demonstrative, the question always is whether it is a gift out of a specified fund or security, or a gift of a specified sum, with a specified fund as security. If it falls within the former class—that is, where it is a gift of a specified fund, or security—"the legacy falls when the fund or security ceases to exist in the testator's lifetime."

In *Hoke v. Herman*, 21 Pa. 301, 304, it was said that if the thing bequeathed in a will by such a description as to distinguish it from all other things be disposed of, so that it does not remain at the death of the testator, the bequest is gone. "If such legacy be of a debt, payment necessarily

makes an end of it." In the case in hand, the money that became due and was payable to the testatrix in her lifetime was a debt, and there was a gift of the entire debt. Since the testatrix in her lifetime collected it and commingled it with her funds, necessarily there was an end of it, and nothing remained at her death to which the legacies here claimed could attach.

Corbin et al. v. Mills' Ex'rs et al., 19 Grat. (Va.) 438, is cited by plaintiffs in error as in point. The particular bequest there under consideration was held to be a demonstrative legacy, but the language of the will by which the legacy was created is entirely different from that in the will of Mrs. Gallup. The opinion of the court with reference to this particular point would make the legacy here involved a specific legacy.

In *Barker v. Raynor*, 5 Maddock's Rep. 208, the testator's will read: "All my right, title, and interest in two policies of insurance [describing them] upon trust to pay," etc. These policies were upon the life of the testator's wife, and were collected by him in his lifetime. The legacy was held to be specific. This bequest in legal effect is precisely the same as the one here where the moneys to be collected on the policy are the subject of the bequest. Such moneys constituted all the right, title, and interest which the beneficiary had in them. This decision by Vice Chancellor Leach was affirmed on appeal by Lord Chancellor Eldon in 3 Eng. Ch. 126. The case is quite in point. *Starbuck v. Starbuck*, 93 N. C. 183; 2 Redfield on Wills, 431.

In 1 Underhill on Wills, § 414, the learned author says a legacy of a debt is specific, but a legacy of a particular sum payable out of a debt due to the testator is demonstrative. Applying the doctrine of the text and of the authorities already cited to the case at bar, we have this situation: The thing given by Mrs. Gallup was the entire debt which the insurance company was obligated to pay to her or her estate upon the death of her husband. There was no particular sum given, nor was that which was given made payable out of the debt due the testatrix, but being the corpus of the debt itself, it was a specific legacy. *Gelbach v. Shively*, 67 Md. 498, 10 Atl. 247; *Maybury v. Grady*, 67 Ala. 147.

Let the judgment be affirmed.

GABBERT, C. J., and GODDARD, J., concur.

# LEIPER v. CITY AND COUNTY OF DENVER et al.

(Supreme Court of Colorado. April 2, 1906. Rehearing Denied May 7, 1906.)

## MUNICIPAL CORPORATIONS—CHANGING GRADE OF STREET—DAMAGES.

A municipality is not liable to the owner of a lot abutting on a street for the raising or

lowering of the grade from the natural surface to the grade established in the first instance, unless the change of grade is unreasonable or negligently made.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 925-929.]

En Banc. Error to District Court, City and County of Denver; S. L. Carpenter, Judge.

Action by the city and county of Denver and the city of Denver against John H. Leiper. Judgment in favor of defendant, and plaintiffs bring error. Affirmed.

Isham R. Howze, for plaintiffs in error. H. A. Lindsley and H. L. Ritter, for defendants in error.

CAMPBELL, J. The sole question for decision is whether a municipality is liable to an abutting lot owner for damages resulting thereto from the authorized lowering or raising of the grade of a public street from the natural surface to a grade established by municipal ordinance in the first instance, notwithstanding the fact that the change is reasonable and the work of making the same is skillfully performed. In *City of Denver v. Bonesteel*, 30 Colo. 107, 69 Pac. 595, section 15 of article 2 of our Constitution, which is here invoked as creating such liability, was considered at some length. It was there held that under this provision, which declares that private property shall not be taken or damaged for public or private use without just compensation, where a permanent grade of a street is established by a city, and an abutting lot owner improves his property in conformity thereto, the city is liable in damages to such property occasioned by a subsequent change of the grade of the street. In prior decisions of this court, referred to in the opinion, the same clause of the Constitution was the subject of careful consideration. While in the various cases the precise question now presented was not expressly determined, the court, as then constituted, made several observations, which were strictly germane to the exact point decided, that indicated its disapproval of the principle now invoked by the plaintiff. It is true that in some of the cases from other states cited in the *Bonesteel* opinion it was ruled that the municipality is liable to an abutting owner for consequential damages caused by a reduction from the natural surface to a grade established in the first instance, as well as from one authorized grade to another. In other cases the doctrine is applied only in the latter contingency. This diversity in the holdings was expressly referred to at page 111 of 30 Colo., and page 596 of 69 Pac. Such reference, however, was not intended as a final or definite expression of our approval of the former doctrine, or rejection of the latter. Yet that opinion shows that not only is there nothing in any of our own previous cases inconsistent with the conclusion then reached, but all such antecedent

expressions of opinion were regarded as consistent with the distinction drawn by Judge Dillon, in his valuable work on Municipal Corporations (4th Ed. § 995b), which was then clearly indicated as the basis of the decision, and as foreshadowing our present conclusion, namely, that municipal liability in these cases should be limited to changes in established grades, and is not to be extended to reductions from the natural surface, except when the change is unreasonable or carelessly made.

It must be conceded that in Illinois, from which our constitutional provision is borrowed, and in the majority of the other states that have adopted similar clauses, a municipality is held liable for consequential damages resulting from changes in the grade of the street, whether made for the first time or for a change from one established grade to another. However, we are now constrained to hold that for reasonable and carefully made changes of the grade of a public street from the natural surface to a legally established grade in the first instance a municipality is not liable to the abutting lot owner for consequential damages to his property. We are led to this conclusion, not only because of the strong reasons advanced by Judge Dillon, *supra*, but also because of our former decisions, which, in view of the general understanding of the profession as to the doctrine they announce, should be regarded as *stare decisis*. Judge Dillon, at section 995a, in stating what the abutting lot owner, who builds with reference to the natural surface, in law is bound to contemplate with respect to the power of the municipality in changing the grade of streets, says: "In view of these considerations, it seem to us clear that for the original establishment of a grade line and the reduction of the natural surface of the street for street purposes to such line there is no legal right or even natural equity in the dedicant or his assignee to compensation." He further says: "But where a grade has been officially established, and particularly where improvements have been thereafter made according to such established grade, and it is afterwards changed to the injury of the abutting owners, there is a strong natural equity in their favor for compensation." \* \* \* For the reasons above suggested, it seems to us that, on principle, the mere provision of the Constitution imposing a liability for property damaged for public use does not create a liability on the part of the municipality for reducing the natural surface of the street, in the course of its normal and ordinary improvement for street purposes proper, to a grade line for the first time established. If there are cases to the contrary, we doubt whether they were well considered, and think that they are not well decided. \* \* \* Although sensible of the apparent difficulty of defining the grounds for the distinction, it seems to us, where a grade

line has been officially established, and where property has been improved on the faith of it (which is, of course, done on the assumption that the grade is permanent, although the power to change it for the public good exists), that such a case rests upon so strong a basis of natural justice as to bring it within the purpose of the constitutional provision in question. \* \* \* The decisions under the amended constitutional provision upon the exact point, as to its effect on street grade cases, are not as yet very numerous, but some of those referred to in the note to the next section appear to give this provision a scope greater than the one here suggested."

Counsel for plaintiff in error, however, says that these observations of Judge Dillon were made in 1890, and after that time a number of cases by the courts of the states where this constitutional provision is in force have ignored his distinction and held that municipal liability is created whenever consequential damages to the abutting owner result from any change whatever in the grade of a street. A leading case so holding is *Less v. City of Butte* (Mont.) 72 Pac. 140, 61 L. R. A. 601, in which the later cases are cited. It is true, as already stated, that the majority of cases support the contention of plaintiff in error, and possibly in only the states of Georgia, Mississippi, and Colorado has the qualified doctrine apparently been announced. Notwithstanding the number of cases to the contrary, we are still convinced of the soundness of the views of Judge Dillon, and our previous decisions are in harmony with this conclusion. This is apparent from the following excerpts taken from several of its opinions:

The leading case is *City of Denver v. Bayler*, 7 Colo. 113, 2 Pac. 6. The precise question there determined was that, for consequential damages to a lot abutting on a street over which the city by ordinance had granted to a railroad company the right to build a railroad track, the railroad company, and not the city, was liable. In the course of the carefully considered opinion by Helm, Justice, in discussing consequential damages in such cases, it was said: "But sometimes these interferences and resulting injury may properly, even in this state, be held to be *damnum absque injuria*, as where they are occasioned by a reasonable improvement of the street by the proper authority for the greater convenience of the public." And in speaking of the power of the city over its streets the judge said: "In determining what changes and improvements are most conducive to this end, the council exercises a large discretion. And unless unreasonable changes are made, or injury results to the adjoining premises through the unskillfulness or negligence of those employed, the owner thereof will not be heard to complain, though in fact the real value and convenience of his property are diminished thereby; for in purchasing his lot, or in relinquishing the

public easement, he is conclusively presumed to have contemplated this power and authority of the municipal government, and is held to have anticipated any injury to his abutting land resulting from a reasonable and proper exercise thereof." The following remark is quite pertinent: "The abutting owner may well be presumed to have taken into consideration the fact that the grade of the street might be raised or lowered, that pavements might be laid and bridges and culverts constructed, and that a street railroad even might be built and operated thereon; and it may fairly be presumed that in purchasing he anticipated and allowed for the possible or probable damages to result from these and similar changes, or that he signified his consent thereto, and thus deprived himself of any right to compensation therefor." And in referring to the fact that some of the decisions under this constitutional provision would establish the liability of the city in a case like that under consideration, and in summing up the doctrine upon the point, the learned judge concludes: "As will be observed, we do not go so far as some of these cases. That our position might not be misunderstood, we have, at the risk of being charged with obiter dictum, suggested that, as at present advised, we think that for injuries caused by a reasonable change or improvement of the street by the council in a careful manner the abutting owner should not recover."

In *City of Denver v. Vernia*, 8 Colo. 399, 404, 8 Pac. 656, the *Bayer Case* was approved, and the concluding observation of Judge Helm, which we have just quoted, was by Chief Justice Beck said to be a correct legal proposition. The concurring opinion of Judge Dickey in *Rigney v. City of Chicago*, 102 Ill. 83, in which the following language was used, was also referred to with approval: "It is not every change of grade made in a street, which may in effect impair the value of the lot in its vicinity, which is a violation of the right of the proprietor thereof. Such changes in a street as it may reasonably be supposed might be made for the improvement of the public highway, the purchaser of a lot upon a street must be assumed to have consented to when the purchase was made. The making of such changes is, therefore, no invasion of his right in that regard." One of the elements of damages claimed by the plaintiff against the city in the *Vernia Case* was for the fixing of the grade of a street in the first instance three feet below the natural surface of plaintiff's lots, and the court held that that was not an element upon which he was entitled to recover.

In *Denver Circle R. R. Co. v. Nestor*, 10 Colo. 403, 15 Pac. 714, Judge Helm, in his concurring opinion, refers to the *Bayer* and *Vernia Cases*, *supra*, and says with reference to the constitutional provision here under

consideration that the abutting lot owner was bound to anticipate, in making his purchase, that the street would necessarily be occupied by the local public for all the usual and ordinary purposes of a highway, and that the city would from time to time so change and improve the street as to render it more convenient for such purposes, and that indirect injuries resulting to him therefrom remain now, as they existed before the constitutional provision was adopted, wrongs without a legal remedy.

In *City of Durango v. Luttrell*, 18 Colo. 123, 31 Pac. 853, in an opinion by Mr. Justice Elliott, the doctrine was recognized that for a reasonable improvement of the street by the authority of the city in bringing it to a legally established grade no liability for consequential damages to an abutting lot owner resulted.

In *Gilbert v. G., S. L. & P. Ry. Co.*, 13 Colo. 501, 22 Pac. 814, the court remarked that it was not proper to say, notwithstanding the broad terms of our Constitution and the unqualified expressions of certain judicial opinions elsewhere, that, whenever a depreciation of private property is caused by some public improvement, the owner of the property thus depreciated may recover compensation against the party making the improvement; and again the previous cases, cited above, were referred to with approval.

In *Pueblo v. Strait*, 20 Colo. 13, 36 Pac. 780, 24 L. R. A. 392, 46 Am. St. Rep. 273, Mr. Chief Justice Hayt, in summarizing the doctrine of these cases, says: "For injuries resulting from reasonable and ordinary or usual change and improvement of the street by the municipality the abutting owner cannot recover, provided the change or improvement is made in a careful and skillful manner for the benefit of the public." And in referring to the interpretation put upon similar clauses of the Constitution of Illinois and other states, where a recovery is allowed in all cases where private property sustains substantial damage by the making of a public improvement, he recognizes that in Colorado such interpretation has not been followed, and says that in this state "the right of recovery has been limited to those unusual uses to which but few streets are subjected."

As well said by Judge Dillon, while sensible of the apparent difficulty of defining the grounds for the distinction, we regard it as almost, if not quite, *stare decisis* in this jurisdiction, that, for the raising or lowering of the grade of a street by a municipality from the natural surface to the grade established in the first instance, the municipality is not liable to the abutting lot owner for consequential damages to his property, unless the change of grade is unreasonable or has been negligently made.

The judgment of the district court, being in line with our conclusion, is affirmed.

Affirmed.

**WHITHAM v. CHICAGO, B. & Q. RY. CO.**  
(Supreme Court of Washington. June 30, 1906.)

**CARRIERS — RAILROADS — TICKETS — DEVIATIONS OR SIDE TRIPS.**

A ticket calling for transportation over defendant's railroad main line did not entitle plaintiff passenger to round trips over branch lines intersecting such main line.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1028.]

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by John H. Whitham against the Chicago, Burlington & Quincy Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

R. W. Prigmore and John W. Whitham, for appellant. John P. Hartman, for respondent.

**CROW, J.** On November 12, 1904, appellant purchased from respondent's agent a first-class round-trip railroad ticket from Seattle, Wash., to St. Louis, Mo., which entitled him while en route to one round trip from Denver, Colo., to St. Louis, Mo., and return to Billings, Mont., over the "Burlington Route," which included certain lines operated by the respondent through the state of Nebraska. The evidence shows that the respondent, as a portion of its system running east from Denver, operates three lines in a general easterly and westerly direction through Nebraska, which for the purposes of this opinion we will designate as "main lines." It also operates in said state a branch line running north and south, intersecting the central main line at Strang and the southerly main line at Chester. Appellant traveled eastwardly on the central main line to Strang, where he stopped over for the purpose of traveling south to Belvidere, a station located on the branch line between Strang and Chester. He presented his ticket on a local train on the branch line, was advised by the conductor that it was not good for transportation from Strang to Belvidere, and after some dispute was permitted to ride to Belvidere without the payment of fare. The conductor, however, then and there notified him that he would have to pay fare when returning from Belvidere. A few days later appellant again boarded the local train on said branch line for the purpose of returning to Strang and continuing his trip east. Returning on the local train, appellant presented his ticket to the same conductor, who then refused to carry him to Strang unless he paid his fare, amounting to 38 cents, which appellant refused to do. Thereupon the conductor without unnecessary force removed him from the train at a way station between Belvidere and Strang. After the appellant had alighted, he again boarded the same train and paid his fare from Belvidere to Strang. He alleges that the conductor was violent, insulting, abusive, and subjected him to great humilia-

tion and disgrace. In these statements, which are denied by the conductor and two passengers, appellant is corroborated by the evidence of his brother and sister, who were traveling with him. After reaching Strang appellant's ticket was honored by respondent whenever presented in both going to and returning from St. Louis. This action has been instituted by the appellant to recover \$1,980 damages claimed to have been sustained by him by reason of the alleged wrongful acts of said conductor. On trial without a jury the court made findings of fact and conclusions of law in favor of respondent, and from the final judgment entered thereon this appeal has been taken.

Appellant has presented several legal propositions which we will not discuss; our view being that the controlling questions herein are questions of fact only. The trial court found all the facts above stated, and in addition thereto further found that appellant's ticket did not designate any particular route of travel over the respondent's lines from Denver to St. Louis, nor did it entitle appellant to retrace any portion of respondent's road until after his arrival at St. Louis; that, when about to return from Belvidere to Strang, he boarded respondent's local train and demanded passage upon his ticket; that the station agent at Belvidere had told him the conductor would allow him to ride to Strang on such ticket, but that such agent had no authority to change the contract between appellant and respondent by making such statement; that the conductor, in removing him from the train, used no more force than was necessary, having escorted him out of the train at a way station; that no force was necessary, as appellant did not resist; that under said ticket appellant was not entitled to transportation from Belvidere to Strang; and that said conductor did not violate any of the terms of the contract between appellant and respondent. No finding was made showing the conductor to have been violent, insulting, or abusive, as alleged by appellant.

Appellant has excepted to these findings, but we find them to be fully sustained by the evidence, and will not disturb them. A copy of the ticket is in the record, and its stipulations are inconsistent with appellant's contention. It simply calls for transportation over respondent's line from Denver to St. Louis, and return from St. Louis to Billings, Mont. The evidence shows that this would only entitle appellant to travel through Nebraska, both going and returning, over one of the main lines running east and west. When he stopped over at Strang, and endeavored to use his ticket for traveling towards the south in a direction almost at right angles to said main line and out of the general course of his trip, he was demanding transportation to which he was not entitled. The appellant should have been able to understand the terms of his contract, as evidenced by the pro-

visions and stipulations clearly expressed in his ticket. When he endeavored to travel on said ticket over a branch line from Strang to Belvidere, and to return over the same line, before reaching his ultimate destination at St. Louis, he was demanding that to which he was not entitled; no such special privilege being included in his contract. If he could have lawfully insisted on such a side trip, there would be no reason why he could not stop at any and all points on the main line, where intersected by branch lines operated by respondent, and insist on taking round trips on such branch lines without the payment of fare, and on returning to the main line thereafter pursue his journey to St. Louis. We fail to see any merit in appellant's contentions. They are fully answered by a mere statement of the facts as found by the trial court and shown by the record.

The judgment is affirmed.

MOUNT, C. J., and ROOT, RUDKIN, DUNBAR, FULLERTON, and HADLEY, JJ., concur.

#### HOEFER v. SAWTELLE et al.

(Supreme Court of Washington. June 27, 1906.)

#### JUDGMENT—VACATION—MERITS.

2 Ballinger's Ann. Codes & St. § 5156, provides that a petition for the vacation of a judgment brought within a year after its rendition shall be verified by affidavit, setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and if the party is a defendant, facts constituting a defense to the action, and section 5158 declares that the judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered. *Held*, that a petition for the vacation of a judgment, where the party was a defendant, alleging merely that petitioners have a meritorious defense to the action, but failing to state the facts so that it could be "adjudged" that such meritorious defense existed was demurrable.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 751, 752.]

Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by E. P. Sawtelle and another against A. H. Hoefer to vacate a judgment. From an order sustaining a demurrer to the petition, plaintiffs appeal. Affirmed.

Maurice A. Langhorne, for appellants. Millett & Harmon and Agnew & Israel, for respondent.

DUNBAR, J. Action by appellant to vacate a judgment. The petition alleges that on or about July 2, 1901, the plaintiff brought an action against the petitioners to recover the possession of a certain tract of land; that in response to a summons they appeared in said action by an attorney whom they had employed to defend said action; that thereafter on the 29th day of September, 1904 the

said attorney acting without the scope of his authority made and entered into a stipulation with the attorneys for the plaintiff whereby it was stipulated and agreed that the plaintiff might have judgment entered in accordance with the stipulation; that thereafter judgment was entered in accordance with said stipulation; that petitioners' said attorney had no power or authority to make and enter into said stipulation; that his employment was for the sole and express purpose of defending the suit brought against the petitioners; that the petitioners had no knowledge of the fact that their said attorney had entered into said stipulation until shortly before the commencement of this proceeding, and the petitioners also aver that they have a meritorious defense to the action brought against them by the plaintiff. A demurrer was interposed to the petition on the ground that it did not state facts sufficient to justify the relief prayed for. Such demurrer was sustained by the court. The petitioners elected to stand upon their petition whereupon the court entered its judgment dismissing the petition, and from such judgment this appeal was prosecuted.

The only question presented was whether the court erred in sustaining the demurrer to the petition. We are of the opinion that the demurrer was properly sustained. This action was brought within a year from the dismissal of the action, and was evidently brought within the provisions of chapter 17, tit. 28, 2 Ballinger's Ann. Codes and St., which provides for the vacation and modification of judgments. Section 5156 provides that the petition shall be verified by affidavit, setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and if the party is a defendant, the facts constituting a defense to the action. Section 5158 provides that the judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered. It would be impossible for the court to have adjudged that there was a valid defense to the action under the averments of the petition which in this respect is simply a bare conclusion that appellants have a meritorious defense of the action brought against them. The requisites of a petition in this character of case is thus announced by Black on Judgments (2d Ed.) § 346a, "The applicant must show that he has a valid and meritorious defense to the action; and this must be made to appear, not by mere averment that he has such a defense, but by setting forth fully the facts which constitute the proposed defense." This is the rule under ordinary statutes which are not as strong as ours, but the author proceeds to state a case which falls squarely within our statute, the language is as follows: "And, in some of the states it is provided by statute that a judgment shall not be vacated until it is adjudged that there is a valid defense to the action, or, if the

plaintiff seeks its vacation, that there is a valid cause of action. Where this provision is in force, it is error for the court to render a judgment of vacation before it has adjudged that there is a valid defense," and as we have before said it would be impossible for the court to so adjudge without a more definite allegation of facts or at least without some allegation of fact. With this view of the petition, it becomes unnecessary to discuss the power and authority of the attorney to enter into the stipulation complained of.

The judgment is affirmed.

MOUNT, C. J., and CROW, RUDEKIN, FULLERTON, HADLEY, and ROOT, JJ., concur.

(43 Wash. 26)

AMOS BROWN'S ESTATE, Inc., v. CITY OF WEST SEATTLE et al.

(Supreme Court of Washington. June 29, 1906.)

1. NEWSPAPERS—PUBLICATION OF NOTICE—STATUTORY PROVISION.

Where there was no newspaper having the mechanical work of printing done in a city, but there was one circulated generally in the city and devoted to items of news and matters of interest pertaining to its people and affairs, and it had been designated as the official newspaper of the city, the publication therein of a notice of an election to determine whether certain property could be annexed to the city, was a sufficient compliance with the statute requiring notice to be given by publication in a newspaper printed and published in the city.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Newspapers, § 17.]

2. INJUNCTION—PRELIMINARY INJUNCTION—OPERATION AND EFFECT.

An election to determine whether certain property should be annexed to a city, held in defiance of a preliminary injunction by the superior court, is void, regardless of the propriety or legality of the court's order.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by the Estate of Amos Brown, Incorporated, against the city of West Seattle and others and G. B. Nicholl and others. From a judgment in favor of plaintiff, defendants the city of West Seattle and others appeal. Affirmed.

E. F. Kleustra (Richard Saxe Jones, of counsel), for appellants. McCafferty & Bell, for respondent.

ROOT, J. This action was instituted by respondent to secure a permanent injunction enjoining the city of West Seattle and the other respondents who were its officers from holding an election on the 22d day of April, 1905, for the purpose of determining whether certain property, including property of respondent, should be annexed to said city. On the day before said election was to be held, the superior court of King county made and entered an order restraining appellants

from holding said election or taking any further proceedings looking toward the annexation of said territory under or by virtue of the notice calling for said election. Said restraining order was personally served upon the officers of said city on the 21st day of April, 1905. The fact of the issuing and serving of said restraining order was published, on the morning of April 22d, in the Post-Intelligencer, a daily paper of Seattle which had a general circulation in the city of West Seattle. Notwithstanding the making and service of said restraining order, the city officers of West Seattle proceeded with said election, and thereafter certified that said election had been carried by the requisite number of votes in favor of annexation, and thereafter treated said property as within the corporate limits of said city. The city officers were summoned before the court as for contempt in violating the order of the court forbidding said election, and were found guilty and punished. When the case came on for trial the court made findings of fact and conclusions of law, and entered judgment thereupon wherein and whereby it was found, adjudged, and decreed that said election was null and void, and said city and its officers were perpetually enjoined from dealing with the property of respondent as a part of the territory of said city. From this judgment and decree an appeal is prosecuted to this court.

The trial court based its decree upon two grounds: First, that the notice of the special election was not given as required by the statute; second, that the election, having been held in defiance of the order of the court, was illegal. The statute requires the notice of an election of this character to be given "by publication in a newspaper printed and published in such corporation, and also in a newspaper printed and published outside of such corporation, and in the county in which the territory so proposed to be annexed is situated, in both cases for a period of four weeks prior to said election." At the time in question there was no newspaper having the mechanical work of printing done in the said city of West Seattle, but there was a newspaper known as the "West Seattle Observer" which had theretofore been regularly designated as the official newspaper of said city. The mechanical work of printing this newspaper was done in the city of Seattle, but the newspaper itself was circulated generally in the city of West Seattle, and was devoted to items of news and matters of interest appertaining to the people and affairs of the last-named city. Notice of the election was published in this newspaper, and also posted in several places in the city, and in the territory sought to be annexed. We think that this newspaper may properly be said to have been "published" within the city of West Seattle; and under the circumstances of this case we think there was a sufficient compliance with the statute.

To hold otherwise would be to absolutely prevent any election of this kind being held for the reason that there was no newspaper actually "printed" within the limits of said city. The purpose of the statute was to furnish the voters with adequate notice of the election, and when this was accomplished and in a manner as nearly as possible in accordance with the literal terms of the statute, as was done in this case, we think it constitutes a sufficient compliance with the statutory requirement. *Seymour v. Tacoma*, 6 Wash. 427, 33 Pac. 1059; *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39; *State v. Russell* (Neb.) 51 N. W. 465, 15 L. R. A. 740, 33 Am. St. Rep. 625, and note.

Upon the other ground, we think the judgment of the trial court must be sustained. This election was held contrary to and in open defiance of an order of a court having general jurisdiction over the persons and subject-matter involved. The questions of the propriety or legality of the court's order made so short a time before the election is not involved at this time. The question is, did the making, issuing, and service of this restraining order and the publication of these facts have a tendency to prevent a full, free, and fair expression of the voters at the election and was the result probably affected by these matters. The natural and legitimate consequences of the making and service of such an order would be to deter voters from participating in an election thus prohibited. The trial court found that by reason of the issuance and service of said restraining order, and of the publication of that fact in the newspaper, many qualified voters may have been deterred from participating in the election, and that the same was not fair and legal. Appellants contend that this finding is insufficient to support the court's action; but that there should have been proof and a finding to the effect that qualified voters were actually prevented from participating in the election. We do not think this contention can be upheld. It having been shown that the election was held contrary to and in defiance of the order of the court, we think the burden of showing that said election was fair and a correct expression of the voters, rested upon appellants. It appears that at a special election held a few weeks prior to the one involved here there were cast in the city a few less votes than were given at this election, and it is urged by appellants that this tends to show that the later election was a fair and full expression of the people. It also appears, however, that there were registered in said city five times as many voters as participated in the election here in question, and that at the last general election in said city there were cast four times as many votes. Public policy requires that all elections should be held under circumstances that will permit and encourage a full, free, and fair expression of those entitled to vote;

and whenever there is shown to have existed circumstances and conditions well calculated to, and which probably did, repress, hinder, or defeat such an expression, the result obtained should not be binding. Under the circumstances revealed by the record in this case, we do not think the result of the election in question can be said to constitute a fair and free expression of the voters of West Seattle and the territory sought to be annexed. The trial court was justified in holding said election null and void. The judgment is therefore affirmed.

MOUNT, C. J., and CROW, RUDKIN, HADLEY, and DUNBAR, JJ., concur.

(48 Or. 253)

#### STATE v. MULLER.

(Supreme Court of Oregon. June 26, 1906.)

#### CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF HOURS OF LABOR.

Laws 1903, p. 148, making it a misdemeanor for any employer to require any female to work in any factory, laundry, or mechanical establishment more than 10 hours a day, does not violate the fourteenth amendment of the United States Constitution, providing that no state shall deprive any person of life, liberty, or property without due process of law, nor Const. Or. art. 1, §§ 1, 20, declaring that all men have equal rights, and that no law shall grant any privileges not belonging equally to all citizens.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 170, 628, 846.]

Appeal from Circuit Court, Multnomah County; Alfred F. Sears, Jr., Judge.

Curt Muller was convicted of a violation of Laws 1903, p. 148, and he appeals. Affirmed.

Wm. D. Fenton, for appellant. Bert E. Haney, Deputy Dist. Atty., for the State.

BEAN, C. J. In 1903 the Legislature passed an act which, among other things, provided that "no female [shall] be employed in any mechanical establishment, or factory, or laundry in this state more than 10 hours during any one day" and that "any employer who shall require any female to work in any of the places mentioned" more than the prohibited time "shall be guilty of a misdemeanor, and upon conviction thereof shall be" punished, etc. Laws Or. 1903, p. 148. The defendant was convicted for a violation of this act by requiring a female to work more than the prescribed time in a laundry. He appeals to this court on the ground that the law is unconstitutional and void, as violative of the fourteenth amendment to the Constitution of the United States, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law," and of sections 1 and 20 of article 1 of the Constitution of this state, as follows: Section 1. "We declare that all men, when they form a social compact, are equal in rights." And section 20. "No law shall be passed granting to any citizen or

class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." The right to labor, or employ labor, on such terms and conditions as may be agreed upon by the interested parties, is not only a liberty, but a property right guaranteed to every citizen by the fourteenth amendment to the Constitution of the United States, and cannot be arbitrarily interfered with by the Legislature. *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937; *Ex parte Kuback*, 85 Cal. 274, 24 Pac. 737, 9 L. R. A. 482, 20 Am. St. Rep. 226; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; *Low v. Rees Printing Co.*, 41 Neb. 127, 59 N. W. 362, 24 L. R. A. 702, 43 Am. St. Rep. 670; *Seattle v. Smyth*, 22 Wash. 327, 60 Pac. 1120, 79 Am. St. Rep. 939. But the amendment was not designed or intended to limit the right of the state, under its police power, to prescribe such reasonable regulations as may be necessary to promote the welfare, peace, morals, education, or good order of the people, and therefore the hours of work in employments which are detrimental to health may be regulated by the Legislature. *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780.

The right to labor and to contract for labor, like all rights, is itself subject to such reasonable limitations as are essential to the peace, health, welfare, and good order of the community, and, as said by the Supreme Court of the United States: "A large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385. In *Holden v. Hardy*, supra, the court, referring to the limitations placed by a state upon the hours of workmen in underground mines, said: "These employments, when too long pursued, the Legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts." And in the subsequent case of *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725, the court uses this language: "regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbi-

trary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for federal interference." The Legislature may not, therefore, unduly interfere with the liberty of contract, or arbitrarily limit the right of a citizen to enter into such contracts as to him may seem expedient or desirable; but it may prescribe reasonable regulations in reference thereto and limitations thereon to promote the general welfare and guard the public health, and the power of the courts to review such regulations exists only "when that which the Legislature has done comes within the rule that if a statute, purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is beyond all question a plain, palpable invasion of rights secured by the fundamental law." *Jacobson v. Massachusetts*, 197 U. S. 11, 31, 25 Sup. Ct. 358, 49 L. Ed. 643.

Now, the statute in question was plainly enacted, although not so declared therein, in order to conserve the public health and welfare by protecting the physical well-being of females who work in mechanical establishments, factories, and laundries. Such legislation must be taken as expressing the belief of the Legislature, and through it of the people, that the labor of females in such establishments in excess of 10 hours in any one day is detrimental to health and injuriously affects the public welfare. The only question for the court is whether such a regulation or limitation has any real or substantial relation to the object sought to be accomplished, or whether it is "so utterly unreasonable and extravagant" as to amount to a mere arbitrary interference with the right to contract. On this question we are not without authority. Legislation limiting the hours during which women may be employed is in force in several of the states of the Union, and, so far as we are advised, such legislation has everywhere been upheld, except in the state of Illinois. This particular class of legislation was first enacted in Massachusetts, and came before the Supreme Court of that state in *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383. The law provided that "no minor under the age of eighteen years, and no woman over that age, shall be employed in laboring by any person, firm or corporation in any manufacturing establishment in this commonwealth more than 10 hours in any one day," except in certain cases, and that "in no case shall the hours of labor exceed 60 per week." This law was held valid, the court declaring that it was not in violation of any rights reserved to the individual citizen, because "it merely provides that in an employment, which the Legislature has evidently deemed to some extent dangerous to health, no person shall be engaged in labor more than 10 hours a day or 60 hours a week. There can be no doubt that such legislation

may be maintained either as a health or police regulation, if it were necessary to resort to either of those sources for power. This principle has been so frequently recognized in this commonwealth that reference to the decisions is unnecessary." And that the law did not violate the right of the female employé to labor in accordance with her own judgment as to the number of hours she should work, because it merely prohibited her being employed continuously in the same service more than a certain number of hours during a day or week, leaving her free to work elsewhere as many hours as she might desire. In 1899 the Legislature of Nebraska (Laws 1899, p. 362, c. 107) enacted a law providing that "no female shall be employed in any manufacturing, mechanical or mercantile establishments, hotel or restaurant in this state more than sixty hours during any one week and that ten hours shall constitute a day's labor." This legislation was upheld by the court on the ground that it was a reasonable regulation to promote the public good and to protect the health and well-being of women engaged in labor in the establishments mentioned in the act, and therefore came within the police powers of the state. *Wenham v. State*, 65 Neb. 394, 405, 91 N. W. 421, 58 L. R. A. 825. The court said: "Women and children have always, to a certain extent, been wards of the state. Women in recent years have been partly emancipated from their common-law disabilities. They now have a limited right to contract. They may own property, real and personal. In their own right, and may engage in business on their own account. But they have no voice in the enactment of the laws by which they are governed, and can take no part in municipal affairs. They are unable, by reason of their physical limitations, to endure the same hours of exhaustive labor as may be endured by adult males. Certain kinds of work, which may be performed by men without injury to their health, would wreck the constitutions and destroy the health of women, and render them incapable of bearing their share of the burdens of the family and the home. The state must be accorded the right to guard and protect women, as a class, against such a condition; and the law in question, to that extent, conserves the public health and welfare." In 1901 a similar statute was enacted in the state of Washington, and was held valid by the Supreme Court in *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52, 59 L. R. A. 342, 92 Am. St. Rep. 930, Mr. Justice Dunbar saying: "It is a matter of universal knowledge with all reasonably intelligent people of the present age that continuous standing on the feet by women for a great many consecutive hours is deleterious to their health. It must logically follow that that which would deleteriously affect any great number of women, who are the mothers of succeeding generations, must necessarily affect the public welfare and the public morals. Law is, or ought

to be, a progressive science. While the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government." The case of *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315, is the only decision to which our attention has been called, or which we have been able to find, in which an act of the kind under consideration has been held unconstitutional and void. The case is well considered and ably presented, but is, we think, borne down by the weight of authority and sound reason.

We are of the opinion, therefore, that the act in question is not void because an arbitrary and unwarranted limitation of the right of contract, but is within the police power of the state. Nor can we concur with counsel that it is an arbitrary and unwarrantable discrimination against persons engaged in the particular businesses or employments specified, because persons in other businesses or callings are not prohibited from requiring or permitting their female employées to work more than 10 hours a day. Nearly all legislation is special in the objects sought to be obtained or in its application, and the general rule is that such legislation does not infringe the constitutional right to equal protection of the laws when all persons subject thereto are treated alike under like circumstances and conditions. In *re Oberg*, 21 Or. 406, 28 Pac. 130, 14 L. R. A. 577; *Ex parte Northup*, 41 Or. 489, 69 Pac. 445. "The discriminations which are open to objection," says Mr. Justice Field, in *Soon Hing v. Crowley*, 113 U. S. 703, 709, 5 Sup. Ct. 730, 28 L. Ed. 1145, "are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to repair that equal right which all can claim in the enforcement of the laws."

The judgment is affirmed.

#### SHOWERS et al. v. ZANONE.

(Court of Appeal, Third District, California.  
April 13, 1906.)

#### 1. APPEAL—FINDINGS—CONFLICTING EVIDENCE—REVIEW.

Findings of a trial court based on conflicting evidence will not be disturbed on appeal, if there is any evidence in the record on which they might be properly based.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3983.]

#### 2. DRAINS—CONSTRUCTION—LIABILITY FOR EXPENSE—EVIDENCE.

In an action to recover one-fifth of the cost of a drainage ditch, evidence held to support a finding that defendant fully consented to the scheme and promised to defray her part of the expense involved therein.

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by Jacob Showers and others against Madaline M. Zanone. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Mahan & Mahan, for appellant. Gillett & Cutler, for respondents.

**McLAUGHLIN, J.** This is an action to recover one-fifth of the cost of a drainage ditch constructed by the plaintiffs. The complaint contains two counts. In the first a cause of action for money expended for the use and benefit of defendant at her request is stated. In the second it is alleged that the plaintiffs were duly authorized by defendant to make arrangements for and construct said ditch, she agreeing to pay her pro rata share of the expense. In this connection it is stated that she acted by and through an agent who communicated her authorization and consent to plaintiffs, and that by her conduct preceding the commencement of the work, and during its progress, she led plaintiffs to believe that she acquiesced in the plan proposed to her, and that said agent had authority to speak and act for her in the premises. The court found for plaintiffs, and judgment was entered accordingly. The sole point urged on this appeal is that the findings are not supported by the evidence.

It is a cardinal rule of appellate practice that the findings will not be disturbed when the evidence is conflicting. *Broder v. Conklin*, 121 Cal. 284, 53 Pac. 699; *Rose v. Rose*, 112 Cal. 343, 44 Pac. 658; *Astill v. South Yuba W. Co.*, 146 Cal. 57, 79 Pac. 594. The weight and effect to be given the evidence was for the trial court to determine, and even though it was demonstrated that the preponderance of evidence was against the conclusion reached, we could not disturb that conclusion if any evidence was found in the record upon which it might properly be based. All doubts must be resolved, and all intendment indulged in favor of the judgment, and we "must construe the testimony as favorably as possible for the respondents." *Carteri v. Roberts*, 140 Cal. 165, 73 Pac. 818; *People v. Wong Suey*, 110 Cal. 117, 42 Pac. 420; *Taylor v. Kelley* 103 Cal. 178, 37 Pac. 216; *Olmstead v. Dauphiny*, 104 Cal. 635, 38 Pac. 505; *Meyer v. Great Western Ins. Co.*, 104 Cal. 381, 39 Pac. 82; *People v. Un Dong*, 106 Cal. 83, 39 Pac. 12.

Viewing the evidence in this case in the light of these well-settled rules, it certainly cannot be said that the findings are not supported by the evidence. The business relations between the defendant and her alleged agent prior to this transaction, her visit to the scene of the contemplated improvement in his company, their joint examination of the premises and what was said and done by each at that time and subsequently, had a strong tendency not only to show his agency, but her consent to and acquiescence in the plan which had been proposed to her. Her

inquiry upon the street in Eureka, and her conduct when the claim of plaintiffs was presented to her were of potent significance. She knew and so did her agent, that the work was in progress, and the latter at least must have known that the plaintiffs were counting on her to pay a portion of the expense incurred. Both defendant and her agent were cognizant of the fact that the ditch would be of great benefit to her land by securing it against overflow, and the facts and circumstances surrounding its construction were such as to warrant the finding and judgment that she was liable for one-fifth of the expense. *Bergthold v. Porter Bros. Co.*, 114 Cal. 688, 46 Pac. 738; *Puget Sound L. Co. v. Krug*, 89 Cal. 243, 26 Pac. 902; *Burnett v. Fisher*, 57 Cal. 152; *Anglo-Cal. Bank v. Cerf*, 147 Cal. 399, 81 Pac. 1081; *Meechem on Agency*, 83; *Donnelly v. S. F. Bridge Co.*, 117 Cal. 422, 49 Pac. 559; *Carpy v. Dowdell*, 115 Cal. 687, 47 Pac. 695; *Dolbeer v. Livingston*, 100 Cal. 621, 35 Pac. 328; *Scott v. Jackson*, 89 Cal. 262, 26 Pac. 898. Indeed, her failure to disclaim liability, and the excuse she gave for failure to pay, coupled with her pertinent inquiry as to what was being done, and other facts incident to her visit to the scene would alone lend strong support to a finding that she had fully consented to the scheme and had promised to defray her portion of the expense it would involve.

True, all this testimony was flatly contradicted, and it may even be said that the evidence would support findings directly to the contrary, but we have pointed to the reasons which forbid our interference, and hence the judgment is affirmed.

We concur: **CHIPMAN, P. J.**; **BUCKLES, J.**

3 Cal. App. 406

# WETZEL v. SUPERIOR COURT OF SISKIYOU COUNTY.

(Court of Appeal, Third District, California.  
April 7, 1906.)

## 1. CERTIORARI—GROUNDS—ERRORS.

A judgment will not be reversed on certiorari for mere errors committed in the exercise of its rightful jurisdiction.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, § 42.]

## 2. SAME.

A writ of review is not a writ of error on which the rulings of the trial court and matters within its jurisdiction may be reviewed, unless they are matters necessary to determine the jurisdictional facts.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, §§ 1, 42.]

Petition by Sigmund L. Wetzel for a writ of review to review the proceedings of the superior court of the county of Siskiyou, which terminated in a judgment determining petitioner to be insane, and ordering his commitment to a state hospital. Writ denied.

Jacob P. Wetzel, for petitioner.

CHIPMAN, P. J. Petitioner presents to the court what purports to be a statement of the proceedings of the superior court of the county of Siskiyou, which resulted in a judgment that the said Sigmund L. Wetzel was insane and that he be committed to and confined in the Napa State Hospital at Napa, Cal. The prayer of the petition is "that a writ of error issued out of the honorable District Court of Appeal, directed to the superior court of the county of Siskiyou, commanding and directing it to certify up to this honorable court a transcript of the records in the papers in the said matter, of Sigmund L. Wetzel, an insane person, and that this honorable court [review] the proceedings and rulings in said matter, as rendered, ordered and adjudged by the said superior court, because of the error heretofore alleged in this petition, and do whatever is meet and just in the matter." Assuming that the intention of the petitioner is to obtain a writ of review, it is sufficient to say that the court had jurisdiction to hear and determine the matter.

The judgment of a court will not, on certiorari, be reversed for mere error committed in the exercise of its rightful jurisdiction. *Hutchinson v. Superior Court*, 61 Cal. 119; *Holbrook, etc., v. Superior Court*, 106 Cal. 589, 39 Pac. 936. The writ of review is not a writ of error upon which the rulings of the court and other matters within its jurisdiction may be reviewed, except they be matters necessary to determine the jurisdictional facts. *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580. So far as appears from the petition and accompanying papers and purported copy of records, the errors complained of were mere errors occurring at the hearing and related to the admissibility of evidence, to the refusal of the court to continue the hearing, to the giving of certain instructions and like questions.

There is nothing in the record to show and no claim is made that the court was without jurisdiction.

The writ is denied.

We concur: McLAUGHLIN, J.; BUCKLES, J.

3 Cal. App. 404

### PRINCE v. KENNEDY.

(Court of Appeal, Second District, California. April 7, 1906.)

#### 1. ATTORNEY AND CLIENT—ACTION FOR COMPENSATION—COMPLAINT.

A complaint in an action by attorneys for compensation alleging that plaintiffs were partners engaged in the practice of law as attorneys and counselors, was not insufficient for failing to allege that plaintiffs were authorized by the laws of the state to practice law.

#### 2. SAME.

In an action by attorneys, the complaint alleged that plaintiffs at the request of defendant rendered for him services for which he agreed to pay the reasonable value, and that such services had been fully rendered and per-

formed, and that a certain sum was the reasonable value thereof. *Held*, that an objection that the complaint did not allege that anything was due from defendant was untenable.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 365.]

#### 3. TRIAL—FINDINGS BY COURT—CONFORMITY TO ISSUES.

A complaint alleged that plaintiffs as attorneys rendered services for defendant for which he agreed to pay the reasonable value which was \$750. The answer denied that the services were of any value, and alleged for a separate defense that defendant had employed plaintiffs to collect a certain claim due to defendant, but that plaintiffs had neglected to collect the same. The court found that the allegations of the complaint were true except the allegation that the services were worth \$750, and found the reasonable value thereof to be \$500. *Held*, that the matter set up in the alleged separate defense raised no material issue, and the findings disposed of every issue in the case.

#### 4. APPEAL—RECORD—FAILURE TO MAKE FINDINGS—ABSENCE OF EVIDENCE.

A judgment will not be reversed for failure of the trial court to find on an affirmative defense where the record does not contain the evidence.

#### 5. EVIDENCE—BURDEN OF PROOF.

A party alleging an affirmative defense has the burden of proving it.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 119-121.]

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by George H. Prince against H. Kennedy. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Tanner, Taft & Odell, for appellant. Stutsman & Stutsman and Taylor & Forgy, for respondent.

GRAY, P. J. In this action it is alleged in the complaint "that Taylor & Forgy is and at all times herein mentioned was a copartnership, composed of W. S. Taylor and E. W. Forgy, who are, and at the times herein mentioned were, engaged in the practice of law as attorneys and counselors at law, in the city of Los Angeles, Cal.; that within two years last past, as such attorneys and counselors at law, and at the special instance and request of the defendant, H. Kennedy, said Taylor & Forgy rendered to and for said defendant services for which said defendant agreed to pay the reasonable value thereof; that no time was agreed upon for the payment thereof, but said services have been fully rendered and performed and \$750 is the reasonable value thereof; that no part of said sum has been paid, and the whole thereof, to wit, the sum of \$750, is now due, owing and unpaid." An assignment of the said claim to the plaintiff is also duly alleged in the complaint. The answer, in effect, admits the performance of services, but denies that they were performed within two years last past, and also denies that they were of any value. The answer then proceeds as follows: "And for a further and separate defense this defendant alleges that

within six months last past defendant employed W. S. Taylor, one of the members of the firm of Taylor & Forgy, as attorney at law, to collect a certain claim of \$525 due defendant as commission upon a sale of real estate from one, Andrea Daneri; that said Taylor and said Taylor & Forgy failed and neglected to collect said claim or any part thereof; that they wholly failed and neglected to institute proceedings to collect said claim, and defendant says that he has no information upon which to found a belief, and basing his denial upon that ground he denies that said Taylor or said Taylor & Forgy performed any services in that behalf." The court found "that all the allegations of the complaint are true," except the allegation that the services were of the reasonable value of \$750 and found the reasonable value thereof to be "\$500 and no more"; and "that no part of said reasonable value of such services has been paid." From the judgment entered in plaintiff's favor on these findings the defendant appeals.

1. It is objected first that the complaint is insufficient to support the judgment, and falls to state a cause of action because it is not alleged therein that Taylor & Forgy were attorneys at law "authorized by the laws of this state to practice law." This contention is fully negated by the case of *Miller v. Ballerino*, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600. The allegations of the complaint herein are much broader than in the *Ballerino* Case. There the complaint contained no allegation that the services were performed as attorneys at law. Here it is so alleged, and, further, that the firm was "engaged in the practice of law," etc. From this it will be presumed, if necessary, that they were regularly authorized to practice law. This point is devoid of merit.

2. The point that the complaint does not allege that anything is due from defendant to plaintiff is also devoid of merit. The complaint alleges specific facts leading to the irresistible conclusion that \$750 is due from defendant to plaintiff; and that is sufficient.

3. The findings are also clearly sufficient to support the judgment and fully dispose of all the issues in the case. To find that the allegations of the complaint are true negatives every denial of those allegations, and to except the allegation of value of the services from this general finding and to dispose of the question by a specific finding that said value is \$500 leaves the findings open to no objection on the score of uncertainty. It is impossible to misunderstand the findings as they are drawn, and we think them sufficient under the authority of *Moore v. Clear Lake Water Works*, 68 Cal. 146, 8 Pac. 816; *County of Sutter v. McGriff*, 130 Cal. 124, 62 Pac. 412, and many earlier cases in this state of similar import.

4. The matter set up in the alleged separate defense in the answer constituted no defense to the action, raised no material

issue and no finding as to it was necessary. There was nothing in it to show that the employment therein referred to had any connection with the services for which suit was brought, nor were any damages alleged or claimed by way of counterclaim or otherwise. Moreover, if it were conceded that the answer contained an affirmative defense, it is settled by numerous cases and beyond question that a reversal will not be had for failure to find on it where, as here, the record does not contain the evidence. *Roberts v. Hall*, 147 Cal. 434, 82 Pac. 66. The burden is on the party alleging an affirmative defense to prove it, and the court will not presume, in the absence of the evidence, that there was evidence upon a point in respect to which there is no finding. *Klokke v. Escallier*, 124 Cal. 297, 56 Pac. 1113. As to whether the appeal was taken for delay, and as to whether damages should be added to the judgment for that reason, the court is unable to reach a unanimous concurrence either way, and therefore damages are not added as for an appeal taken for delay.

The judgment is affirmed.

We concur: SMITH, J.; ALLEN, J.

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VAN LEUVEN v. VAN LEUVEN.

(Court of Appeal, Second District, California.  
April 9, 1906.)

APPEAL—REVIEW—ADMISSION OF EVIDENCE—  
FAILURE TO EXCEPT.

The admission of an exhibit in evidence will not be reviewed on appeal, where no exception was taken.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1503, 1508.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by W. H. Van Leuven against A. B. Van Leuven. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Henry M. Willis, for appellant. Frank C. Prescott and Prescott & Morris, for respondent.

GRAY, P. J. This action is brought by one brother against another to reform a written contract of a sale of an interest in real estate, so as to make it also an agreement to purchase on the part of the defendant, and to enforce performance of said agreement to purchase. The findings and judgment are in plaintiff's favor, and the defendant appeals from the judgment and from an order denying him a new trial.

1. The court found, in substance, that it was agreed by defendant to pay plaintiff \$325 on or before the 14th day of November, 1903, in consideration of the conveyance to defendant by plaintiff of plaintiff's interest in the Whaley place, and that said agreement was omitted from the written agreement through a clerical error and mutual mistake

of the parties. Appellant contends that this finding is not supported by the evidence. It appears from the evidence that defendant had originally purchased the Whaley place, paying therefor \$1,400 of money he had on hand, \$1,700 that he borrowed from the Union Bank, and \$325 from and of the plaintiff's money. After this purchase, the brothers quarreled for some weeks and finally entered into negotiations for a business settlement with the view of placing themselves in a position where no further communication between them should be necessary. To show that in the course of these negotiations the defendant agreed to buy plaintiff's interest and pay him this \$325 for it much evidence, oral and written, was introduced. C. E. Truesdell, one of the lawyers who had a hand in the settlement and drew up the contract, testified, among other things, "what I want the court to understand is of a conversation that was had there that A. B. Van Leuven was to purchase W. H.'s interest in the Whaley place; it must have been left out of the contract by an oversight on Mr. Prescott's and my part." It is needless to go into all the evidence on this subject. It is sufficient to say that the very purpose of the agreement and of the negotiations for the agreement was to effect a settlement and segregation between these quarrelling brothers, and this could not be done without the defendant buying out his brother and paying off this \$325 that the latter had in the land. It was the clear intent and purpose of the parties that this should be done, and it is plain from the evidence that defendant intended that it should be done, and that the contract which was to be formally prepared and signed should accomplish that purpose. The omission of this most essential part of their agreement cannot be accounted for on any other theory consistent with the evidence, than on that of a mistake and oversight on the part of all concerned in the preparation of the written contract. The finding has ample support in the evidence.

2. There can be no reasonable question that plaintiff was interested in the land to the extent of \$325 of his money which had gone into the purchase of it. Plaintiff's interest in the land is admitted by defendant's becoming a party to the contract of sale. The finding of such interest is supported by the evidence.

3. As to appellant's complaint concerning Exhibit L-1, there was no ruling of the court, except that it might be marked for identification. It was not admitted in evidence, nor was there any exception taken by appellant to any action of the court in connection with this exhibit. There is, therefore, nothing concerning it that this court can review.

The judgment and order appealed from are affirmed.

We concur: SMITH, J.; ALLEN, J.

§ Cal. App. 412

# CORSON v. McDONALD.

(Court of Appeal, Second District, California.  
April 9, 1906. Rehearing Denied  
May 28, 1906.)

## 1. FRAUDS, STATUTE OF—SUFFICIENCY OF WRITING—EXTENSION OF MORTGAGE—EXERCISE OF MORTGAGOR'S OPTION.

Where a mortgage provided that the mortgagor might extend it for a year from the expiration of the term thereof, it was not necessary that the mortgagor's decision to extend be expressed in writing, as the agreement constituted a written proposition on the part of the mortgagee which on acceptance by the mortgagor became a valid contract in writing on the part of the mortgagee.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 195.]

## 2. MORTGAGES—CONSTRUCTION—EXTENSION OF TIME—CONSTRUING MORTGAGE AND NOTE SECURED.

A provision in a mortgage that the mortgagor might extend it for a year from the expiration of the term thereof included the notes secured.

## 3. APPEAL—DISPOSITION OF CAUSE—PROCEEDINGS IN LOWER COURT—AMENDMENT.

A clerical error constituting a discrepancy between the finding and the judgment may be corrected in the trial court, by a reduction of the judgment notwithstanding an affirmation on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2201.]

## 4. MORTGAGES—FORECLOSURE BY ACTION—ATTORNEY'S FEES—LIEN.

Where a note secured by a mortgage provides for attorney's fees, it is proper on foreclosure to make the fee a lien on the land.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1678.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by May Delevan Corson against Mrs. Mary A. McDonald. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

John Satterwhite, for appellant. Willoughby Rodman and Rodman & Garrett, for respondent.

SMITH, J. Appeal from a judgment foreclosing a mortgage, and from an order denying the defendant's motion for a new trial.

The mortgage was given to secure a promissory note of date November 26, 1897, for the sum of \$3,500, payable with interest on or before one year from date, and for an additional sum of 10 per cent. on principal as attorney's fee, in case suit should be commenced to enforce payment. There is contained in the mortgage the following provision: "And it is further understood and agreed by and between the parties hereto, that the mortgagor herein has the privilege of renewing or extending this mortgage for one additional year from the expiration of the term hereof."

The complaint alleges in effect that the defendant exercised her option of extending the mortgage for an additional year, and the court so finds; and finds further that the option was exercised and the plaintiff's assignor

notified thereof prior to November 26, 1898. The court also finds adversely upon the plea of the statute made by the defendant. Judgment was accordingly entered for the amount due on the note and mortgage, and also for the sum of \$350 as attorney's fee. The complaint was filed November 10, 1903; that is to say, not within four years from the maturity of the note according to its original terms, but within four years from the closing date of the extension. The finding of the court as to the defendant's exercise of her option to extend the note for one year is fully supported by the evidence of the plaintiff's assignor and another witness. But the point is made that the extension of the time and the acquiescence therein of the plaintiff's assignor was not in writing, and that the court erred in admitting the testimony. But the position is untenable. The agreement contained in the mortgage does not provide that the option of the mortgagor should be expressed in writing. It constituted, in fact, a written proposition on the part of the mortgagee, which, upon acceptance by the mortgagor, became a valid contract in writing on the part of the mortgagee to extend the time. Nor, though the contrary is suggested by the appellant, can the agreement be construed as applying to the mortgage only, and not to the note. It is inconceivable that such could have been the intention of the parties.

With regard to attorney's fee, there is an apparent discrepancy between the finding of the court that \$300 is a reasonable fee and the judgment, which is for \$350. But as no explanation is given in the briefs of this discrepancy, or any point made thereon by the appellant, we shall assume that the sum contained in the judgment was regarded by the court as a reasonable fee. If, however, there is any error in regard to the fee, it is merely clerical and can be corrected by the court below, notwithstanding the judgment on the appeal. Nor do we see any error in the judgment of the court in making the attorney's fee a lien upon the property. The note itself provides for the fee, and it thus becomes a part of the sum or sums secured by the mortgage. In the decision cited by appellant the case was otherwise. *Irving v. Perry*, 119 Cal. 357, 51 Pac. 544, 949; *Klokke v. Escailler*, 124 Cal. 297, 56 Pac. 1113. The judgment and order appealed from are affirmed.

We concur: GRAY, P. J. ; ALLEN, J.

#### STATE v. KEERL.

(Supreme Court of Montana, Feb. 19, 1906.  
On Rehearing, April 30, 1906.)

#### 1. CRIMINAL LAW—FORMER JEOPARDY—DISAGREEMENT OF JURY.

A disagreement of the jury coupled with a failure to find a verdict does not bring defendant within the provisions of Const. U. S. Amend. 5, and Const. Mont. art. 3, § 18, pro-

viding that no person shall be twice put in jeopardy for the same offense.

[Ed. Note.—For cases in point, see vol. 14. Cent. Dig. Criminal Law, § 344.]

#### 2. SAME—DISAGREEMENT OF JURY—RECORD ENTRY.

Pen. Code, § 2125, providing that a jury cannot be discharged after the cause is submitted until they have agreed on their verdict, unless by consent of both parties "entered upon the minutes or unless at the expiration of such time as the court may deem proper it satisfactorily appears that there is reasonable probability that the jury cannot agree," was sufficiently complied with by an entry as follows: "In this case the jury returned this day into open court, defendant being present in person and by counsel; whereupon, it satisfactorily appearing to the court that there is a reasonable probability that the jury cannot agree, the court ordered the jury discharged from further consideration of this case."

#### On Rehearing.

#### 3. COURTS—FORMER DECISIONS AS CONTROLLING—FEDERAL QUESTIONS—DECISION OF FEDERAL SUPREME COURT.

The question of former jeopardy in a capital case is a federal one, and, the federal Supreme Court having decided that, when a court discharged a disagreeing jury in a capital case, the defendant was not put again into jeopardy on a new trial, such decision is binding on the state court.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 329.]

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

James S. Keerl was convicted of manslaughter, and appeals. Affirmed.

C. B. Nolan, T. J. Walsh, and W. M. Cockrill, for appellant. Albert J. Galen, Atty. Gen., and E. M. Hall, Asst. Atty. Gen., for respondent.

MILBURN, J. This case is on appeal from a judgment of conviction of manslaughter. The defendant was tried three times. The first trial resulted in conviction of murder in the second degree. The judgment was reversed on appeal. *State v. Keerl*, 29 Mont. 508, 75 Pac. 362, 101 Am. St. Rep. 579. Upon the second trial the jury disagreed and was discharged. The third trial resulted in the conviction for manslaughter, and the judgment from which the appeal was taken.

The alleged crime was committed in Lewis and Clark county. The third trial was had by change of place of trial, before the district court of the Eighth judicial district. Before entering upon the third trial the information was amended in the particulars suggested in the opinion of this court after the first trial. The second trial was upon information without amendment. The brief of appellant sets out six specifications of error, only one of which was argued orally, the rest being submitted merely upon the briefs. After considering all we find that the one argued orally is the only one worthy of consideration, and it is the one which will be noticed herein. The specification which

we must consider is: "The court erred in not sustaining the second plea of appellant, that he was once in jeopardy and acquitted through the improper discharge of the jury upon the second trial." Upon the second trial of the defendant the jury, after deliberating upon their verdict for about 24 hours, returned into court and having been inquired of by the judge, the jury was discharged, and the following minute entry made by the court: "In this cause the jury returned this day into open court, the defendant being present in person and by counsel; whereupon it satisfactorily appearing to the court that there is a reasonable probability that the jury cannot agree, court ordered the jury discharged from further consideration of this cause."

The plea relied upon on the beginning of the third trial is as specified above, the formal plea in writing containing the following language, speaking of the second trial: "The said jury retired to deliberate and having on the 14th day of July, 1904, after the expiration of about twenty-four hours after their retirement to deliberate upon their verdict returned into court, they were questioned by the court as to whether they had agreed and having reported to the court, as the fact was, that they had not agreed, the said jury were by the said court on the said 14th day of July, 1904, without the consent of the defendant, and without having arrived at or returned any verdict, discharged, without there existing any necessity for the discharge of the said jury and without there being or existing no reasonable probability that the said jury could or would agree upon a verdict. \* \* \* The said court directed the clerk thereof to enter of record that the court found that there was a reasonable probability that the said jury would not agree and that they were for that reason discharged." Article 5 of the amendments to the Constitution of the United States provides: " \* \* \* Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Section 18 of article 3 of the Constitution of the state of Montana provides: " \* \* \* Nor shall any person be twice put in jeopardy for the same offense." Our Constitution includes all in the federal Constitution on the subject and more, and is not in any wise in contravention thereof. This question has been argued since American courts have been established under our Constitution and has been considered from every possible standpoint, and the opinions are not consistent or reconcilable. Many of the courts have held that after the jury is sworn in a criminal case, the defendant is in jeopardy, and that, except in a case of necessity arising from some act almost amounting to an "act of God," the jury may not be discharged without such discharge amounting to an acquittal. Other

courts have held that the discharge lies in the discretion of the court for reasons sufficiently appearing to it. Others have held that in capital cases the discharge of the jury, for reasons of accident or otherwise, will not amount to an acquittal. We think that all of these holdings are inconsistent with the idea that the defendant is in such jeopardy as the Constitutions, federal and state, refer to, as soon as the jury is sworn, because if the defendant is in such jeopardy as soon as the jury is sworn, then the death of a juror, or a disagreement of the jury, could not alter the fact. What has happened, has happened, and cannot be changed without a miracle.

Our Legislature in the enactment of the Penal Code has, with abundance of caution, undertaken to pass upon this matter in at least four sections. Section 2124 provides: "If, after the retirement of the jury, one of them be taken so sick as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept for deliberation, the jury may be discharged." Section 2125 reads: "Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict, and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless at the expiration of such time as the court may deem proper, it satisfactorily appears that there is reasonable probability that the jury cannot agree." Section 2126 provides: "In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial, or after the cause is submitted to them, the cause may be again tried." Section 2103 reads as follows: "When the defendant has been convicted or acquitted upon an indictment or information for an offense, consisting of different degrees, the conviction or acquittal is a bar to another indictment or information for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein." The legislative construction of what the Constitution means in regard to twice being put in jeopardy is apparent from a reading of section 1356 of the Penal Code, to wit: "No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted." This implies a verdict and is consistent with the views of the Supreme Court of the United States as it announced them in *United States v. Perez*, 9 Wheat. 579, 6 L. Ed. 165, respecting a prisoner who was tried for a capital offense, the jury being discharged without agreeing upon a verdict and without the consent of the defendant: "The prisoner has not been convicted

or acquitted, and may again be put upon his defense." We think that the Legislature meant by this latter section that a person may not be subjected to a second prosecution if once there has been rendered against him a verdict of conviction or a verdict of acquittal has been returned in his favor. We do not believe that it meant to say that "in case a verdict of conviction or a verdict of acquittal has been rendered, or if the jury has been discharged without rendering any verdict, the defendant, in a criminal case, shall not be prosecuted again for the same public offense." We do not believe that the Legislature meant that the discharge of the jury amounted to an acquittal.

The authorities supporting the view that a disagreement of the jury, coupled with a failure to find a verdict, does not operate to bring the defendant within the provision of the Constitution as to former jeopardy, which view we believe to be also that of the Legislature and which we think to be in accord with our Constitution and that of the United States, are numerous, a few of which we cite: 3 Current Law, p. 984; *United States v. Perez*, supra; Wharton's Criminal Pr. & Procedure (8th Ed.) § 490; *Mosely v. State*, 33 Tex. 671; *State v. Walker*, 26 Ind. 346; *Commonwealth v. Purchase*, 2 Pick. (Mass.) 521, 13 Am. Dec. 452; 17 Am. & Eng. Ency. Law, p. 585, citations note 1. One most fully expressing our ideas in clear language is that of *United States v. Perez*, supra. The case is so similar to the one under consideration that we quote the opinion in full: "The prisoner, Josef Perez, was put upon trial for a capital offense, and the jury, being unable to agree, were discharged by the court from giving any verdict upon the indictment, without the consent of the prisoner, or of the Attorney for the United States. The prisoner's counsel, thereupon, claimed his discharge as of right, under these circumstances; and this forms the point upon which the judges were divided. The question, therefore, arises, whether the discharge of the jury by the court from giving any verdict upon the indictment, with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offense. If it be, then he is entitled to be discharged from custody; if not, then he ought to be held in imprisonment until such trial can be had. We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to

exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject, in the American courts; but after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial." So far as the reasoning is concerned, it does not make any difference, under the broad provision of our Constitution, as to any charge so it is the same offense, whether the defendant is put upon trial for a capital offense or for murder in the second degree which is not a capital offense under our law.

In conclusion we repeat the language of the federal court in *United States v. Perez*, supra: "We are aware that there is some diversity of opinion and practice on this subject, in the American courts; but, after weighing the question with due deliberation, we are of the opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial." The entry made by the court in its minutes as to its action in discharging the jury and the reason therefor, complies with the statute and is sufficient.

The judgment is affirmed.

Affirmed.

HOLLOWAY, J., concurs.

BRANTLY, C. J. I concur in the conclusion reached in the majority opinion, but do not wish to be understood as giving assent to the proposition that, in order for a defendant to sustain his plea of former jeopardy, he must show a former conviction or acquittal of the same charge by a verdict of a jury. I think it possible that the trial court might so far abuse its discretion in discharging a jury, on the ground that it has failed to agree, that the prisoner should be held to be acquitted.

On Rehearing.

MILBURN, J. On motion for rehearing counsel invites the attention of the court to certain sections of the Penal Code which were not cited by the court in the former opinion,

desiring to convince us that the word "jeopardy," as used in the legislative Acts of the state, should be understood as meaning more than former acquittal or former conviction, and saying that we have inadvertently overlooked the distinction between real and apparent jeopardy. After further consideration of this difficult matter, upon which the courts and text-writers of the country are so hopelessly divided, we are of the opinion that what we said in the former opinion should be amplified, but not that our conclusion should be changed. Section 1940 of the Penal Code is as follows: "There are four kinds of pleas to an indictment or information. A plea of (1) Guilty. (2) Not guilty. (3) A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty. (4) Once in jeopardy." Section 1941 of the same Code provides: "Every plea must be oral, and entered upon the minutes of the court in substantially the following form: \* \* \* (3) If he plead a former conviction or acquittal: 'The defendant pleads that he has already been convicted (or acquitted) of the offense charged by the judgment of the court of \_\_\_\_\_ (naming it), rendered at \_\_\_\_\_ (naming the place) on the \_\_\_\_\_ day of \_\_\_\_\_.' (4) If he plead once in jeopardy: 'The defendant pleads that he has been once in jeopardy for the offense charged' (specifying the time, place and court.)" Section 1947 reads: "When the defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment or information, the conviction, acquittal or jeopardy, is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under the indictment or information." Section 1990 is as follows: "An issue of fact arises: (1) Upon a plea of not guilty. (2) Upon a plea of a former conviction or acquittal of the same offense. (3) Upon a plea of once in jeopardy." Section 1356 provides: "No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted." Section 2126 reads as follows: "In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the process of the trial, or after the cause is submitted to them, the cause may be again tried." This last section, which was not called to our attention by counsel, supports the position taken in the former opinion.

The language of the statute in these several sections is not clear, and the sections are apparently somewhat conflicting, but, when read together, are not impossible to understand. Section 1940 in the third subdivision

cited, provides that "a former judgment of conviction or acquittal of the offense charged" may be pleaded, but, as we see, other sections speak of conviction or acquittal merely. The special plea of former judgment of conviction or acquittal, or of former conviction or acquittal, seems to be superfluous, for the reason that the plea of "once in jeopardy" can be made. The latter includes the plea of former conviction or acquittal, and a judgment of conviction or acquittal. Certainly, if a man has been convicted and a judgment of conviction has been entered for a felony, he has been "once in jeopardy." We think that the plea of "once in jeopardy" was added to include other cases of jeopardy than those of judgment of conviction or acquittal. In section 2126 it appears conclusively that the defendant may not be tried again if he has been discharged during the progress of the trial, or after the case has been submitted to the jury, although the jury may have been discharged or prevented from giving a verdict by reason of an accident or other cause. Such a discharge of the prisoner amounts to an acquittal, and brings him within the provision of section 1356, although there has not been any judgment of acquittal as mentioned in section 1940. Section 2126 seems to expressly provide for the case now under consideration, for it says that in all cases of a disagreement of a jury, the prisoner may be tried again, unless he has been discharged as aforesaid. In case of the discharge of the jury for disagreement, as in the case of granting a new trial, the jeopardy is the same continuing jeopardy from the beginning of the trial after the swearing in of the first jury, until the particular same case is determined. There is only one jeopardy; a second jeopardy can only be pleaded in another case. A new trial is the re-examination of the facts under the same plea of not guilty, on the same information or indictment. Certainly, there has not been any judgment of conviction or acquittal in the case before us. There has not been any conviction without a judgment. Has there been an acquittal without a judgment? What is an acquittal? The appellant certainly has not been adjudged to be acquitted. This question is not the simple one that it appears to be. The word "acquittal" is said to be "verbum equivocum." For some of the equivocations, see Words and Phrases, vol. 1, p. 114. The definition expressed or implied in our former opinion in this case is too narrow, although supported by authority. We consider that one is acquitted if, after he has been arraigned and the trial has been begun upon a valid indictment or information, he is discharged by a competent court before verdict. Penal Code, § 2126. He has been in jeopardy. Such is not the situation in the case before us.

We are also of the opinion that after a verdict or a judgment of conviction or acquittal,

the defendant in a criminal case has been in jeopardy, and may not be tried again for the same offense, except in a case of a new trial which has been granted or ordered. The jeopardy which is forbidden is a new jeopardy. In the case before us the defendant, when he went to trial the third time, was in the same jeopardy that he was in when the first trial was had. The continuance of the jeopardy is not a new jeopardy. A mistrial or a new trial secured by plaintiff or defendant, continued the jeopardy and does not renew it. If this court was correct in the two cases in which new trials were ordered in criminal cases on appeal by the prosecutions (*State v. Herron*, 12 Mont. 230, 29 Pac. 819, 33 Am. St. Rep. 576; *Id.*, 12 Mont. 300, 30 Pac. 140; *State v. Mjelde*, 29 Mont. 490, 75 Pac. 87), then, on a new trial, the jeopardy would not be a new one, but a continuation of the old danger. This remark is made by the writer of this opinion on his sole responsibility, and not with the concurrence of the other members of the court, as he has now a doubt as to the logic and correctness of those two opinions, in the latter of which he concurred.

In the *Perez Case* cited (9 Wheat. 579, 6 L. Ed. 165) the federal Supreme Court decided that when a court discharged a disagreeing jury in a capital case, the defendant was not put again into jeopardy on a new trial. It made no exception in a supposed case of abuse of discretion. This decision of the highest court in the country is strongly persuasive. Section 2126 settles it. The defendant here was not acquitted. He was not twice put in jeopardy. There was not a new jeopardy. The record of the court as to the discharge of the jury was statutory and sufficient as to the reason why the jury was discharged and as to the necessity for discharging them. Mr. Justice Holmes, in his dissenting opinion in *Kepner v. United States*, 195 U. S., at page 134, 24 Sup. Ct. 797, 49 L. Ed. 114, while being of the opinion that the defendant should have stood convicted on the trial by the Philippine appellate court, lays down certain general principles applicable to all cases. He says: "It seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury disagree. *United States v. Perez*, 9 Wheat. 579, 6 L. Ed. 165. See *Simmons v. United States*, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; *Thompson v. United*

*States*, 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146.

The former opinion herein is modified to conform to the views herein expressed, and the motion for rehearing is denied.

Rehearing denied.

HOLLOWAY, J., concurs. BRANTLY, C. J., concurs in the result reached.

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STATE ex rel. RUEF v. DISTRICT COURT  
OF TWELFTH JUDICIAL DIST. IN  
AND FOR CHOUTEAU COUNTY  
et al.

(Supreme Court of Montana. April 4, 1906.)

WILLS—FOREIGN WILLS—PROBATE—CONCLUSIVENESS.

Code Civ. Proc. § 2352, provides that, when a foreign will is admitted to probate, it shall have the same force and effect as a will first admitted to probate in the state, and it is elsewhere provided that a domestic will or the validity thereof may be contested within one year after probate. Const. U. S. art. 4, § 1, and Rev. St. U. S. § 905 [U. S. Comp. St. 1901, p. 677] enacted in pursuance thereof, providing for authentication, declares that full faith and credit shall be given in each state to judicial proceedings of every other state. Code Civ. Proc. Cal. § 1908, provides that the effect of a judgment or final order in respect to the probate of a will is conclusive upon the will. Code Civ. Proc. § 2350, provides that, in order to contest the probate of a will after probate, the petition therefor must be filed in the court in which the will was proved. Section 2350 provides that all wills duly proved and allowed in any state may be allowed and recorded in the district court of any county in which the testator shall have left any estate. Civ. Code, § 1731, provides that a will made out of the state, by one not having his domicile in the state, is as valid, when executed according to the law of the place in which it is made, as if it were made in the state. *Held*, that a will admitted to probate in California, and subsequently admitted to probate in a county of Montana, because of testator having had real estate there, could not subsequently be contested in the courts of Montana on the ground that testator was lacking in testamentary capacity.

Application by the state, on relation of A. Ruef, as executor of G. F. Deletraz, for a writ of prohibition restraining the district court of the Twelfth judicial district in and for Chouteau county from hearing proceedings on a contest of the will. An alternative writ was issued, and on the return the matter was submitted on a motion to quash the alternative writ and dismiss the proceedings. Motion to quash the alternative writ and dismiss the proceedings overruled, and a peremptory writ ordered in accordance with the prayer of the petition.

F. E. Stranahan, for relator. Geo. H. Stanton and Jos. A. McDonough, for respondent.

HOLLOWAY, J. Prior to his death, which occurred at San Francisco on March 7, 1904,

G. F. Deletraz made and published two wills, the first of which for convenience will be designated the "Mossholder will," and the last the "Ruef will." Such proceedings were had in the superior court of San Francisco that the Ruef will was duly admitted to probate, and letters testamentary issued to the person named as executor in that will. The decedent had real and personal property in Chouteau county, Mont., and in May, 1904, after the will had been admitted to probate in California, a copy of such will and the probate thereof, duly authenticated, were produced by the executor with a petition for letters, and filed in the district court of Chouteau county, where such proceedings were had that thereafter, on December 30, 1904, it appearing to that court from the record that said will had been proved, allowed, and admitted to probate in the state of California, and that it was executed according to the laws of California, a decree was duly given and made admitting such will to probate. Thereafter, on February 2, 1905, certain devisees, and the executor named in the Mossholder will, filed in the district court of Chouteau county what purported to be a contest in writing of the Ruef will, which writing sets forth as the ground of contest that, at the time of making the Ruef will, the testator, Deletraz, did not have mental capacity to make a will and was acting under fraud, misrepresentation, and undue influence of certain other persons, and prays that the order admitting the Ruef will to probate be annulled; that the letters issued thereon be revoked; that the Mossholder will be admitted to probate; and that letters testamentary issue to the executor named in that will. To this contest the relator, the executor named in the Ruef will, demurred on the ground that the district court of Chouteau county has not jurisdiction to hear such contest, and that the so-called contest in writing does not state facts sufficient to constitute any ground of contest. This demurrer was overruled, and, the district court being about to proceed to hear such alleged contest, an application was made to this court for a writ of prohibition restraining the district court of Chouteau county and the Honorable Jere B. Leslie, judge of said court for the purpose of hearing all the proceedings in connection with this matter, the resident judge being disqualified, from further proceeding with said alleged contest. An alternative writ was issued, and upon the return the matter was submitted upon a motion to quash the alternative writ and dismiss the proceedings.

The question which arises, and which was submitted for determination, is: May a foreign will, after it has been admitted to probate in this state, be contested in the courts of this state upon the ground that the testator at the time of making such will was not of sound and disposing mind, or was acting under duress, fraud, or undue influence?

A "foreign will," in the sense that the term is used throughout this opinion, is a will executed in another state by a testator residing there, admitted to probate in such sister state after the death of the testator, and subsequently offered for ancillary probate in this state, as was the case with the will now under consideration. While our Code does not in express terms provide for the contest of an application to the courts of this state for the probate of a foreign will, it does so impliedly; for section 2351 of the Code of Civil Procedure, which has to do with the subject, provides for a hearing of such application, and that notice of such hearing shall be given. If objections could not be made at such hearing, then there would be no reason for requiring a hearing or notice thereof, and the mere fact that a hearing is required to be had, and proper notice of such hearing given, implies that some kind of objections may be interposed. The only specifications of grounds of contest of a domestic will are to be found in section 2340 of the Code of Civil Procedure, and they are not designated as such, but as the issues which may be raised and which the court is required to try and determine. So, likewise, while no particular grounds of contesting an application for the probate of a foreign will are expressly designated, section 2352 of the Code of Civil Procedure does enumerate the findings which the trial court must make before admitting such will to probate, and these may be accepted as questions with respect to which issues may be raised, and therefore the grounds of such contest. But these questions arise upon the hearing of the application for probate and are to be tried by the record itself, and have not any reference to proceedings after the will has been admitted to probate here. As these proceedings are purely statutory, and the statute makes no specific provision for the contest of a foreign will after probate, we might dispose of this proceeding by saying that the provisions of section 2352 above are exclusive, except as to the question of jurisdiction of the court of the sister state over the subject-matter, and likewise the question of the jurisdiction of the Montana court, which might be raised independently of statute. But attention is directed to one portion of section 2352, above, which provides that, when such foreign will is admitted to probate in this state, it shall "have the same force and effect as a will first admitted to probate in this state," and the argument is made that, as the probate of a domestic will or the validity of such will is subject to contest within one year after such probate, and as the foreign will when admitted has the same force and effect as the domestic will, therefore the probate of the foreign will in the courts of this state and the validity of such will are likewise subject to contest within a like period.

When the proper record of the probate of

the will in the court of a sister state having jurisdiction is presented in a district court of this state likewise having jurisdiction of the subject-matter, the question arises: What force and effect shall be given by the courts of this state to such record? Section 1, art. 4, of the Constitution of the United States, provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Pursuant to this direction, section 905 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 677] was enacted, which, after providing for the manner of authenticating such records, reads: "And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." Section 3201 of our Code of Civil Procedure also provides: "The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding, and except also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority." Section 1908 of the California Code of Civil Procedure, which is pleaded in the petition for the writ of prohibition, is as follows: "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: (1) In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person. \* \* \*" The decree of the superior court of California, then, must be deemed conclusive upon the court in Chouteau county, of every matter with respect to which it is conclusive in California. Section 1908 above is not very definite. A judgment in respect to the probate of a will is conclusive upon the will. Conclusive of what? In *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118, the Supreme Court of California, in considering an attack made upon the decree admitting the Broderick will to probate, after reviewing the authorities at length, says: "This review of the cases decided in England and in the United States establishes that it is a perfectly settled doctrine that the decision of the court to which the proof of wills

is confided, whether of real or personal estate, is conclusive upon the question of the validity or invalidity of the will." The reference here to real estate, of course, applies to real estate within the jurisdiction of that court.

It is generally conceded that a judgment in a probate proceeding is a judgment in rem; that is, it determines the status of the subject-matter. Therefore the judgment of the California court, admitting the will to probate there, fixed the status of the instrument as a will and became at once conclusive upon all the world of all the facts necessary to the establishment of a will, among which are that, at the time the will was executed, the testator was of sound and disposing mind and was not acting under duress, fraud, menace, or undue influence. 16 Enc. Pl. & Prac. 1073; note to *Bowen v. Johnson*. 73 Am. Dec. at page 53, where the authorities are cited. See, also, the leading case of *Crippen v. Dexter*, 13 Gray (Mass.) 330. The decree of a court of this state first admitting a will to probate does establish such instrument as a will. It is true that such decree is not necessarily final. It may be reviewed on appeal and is subject to attack within one year in a proper proceeding instituted for that purpose. But, until set aside by a proper proceeding, such decree is conclusive of all facts necessary to the validity of the will. If the foreign will, after being admitted to probate, is subject to a like attack, it follows necessarily that it must, when such attack is made, be proved as a domestic will. But this was never contemplated. and, if it was, the mere fact that such foreign will may be required to be proved, as if probate thereof had never been had, would nullify the provision of section 905 of the United States Revised Statutes above, and render meaningless the sentence quoted from section 2352, above. These views are reinforced by the provisions of section 2360 of the Code of Civil Procedure, which provides that, in order to contest the probate of a will after such will has been admitted to probate, an interested party must file a petition in writing setting forth the grounds of contest, and this petition must be filed in the court in which the will was proved. But a foreign will admitted to probate here is not proved in the court of this state. Section 2350 of the Code of Civil Procedure provides: "All wills duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the district court of any county in which the testator shall have left any estate."

In order to entitle a foreign will to probate here, it must first appear that it was duly proved, allowed, and admitted to probate in the court of the sister state; that it was executed according to the law of the place in which it was made or in which the testator was at the time domiciled, or in conformity

to the laws of this state; and that the record is authenticated as required by section 905 of the United States Revised Statutes, above. Of course, it must also appear that there is property within the jurisdiction of the Montana court subject to administration, and that the court of the sister state likewise had jurisdiction of the subject-matter. But, when these facts do appear, "it [the foreign will] must be admitted to probate \* \* \* and letters testamentary or of administration issued thereon." Section 2332, above. But it may be said, conceding all this, the decree of the California court can only be conclusive of matters with respect to which that court had jurisdiction, and that this is the meaning which has been given uniformly to the constitutional provision quoted above; that the California court did not have jurisdiction of real estate situated in Montana, and therefore the decree of the California court admitting the Ruef will to probate only establishes that instrument as a will, in so far as it affects personal property, upon the principle "of international law originated by the necessities of commercial intercourse, founded on the fiction that movable property, wherever situate, is in the actual possession of the owner at his domicile, and universally accepted by comity with all the force of domestic law, that the personal property of every man is subject to the law of his domicile" (Irwin's Appeal, 33 Conn. 128); that the devolution of title to real estate in this state is to be determined by the laws of this state; and that the full faith and credit clause of the United States Constitution, above, does not operate to the prejudice of this right. Assuming this to be true, and that the general rule is that, in the absence of statute, the probate of a foreign will devising real estate situated in this state does not establish the validity of such will in this state, upon the familiar principle that the *lex rei sitæ* governs as to the formalities necessary to the transfer of real estate, whether testamentary or inter vivos, still this state may by statute give to a foreign will, which devises real estate located in this state, the same effect as is given to a will devising personal property only, or a will executed in conformity with the laws of this state; and, if such statute is enacted, the probate of such foreign will in the courts of this state under that statute is conclusive as to the validity of the will to pass title to the land so devised. 23 Am. & Eng. Enc. Law (2d Ed.) 143.

Section 1731 of our Civil Code provides: "A will of real or personal property, or both, or a revocation thereof made out of this state by a person not having his domicile in this state, is as valid when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this state, and according to the provisions of this chapter." Provisions similar to this section, and to that portion of section 2352 quoted

above, have frequently been construed. The case of *Ives v. Salisbury's Heirs*, 56 Vt. 565, presents the precise question argued here, and the decision is upon similar statutory provisions. It is held that the questions of the testamentary capacity of the testator and his freedom from undue influence are foreclosed by the decision of the court of the sister state where the will was first admitted to probate. Under statutes almost, if not quite, identical with our sections 2350, 2351, and 2352 of the Code of Civil Procedure, and section 1731, Civ. Code, above, the Supreme Court of Minnesota says that the ancillary probate is mostly a mere matter of form, and holds that these statutes make the judgment of a sister state, admitting the will to probate, conclusive as to the validity of the will, and that the proceedings to probate it in Minnesota are much in the nature of a suit upon a foreign judgment. *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020, 51 Am. St. Rep. 503; *Lyon v. Ogden*, 85 Me. 374, 27 Atl. 258; *Page on Wills*, § 30; *Green v. Alden*, 92 Me. 177, 42 Atl. 358; *Crippen v. Dexter*, above; *Irwin's Appeal*, supra; *Hayes v. Lienlokken*, 48 Wis. 500, 4 N. W. 584. Reference is made to section 1838 of our Civil Code, which reads as follows: "Except as otherwise provided, the validity and interpretation of wills are governed, when relating to real estate within this state, by the law of this state; when relating to personal property, by the law of the testator's domicile." This section must be read in connection with section 1731, above, and without doubt refers to particular devises which are prohibited by the laws of Montana, and, probably, to conditions such as are enumerated in sections 1729, 1744, 1751, and 1752 of the Civil Code, and probably to other like questions which are not in controversy in this proceeding.

From these considerations it follows that, by giving full force and effect to the decree of the California court admitting the Ruef will to probate, and adjudging that such will was executed according to the law of California where it was executed, such will, when admitted to ancillary probate in Chouteau county, operates to transfer all property, real and personal, of the testator, to the same extent that a will drawn in Montana, in conformity to the laws of Montana, and duly probated here in the first instance, would transfer it. Section 1731, above, then, makes applicable the provisions of section 1, art. 4. of the Constitution, above, and section 905 of the United States Revised Statutes, to the decree of the California court admitting the Ruef will to probate, even though that will devises real estate situated in Montana, and that decree is conclusive upon the court in Chouteau county to the same extent respecting the Ruef will as if it transferred personal property only. We think that the questions of the testamentary capacity of the testator and his freedom from duress, fraud,

misrepresentation, or undue influence, when executing the Ruef will, are foreclosed by the decree of the California court, and that the district court of Chouteau county is without jurisdiction to inquire into them.

The motion to quash the alternative writ and dismiss the proceedings is overruled. It is ordered that the peremptory writ of prohibition issue according to the prayer of the petition.

BRANTLY, C. J., and MILBURN, J., concur.

T. F. HICKEY & CO. v. KAUFMAN et al. (Supreme Court of Montana. April 9, 1906.)  
APPEAL—BRIEFS—SPECIFICATIONS OF ERROR.

Where appellant's brief contains no specifications of error, as required by Supreme Court Rule 10 (82 Pac. ix), the judgment will be affirmed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3093, 3108.]

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

Action by T. F. Hickey and Company against Jake Kaufman and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

C. M. Parr, for appellants. Mackel & Meyer, for respondents.

HOLLOWAY, J. The defendants appealed to this court from a judgment, and from an order of the district court denying them a new trial.

Appellants' brief does not contain any specification of errors relied upon, as required by Rule 10 of the Rules of this court (82 Pac. ix). Upon the authority of the following cases the judgment and order are affirmed. *Cole v. Ryan*, 24 Mont. 122, 60 Pac. 991; *Rehberg v. Greiser*, 24 Mont. 487, 62 Pac. 820, 63 Pac. 41; *Casey v. Thieviege*, 27 Mont. 516, 71 Pac. 755; *Larkin v. Butte & Boston C. M. Co.*, 28 Mont. 41, 72 Pac. 304.

Affirmed.

BRANTLY, C. J., concurs. MILBURN, J., not having heard the argument, takes no part in the foregoing decision.

STATE ex rel. BREEN v. DISTRICT COURT OF SILVER BOW COUNTY et al.

(Supreme Court of Montana. April 11, 1906.)

1. CONTEMPT—JUDGMENT—SUFFICIENCY.

An order adjudging one guilty of contempt, as defined by Code Civ. Proc. § 2170, declaring disorderly conduct, insolent behavior toward the judge while holding court, a contempt, which alleges that accused, an attorney at law, while the court was in session, addressed the court in an insolent manner and in an insolent manner called and attempted to call the judge to prove certain scandalous matters, is insuffi-

cient under section 2172, declaring that an order of conviction must recite the facts on which the conclusion of guilt is based.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, § 200.]

2. CERTIORARI—REVIEW OF CONTEMPT PROCEEDINGS—SCOPE.

The Supreme Court, on certiorari to review an order adjudging one guilty of a direct contempt, may not look beyond the contents of the order adjudging him guilty.

3. WITNESSES—COMPETENCY—JUDGE ACTING AT TRIAL.

Where a party challenges a jury on the ground of a material departure from the law in respect to the drawing and return thereof, as authorized by Pen. Code, § 2034, and the fact stated as the ground of challenge is denied, the court must, as required by section 2038, try the question of fact presented, and the officer, whether judicial or ministerial, whose irregularity is complained of, may be examined as a witness, and hence a judge ordering the drawing of the jury and directing the clerk during its progress, as provided by Code Civ. Proc. § 261, may be called as a witness when the question as to the regularity of the drawing is presented by a challenge.

Certiorari by the state, on the relation of Peter Breen, against the district court of Silver Bow county and another to review an order adjudging relator guilty of contempt. Annulled.

Peter Breen and Jesse B. Roote, for relator. Albert J. Galen, Atty. Gen., and E. M. Hall, Asst. Atty. Gen., for respondents.

BRANTLY, C. J. Certiorari to the district court of Silver Bow county to review an order adjudging Peter Breen, Esq., an attorney at law, guilty of contempt. On March 6th of this year there was on trial in department 3 of said court a cause entitled "State of Montana v. Harry Smith"; the said Breen appearing as counsel for defendant. During the progress of the trial, the court made and entered the following order: "Whereas, the above-entitled court, on the 6th day of March, 1906, was duly in session, the Honorable Michael Donlan, Judge, presiding, and there was then and there on trial before the said court a case entitled the 'State of Montana v. Harry Smith,' and whereas the above-named Peter Breen, an attorney at law, and an attorney in the said case, while the court was duly in session, knowingly and willfully addressed the court in a contemptuous, insolent, and disrespectful manner, and in an insolent, contemptuous, and sneering manner called, and attempted to call the said Honorable Michael Donlan, judge as aforesaid, to prove and attempted to prove by said judge certain scandalous matters, which the said Peter Breen alleged had transpired in the said court on a former occasion, and which allegations were made for the purpose of reflecting upon the honesty and judicial integrity of said judge and which did reflect upon the honesty and integrity of said judge, and thereupon the court then and there found, decided, adjudged, and decreed that the said Peter Breen was guilty of contemptuous and insolent

behavior toward the judge of the said court, while holding the court, tending to interrupt the due course of a trial, and which did interrupt the due course of the trial of said cause, and immediately after so finding the said Peter Breen guilty then and there ordered, adjudged, and decreed, and sentenced that the said Peter Breen should pay a fine of five hundred (\$500.00) dollars, and to be committed as required by law in case of failure to pay the said fine. Now, therefore, it is ordered, adjudged, and decreed that the said Peter Breen forthwith pay the said five hundred (\$500.00) dollars to the clerk of this court, and that in default thereof the said Peter Breen be committed to the county jail of said county until the said fine has been paid for at the rate of two (\$2.00) dollars per day." Thereupon the present proceeding was brought to have the order annulled, for that it does not appear from the facts set forth therein that the court had jurisdiction to punish the relator.

Section 2170 of the Code of Civil Procedure declares disorderly conduct, contemptuous or insolent behavior toward the judge while holding the court, tending to interrupt the due course of the trial or other judicial proceeding, a contempt. Contempts may be direct or indirect. If direct—that is, in the immediate view and presence of the court or of the judge at chambers—they may be punished summarily. In such case the order or judgment of conviction must recite the facts upon which the conclusion or adjudgment that the contemnor is guilty is based (Code Civ. Proc. § 2172), and this order or judgment constitutes the record of the case. If the contempt is indirect—that is, not in the immediate view or presence of the court or judge at chambers—before the court can acquire jurisdiction to punish it, an affidavit must be presented setting forth the facts constituting the contempt, and thereupon the court must hear proof. The conviction here was for a direct contempt. The judgment, however, is wholly insufficient to meet the requirements of the statute. It does not contain, even by appropriate reference to the proceedings before the court, anything to show what the matters referred to as scandalous were, nor any fact tending to show what the manner of the relator was. It states conclusions and inferences only, drawn by the judge from the facts as they actually transpired; thus leaving this court no alternative but to accept these conclusions or to hold the order invalid. The purpose of the statute is to require the court to set forth the jurisdictional facts, so that the propriety of the judgment of conviction may be examined and reviewed. If adjudged sufficient as it stands, the order complained of would be conclusive upon this court, and review of it as to the sufficiency of the facts to put the power of the

court in motion would be impossible. In a given case, where the contempt consists in the manner or bearing of the contemnor, it may be difficult for the court to set forth the facts in any other form than by a shorthand rendering thereof, so to speak; but it is, nevertheless, necessary, that the attendant circumstances be set forth, so that the propriety of the conclusion reached may be determined. The relator has presented this case in his affidavit, upon the theory that this court may look beyond the order and determine from the facts whether or not the judgment of the district court was proper. In such case, however, we may not look beyond the contents of the order itself.

It appears from the facts stated in the petition that at the time the order was made counsel were about to enter upon the selection of a jury to try the case of *State v. Smith*, and that the relator offered a challenge to the panel, accompanied by a written offer to prove the facts therein stated, and giving a list of the witnesses whose testimony he would offer, including, among others, the judge himself. The court evidently proceeded upon the theory that the relator had no right to present the challenge, or, if he had, to call the presiding judge as a witness to establish the truth of the facts therein stated, and was of the opinion that the whole proceeding was not warranted by law, especially the offer to call the judge as a witness. We remark that, if such was the theory of the court, it was wholly wrong, because a party has a right to challenge a jury on the ground of a material departure from the law in respect to the drawing and return thereof, or on the ground of the intentional omission of the sheriff to summon one or more of the jurors drawn (Pen. Code, § 2064); and where the facts stated as the grounds of the challenge are denied by the adverse party the court must proceed to try the question of the fact thus presented, and the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined as witnesses. Pen. Code, § 2038. The judge orders the drawing of the jury and directs the clerk during its progress. Code Civ. Proc. § 261. He may, therefore, be called as a witness when the question as to the regularity of the drawing is presented by a challenge. We shall not enter here into a discussion of this feature of the proceedings, since the record of them is not properly before us.

The order itself being insufficient to show that the court had jurisdiction to make it, it is void and must be annulled. It is so ordered.

Order annulled.

HOLLOWAY, J., concurs. MILBURN, J., concurs in the conclusion.

(34 Mont. 112)

**STATE ex rel. HALL et al. v. DISTRICT COURT OF FIFTH JUDICIAL DIST. IN AND FOR MADISON COUNTY et al.**

(Supreme Court of Montana. April 11, 1906.)

**JUSTICES OF THE PEACE—APPEAL—FILING AND SERVING NOTICE.**

Code Civ. Proc. § 1760, relative to appeals from justices of the peace to the district court, providing that the appeal is taken by filing a notice of appeal with the justice, and, serving a copy on the adverse party, is mandatory, and requires the filing of the notice to precede or to be contemporaneous with the service; section 778, providing that the court must in every stage of an action disregard any error in the proceedings not affecting the substantial rights of the parties, and section 3453, providing that the Code provisions are to be liberally construed with a view to effect its objects and promote justice, having no application.

Application by Amos C. Hall and others for writ of probation to the district court of the Fifth judicial district, in and for the county of Madison, and Hon. Lew L. Callaway, judge thereof. Writ issued.

Clark and Duncan, for relators. J. B. Clayberg and S. V. Stewart, for respondents.

HOLLOWAY, J. In August, 1905, an action was commenced in the justice of the peace court of Union township, Madison county, by Amos C. Hall et al. against J. H. Owen et al. By agreement the venue was changed to Hot Springs township, where the cause was tried, a verdict returned in favor of the plaintiffs, and judgment entered on the verdict on November 28, 1905. On December 1st a notice of appeal was served on counsel for plaintiffs, and on December 4th this notice was filed in the justice of the peace court. The transcript of the justice's docket and the papers in the case were lodged with the clerk of the district court, and on January 2, 1906, plaintiffs moved to dismiss the appeal on several grounds, among which were, that the pretended appeal had not been perfected as required by law, and that a notice of appeal had not been filed and served upon the plaintiffs or their counsel as required by law. This motion was overruled, and the district court being about to proceed to try the cause, an application was made to this court for a writ of prohibition to restrain the district court and the judge thereof from further proceeding. An alternative writ was issued and on return an answer was filed. Upon the hearing it was conceded that the petition and answer correctly state the facts.

1. The only question for determination is: Did the district court acquire jurisdiction of the case of Hall et al. v. Owen et al.? Section 1760 of the Code of Civil Procedure provides for appeals from the justice of the peace court to the district court, and, respecting the manner of effecting such appeals, prescribes: "The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party or

his attorney." These appeals are purely matters of statutory regulation (State v. Whaley, 16 Mont. 574, 41 Pac. 852, and cases cited), and it becomes important, then, to know whether the order in which the notice of appeal is filed and served is of consequence. The statute provides that such notice must be filed and served. In this instance the notice was served on one day and not filed until three days later.

2. The question is not a new one. It has been before this court and before the Supreme Courts of California, Nevada, Colorado, Idaho, and Washington. An early California statute provided: "Art. 1071, § 337. The appeal shall be made by filing with the clerk of the court, with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney." Wood's California Digest, 1850-53, p. 210. Construing this statute in *Hastings v. Halleck et al.*, 10 Cal. 31, the Supreme Court of that state held that the filing of the notice of appeal must precede or be contemporaneous with the service, and if the service preceded the filing, the notice was of no effect and did not perfect the appeal. This was followed in *Buffendeau v. Edmondson*, 24 Cal. 94; *Warner v. Holman*, 24 Cal. 228; *Moulton v. Ellmaker*, 30 Cal. 528; *Boston v. Haynes*, 31 Cal. 107; *Foy v. Domec*, 33 Cal. 317; and in *Lynch v. Dunn*, 34 Cal. 518.

3. The statute of Nevada in force in 1873 was identical with the California statute above. Comp. Laws Nev. 1873, c. 1, tit. 9, § 331. In *Lyon County v. Washoe County*, 8 Nev. 177, in construing this statute, the Supreme Court of Nevada said: "It is well settled that to render an appeal effectual the filing of the notice of appeal must precede or be contemporaneous with the service of the copy; otherwise that which purports to be a copy fails as such for want of an original to support it. It is ordered that the appeal be dismissed." This decision has since been affirmed in *Johnson v. Mining Company*, 12 Nev. 261, and in *Reese Gold & Sil. M. Co. v. Rye Patch Con. M. & M. Co.*, 15 Nev. 341, and in *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 264, 52 Pac. 575, decided in 1898.

4. The Colorado statute in force in 1879 is as follows: "Sec. 339. The appeal shall be made by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and executing an undertaking as hereinafter prescribed, and serving a copy of the notice upon the adverse party or his attorney." Code Civ. Proc. Colo. tit. 9, c. 35, p. 125. With these provisions in force, the Supreme Court of Colorado, in *Alvord v. McGaughy*, 4 Colo. 97, held that unless the filing of the notice of appeal precedes or is contemporaneous with the service thereof, it is ineffectual

for any purpose and the appeal is not perfected. This was followed and approved in *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657, construing a statute then in force in all material respects the same as the one considered in *Alvord v. McGauby* above.

5. The Idaho statute in force in 1875 was also identical with the California statute above. Laws Idaho, tit. 9, c. 1, p. 141. This statute was considered in *Slocum v. Slocum*, 1 Idaho, 589, and the Supreme Court of Idaho said: "By this statute it becomes necessary as a part of the notice that it should be filed, and consequently it must precede or be contemporaneous with the service of a copy on the adverse party. This has been decided in California under a statute similar to ours, and in adopting its statute we adopt the construction which has been given to it by the courts of that state. Before the court can take jurisdiction of an appeal the filing of the notice and the service of a copy thereof as prescribed by the statute must be had, and before the notice is filed, it possesses none of the elements of a notice, and consequently there can be no copy of it."

6. The Code of Washington providing for appeals from a justice of the peace court to the superior court, in force in 1897, among other things provided: "Sec. 1631. Such appeal shall be taken by filing a notice of appeal with the justice and serving a copy on the adverse party or his attorney. \* \* \* " *Hill's Ann. St. & Codes of Washington*, p. 612. This section was considered in *State ex rel. Alladio v. Superior Court*, 17 Wash. 54, 48 Pac. 733, where it is held that the filing of the notice must precede the service, otherwise the superior court does not acquire jurisdiction. A similar provision respecting the finding and service of a statement was considered in *Erickson v. Erickson*, 11 Wash. 76, 39 Pac. 241, and the same conclusion reached.

7. In 1876 we had in this state the following provision respecting appeals to this court from the district courts: "Sec. 370. The appeal shall be made by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving copy of the notice upon the adverse party or his attorney." *Codified Statutes of Montana* (7th session, 1871-72) tit. 9, c. 1, p. 107. This statute is identical with the California, Nevada, and Idaho statutes above, and in all material respects the same as the Washington and Colorado statutes quoted. In *Courtright v. Berkins*, 2 Mont. 404, this court said: "The statutes of California and Nevada regulating appeals are the same as those of this territory. The courts of these states hold that the filing of the notice of appeal must precede or be contemporaneous with the service of the copy thereof to render an appeal effectual. The failure of the appellants to comply with the Civil Practice Act in this

proceeding is an error which affects the jurisdiction of this court. \* \* \* Appeal dismissed."

8. But it may be said that the statutes considered in the cases cited above, except the Washington Case, relate to appeals from courts of record, while the statute now under consideration relates to appeals from a justice of the peace court, and that a different construction should be given to it. The district court evidently proceeded upon this theory, following the decisions of the Supreme Courts of California and Idaho. After the California cases above were decided, the Supreme Court of California in *Coker v. Supreme Court*, 58 Cal. 177, in considering sections 974 and 978 of the California Code of Civil Procedure, which correspond with sections 1760 and 1763 of our Code of Civil Procedure, without giving any reason for its conclusion and without referring to its former decisions above, announced the doctrine that in order to effectuate an appeal from a justice of the peace court, three things are necessary, namely: "The filing of a notice of appeal with the justice, the service of a copy of the notice upon the adverse party, and the filing of a written undertaking. \* \* \* The mere order in which they are done within that time is not material." This decision was followed in *Hall v. Superior Court*, 68 Cal. 24, 8 Pac. 509; *Id.*, 71 Cal. 550, 12 Pac. 672. That the decision in the *Coker Case* was wholly illogical is demonstrated when the legitimate result of such holding is reached, as was done in *Dutertre v. Superior Court*, 84 Cal. 535, 24 Pac. 284. In that case the undertaking on appeal was filed 11 days before the notice of appeal was served, and 11 days before the adverse party had any intimation that an appeal would be taken, and notwithstanding the California Code, section 978 above, specifically confers upon such adverse party the right to except to the sufficiency of the sureties within five days after the filing of the undertaking, as does our section 1763 above, the court held, following the *Coker Case* above, that the appeal was nevertheless perfected, a conclusion which can have but one result, namely, the annulment of the provision permitting the adverse party to except to the sufficiency of the sureties, for that right is only in existence for five days after the undertaking is filed; and yet a court has the same authority for saying that the undertaking on appeal may be filed before the filing or service of the notice, as it has for saying that the notice may be served before it is filed. Either conclusion is directly opposed to the express language or the evident meaning of the statute. In *Reynolds v. Corbus*, 7 Idaho, 481, 63 Pac. 884, the same doctrine is announced as in the *Coker Case*. We think the result reached in the *Dutertre Case* above is nothing short of judicial legislation, or, what is the same thing, a construction by a court of plain language to mean what it does

not say. There is not any reason apparent which will give to the same language one meaning when it applies to the district court practice, and a contrary meaning when applied to the justice of the peace court practice. Assuming that the words, "The order of service is immaterial" were intended to mean that it is immaterial whether the notice is first filed or served, it is worthy of consideration to note that it required an act of the Legislature to add those words to section 370 of the district court practice act of 1871-72, and this court cannot undertake to amend section 1760 above in the like particular, and nothing short of an appropriate amendment would justify the conclusion for which respondents are contending. That legislation is needed is apparent, but this court ought not to affect it by construction which does violence to the language employed.

9. The history of our statutes regulating appeals is of interest. By an act approved January 12, 1872, a civil practice act was adopted which contained section 370 quoted above, which applied to appeals to the Supreme Court. It also contained section 411, which applied to appeals from the probate court, and section 742, which applied to appeals from the justice of the peace court. These sections were all of like import. By an act approved February 16, 1877, a year after the decision in *Courtright v. Berkins*, above, was rendered, sections 370 and 411 of the practice act of 1872 were repealed, and new sections adopted in lieu thereof. Section 409 enacted in lieu of 370, above, was of like import, but to it was added the clause "the order of service is immaterial" etc. This act re-enacted section 411 above in terms, as section 437, and did not assume to change in any manner section 742 of the practice act of 1872. These sections of the act of 1877, and section 742 above, were carried into the revision of 1879, First Division, as sections 409, 437, and 802, respectively; and in the Compiled Statutes of 1887, First Division, as sections 422, 450, and 822. The section respecting appeals from the probate court became nugatory upon the adoption of the Constitution. The sections respecting appeals from the district court and from the justice of the peace court were carried into the Code of Civil Procedure of 1895, as sections 1724 and 1760, respectively.

10. It is to be observed that since 1877 there has not been any material change in any of these sections referred to; that while the section respecting the method to be pursued in appealing from the district to the Supreme Court was amended in 1877, the sections referring to appeals from the justice of the peace to the district court has continued in force without any substantial alteration for more than thirty years, and has been re-enacted over and over again without modification and with the full knowledge which the Legislatures had of the construc-

tion given a similar statute as early as 1876. We must presume, therefore, that in amending the district court practice act and repeatedly re-enacting the justice of the peace practice act without alteration, the Legislature intended that the construction given in *Courtright v. Berkins* should apply to the practice act regulating appeals from a justice of the peace court; and as it is the province of this court to determine the intention of the Legislature, if possible, and apply the law as thus ascertained, we are not warranted now in departing from the former holding of this court and from the rule announced by other courts in construing like statutory provisions. Neither do we think that the provisions of sections 778 and 3453 of the Code of Civil Procedure have any application to the question presented in this proceeding.

11. We are satisfied that the provisions of section 1760 above were intended to be, and are in fact, mandatory, and that a party wishing to appeal from a justice of the peace court must pursue the statutory method strictly, and a failure to do so does not divest the justice of the peace court of its jurisdiction. 2 Ency. Pleading & Practice, 16; *Green v. Castello*, 35 Mo. App. 127; *Sholty v. McIntyre*, 136 Ill. 33, 26 N. E. 655.

12. As disclosed by the record before us, the district court of Madison county was without jurisdiction to try the case of *Hall et al. v. Owen et al.*, and a peremptory writ of prohibition should issue in conformity with the prayer of the petition. The writ is directed to issue accordingly.

Writ issued.

BRANTLY, C. J., and MILBURN, JJ., concur.

#### MUSSELSHELL CATTLE CO. v. WOOL-FOLK et al.

(Supreme Court of Montana. April 16, 1906.)

##### 1. ANIMALS—TRESPASS.

One who knowingly and willfully drives his stock upon uninclosed lands of another is guilty of trespass and liable in damages.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, § 335.]

##### 2. INJUNCTION—PREVENTION OF TRESPASS—GROUNDS OF RELIEF.

Though, as a general rule, equity will not enjoin the commission of a trespass, yet, where defendants willfully drove their sheep upon plaintiff's land so as to consume the grass and water which was necessary for the support of plaintiff's cattle and threatened to continue such acts, both the impossibility of accurately estimating the damages in money and the prevention of a multiplicity of suits justified the enjoining of further trespasses.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 101.]

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

Action by the Musselshell Cattle Company against Alex Woolfolk and another. From

an order refusing to dissolve a temporary injunction, defendants appeal. Affirmed.

Harry A. Groves and J. B. Herford, for appellants. W. M. Johnston, for respondent.

BRANTLY, C. J. Appeal from an order refusing to dissolve a temporary injunction. The injunction was issued upon the verified complaint without notice. Thereupon the defendants moved for a dissolution, on the ground that the complaint does not state facts sufficient to entitle the plaintiff to an injunction. Omitting the formal parts thereof, the complaint alleges, in substance, that the plaintiff is now, and for a long time has been, in possession and entitled to the possession of several thousand acres of land (giving a description thereof by number of section, township, and range) in Yellowstone county; that it is the owner of part of these lands in fee and holds others under contract of purchase from the Northern Pacific Railway Company, and still others under leases from the state of Montana, the latter being school lands; that all of said lands are surveyed and are well stocked with native grasses and valuable for grazing live stock; that there are numerous watering places upon certain described portions thereof, created by plaintiff by the digging of wells and the construction of reservoirs and other like devices for storing and holding water; that these lands are useful to plaintiff solely for the purpose of grazing sheep, cattle, horses, and other stock, and constitute in large measure its winter range; that plaintiff requires all of the grasses thereon and all the water at said watering places for the proper care, feeding, and watering of its stock during all the seasons of the year; that none of the said lands, except a small portion thereof, are inclosed; that defendants are engaged as co-partners in the business of breeding, raising, buying, and selling sheep, owning large bands of them, which they graze upon the public range in Yellowstone and Fergus counties, holding the same in herd; that, though they and their employes have been and are well acquainted with the boundaries of plaintiff's said lands, they have willfully, deliberately, and intentionally on numerous occasions during the past five years, and do now, hold in herd and graze on the said range of the plaintiff, large bands of sheep, and that said sheep have eaten and consumed, and do now consume, the grasses and verdure thereon and also the water at said watering places, to the great detriment and injury of the plaintiff; that, though frequently during the month of December, 1905, and at many other times, the plaintiff has requested the defendants to desist from so using plaintiff's lands, the defendants have refused to do so, and continue, and threaten to continue, their trespasses as aforesaid; and that the plaintiff has no plain, speedy, and adequate remedy at law by which it may obtain redress, because many different suits will be required, and

the amount of damage so wrought by defendants cannot be estimated in money. It will be observed that, though it appears that a portion of the lands described are inclosed, no complaint is made that the defendants have in any way broken any inclosure or committed trespasses upon lands within it. The wrong complained of is the continued herding of sheep by defendants upon plaintiff's uninclosed lands, willfully and against plaintiff's protest, whereby the lands are depastured and rendered useless to the plaintiff.

On the argument in this court, counsel for appellants correctly assumed it to be the rule in this jurisdiction that one who knowingly and willfully drives his stock upon lands of another, though uninclosed, is guilty of a trespass and must respond in damages at the suit of the latter. In any event, any doubt on this subject was set at rest by the decision of this court in *Monroe v. Cannon*, 24 Mont. 317, 61 Pac. 863, 81 Am. St. Rep. 439. In that case, while recognizing the doctrine that the common-law rule that the owner of domestic animals is bound at his peril to keep them within his own inclosure, so that they may not trespass upon his neighbor's, has never been in force in this state, this court held that one who knowingly and willfully permitted his sheep to be herded upon the lands of another, and to depasture the same, must respond in damages to the owner thereof. Indeed, this rule prevails generally throughout the public land states and territories, and has been recognized in the federal courts. 12 Am. & Eng. Enc. Law (2d Ed.) 1045, and collection of cases in note; *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618; *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. 477, 38 L. Ed. 303.

The only contention made was that a court of equity will in no case assume jurisdiction to enjoin a trespass, unless the title of plaintiff is admitted or clearly established, and the injury being done or threatened is irreparable because not susceptible of complete pecuniary compensation, and that the allegations of the complaint do not make out such a case. There is no rule better settled than that a court of equity will not interfere to enjoin a trespass when there is an adequate remedy at law. It has been repeatedly recognized and applied by this court. *Heaney v. Butte & Montana Com. Co.*, 10 Mont. 590, 27 Pac. 379; *King et al. v. Mullins et al.*, 27 Mont. 364, 71 Pac. 155; *Harley et al. v. Montana Ore Pur. Co.*, 27 Mont. 388, 71 Pac. 407. Though the rule as stated in the case of *Heaney v. Butte & Montana Com. Co.*, founded upon the case of *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315, 11 Am. Dec. 484, was afterwards modified in *Lee v. Watson*, 15 Mont. 223, 38 Pac. 1077, because, in view of the tendency of the later decisions, it was stated too broadly as applied to the facts presented, that case nevertheless, generally speaking,

states the rule correctly. An adequate remedy always exists where the damages can be estimated in money, and the only purpose sought by the action is to determine the amount. If, however, there are peculiar circumstances in the case, as that the trespass is continued or repeated so that its redress would require a multiplicity of suits, or the injury is of such a nature that it cannot be estimated in money, the courts do not hesitate to grant relief by injunction. Such a case was *Sankey v. St. Mary's Female Academy*, 8 Mont. 265, 21 Pac. 23, in which the defendant was enjoined from erecting a fence in an alley way jointly owned by the plaintiff and defendant and separating their respective premises, so as to close the windows on that side of plaintiff's house, thus excluding light and air. This was a case of continuing trespass involving rights injury to which could not be estimated in money. In *Palmer v. Israel et al.*, 13 Mont. 209, 33 Pac. 134, the plaintiff had a contract to pave and curb a portion of Main street in the city of Helena. While engaged in doing so, he was excluded from the street by respondent and others, and thus hindered and delayed in the performance of his contract. The district court on motion dissolved a temporary injunction granted at the commencement of the action, upon the theory that it had no equitable jurisdiction; but, on appeal of this court, the order of dissolution was reversed. In deciding the case the court quoted with approval from the text of Mr. Pomeroy (*Equity Jurisprudence* [2d Ed.] 1357), as follows: "If the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts taken by itself may not be destructive, and the legal remedy may therefore be adequate for each single act if it stood alone, then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions." In *Lee v. Watson*, *supra*, the defendant appeared to have been guilty of repeated trespasses in plowing, seeding, and cultivating land which belonged to the plaintiff and against the warnings and protests of the plaintiff. Plaintiff repeatedly tried to plow and cultivate his land, but was always interfered with by defendant. This was a case of wanton and repeated trespass. While it appeared further that the defendant was insolvent, yet we apprehend that was only an additional fact tending to show irreparable damage, and that the court would have properly issued the injunction if this fact had not appeared, on the theory that the repeated, wanton trespass was sufficient to give the court jurisdiction.

The facts in the complaint here show a case falling clearly within the principle of the cases of *Sankey v. St. Mary's Female Academy*, *Palmer v. Israel et al.*, and *Lee v. Watson*, *supra*. In each of them the right involved was such that an action for damages

would have afforded no adequate remedy, conceding that the damages were susceptible of computation in money. So in the present case. The lands of plaintiff are fit for pasture only. It would hardly be possible to measure adequately in money the value of the wild grasses grown thereon. They cannot be harvested, and their value thus ascertained. Plaintiff could use them only by having his stock eat them, and their value could only be manifested in the improved condition of its flocks and herds. Nor can the amount of water consumed, or its value, be estimated. Again, the trespasses are constantly repeated, and, though warned to desist, defendants persevere in their wrongdoing. Many suits would, in all probability, be necessary to obtain any sort of redress, even if the injury resulting from each separate invasion of plaintiff's rights could be adequately estimated. The facts also bring it clearly within the principle stated by Mr. Pomeroy in his text quoted above. Especially is this apparent when attention is called to the condition of the record before us. For the defendants do not in any way controvert the plaintiff's title, and, for present purposes, we must assume, cannot do so. They make no objection to the form in which the facts are stated in the complaint, but merely rely upon the general principle that a court of equity will not interfere by injunction to restrain a trespass. While upon the final hearing upon the merits, after the issues are made up, other questions may arise which will constitute a complete defense to the plaintiff's action, upon the record before us we think the injunction was properly issued, and that the order of the court refusing to dissolve it was correct. It is accordingly affirmed.

Affirmed.

MILBURN and HALLOWAY, JJ., concur.

#### TANNER v. BOWEN.

(Supreme Court of Montana. April 16, 1906.)

#### ASSIGNMENTS—SATISFIED CLAIMS—PAYMENT.

The owner of a horse let the same to plaintiff, a livery stable keeper, who hired the horse to defendant to drive. After being driven the horse died from the alleged negligence of defendant, whereupon the owner asserted a claim against both plaintiff and defendant. Plaintiff admitted the owner's claim, paid him the value of the horse in satisfaction thereof, and took an assignment of the owner's cause of action against defendant, and as such assignee sued defendant to recover the value of the horse, alleging that the cause of its death resulted from defendant's negligence. *Held* that, as plaintiff's payment of the value of the horse to the owner satisfied any cause of action that he had for the loss of the horse, plaintiff was not entitled to recover for such loss as the owner's assignee.

Appeal from District Court, Teton County; J. E. Erickson, Judge.

Action by Ed. Tanner against J. R. Bowen. From a judgment for plaintiff, defendant appeals. Reversed.

E. S. Bishop, for appellant.

HOLLOWAY, J. The facts disclosed by the record are that John H. Devlin was the owner of a certain horse and let it to the plaintiff Tanner, who was a livery stable keeper at Conrad, Teton county, for use in his livery business. The defendant Bowen hired a team and buggy from Tanner on December 1, 1904, to drive to Chouteau, and the Devlin horse and another were furnished to him by Tanner. Bowen made the trip with the team to Chouteau, and on the following morning it was ascertained that the Devlin horse had died. Devlin asserted a claim for the value of the horse against both Tanner and Bowen and demanded a settlement for the same from each. Upon the trial it was made to appear that Tanner admitted Devlin's claim, acknowledged his own liability, paid to Devlin the value of the horse in satisfaction of Devlin's claim, took an assignment of Devlin's cause of action as against Bowen, and as such assignee brought this action to recover from Bowen the value of the horse, alleging in his complaint that the death of the horse was caused by negligence on the part of Bowen. The answer denies any negligence on Bowen's part. A verdict was returned in favor of the plaintiff, a judgment entered thereon, and from the judgment and an order denying him a new trial, the defendant appealed.

The only error assigned in the brief of appellant is that the court erred in refusing to instruct the jury to return a verdict for the defendant as requested by him. In discussing this alleged error, counsel for appellant makes three distinct contentions, only one of which it will be necessary to consider. It is said that plaintiff Tanner, having paid to Devlin the amount of Devlin's claim in satisfaction of the same, thereby discharged Bowen from liability. As to whether Tanner was in fact liable might be a question, but this liability was admitted. The payment by Tanner to Devlin and the attempted assignment of Devlin's cause of action operated as a complete satisfaction of Devlin's claim and a release of Tanner from any further liability. In *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107, it is said: "The validity and effect of a release of a cause of action do not depend upon the validity of the cause of action. If the claim is made against one and released, all who may be liable are discharged, whether the one released was liable or not." The principle underlying this decision is that if when the release was given, Devlin was asserting against Tanner a liability for the same act for which Tanner now asserts the liability of Bowen, the two causes of action are the same and the release of one dischar-

ges the other. The decision above is referred to with approval, and the doctrine there announced is again asserted, in *Miller v. Beck*, 108 Iowa, 575, 79 N. W. 344, and numerous other cases are cited in support of the conclusion reached. 1 Cyc. 317.

If Devlin, instead of merely presenting his demand against Tanner and Bowen separately, had sued each, as he might have done, and had recovered a judgment against each, and if Tanner had then paid the judgment against himself and had taken an assignment from Devlin of the judgment against Bowen, the situation would not have been different from that which is presented by this record, and under those circumstances it is quite clear that the judgment against Bowen could not have been enforced. A case directly in point is *Gross v. Pennsylvania P. & B. R. Co.* (Sup.) 20 N. Y. Supp. 28. The plaintiff recovered separate judgments against the Pennsylvania, etc., Railroad Company and the Central New England, etc., Railroad Company for an injury caused by the negligent acts of those companies. The New England Company paid the judgment against it and took an assignment of the judgment against the Pennsylvania Company. The Pennsylvania Company then moved the court to cancel the judgment against it. In reversing the trial court for refusing this motion, the Supreme Court of New York said: "It is claimed by the assignee of the judgment that, as between it and the defendant (the Pennsylvania Company), it was the negligence of the latter that caused the injury, \* \* \* and that hence it is not precluded from recovering indemnity or contribution from its co-tortfeasor. This may well be, but has no effect on this application. On this motion the Central New England, etc., Company has but the same rights as its assignor, the plaintiff. As the plaintiff could not collect anything from the defendant after satisfaction by the other company, his assigns cannot."

Section 571 of the Code of Civil Procedure provides: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before, notice of the assignment," etc. If, then, when Devlin assigned his pretended cause of action against Bowen to Tanner, he (Devlin) had been paid by Tanner for all damages sustained by him, under the circumstances of this case the defense of payment or satisfaction could have been interposed by Bowen, and when these facts were developed upon the trial, the defendant's request for an instruction for a verdict in his favor should have been granted. Devlin having been paid and satisfied by Tanner, did not have any cause of action against Bowen which he could assert in court himself, and, of course, if he could not assert it, his assignee could not.

The judgment and order are reversed, and the cause remanded for further proceedings. Reversed and remanded.

BRANTLY, C. J., concurs.

MILBURN, J., not having heard the argument, takes no part in the foregoing decision.

#### CASE et al. v. KRAMER.

(Supreme Court of Montana. April 21, 1906.)

##### 1. APPEAL—AWARDING NEW TRIAL—REVIEW.

An order granting a motion for a new trial which does not designate on which of the grounds mentioned in the motion it was made will be affirmed if justified by any one of the grounds.

##### 2. NEW TRIAL—GROUNDS—DISCRETION OF COURT.

A new trial may be demanded as a matter of right for errors at law prejudicially affecting the rights of the moving party, and in such a case the court has no discretion on the error being made manifest.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 10.]

##### 3. SAME—DISCRETION OF COURT—REVIEW.

Where the ground for a new trial is newly discovered evidence or insufficiency of the evidence to justify the verdict, the motion is addressed to the discretion of the court, and its action will not be disturbed on appeal unless it appears that there has been an abuse of discretion.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 9, 10.]

##### 4. FRAUDS, STATUTE OF—SALE OF GOODS—PART PAYMENT—EFFECT.

Code Civ. Proc. § 3276, and Civ. Code, §§ 2183, 2340, provide that a contract for the sale of goods must be in writing unless the buyer pays a part of the purchase money. An agent orally employed to sell cattle was instructed to require a part payment of the purchase price. The agent procured a purchaser who made a partial payment. *Held*, that the contract of sale was valid notwithstanding Civ. Code, § 3085, declaring that authority to enter into a contract required by law to be in writing can only be given in writing.

##### 5. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EXCESS OF AUTHORITY.

An agent employed to sell cattle was instructed to require a partial cash payment. He accepted a check payable to his principal which was paid and the money went to the principal's account. *Held*, that though the agent had no authority to accept the check, the sale was valid as the principal actually obtained a partial payment.

Appeal from District Court, Dawson County; C. H. Loud, Judge.

Action by W. E. Case and another, copartners as Case & Truscott, against M. L. Kramer. From an order granting a new trial after verdict and judgment for defendant, he appeals. Affirmed.

Geo. W. Farr and O. F. Goddard, for appellant. T. J. Porter and Sydney Sanner, for respondents.

BRANTLY, C. J. This action was brought to recover damages for the breach of a writ-

ten contract, under the terms of which, it is alleged, defendant on November 27, 1899, sold to plaintiffs, as copartners, certain cattle and agreed to deliver them at any time from May 1 to 15, 1900, at a designated place in Dawson county. It is alleged by plaintiffs that they negotiated the contract with defendant through one Courtney, defendant's agent, duly empowered to act in that behalf; that they made a cash payment of \$5,000 required by its terms, which was received and retained by the defendant; that they were ready and able to make payment of the balance of the purchase price at the time and place of delivery, as well as to comply with all the terms and conditions of the contract to be by them performed; but that defendant failed to perform the contract on his part by refusing to deliver the cattle at the time and place agreed upon, or at all, to the plaintiffs' damage in the sum of \$15,000. A copy of the contract is set forth in the complaint. It recites the different classes of cattle sold and the price per head to be paid for each class, and includes all the cattle bearing the brands of the defendant at the date of its execution, "with the calves thrown in and not to be paid for." The receipt of \$5,000 in cash is acknowledged. The answer is a general denial. A trial upon the issues thus presented resulted in a verdict and judgment for defendant. By a general order the court granted plaintiffs' motion for a new trial. From this order the defendant has appealed.

The grounds of the motion are errors of law in rulings upon the admission and exclusion of evidence, and in instructing the jury, and insufficiency of the evidence to justify the verdict. Since the order does not designate upon which of the grounds mentioned it was made, it must be affirmed if justified by any one of them. Respondents insist that the granting of a motion for a new trial rests entirely in the discretion of the trial court, and that for that reason the order appealed from should be affirmed. For errors at law prejudicially affecting the rights of the movant, a new trial may be demanded as a matter of right. In such case the court has no discretion, if the error is made manifest. *State v. Schnepel*, 23 Mont. 523, 58 Pac. 868. When the ground is newly discovered evidence or insufficiency of the evidence to justify the verdict, the motion is addressed to the discretionary power of the court, and its action in the premises will not be disturbed by the appellate court unless it appears that there has been a clear abuse of this power. *State v. Schnepel*, supra; *In re Colbert's Estate*, 31 Mont. 477, 78 Pac. 971, 80 Pac. 248; *Gillies v. Clarke Fork Coal M. Co.*, 32 Mont. 320, 80 Pac. 370; *Hamilton v. Nelson*, 22 Mont. 539, 57 Pac. 146; *Harrington v. Butte & Boston M. Co.*, 27 Mont. 1, 69 Pac. 102; *Rand v. Kipp*, 27 Mont. 138, 69 Pac. 714; *State v. Landry*, 29 Mont. 218, 74 Pac.

418. An examination of the record reveals the fact that upon every issue presented by the pleadings, the evidence introduced at the trial involves an irreconcilable conflict. For this reason alone, we are of the opinion that the order of the district court was properly made.

It appears from the testimony introduced by the plaintiffs, that during the latter part of August, 1899, the defendant, being desirous of closing out his cattle interests in Dawson county, went to one William Courtney, a broker in Miles City, Custer county, and listed his stock with him for sale, stating to him the character of the different classes of cattle he had and the prices he asked. He thereupon dictated a circular letter, to be addressed by the broker to various persons who might desire to buy his cattle, stating the terms upon which he wished to sell. Among other things, this circular letter stated the number of steers of various ages owned by the defendant, and also of cows and heifers. It also stated that there had been branded the preceding spring 144 calves, that there would probably be branded that fall 50 or 60 more, and that under the terms of the sale the calves would be thrown in. A cash payment of \$5 per head, amounting to \$5,000, was required. The place of delivery designated was Miles City stockyards. He thereupon went to his home, some 125 miles away, in Dawson county. In the meantime, and prior to November 24th, there was some correspondence between himself and Courtney as to the sale of the cattle; and on or about November 13th Courtney wrote the defendant that he had possibly secured a purchaser for his cattle to be delivered at a designated place in Dawson county on or about May 15th, upon the conditions and at the prices fixed by the defendant. On November 24th the defendant went to Miles City and saw Courtney. According to Courtney's statement, he was then told by the defendant to close up the sale. On leaving Miles City the defendant met plaintiff Case a short distance from the town, and, in a conversation then had with him with reference to the purchase of the cattle, told him to go to Courtney and buy the cattle. On November 27th, after negotiations between Case and Courtney extending over two or three days, Case bought the cattle at the stipulated price and paid the \$5,000 required by the defendant. This he paid to Courtney by his check, which was afterwards deposited by Courtney in one of the banks in Miles City and paid to the credit of the defendant. The memorandum set forth in the complaint was then drawn by Courtney and signed by the plaintiff Case on behalf of himself and his coplaintiff, and by Courtney for the defendant. Courtney immediately notified the defendant by mail, enclosing a copy of the contract. So the matter stood until about December 29th. The defendant

then visited Miles City and called on plaintiff Case. Referring to the contract of sale entered into by Courtney in his behalf, he said to Case that he would not deliver the cattle under the terms of the contract, unless Case and his coplaintiff would pay him an additional \$5 per head for one class of cattle designated in the contract as Colorado cattle. This additional demand amounted to \$1,300. Case refused to make this concession. Thereupon Kramer notified the bank that he would not accept the money and also wrote to plaintiffs that he did not intend to abide by the contract. At the same time he also wrote Courtney saying that he would not ratify the contract and that his reason therefor was that in making it Courtney had not obeyed his instructions. Kramer denied that he had a conversation with Case on November 24th or at any other time, referring him to Courtney. He denied that he ever authorized Courtney to enter into any contract of any character or description for him with reference to the cattle, or to accept any payment for him of a part of the purchase price. He stated that he employed Courtney for the sole purpose of finding him a purchaser with whom he intended to arrange the terms of the sale himself, without the intervention of any agent. It does not appear that Kramer specially authorized Courtney to enter into a written contract, nor that he indicated how the cash payment should be made. Upon these facts we do not think the court abused its discretion in granting the order.

Counsel say, however, that under section 3276 of the Code of Civil Procedure, and sections 2185 and 2340 of the Civil Code, the contract of sale, in order to be valid, must have been in writing and signed by Kramer or his duly authorized agent, and since it does not appear that Courtney's authority was in writing, the contract as made by him was void. In support of this contention they cite also section 3085 of the Civil Code. This section declares: "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." The fallacy involved in the contention is the assumption that the contract falls in the class of those that must be evidenced by writing, under the sections of the Civil Code and of the Code of Civil Procedure, supra. Under the instructions given by Kramer to Courtney, a part of the purchase price was to be paid down, and this was done. This brings the agreement clearly within the exception provided for in the sections cited with reference to the sales of chattels. Section 3085, supra, therefore has no application. If the contract had been negotiated by Kramer himself and had been oral, the part payment to him would have brought it within the exception. Since this is so, oral authority to Courtney to act for

him in the making of the contract was valid; for under section 3085, *supra*, Kramer could orally authorize Courtney to make for him any contract which he himself might make orally. Nor was the relation of the parties or the authority of Courtney changed by the fact that Courtney, doubtless for safety, drew up and signed the memorandum for Kramer. It cast no greater burden upon Kramer than it would, had it been left to rest entirely upon oral evidence. If Courtney had authority to act for Kramer, as this evidence tends to show, the latter could not, after the agreement was made, repudiate it and deny his liability. Counsel also contend that Courtney had no authority to accept Case's check to meet the cash payment required. If Case's testimony touching his conversation with Kramer on November 24th, in which he was told to go to Courtney to make the purchase, is to be accepted as true—and for present purposes it must be so accepted—Courtney has ostensible authority to negotiate the sale, and in connection therewith to do everything necessary, proper, and usual in the ordinary course of business for effecting the purpose of his agency. Civ. Code, §§ 3039, 3095. But we are not now called on to inquire whether it is usual or customary in such transactions to make payments in checks. The check given by Case and accepted by Courtney was afterwards actually cashed by the drawee and the amount thereof paid by Courtney to the credit of Kramer. It is the rule that an agent under his authority to receive payment, may not accept anything but cash. 1 Am. & Eng. Enc. Law (2d Ed.) 522; *Mechem on Agency*, 321. Yet, if the check received is actually paid by the drawee, this constitutes payment to the principal, even though the agent misappropriates the fund and converts it to his own use. *Mechem on Agency*, 382; *Sage v. Burton*, 84 Hun, 267, 32 N. Y. Supp. 1122; *Kansas City M. B. R. R. Co. v. Ivy Leaf Coal Co.*, 97 Ala. 705, 12 South. 395; *Harbach v. Colvin et al.*, 73 Iowa, 638, 35 N. W. 663; *Bardwell v. American Express Co.*, 35 Minn. 344, 28 N. W. 925. Nor is it of importance that the check made payable to the order of Kramer, was indorsed in his name for collection by Courtney without special authority. The money went to Kramer's account, and thus he actually received it. Appellants contend further, that the specifications are not sufficient to point out the particulars wherein the evidence is alleged to be insufficient to justify the verdict. The objections made to them are general and to the effect that, instead of setting out what the evidence does not show, they urge what the evidence does show. We think, however, that the specifications are sufficient to give to the defendant notice, and to advise the court in plain language of the matters that would be urged upon the hearing of the motion. Such being the case, the order should not be reversed on the ground of their

insufficiency. *Gillies v. Clarke Fork Coal M. Co.*, *supra*, and cases cited therein.

Since, for the reasons stated, it was within the sound discretion of the district court to direct a new trial, it is not necessary to discuss the other points presented. The order is affirmed.

Affirmed.

HOLLOWAY, J., concurs. MILBURN, J., being disqualified, did not hear the argument and takes no part in the foregoing opinion.

#### BEAVERHEAD CANAL CO. v. DILLON ELECTRIC LIGHT & POWER CO.

et al.

(Supreme Court of Montana. April 21, 1906.)

##### 1. TRIAL—IMPLIED FINDINGS.

Where the court did not specially make a finding on an issue raised by an allegation of fact in the answer, which was denied in the reply, a finding in consonance with the allegation in the answer will be implied unless such implied finding is inconsistent with any express finding of the court.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 945.]

##### 2. SAME—INCONSISTENT FINDINGS.

Where, in an action to determine water rights, the court found that certain spring and seepage water claimed by defendant S. rose in a certain creek, which was a tributary of B. river, and that the waters of the creek flowed into the river at all times above the head of plaintiff's canal, a finding that such spring or seepage water would not, if permitted to flow uninterruptedly, reach the head of plaintiff's ditch, would be inconsistent with the other findings, and therefore could not be implied.

##### 3. WATERS — APPROPRIATION — SPRING AND SEEPAGE WATER.

The prior appropriator of a particular quantity of the water of a stream is entitled to the use of that water or so much thereof as naturally flowed into the stream unimpaired or unaffected by subsequent changes therein by spring and seepage waters finding their way into a tributary of the stream in the course of nature unaffected by artificial works constructed by a subsequent appropriator.

##### 4. SAME.

Where springs and surface water flowed with the waters of a creek into B. river, at all times above the head of plaintiff's canal, plaintiff's prior right to a certain amount of water from the river did not entitle it to such spring and surface water as against a subsequent appropriator thereof in case the creek became dry below the springs and above plaintiff's canal.

Appeal from District Court, Beaverhead County; Lew L. Callaway, Judge.

Action by Beaverhead Canal Company against the Dillon Electric Light & Power Company and others. From a judgment in favor of plaintiff for less than the relief demanded, it appeals. Modified.

Robert B. Smith, for appellant. W. B. Barbour and Word & Word, for respondents.

HOLLOWAY, J. This action was brought to have determined the relative rights of the

parties to the use of the waters of Beaverhead river and its tributaries. The appellant was plaintiff in the court below. The appeal is from that portion of the decree which awards to John B. Smith, who was one of the defendants, the prior right to the use of 250 inches of water.

Appellant is satisfied with the findings of fact returned by the trial court, but the contention is made in this court that the trial court erred in its conclusion of law No. 3, and in entering its decree in accordance with such conclusion. The court found that the plaintiff appropriated 4,254 inches of the waters of Beaverhead river in August, 1883. Findings No. 4 and 5 are as follows: "(4) That Rattlesnake creek is, and was, at all times herein mentioned a tributary of Beaverhead river, and that the waters thereof flow into the Beaverhead river at all times above the head of plaintiff's canal; but this finding does not imply that the plaintiff is entitled to the spring of seepage waters rising in the channel of Rattlesnake creek, hereinafter mentioned. (5) That beginning with the year 1890, certain seepage or spring waters began to rise in Rattlesnake creek, and have continued to increase from year to year; that during the month of May, 1897, Cox and Pyle, the predecessors in interest of John B. Smith, built a dam across Rattlesnake creek, and by means of said dam and ditch constructed from said Rattlesnake creek known as and called the 'Cox and Pyle Ditch,' diverted from said creek certain springs and seepage waters arising in the bed of said creek on the Perkins and McLaughlin ranches, to the amount of 250 inches, and thereby appropriated the same; and the said defendant and his said predecessors have ever since said date made a beneficial use thereof."

The foregoing are all the findings made by the court which affect the rights of either of the parties to this appeal, and from these findings the court drew its conclusions of law No. 1 and 3 as follows: "(1) That the plaintiff is the owner, and entitled to the prior use of 4,254 statutory inches of the waters of Beaverhead river for irrigation, and other useful purposes, as of date August 15, 1883. (3) That John B. Smith is now, and he and his grantors and predecessors in interest have been since May, 1897, the owner and owners of, and entitled to the prior use of, 250 statutory inches, or 6¼ cubic feet, of the waters of certain spring or seepage waters arising in the bed of Rattlesnake creek on the Perkins and McLaughlin ranches, taken thereout and appropriated by means of his certain ditch, known as and called the 'Cox and Pyle Ditch,' tapping said creek; and leading to and upon his lands in the county of Beaverhead and state of Montana, mentioned in his answer on file herein."

In the answer of the defendant Smith it is alleged that the spring or seepage water appropriated by his predecessors in 1897, would not, if permitted to flow uninterrupted-

ly, reach the head of plaintiff's ditch. This allegation is denied in the reply. As the court did not specifically make any finding upon the issue thus raised, it is urged by counsel for respondent that a finding in consonance with the allegation in the answer will be implied, and this is true provided such implied finding is not inconsistent with any express finding of the court. But we are not able to reconcile such an implied finding with findings No. 4 and 5 above. If the spring or seepage water, the prior right to the use of which defendant Smith makes claim, rises in Rattlesnake creek (finding No. 5), and Rattlesnake creek is a tributary of Beaverhead river, and the waters of Rattlesnake creek "flow into the Beaverhead river at all times above the head of plaintiff's canal" (finding No. 4), it would be an impossibility to determine that the particular water in Rattlesnake creek which is designated as spring or seepage water, would not flow down Rattlesnake creek to the head of plaintiff's canal if permitted to flow without interruption by some artificial means, just as the remaining portion of the water in such creek is determined by the court to do. Therefore we cannot presume that the trial court found in accordance with that theory; but, on the contrary, findings 4 and 5 above are not consistent with any other theory than that the spring or seepage water is a part of the water of Rattlesnake creek which flows "into Beaverhead river at all times above the head of plaintiff's canal." Accepting this latter theory as the only one which the trial court could have acted upon, if finding No. 4 is in accordance with the facts as shown by the evidence, and we must presume that it is, as no one is finding fault with it, and the evidence is not before us, then the court's conclusion of law No. 3 above is erroneous and directly contradictory of conclusion No. 1 above, and the decree is not supported by the findings.

Conclusion No. 1 awards to the plaintiff the prior right to the use of 4,254 inches of water, and conclusion No. 3 awards to defendant Smith the prior right to the use of 250 inches. We must assume that the trial court proceeded upon the theory that as this spring or seepage water did not appear, as such at least, in Rattlesnake creek until several years after plaintiff made its appropriation, such spring or seepage water, although it formed a part of the waters of Rattlesnake creek after 1890, and, if unmolested, would flow into Beaverhead river above the head of plaintiff's canal, was nevertheless unaffected by plaintiff's appropriation and open and subject to appropriation by the predecessors of defendant Smith in 1897, and contention is made for this theory by counsel for respondent in their brief. They say: "The rights of appellant were and are limited to the natural condition of Beaverhead river and its tributaries at the time its appropriation was made, and cannot now be ex-

tended so as to include the spring waters in question," and Farnham on Waters & Water Rights, § 672d is cited in support of their contention. The language of the author, however, we think is not susceptible of the construction given it. It is true this language is used: "The rights of the appropriator are limited to the natural condition of the stream at the time the appropriation is made." But the word "natural" is used here in contradistinction to "artificial." When read with the context we think the author's meaning is made plain. He says: "When an appropriation is made of the water of a stream, the rights of the appropriator are limited to the natural condition of the stream at the time the appropriation is made, and he has no interest in improvements subsequently made which increase the supply of water flowing in it. Therefore, if by his own exertions another increases the available supply of water in the stream, he has a right to appropriate and use it to the extent of the increase. This rule does not apply to mere removal of obstructions or hastening of flow, so that the actual amount of water which passes along the stream is not increased, but only to cases in which a supply of water is added to the stream which would not otherwise have flowed there."

This increased supply of water to which reference is made is that occasioned by artificial means. That this is the author's meaning is made manifest by the reference in support of the text: *Paige v. Rocky Fork Canal & Irrigation Co.*, 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875 and when thus understood, the language of the text first quoted above is made plain, viz., that if defendant Smith by his own exertions had increased the supply of water in Rattlesnake creek, he would have the prior right to such increased supply, and, of course, as against him the plaintiff would not have any interest in such water so caused to flow there by artificial means. There is not anything to indicate that this spring or seepage water is caused to rise in Rattlesnake creek by artificial means, and in the absence of a finding to that effect the presumption is that such waters form a part of the natural supply of such creek. It is common knowledge that springs form the source of many of these mountain streams, and to hold to the doctrine for which contention is made by respondent, would impose upon the prior appropriator the burden of constantly watching the source of his water supply, and in fact make his water right the most unreliable and hazardous species of property imaginable; for, if that doctrine should prevail and the particular springs which gave rise to the stream from which his water supply was obtained, should cease to flow, and other springs furnishing a like amount of water should commence to flow into and feed the same stream above the head of his canal, a subsequent appropriator could deprive him of his prior right, merely because in the

course of nature water which had formerly come to the surface in one spring, had afterwards found a new outlet. We are satisfied that such a result was never contemplated. The prior appropriator of a particular quantity of water from a stream is entitled to the use of that water, or so much thereof as naturally flows in the stream, unimpaired and unaffected by any subsequent changes which, in the course of nature, may have been wrought. To the extent of his appropriation his supply will be measured by the waters naturally flowing in the stream and its tributaries above the head of his ditch, whether those waters be furnished by the usual rains or snows, by extraordinary rain or snow fall, or by springs or seepage which directly contribute. Of course, the court's finding that the waters of Rattlesnake creek flow into Beaverhead river at all times above the head of plaintiff's canal does not establish the fact that they will continue to do so during the irrigation season of every year hereafter; and if it should occur that Rattlesnake creek becomes dry below these springs and above the head of plaintiff's canal, at such times plaintiff could not complain if defendant Smith use these waters which otherwise would be lost. *Raymond v. Wimssetta*, 12 Mont. 551, 31 Pac. 537, 33 Am. St. Rep. 604.

The cause is remanded to the district court, with directions to modify the decree by striking from the conclusion of law No. 3, copied in the decree, and from paragraph No. 3 of the decretal portion of the decree the word "prior," wherever it occurs in said conclusion of law or paragraph, and by striking out the last sentence in said paragraph No. 3, to wit: "The plaintiff has no right in said spring or seepage waters equal to those of the defendant Smith therein," and inserting in lieu thereof the following: "The right of the plaintiff is prior and superior to that of the defendant John B. Smith, as determined by the dates of their respective appropriations;" and, as so modified, the decree will be affirmed.

Modified and affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

#### MORSE v. JACKY et al.

(Supreme Court of Montana. April 30, 1906.)

#### SCHOOLS AND SCHOOL DISTRICTS—INJUNCTION—TAXATION—ACTS OF TRUSTEES.

Since, under Acts 1899, p. 61, § 7, as amended by Acts 1901, p. 8, § 6, the trustees of a free county high school are only to furnish an estimated rate of taxation, while the board of county commissioners are to levy the taxes as they may be advised touching their legality, injunction will not lie at the suit of a taxpayer of a county to restrain trustees of a free county high school acting under a void election from performing acts as trustees and entering into contracts and presenting to the county commissioners an estimate of the necessary tax rate; for whatever the trustees may do

they do not trespass on any right of the taxpayer, and if the county commissioners assume to pay liabilities contracted by the trustees he has an adequate remedy.

Appeal from District court, Granite County; Geo. B. Winston, Judge.

Action by George W. Morse against Valentine Jacky and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Rodgers & Rodgers, for appellant. D. M. Durfee and Geo. A. Maywood, for respondents.

BRANTLY, C. J. The plaintiff, an elector and taxpayer upon real and personal property in Granite county, brought this action against the defendants to enjoin them from acting as trustees of the free county high school at Phillipsburg, Granite county, from entering into any contracts in relation to the same, or from performing any other acts as trustees, and to declare the election by which it is claimed by them that such high school was established, null and void. The election was held under the provisions of sections 2 and 3 of an act of the Legislature approved March 3, 1899 (Laws 1899, pp. 59, 60), as amended by an act approved March 14, 1901 (Laws 1901, p. 6). The complaint sets forth in detail the history and method of conducting the election, the appointment of the defendants as trustees, and the steps taken by them as a board to establish and conduct the school pursuant to their appointment. Upon the facts stated, it is contended that the election was void and ineffective to establish a free county high school, and hence that the defendants are proceeding without right or authority, in that the legislation contains so many inconsistent and conflicting provisions that its intention cannot be discerned, or, if so, that no adequate means are provided for its execution; in that, if it can be executed, the board of county commissioners failed to give the required notice of the election in the manner provided; in that it failed to give notice of the presentation of petitions for the establishment of the school at Phillipsburg, so that the electors of any other town or village in the county might have an opportunity to name their own town or village as a candidate; and in that women were permitted to vote in such number as to affect the result of the election. Incidentally the further contention is made that in any event, since the defendants were appointed by the board of commissioners instead of by the county superintendent of schools, in whom alone is vested the power of appointment, they have no power to act. Finally it is argued that the legislation is open to constitutional objection, because under its provisions the electors cannot give a free and fair expression of their wishes at the ballot box. The matter specially alleged as justifying the issuance of an injunction is that the defendants, assuming to be a legal board, are proceeding to enter into a contract with the board of school

trustees of District No. 1 at Phillipsburg, to secure certain rooms and buildings for the use of the school at an annual rental of \$1,025, to employ a principal at an annual salary of \$1,500, to secure furniture and apparatus by the expenditure of considerable sums of money, to employ teachers at annual salaries of \$900 each, and, having made an estimate of the amount of funds needed for these purposes and for contingent expenses, they are about to present to the board of commissioners of the county an estimate of the tax rate required to raise the necessary amount. And it is averred that if they are permitted to certify this estimated rate to the board of commissioners, said board will levy the same upon all the taxable property in the county, and this levy will be in effect a judgment against the plaintiff and a lien upon all his real estate in the county. The district court sustained a general demurrer to the complaint. Plaintiff having declined to amend, judgment was entered for the defendants. The appeal is from the judgment. The question submitted is whether a case is stated for injunction.

For the purposes of this review it may be conceded that the election was void for any or all reasons alleged, and that the defendants are proceeding without legal authority; nevertheless we do not think the plaintiff shows himself entitled to the relief demanded. The theory upon which he proceeds is that if the board of trustees certifies the rate estimated to be necessary to raise the amount of funds needed for the purposes of the school, the board of commissioners will certainly levy it, and he will be injured by having a lien upon his property. His notion is that the board of trustees constitutes a part of the taxing power, and that to enjoin it from making and certifying its estimate to the board of commissioners will effectively relieve him from the threatened injury. He invokes the rule, recognized and applied by this court in *Hensley v. City of Butte*, 33 Mont. —, 83 Pac. 481, that where a special assessment for municipal purposes is void because the city council has proceeded to levy the same in contravention of the statute and there is no other adequate remedy, the collection of it will be enjoined. The rule has no application to the situation presented in this case. The board of trustees is no part of the taxing power. Its office under the statute (Acts 1899, p. 61, § 7; Acts 1901, p. 8, § 6) is only to furnish an estimated rate. The board of commissioners levies the tax, and it may or may not proceed to levy the rate certified to it, according as it may be advised touching the legality of the tax. It is not a party to this action. Any injunction issued in this case will not control or affect its action. If, as plaintiff insists, the defendants are acting without authority of law, their action is simply void. No matter what they do, they do not trespass upon any right of the plaintiff.

The liabilities contracted by them are personal, and do not bind the county or the board of county commissioners. If the board assumes to pay them, there is a remedy by appeal to the district court, whereupon the authority of the board of trustees to incur the liabilities can be tested and the legality of its acts determined. It will be time enough for the plaintiff to complain when the board of commissioners assumes to make the levy and the treasurer undertakes to force collection of the tax so levied, or when the liabilities contracted by them are recognized as a charge against the county. In our opinion this action is premature, in that it does not appear that the plaintiff is suffering, or is about to suffer, any injury for which he has not adequate remedy.

Counsel cite, also, *Foster v. Coleman & Alexander*, 10 Cal. 279, *Andrews v. Pratt*, 44 Cal. 309, *Schumacker v. Toberman*, 56 Cal. 508, and *Doan v. Board of Co. Com'rs of Logan County (Idaho)* 26 Pac. 167. An examination of these cases shows that the principle applied in them has no application to the facts of this case. In each of them it was sought to annul or enjoin the action of the local municipal board, where it was undertaking to proceed without authority or in violation of law, the result of its action being a distinct trespass upon the rights of plaintiffs. As we have said, it does not appear that the plaintiff here is, or will be, directly affected by any action taken by the alleged board of trustees of the school. The demurrer was properly sustained.

The judgment is affirmed, with costs.  
Affirmed.

MILBURN and HOLLOWAY, JJ., concur.

ANDERSON v. NORTHERN PAC. RY. CO.  
et al.

(Supreme Court of Montana. April 30, 1906.)

1. APPEAL—DISMISSAL—UNCERTAINTY OF RECORD.

It appearing from the order denying the motion for a new trial that the defendants joined in the motion, and the notice of appeal from the order indicating that only one of the defendants made such motion, and there being nothing to show which defendant, the court will, of its own motion, dismiss such appeal.

2. SAME—JOINT APPELLANTS—ERRORS CONSIDERED.

On a joint appeal, errors not common to both appellants may be considered; but one of them may not assume a position antagonistic to the other.

3. SAME—ASSIGNMENTS NOT DISCUSSED.

Assignments of error, not discussed by counsel, will not be considered on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4256-4261.]

4. MASTER AND SERVANT—ASSUMPTION OF RISK—KNOWLEDGE OF DANGER.

Whether a brakeman, struck by a bridge 8 feet 2 inches above the track when on gondola cars the platforms of which were 3½ to 4 feet above the track, knew or ought to have

known the danger, and so assumed the risk, is a question for the jury; this having been on a spur track, on which according to his testimony he had never been before, and he testifying that when he got off the engine and walked under the bridge to get to the cars he did look at it.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1072-1080.]

5. SAME—CONTRIBUTORY NEGLIGENCE—EXCUSE.

A brakeman, struck by a low bridge of which he knew, will be excused from what would otherwise be contributory negligence; an emergency having arisen by reason of the train having started before a brake was released, and he being engrossed in his duty of releasing it, it not responding as it should to his efforts, so that he forgot the danger or did not appreciate that he was in close proximity to it.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 792.]

6. APPEAL—INVITED ERROR.

One may not complain of an instruction given at his request, though amended by the court; the amendment not making it any more erroneous.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3602-3604.]

7. NEGLIGENCE—EXISTENCE OF DUTY.

An instruction, in an action against a smelter company by a brakeman, an employé of a railroad company, who, while on cars which were being taken out from the smelter over a spur track, was struck by a bridge over the track constructed and maintained by the smelter company, that, if the employés of the railroad company were taking out the cars at the invitation of the smelter company, it owed to them a duty, a violation of which would render it liable, states a correct rule of law.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 42-44.]

8. SAME—QUESTION FOR JURY.

Whether a smelter company was negligent in constructing and maintaining a bridge over a spur track to its smelter so low that it was dangerous to employés of the railroad company in discharging their duties about it is a question for the jury, though the bridge had a draw which could be removed.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 316, 324.]

9. TRIAL—MODIFYING INSTRUCTIONS.

Though a requested instruction is correct, except for the concluding sentence, it is not error to refuse it, instead of correcting it and giving it as corrected.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 660.]

10. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where an instruction stated in several different ways the duty of a railroad company to its employés, it cannot be held that the jury selected the statement which is substantially correct and rejected those which are erroneous.

11. MASTER AND SERVANT—DUTIES OF MASTER.

The duty of a railroad company to its employés as to roadways and appliances is to exercise ordinary care to furnish reasonably safe roadways and appliances, and to use ordinary care and diligence to keep them in a reasonably safe condition.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 173, 218-226.]

12. SAME—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—KNOWLEDGE OF DANGER.

To charge an employé with knowledge as regards the defenses of contributory negligence and assumption of risk, it is not necessary to

show that he had actual knowledge of the existence of the danger, but merely that the circumstances were such that a reasonably prudent man ought to have known of the danger.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 577, 578, 706-709.]

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

Action by Harry Anderson against the Northern Pacific Railway Company and the Helena & Livingston Smelting & Reduction Company. Judgment for plaintiff. Defendants appeal. Affirmed as to smelting company; reversed and new trial ordered as to railway company.

Wallace and Donnelly, for appellant railway company. McConnell and McConnell, for appellant smelting company. T. J. Walsh and R. R. Purcell, for respondent.

HOLLOWAY, J. Harry Anderson, the respondent, was a freight brakeman employed by the Northern Pacific Railway Company. In September, 1903, he was injured while in the performance of his duties, and brought this action to recover damages from the railway company and from the Helena & Livingston Smelting & Reduction Company, alleging negligence on the part of the defendant smelting company in constructing and maintaining, and on the part of the railway company in permitting the construction and maintenance of, a certain bridge or trestle over the track of the railway company at the smelting company's concentrator at Corbin, in Jefferson county. The bridge or trestle was used by the smelting company to load cars with ore and other products for shipment. It is alleged that this bridge or trestle was so low that an employé of the railway company could not pass under it while standing upon the platform of an ore car, and that neither the smelting company nor railway company erected or maintained telfaltes or other devices to warn employés of the railway company of the approach to such bridge or trestle. It is further alleged that this bridge or trestle was erected over a spur track operated by the railway company for the use of the smelting company; that on the day of the accident the defendant railway company operated a train on this spur track at the request of the defendant smelting company, and that, while the plaintiff was on one of the cars constituting the train, he came in contact with the timbers of the bridge or trestle, was knocked from the train, and severely injured. The defendant railway company denies any negligence on its part; denies that the spur track is upon its right of way, but alleges that it is upon property owned entirely by the defendant smelting company. It admits, however, that the spur track was constructed by the joint efforts of the railway company and the smelting company. The plaintiff's contributory negligence

and assumption of risk are also pleaded. The defendant smelting company denies any negligence on its part; alleges that the spur track was constructed in part upon ground owned by the smelting company, and in part upon the right of way of the railway company, and that while it was built by the joint efforts of the two companies, the smelting company was fully repaid by the railway company, and that the railway company owns the spur entirely. The smelting company admits that it erected the bridge or trestle, but alleges that the span of the bridge or trestle, immediately over the roadbed or railway track is constructed as a drawbridge solely for the benefit of the railway company, and that the railway company has the exclusive control of such drawbridge. It also alleges that the plaintiff's injury was caused by reason of the brake on the last of the cars of the train being out of order through the negligence of the railway company. It also pleads the defenses of contributory negligence and assumption of risk. All the material allegations of these answers are put in issue by the replies. The plaintiff recovered judgment, and each defendant gave its separate notice of intention to move for a new trial, prepared its separate statement, and made its separate assignments of errors. How these matters were submitted to the district court does not clearly appear. The court's order is as follows: "In this cause court this day ordered that defendants motion for a new trial herein is denied." The defendants gave a joint notice of appeal and only one undertaking on appeal.

After reciting the appeal from the judgment, the notice of appeal reads: "And also from an order made and entered in said court and cause on the 21st day of August, 1905, overruling defendant's motion for new trial in said action." While a motion to dismiss the pretended appeal from the order denying a new trial has not been made, it is urged that such pretended appeal cannot be considered. The order of the court would seem to indicate that the defendants joined in the motion for a new trial; while the notice of appeal in the case indicates that only one defendant made such motion, and, if that is true, there is not anything to indicate which defendant did so. We therefore, of our own motion, dismiss the pretended appeal from the order denying a new trial and will consider only the joint appeal from the judgment.

On such appeal counsel for the respondent urge that the appellants must join in their assignments of error, and that this court cannot consider alleged errors not common to both appellants. The authorities cited in support of this contention, however, are not directly in point. They are from states where the method of review is by writ of error and refer to cases where joint assignments of error were made. This question has not been before this court directly,

but we have heretofore proceeded upon the assumption that proper practice might warrant the affirmance of a judgment as to one joint appellant and its reversal as to another. *Cook v. Gallatin R. Co.*, 28 Mont. 340, 72 Pac. 678; *City of Butte v. Cook*, 29 Mont. 88, 74 Pac. 67; *Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994. In the absence of any authorities directly in point to the contrary, we prefer to follow the rule heretofore adopted, or which seems to be implied by the position which this court has heretofore assumed. We, however, adopt the suggestion of counsel for respondent to this extent: That one joint appellant will not be permitted to assume a position in this court antagonistic to his other joint appellant. It was evidently one purpose of section 1721 of the Code of Civil Procedure, in permitting any aggrieved party to appeal, to enable one defeated party to urge an antagonistic attitude as against another defeated party, as well as against the successful litigant, by a separate appeal. But it would seem entirely inconsistent with proper practice to permit one of two joint appellants to assume a position antagonistic to his joint appellant. In so far as the position of either of these appellants is antagonistic to the other, it will not be considered.

The railway company assigns as errors the giving of instructions 4, 5, 7, 8, 9, 11, and 13 respectively. The defendant smelting company assigns as errors the giving of instructions 6, 8, 10, and 13 respectively. As the smelting company does not predicate error upon the giving of instructions 4, 5, 7, 9, or 11, it is presumed to be satisfied with them. Counsel for the smelting company do not discuss the assignments of error predicated upon the giving of any instructions. In their brief they say: "We will not enter into the discussion of the errors committed by the court in the instruction given to the jury, as this has been so ably done by counsel for the defendant railway company." But counsel for the railway company do not discuss the giving of instructions 6 or 10, and therefore these assignments are not discussed by any one, and under the well-established rule of this court and other appellate courts, assignments not argued will be deemed waived. We therefore eliminate from consideration the assignments predicated upon the giving of instructions 6 and 10.

The common errors assigned are (1) the refusal of the court to grant a nonsuit; (2) the giving of instruction No. 8; and (3) the giving of instruction No. 13. Applying the well-recognized rule, that upon a motion for nonsuit those facts will be deemed proved which the evidence tends to prove, it appears that the plaintiff had never been over the Boulder Branch of the Northern Pacific Railway but three or four times prior to the day of this accident; that he had never been on this spur at Corbin before that day; that the smelting company had loaded four

cars with concentrates, one of which cars stood immediately under the bridge or trestle, and the other three beyond it. The superintendent of the concentrator requested the train crew, of which this plaintiff was a member, to take these loaded cars from the spur for shipment to the smelter at East Helena. The locomotive was detached from the train on the main line and backed in on the spur nearly to the car beneath the bridge, the entire train crew riding. This plaintiff then stepped down from the locomotive, walked back under the bridge or trestle and, as was his duty, removed blocks from under the wheels of the cars, saw to it that the cars were coupled together, that the air was properly coupled and the angle cocks properly turned. He walked back to the last car, mounted upon the platform of that car to release the ordinary hand brake. The bridge is about 8 feet or 8 feet 2 inches above the track. The cars in use were the ordinary gondola cars, the platforms of which are from  $3\frac{1}{2}$  to 4 feet above the track. The plaintiff is a man about 5 feet 9 inches in height. The plaintiff testifies that he looked down in going back from the locomotive in performing the duties of his office. About the time plaintiff undertook to release the brake on the rear car, the train commenced to move, and by the time the car upon which he was standing reached the bridge, the train was moving at a rate of from 8 to 10 miles an hour. The brake did not respond readily to plaintiff's efforts and, while engaged in attempting to release it and while his attention was absorbed in this duty, he was struck by the bridge and injured. There were no telltales or other devices for warning the employes of the railway company of their approach to this bridge, and the plaintiff testifies that he was not informed of it and knew nothing about it. There was not any evidence offered by plaintiff respecting the control of the drawbridge, except that it had never been removed before this accident, and when it was removed afterwards, it was done by the employes of the smelting company and was quite a difficult undertaking. It appears that this spur was used by the railway company for general commercial purposes in addition to the business of the smelting company. The plaintiff then offered testimony showing the extent of his injuries and rested his case. Each of the defendants moved for a nonsuit, upon the ground (generally speaking) that the plaintiff had failed to make out a case sufficient to go to the jury. These motions were denied, and error is predicated upon the denial.

It is earnestly urged that, if the plaintiff did not see the bridge when he passed from the locomotive to the rear of the train, he ought to have seen it, and ought to have appreciated the fact that he must be swept from the car if he stood upon the platform while the car was being drawn under the

bridge, and by the exercise of ordinary care he would have seen it and appreciated such fact, and therefore he is chargeable with such knowledge. Of course, every master has a right to expect that his servant will be alert, and will inform himself of existing conditions about the place of his employment. The master is not required to furnish the servant with eyes to see and ears to hear. It is also a rule that the servant, upon entering the service, assumes the risks and perils incident to the employment, so far as such risks and perils are open, apparent, and discernible by a person of his age and capacity in the exercise of reasonable care for his own safety. But we do not think that these rules are at all inconsistent with that heretofore adopted by this court, namely; if the questions whether the servant knew or ought to have known of the danger are in dispute, and from the facts stated, "different conclusions might be drawn by different men of fair, sound minds, then the matter must go to the jury; but if only one conclusion can be reached by men of fair, sound minds, the determination is for the court." *Prosser v. Mont. Central Ry. Co.*, 17 Mont. 372, 43 Pac. 31, 30 L. R. A. 814; *McCabe v. Montana Central Ry. Co.*, 30 Mont. 323, 76 Pac. 701. The McCabe Case illustrates the principle involved here. In that case the plaintiff was a switchman employed in the yards at Great Falls. He had frequently had occasion to see the different switch stands in the yards; but this court, in reversing the district court for granting a nonsuit, held that whether the plaintiff assumed the risk necessarily depended upon his knowledge or means of knowledge as to the location of switch stand No. 2, that is, his knowledge or means of knowledge of its close proximity to the track, and that upon the plaintiff's denial of such knowledge and the circumstances appearing from the evidence, which did not present so strong a case for the plaintiff as do the facts above narrated, the motion for nonsuit should have been denied and the question of his knowledge or opportunity of knowing left to the jury.

The plaintiff was not required to carry a rule with him and measure the distance from the bridge to the platform of the car where he stood, and the mere fact that he may have noticed on the first trip which he made on this spur, if he did do so, that the bridge timbers were only about eight inches above the top of the gondola car is not sufficient to justify a court in saying, as a matter of law, that he should have appreciated the danger to himself in case he should attempt to ride upon the platform of the car while it was being drawn under the bridge. And this is not opposed to the doctrine announced in *Jennings v. Railway Co.* (Wash.) 34 Pac. 937, cited by counsel for the railway company. In that case the plaintiff permitted himself to stand between a brick wall and a passing car where the space was only

3½ inches, but the court said: "Had the space been 10 or 12, or 14 inches, the man might readily have been deceived and have been led into trouble." And so, in this case, we are not prepared to say that if the space between the platform of the car and the bridge had been but one foot or two feet, and plaintiff's duty had not required his attention away from the bridge, he might not then have been charged with knowledge of the danger, but this we do not decide. However, had he observed the bridge, which he says he did not, we are not prepared to say that he ought to have appreciated the fact that the distance between the platform of the car and the bridge was only 4 or 4½ feet. We think the case presented by this plaintiff was much stronger than that in the McCabe Case; but the decision in the McCabe Case completely disposes of the contentions made by counsel for appellants. The motions for nonsuit were properly overruled.

Instruction No. 8 is as follows: "You are instructed that although you should find that the plaintiff knew of the existence of the bridge or trestle, and knew that it was so low as that he could not pass under it in safety, standing where he stood at the time he was injured, yet, if, at the time he was injured, he was engaged in discharging his duties as a brakeman, and by reason of his attention to his duties, and his absorption in their discharge, he omitted for the moment to think of the bridge, or thinking of it did not recognize that the train had already proceeded so far as would bring him in contact with it; and you further believe from the evidence that a reasonably prudent man, under all the circumstances, might have omitted for the moment to bear in mind the danger, or to recognize that he was in such close proximity to the bridge, considering the speed at which the train was going, then the plaintiff was not negligent in forgetting, if he did forget, about the bridge, or in failing to recognize, if he did fail to recognize, how close he was being brought to it." This instruction involves a consideration of the question: May a servant, with knowledge of an existing danger, excuse himself from what would otherwise be his contributory negligence, by saying: "I knew the danger, but for the moment I was so completely engrossed in the performance of my duties that I forgot the danger or did not appreciate the fact that I was in close proximity to it?" That there is a well-established rule of law respecting this question is conceded. The extent of the rule rather than its existence is the subject of controversy. It has been variously stated by various courts and text-writers, and in many instances the conclusions reached are not reconcilable. But the trend of the modern decisions is towards the rule, considered more humane from the standpoint of the servant, which resolves itself into a declaration that, if the service is of such a character, as to engross the attention

of the servant, the master may not say the servant should have divided his attention between the performance of the particular duty and keeping a lookout for danger. In other words, if the servant has two duties to perform, one to do the work of his office and the other to be vigilant in looking out for danger, his failure to perform the latter will not, as a matter of law, constitute contributory negligence, where such failure results from the necessary observance and performance of the former, where such observance and performance engross his attention, if a reasonably prudent man under like circumstances would have been likely to make the same mistake. And the reason for the rule is apparent. It goes without saying that, if the servant's attention is engrossed by the performance of one duty, it cannot be divided between the performance of that and of another; and it would be a harsh rule indeed which would permit the master to say to his servant: "You must perform the duties of your position, even though such performance requires your undivided attention, and at the same time you must give a portion of your attention to known dangers or suffer the consequences of an accident."

We think the rule we have announced is supported by the decided weight of modern authority. In substance it is announced in 1 Labatt on Master and Servant, § 350. That author, after considering the inapplicability of the doctrine to defeat the plea of assumed risk, says: "A materially different situation is presented where the fact is considered in regard to its bearing upon the question of how far the servant's close attention to his duties tends to rebut the inference of contributory negligence. In this point of view the effect of the decisions may be summed up as follows: Where the servant failed to take such precautions as were appropriate for the purpose of protecting himself at the moment when the accident occurred, evidence that such failure was due to the fact that his attention was engrossed by his duties is always competent for the purpose of rebutting the inference of contributory negligence which might otherwise be drawn from his conduct; and if such evidence is offered, a court is very seldom justified in declaring him to have been, as a matter of law, wanting in proper care." A long list of modern authorities is cited in support of the text. And we think the author is entirely consistent too, in section 351, wherein he announces the limits of the doctrine, as follows: "To justify applying, for the servant's benefit, the doctrine stated in the last section, it must appear from the evidence that the circumstances were either such as to create a situation approaching to or constituting an emergency, or such as to exhibit the servant in the light of a person who was discharging a duty which demanded an unusual amount of attention. The effect of allowing it to operate in cases where he was merely dis-

charging, under normal conditions, some ordinary function incident to his employment, would manifestly be to render the defense of contributory negligence little more than a merely nominal protection to the master." Of course, if the evidence showed that the plaintiff was merely performing his ordinary duties under normal conditions, we are not ready to say (and it is not necessary for us to say in this case) that he could excuse himself by asserting that he forgot a known danger, although some of the authorities appear to go to this extent, but in this instance every requisite of the rule we have announced is fully met. The evidence is ample to show that an emergency arose. The train started before the brake was released. Plaintiff's duties required him to act promptly and with dispatch. The brake refused to respond as it should have done, and plaintiff's attention was absorbed in attempting to perform his duty. The facts in *Cummings v. Helena & Livingston Smelting & Reduction Company*, 26 Mont. 434, 68 Pac. 852, are quite different from those in this case, and the doctrine there announced we think is not inconsistent with the rule just stated. In our opinion, instruction No. 8, fairly states the law. Whether this doctrine is applicable against the defense of assumed risk is not before us. It is only argued as presented by instructions 8 and 13 given, and the railway company's refused instructions 2 and 3, and these all have to do with the question of contributory negligence and not with the defense of assumed risk.

Instruction No. 13 is erroneous, but it is not subject to the attack made upon it by counsel for the railway company, and, as the smelting company relies entirely upon the argument made by the railway company, it is not open to attack at all in this case. It is not open to the particular attack made by the railway company for the reason, that it is practically the same instruction as No. 6 requested by that company. The instruction as given is as follows: "Before the plaintiff can be excused for failing to see the tramway, if you find that a reasonable person exercising reasonable watchfulness ought to have seen it, it must appear from the evidence that his duties were claiming his attention, and therefore drawing his attention from the tramway and other visible things from the time when he first could have seen it; and if there was any reasonable period from the time that he stepped on the ground beside the engine at the gangway, while he was walking toward the tramway, during which he had no duty of the kind referred to to perform, or before his duties began which period was reasonably sufficient to have enabled a person not engrossed in duties to have noticed the tramway, then you are instructed that the plaintiff's failure to notice it under such circumstances, would be contributory negligence and would prevent his recovery in this action, unless you should

also find from the evidence that, at the moment of the accident, his attention was so far absorbed in the discharge of duties required of him at that moment that he omitted to think of the bridge." The court omitted an opening sentence, which did not add anything of merit, and added these words: "Unless you should also find from the evidence that, at the moment of the accident, his attention was so far absorbed in the discharge of duties required of him at that moment that he omitted to think of the bridge," and added a further sentence which is not criticized. It will be observed that, in the instruction as offered by the railway company, the rule is announced that, in order for plaintiff to excuse his failure to see the tramway, his duties must have been claiming his attention from the time when he first could have seen it. The amendment made by the court only limits this like doctrine to the particular moment of time when the plaintiff was injured, and however erroneous the instruction is, it was not made any more so by the amendment, and the railway company cannot complain that the court announces a rule of law which it itself had urged upon the court. We think there is not any difference whatever in principle between the rule embraced in the instruction as offered and the one in the amendment.

Counsel for the smelting company urge that the court erred in refusing its offered instruction No. 8, as follows: "The court further instructs you that before you can find in favor of the plaintiff as against the smelting company, you must find that said smelting company owed a duty to the plaintiff and failed to exercise ordinary care or skill towards him, by which failure the plaintiff, without contributory negligence on his part, suffered the injury complained of. In determining this question as to whether the smelting company owed any duty to the plaintiff you will take into consideration the fact that the plaintiff had no contract whatever with the smelting company; that he did not sustain the relation of servant to master to the defendant smelting company; but that the plaintiff was the servant of the defendant railway company and not under the control or direction of the smelting company, and if, upon the consideration of all the facts proven in the case, you find that the defendant smelting company owed no duty to the plaintiff by the violation of which the injury was caused on the part of the smelting company to the plaintiff, then your verdict should be in favor of the defendant smelting company." The court by instruction No. 6 (any objection to which is waived by the failure of either defendant to argue the matter) told the jury in effect that if the employes of the railway company, including the plaintiff, were taking out the cars from the concentrator at the invitation, express or implied, of the smelting company, then the smelting company did owe to such employes a duty, any violation

of which would render that company liable. That this is a correct rule of law and applicable to the facts of this case can hardly be questioned. The rule is stated with the authorities in support of it, in 21 Ency. of Law (2d Ed.) 471, and Thompson on Negligence, §§ 978, 979. Under the circumstances of this case, the requested instruction No. 8 could hardly have failed to mislead the jury. The court having submitted a correct rule of law for the guidance of the jury, properly refused the instruction requested.

It is also urged by the smelting company that the court should have instructed the jury, as a matter of law, that if the bridge or trestle was built with a drawbridge, which could be removed and thereby rendered harmless, then the verdict should be in favor of the smelting company. But we think that was also properly refused. It can hardly be said that the mere fact that the bridge could be removed would, as a matter of law, absolve the smelting company from liability. It is charged with negligence in constructing and maintaining the bridge so low that it was dangerous to the employes of the railway company in discharging their duties about it. Whether the construction and maintenance of the bridge in the manner in which it was constructed and maintained, constituted negligence on the part of the smelting company, we think was a question to go to the jury under proper instructions.

Counsel for the smelting company also asked the court to give an instruction numbered 6, which might have been proper had it not contained the concluding sentence: "And if he (plaintiff) knew the bridge was there and at the moment forgot the same, this will not excuse him." Of course this last sentence is directly opposed to the doctrine announced in instruction No. 8, given by the court and approved by us; but counsel in their reply brief say: "The fact that we added to this instruction the following: 'And if he knew the bridge was there and at the moment forgot the same, this will not excuse him,' affords no excuse for not giving that portion of the charge above quoted. The court could have stricken out this portion just as he added a modification to the instruction 13 as requested by counsel for the railway company." The court, of course, might have stricken out this objectionable sentence, but it was not bound to do so, and error cannot be predicated upon its refusal.

So far as the smelting company is concerned, our attention has not been directed to any reversible error committed by the court. Upon the facts the case was properly submitted to the jury. The errors assigned which are presented by this company and which are not antagonistic to its joint appellant, have all been considered, if not discussed separately.

On behalf of the railway company it is urged that the court erred in giving instruc-

tions 4, 5, 7, and 9. Instructions 4 and 5 deal with the question of the master's duty to the servant. In No. 4 it is declared: "A railway company is bound to provide suitable and safe material and structures in the construction of its road and appurtenances, and to maintain them in a reasonably safe condition." Further on in the same instruction there is an attempt apparently made to limit or explain this sweeping statement as follows: "The railway company is not to be held as guarantying or warranting absolute safety under all circumstances, but is bound to exercise the care which the exigencies reasonably demand in furnishing a proper roadbed and track, and in keeping the same free from obstruction with which its servants are likely to come in contact and be injured in the ordinary discharge of their duties." In No. 5 it is said that "the defendant railway company was bound to use due care as between it and its servants, and to keep the track on which it was operating its cars at the time the plaintiff was injured in a safe condition for the use of its servants in doing the work for which their duties devolved upon them." And further on in the same instruction it is said: "It was bound to use due care to keep them in a reasonably safe condition;" and again: "If the defendant railway company did not own or control the track, it was bound to see that it was kept in such condition as that it was reasonably safe for the employees of the railway company to do their work on and over it." It is unfortunate that some courts, including this one, have been extremely careless in attempting to define the master's duty in this regard; but no useful purpose can be subserved in continuing the like practice after our attention has been called to the error as is done in this instance.

It will be observed that in instruction No. 4 the jury was told that the master's duty is (1) to provide suitable and safe materials and structures, and maintain them in a reasonably safe condition; (2) to exercise the care which the exigencies reasonably demand in furnishing a proper roadbed and track, and in keeping the same free from obstructions. Was the jury to understand that this was intended to be two statements of the same rule, or the statement of two different rules, and, if the latter, which rule should control? In fact neither is a correct statement of the law. In instruction No. 5 the master's duty is again defined to be (1) to use due care as between itself and its servants; (2) to keep the track in a safe condition for doing the work required of the servant; (3) to use due care to keep the track and appliances in a reasonably safe condition; and (4) to see that the track was kept in such condition as that it was reasonably safe for the servant to do his work. Having read these instructions, the jury might properly have drawn any one of a

half dozen different conclusions as to the master's duty toward the servant; but the most natural conclusion, it seems to us, for the jury to have drawn, would have been that the court was simply stating the same rule in different terms, and that, in fact, the various statements were intended to mean the same thing. It is asking altogether too much of this court to say that the jury selected the one statement of the rule which is substantially correct so far as it goes, and rejected the other statements of it which are erroneous. The rule of law defining the master's duty to his servant in this respect is: The master's duty to the servant is to exercise ordinary care to furnish reasonably safe roadways and appliances, and use ordinary care and diligence to keep them in a reasonably safe condition. *Union Pac. Ry. Co. v. Jarvi*, 3 C. C. A. 433, 53 Fed. 65; 4 *Thompson on Negligence*, § 3767. We hardly think this court would be justified under all the facts presented by this record, in saying that it was negligence per se on the part of the railway company to operate its trains under this bridge or trestle.

In its instruction No. 7 the court said: "The plaintiff is not required to prove to your satisfaction that he is not guilty of contributory negligence; the defendants must prove that he was. So likewise, the plaintiff is not obliged to prove to you that he did not know of the existence of the bridge, and that it was so low that he could not perform his duties in safety. The defendants must show that he had such knowledge." And instruction No. 9 is as follows: "In order to establish the defense of assumed risk in this case, it is not enough that it should appear from the evidence that the plaintiff knew of the existence of the bridge. You must reach the conclusion from the evidence, not only that he knew of the existence of the bridge, but also that he knew it was so low that he could not pass under it in safety while standing on the platform of the car in the discharge of his duties, or you must find in favor of the plaintiff on this issue." Each of these instructions is clearly erroneous. Actual knowledge on the part of plaintiff of the existence of the danger is made the test of plaintiff's assumption of risk. If such circumstances were shown that a reasonably prudent man ought to have known of the danger, the plaintiff was chargeable with knowledge, even though in point of fact he may not have had such knowledge. In 4 *Thompson on Negligence*, § 4647, the rule is more fully stated as follows: "Negligent ignorance being in law tantamount to knowledge, it is sufficient, to put upon the servant the disadvantage of accepting the risk, that he knew of the source of danger, or might have known of it by the exercise of that measure of care which he ought to take for his own safety under the circumstances of the particular case, which comes within the description of ordinary or reason-

able care. The true test by which to determine whether the servant assumed the risk of the particular danger as one of the ordinary risks of his employment, and whether he was guilty of contributory negligence in facing or neglecting the danger, is to consider whether, under all the surrounding conditions, he ought to have known and comprehended the danger, and not whether, in point of fact, he did know and comprehend it."

We have examined the other assignments made by the railway company, but think they are without merit.

As to the defendant Helena & Livingston Smelting & Reduction Company, the judgment is affirmed. For the errors in giving instructions 4, 5, 7, and 9, the judgment is reversed and a new trial ordered as to the defendant Northern Pacific Railway Company, which has specified and urged these errors.

BRANTLY, C. J., and MILBURN, J., concur.

#### GRINDROD v. ANGLO-AMERICAN BOND CO.

(Supreme Court of Montana. April 30, 1906.)

##### 1. FRAUD—FALSE REPRESENTATIONS—EVIDENCE—SUFFICIENCY.

Evidence examined, and *held* insufficient to show that the purchase of certain bonds by plaintiff was induced by false statements on defendant's part contained in certain circulars.

##### 2. CONTRACTS—RESCISSION—ESTOPPEL.

Where certain bonds purchased by plaintiff specifically provided that the entire contract was therein set forth; that no one had authority to alter, change, or modify the same in any manner; and that defendant company issuing the bonds was not to be bound by any statement, promise, or agreement not therein contained, made by any person—plaintiff, by retaining the bonds, making monthly payments thereon for more than a year after the date of their receipt, and further obtaining permission from defendant to act as its agent in the same capacity as that in which another agent was acting at the time plaintiff entered into the contract, was thereby estopped from rescinding the contract on the ground that he was misled to his prejudice by any representations made by such other agent or by any circular given him by the latter or mailed to him by the company before or after receiving the bonds.

##### 3. FRAUD—RELiance ON REPRESENTATIONS.

When it appears that a party claiming to have been deceived to his prejudice has investigated for himself, or that the means were at hand to ascertain the truth or falsity of any representations made to him, his reliance on such representations, however false they may have been, affords no ground of complaint.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 19-23.]

##### 4. CONTRACTS—BREACH—SUFFICIENCY OF EVIDENCE.

Evidence examined, and *held* insufficient to show a breach on defendant's part of the conditions of a contract with plaintiff.

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

Action by Edward Grindrod against the Anglo-American Bond Company. Judgment for plaintiff, and defendant appeals. Reversed.

T. J. Walsh, H. S. Hepner, and Eugene B. Hoffman, for appellants.

BRANTLY, C. J. This action was brought to recover from defendant certain sums of money with interest thereon from September 12, 1904, amounting in the aggregate to \$1,750, which the plaintiff alleges he paid to defendant under contracts into which he was induced to enter by false and fraudulent representations made by defendant. The complaint contains two causes of action. Omitting the formal parts, the first of these alleges, in substance, that on May 12, 1903, plaintiff and defendant, a corporation organized under the laws of California and doing business in California and also in Montana, entered into a contract whereby the plaintiff became the purchaser from defendant of two cumulative cash bonds, numbered 676 and 677. That the plaintiff was induced to enter into said contract by reason of certain false and fraudulent representations made by defendant contained in printed circulars issued by and under the authority of the defendant, and accepted and acted upon as true by the plaintiff, as follows: (1) That in said circulars defendant represented to plaintiff that bondholders could surrender their bonds at any transition period and receive the amount paid to date into the maturity fund, plus interest at 6 per cent. per annum, which representation was false and fraudulent and made for the purpose of defrauding plaintiff; (2) that in said circulars defendant represented to plaintiff that bondholders could at any time, when they could not continue their payments under the terms of the bonds, have the amount paid by them into the maturity fund returned to them, with 6 per cent. interest per annum, which representation was false and made for the purpose of defrauding the plaintiff. That plaintiff, relying upon said representations, purchased said bonds and paid to the defendant at different times sums aggregating \$310. That on or about August 1, 1904, plaintiff made demand of the defendant at its home office at San Francisco, Cal., that it return to him the amount paid as aforesaid, but that it refused and still refuses to do so. That in said bonds it is provided that they shall mature in classes A, B, C, D, and E, and that bondholders should have the privilege of withdrawing in any of said classes, but that said defendant, without the knowledge and consent of plaintiff and against his express wish and instructions, progressed said bonds from class A through intermediate classes into class E, and would not permit plaintiff to withdraw in any of said classes, and has declared said bonds forfeited because plaintiff has failed



The second cause of action is identical with the first, except that its purpose is to recover the sum of \$1,440, paid in like manner on bonds numbered 804 to 823, inclusive, obtained subsequent to those made the basis of the first cause of action, and with like privileges, requirements, and conditions. The answer is a general denial. Upon the issues thus presented the cause was tried. Defendant's motion for a nonsuit having been denied, and no proof being offered by it, the court directed a verdict and judgment for plaintiff for the amount demanded, with interest. Defendant has appealed.

The first assignment is that the court erred in overruling the motion for nonsuit. The grounds of the motion were: (1) That there was no evidence tending to show any false or fraudulent representations whereby plaintiff was induced to enter into the contract; (2) that the evidence shows that the plaintiff failed to comply with the terms of the contract on his part upon which he seeks to recover; and (3) that there is no evidence tending to show that the defendant ever demanded settlements at the maturity or transition periods provided for in the contract or any of them, or that the bonds were advanced from class to class and finally into class E without the plaintiff's consent, or that he was denied the right to withdraw at any maturity period, or that the defendant ever discontinued sales in the state of Montana, thereby rendering the maturity of plaintiff's bonds impossible. From a cursory examination of the complaint, it is apparent that plaintiff seeks to recover on one or the other of two theories, which are entirely inconsistent. The first of these proceeds upon the notion that the contract is void by reason of false and fraudulent representations of material matters upon which plaintiff relied, and by which he was induced to enter into it. The second alleges two distinct breaches of the contract: First, in the advancement of the bonds into class E without plaintiff's consent, a refusal to permit plaintiff to withdraw at any maturity period, and a forfeiture for failure to make the payments required after advancement to class E; and, second, in that the maturity of the bonds sold in the state of Montana depended upon the sales made in Montana exclusively, and that defendant ceased to sell bonds in Montana after the purchase by the plaintiff, thus rendering impossible for plaintiff's bonds to mature at any time. It is not necessary to analyze the investment scheme conducted by the defendant corporation or to discuss at length the character of the contracts made with the bondholders. It is sufficient to say that the plan contemplated the advancement of the bonds successively from class A to class E as fast as they matured, upon notice to the stockholder, who at each advancement had the option to withdraw, until advancement to class E. After this occurred the right of with-

drawal ceased until final maturity in this class. This is clearly expressed in the contract. The power to forfeit for failure to make the monthly payments in each class, and until final maturity in class E, was vested in the defendant. Treating the complaint as stating a cause of action for a rescission of the contract for fraud and misrepresentation and to recover back the money paid under it, there is no evidence before us to sustain its allegations or to justify the verdict. The only evidence offered was a copy of a circular sent to plaintiff after the contract was made. Plaintiff stated in his evidence that he relied upon the statements contained in a circular given him by one Henry, an agent of defendant, who induced him to enter into the contract. It nowhere appears, however, that the two circulars contained the same statements. Assuming this to be the fact, the circular introduced in evidence contains no false statement as to the nature or terms of the contract. The portions of it which are pertinent here are the following:

"Bonds can be surrendered for face value, and loans repaid in small monthly installments of \$11 per month per \$1,000 and 2 per ct. per annum.

"Before surrender monthly dues are \$1.00, \$4.00, \$7.00, \$9.00, \$10.00 in the different classes.

"Loans made on any kind of approved security. Withdrawals and 6 per cent. at any transition period. Company disclaims responsibility for misstatements of agents. Read your bond carefully.

#### "Withdrawal Privileges.

"Bondholders can surrender their bonds at any transition period and receive amount paid to date into maturity fund plus interest at 6 per cent. per annum. This is most important privilege and prevents loss in case of illness or loss of employment.

#### "Advantages.

"Payments on the cumulative cash bonds are \$1.00 per month to begin. This is in class A. The bondholder is notified when the profits in this class entitle him to pass to class B, and commencing the following month his payments are \$4.00 per month. From class B he passes to class C, and his payments are increased to \$7.00 per month; thence to class D, \$9.00 per month. From class D he passes to class E, paying \$10.00 per month. It will be seen that the loans accrue quickly, for 5 bonds accumulate 1 maturity in class A, 4 in Class B, 3 in class C, 5 in class D, and 1 in class E. Five bonds sold in one day mean one progression from class A and so on.

#### "Other Advantages.

"(1) If you cannot continue your payments the money you have paid into maturity fund is returned with 6 per cent. interest as provided in the bond."

There is no other statement which undertakes to represent the terms of the bonds and the rights accorded to the purchaser. Comparing the foregoing with the privileges, requirements, and conditions which are attached to and form a part of the bonds, they correspond exactly with them, and in no sense of the term can they be regarded as false statements. But, even if they were, the circular distinctly requires the purchaser to read the bonds. One of the conditions attached to the bonds themselves, which the plaintiff says he read, specifically provides that the entire contract is set forth in the bonds, that no one has the authority to alter, change, or modify the contract in any manner, and that the company is not to be bound by any statement, promise, or agreement, not contained therein, made by any person. When the plaintiff received and read his bonds, it was his privilege then to rescind his contract if he found that he had been misled. Having elected to retain them, he cannot now be heard to say that he was misled to his prejudice by any representations made by Henry, or by any circular given him by Henry or mailed to him by the company before or after that time. For the evidence shows further that he made monthly payments for more than a year after that date, and actually obtained permission from the company to act as its agent in the same capacity as that in which Henry was acting at the time he entered into the contract. When it appears that a party, who claims to have been deceived to his prejudice, has investigated for himself, or that the means were at hand to ascertain the truth or falsity of any representations made to him, his reliance upon such representations, however false they may have been, affords no ground of complaint. *Pierce v. Ten-Eyck*, 9 Mont. 353, 23 Pac. 423; *McCormick v. Hubbell*, 4 Mont. 99, 5 Pac. 314; *Slaughter's Adm'r v. Gerson*, 13 Wall. (U. S.) 379, 20 L. Ed. 627; *Osborne v. Missouri Pac. Ry. Co.*, 98 N. W. 685; *Andrus v. St. Louis, S. & I. Co.*, 130 U. S. 643, 9 Sup. Ct. 645, 32 L. Ed. 1054; *Cagney v. Cuson*, 77 Ind. 494; *Salem Rubber Co. v. Adams*, 23 Pick (Mass.) 256; *Farnsworth v. Duffner*, 142 U. S. 48, 12 Sup. Ct. 164, 35 L. Ed. 931; *Long v. Warren*, 68 N. Y. 426.

Viewing the complaint now as one for breach of the contract, there is no evidence to sustain a cause of action for the breaches alleged. The evidence shows that the defendant, whenever the bonds were ready to be advanced from one class to another, duly notified the plaintiff of that fact, and that the plaintiff immediately made remittances to meet the increased payments required by each advance. There is no suggestion in the evidence that the plaintiff ever at any time requested at any maturity or transition period, or at any other time, the privilege of withdrawal, until August, 1904, three months after he had ceased to make any payments whatever, and he had received notice

that the contract would be forfeited unless prompt payment should be made. Nor is there any evidence that the maturity fund, out of which the plaintiff expected to have his bonds paid, depended exclusively upon the sale of bonds made in the state of Montana. This is not a stipulation in the bond. Neither is there anything in the circular, nor on the face of the bonds themselves, nor in any of the conditions attached thereto, to indicate that any bond depended for its maturity upon the funds derived from sales of bonds at any particular locality. So that from whatever point of view we examine the evidence, we do not find any justification for the action of the district court in overruling the motion for nonsuit. It should have been sustained. We have assumed for present purposes that the complaint states a cause of action on one or the other of the two theories mentioned. We do not care to be understood as expressing any opinion on this subject. Its sufficiency was challenged in the district court by demurrer. The demurrer, however, was never passed upon by the district court, for the reason that the defendant itself agreed that it might be overruled. So the question of the sufficiency of the complaint is not among those properly before this court for judgment. These remarks apply also to the second cause of action.

Since the judgment must be reversed for the reasons stated, it is not necessary to notice other assignments of error.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

MILBURN and HOLLOWAY, JJ., concur.

#### COLEMAN et al. v. JAGGERS.

(Supreme Court of Idaho. Feb. 28, 1906.)

#### 1. QUIETING TITLE—ADVERSE CLAIMS—RIGHT OF ACTION.

Under the provisions of section 4538, Rev. St. 1887, an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, § 51.]

#### 2. SAME—NECESSITY OF POSSESSION AND LEGAL TITLE.

Under the jurisdiction and practice in equity, independent of statute, a bill to quiet title cannot be maintained unless the possession and legal title are in the complaint; but that rule of equity practice has been greatly modified by the provisions of section 4538, Rev. St. 1887, in this state, and an action may be maintained although the plaintiff have neither the possession nor the legal title thereto.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, § 54.]

#### 3. SAME—WHO MAY SUE.

Under the provisions of said section 4538, Rev. St. 1887, a suit may be brought by any one claiming some right or interest in land to determine any adverse claim thereto.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, §§ 49-54.]

#### 4. ACTIONS—EQUITY AND LAW—DISTINCTION—ABOLITION.

By the provisions of section 1, art. 5, of the Constitution of Idaho, the distinction between actions at law and suits in equity and the forms of all such actions and suits are prohibited, and there is but one form of action in this state for the enforcement or protection of private rights or the redress of private wrongs.

#### 5. COURTS—DISTRICT COURTS—JURISDICTION.

By the provisions of section 20, art. 5, of the Constitution, the district court is given original jurisdiction in all cases both at law and in equity, as well as certain appellate jurisdiction.

#### 6. PLEADING—COMPLAINT.

Under the provisions of section 4168, Rev. St. 1887, the complaint is only required to contain the title of the court and cause, a statement of the facts constituting the cause of action in ordinary and concise language, and the demand for relief, and the district court is authorized to grant such relief, whether in equity or at law, as the parties are entitled to under their allegations and proof.

#### 7. COURTS—DISTRICT COURT—EQUITABLE JURISDICTION—INADEQUATE REMEDY AT LAW.

Under the provisions of our Constitution and statute, the district court has equitable jurisdiction and is authorized to exercise it in all cases where the remedy at law is not adequate, complete, and certain, so as to meet all the requirements of justice in the case.

#### 8. HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—QUIETING TITLE—EVIDENCE.

*Held*, under the evidence in this case, that the trial court was justified in finding that the premises in dispute were not the separate property of the appellant.

(Syllabus by the Court.)

Appeal from District Court, Boise County; George H. Stewart, Judge.

Action by B. H. Coleman and others against L. A. Jaggars. Judgment for plaintiffs, and defendant appeals. *Affirmed*.

H. L. Fisher, for appellant. Karl Paine, for respondents.

**SULLIVAN, J.** This action was brought by the respondents to quiet the title to certain premises situated in Centerville, Boise county. The action was originally brought against Joseph A. Jaggars and L. A. Jaggars, husband and wife, and H. C. Granger and Belle Granger, husband and wife. It appears from the record that Joseph Jaggars and H. C. Granger were engaged in the saloon business in Centerville and became indebted to the respondents; that respondents recovered judgment against them, and the premises in controversy were sold at sheriff's sale and purchased by the respondents; they thereafter procured a sheriff's deed to said premises, and base their claim of ownership on said sheriff's deed. Granger and his wife and Joseph Jaggars filed a disclaimer in this suit, and Mrs. Jaggars filed her separate answer denying the allegations of the complaint as to the ownership of said premises by the respondents and their right to the possession thereof. She averred that she was the owner and entitled to the possession of the premises, having paid the entire purchase price therefor out of her separate means and property, and that the same was acquired by

her as her separate property and estate, and that she had never conveyed the same to any one. The cause was tried by the court without a jury and judgment entered in favor of the respondents. The first five errors assigned were considered on the argument of this case together.

It is contended by counsel for appellant that the undisputed evidence shows that the respondents, nor the judgment debtors through whom they claim, never had the legal title to the premises in question, and that the legal title now stands in the appellant. That being true, it is contended that an action to quiet title cannot be maintained against the holder of the legal title by the holder of the equitable title. In support of that contention counsel cites the following authorities: *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. 518; *Nidever v. Ayers*, 83 Cal. 39, 23 Pac. 192; *Harrigan v. Mowry*, 84 Cal. 458, 22 Pac. 658, 24 Pac. 48; *Shanahan v. Crampton*, 92 Cal. 13, 28 Pac. 50; *Chase v. Cameron*, 133 Cal. 231, 65 Pac. 460; *Castro v. Barry*, 79 Cal. 448, 21 Pac. 946; *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010; *Moore v. Townshend*, 102 N. Y. 387, 7 N. E. 401. The case of *Von Drachenfels v. Doolittle*, supra, was decided by the Supreme Court of California in 1888, and it is there held that an action to quiet title cannot be maintained by the owner of an equitable interest as against the holder of the legal title, and cites in support of that proposition only one case, that of *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010. The California court seems to have held strictly to the general principles of equity jurisprudence as administered by the Chancery Courts of England, regardless of the provisions of section 738 of the Code of Civil Procedure of that state. That section is identically the same as section 4538 of the Revised Statutes of 1887, and is as follows: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." In *Tuffree v. Polhemus*, 108 Cal. 670, 41 Pac. 306, the court apparently took a little broader view of the provisions of that section than it had in some previous cases and said: "But as this court in the past has had occasion to remark, section 738 of the Code of Civil Procedure is broad in its terms. It possesses no limitations or restrictions, and we see no reason why it does not vest in the holder of an equitable title the right to come before the court and have their equities declared superior to any and all opposing equities." The court also said in opinion as follows: "There are cases in this state holding that the possessor of an equitable title cannot bring an action to quiet such title against the holder of the legal title," and cites in support of that proposition the authorities above cited. Under the jurisdiction and practice in equity

both in England and in the courts of the United States, independent of any statute, a bill to quiet title cannot be maintained without clear proof of both possession and legal title in the complainant, hence, one holding the equitable title could not sustain an action against one holding the legal. In *Frost v. Spitley*, supra, which was an appeal from the United States Circuit Court of the District of Nebraska, the statute of that state authorized an action to quiet title to be brought by any person or persons whether in actual possession or not, and in that case the Supreme Court of the United States held that the requisite of the plaintiff's possession was dispensed with by statute. That statute, however, did not dispense with the requisite that the plaintiff must have the legal title, as required by the ancient equity jurisdiction and practice in such cases. That is the only case cited in support of the rule laid down in *Von Drachenfels v. Doolittle*, supra, which case seems to be the leading case in California, and there the Supreme Court of the United States recognizes the fact that the general jurisdiction of the courts of equity in regard to such actions have been changed in many of the states by statute.

Independent of statute, the equity jurisdiction to quiet title was intended to protect the legal owner of such title from being harassed by suits in regard to the title, and originally such equity jurisdiction could be invoked only by a plaintiff in possession holding the legal title. Such suits have been extended by statute, and in many states is the ordinary mode of trying a disputed title, and suits under such statutes are not now particularly designated as proceedings to quiet title, but are known and designated as proceedings for the determination of adverse claims. In volume 6, § 735, *Pomeroy's Equity Jurisprudence* (3d Ed.) the author there says: "The statutory action to determine an adverse claim is an improvement upon the old bill of peace. The statute enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title. It is not necessary, as formerly, that the plaintiff should first establish his right by an action at law. He can immediately, upon knowledge of such claim, require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined, and the question of title be thus forever quieted." In section 738, *Id.*, the author says: "As a general rule the suit may be brought by any one claiming some right or interest in the land. In most of the states the owner of an equitable interest, as well as the owner of the legal title, may maintain the suit to determine adverse claims." In jurisdictions where courts of equity and courts of law are separate and distinct and where the equity jurisdiction to quiet title was intended to protect the legal owner of the title from being harassed in regard to such title,

the equitable owner could not maintain an action against the one holding the legal title, and in such jurisdiction the one holding the equitable title is required to go into a court of law first to establish his rights, as equity had no jurisdiction of the case for the reason that the law courts concern the legal title only, and that the plaintiffs had a plain, adequate, and complete remedy at law. But this method of protecting a person's rights was found very cumbersome and vexatious, as in some cases several suits had to be brought before the party could obtain all of his rights. The inability of a court of law to afford adequate relief was the strong argument in favor of extending the jurisdiction of a court of equity in this class of cases. This feature of the matter is commented upon in *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167. A statute of the state of Iowa was involved in that case, which statute enlarged the jurisdiction of courts of equity in three particulars at least: (1) It did not require the plaintiff to have been annoyed or threatened by repeated acts of ejectment. (2) It dispensed with the necessity of his title having been previously established in an action at law. (3) The suit might be brought by a party having the equitable title, as well as a party having the legal title. Statutes thus enlarging the jurisdiction of courts of equity have been held to be constitutional. *Wehrman v. Conklin*, supra.

By the provisions of section 1, art. 5, of the Constitution of Idaho, the distinction between actions at law and suits in equity and the forms of all such actions and suits are prohibited, and we have but one form of action in this state for the enforcement or protection of private rights or the redress of private wrongs, and by the provisions of section 20 of said article the district court is given original jurisdiction in all cases, both at law and in equity, as well as certain appellate jurisdiction, and under the provisions of section 4168, Rev. St. 1887, the complaint in each and every case besides the title of the action, etc., is only required to contain a statement of the facts constituting the cause of action in ordinary and concise language, and demand for relief. Thus many of the rules of pleading in other jurisdictions in both suits in equity and actions at law have been greatly modified and changed. The provisions of said section 4538, Rev. St. 1887, above quoted, are very broad, and authorize any person, whether in possession or out of the possession, whether holding the legal title or equitable title, or what not, to bring his action against another who claims an estate in real property adverse to him, and may, in such action, have the adverse claim determined and settled.

Under our Constitution and statutes equitable jurisdiction exists and will be exercised in all cases and under all circumstances where the remedy at law is not adequate,

complete, and certain, so as to meet all the requirements of justice. That there is a legal remedy is not sufficient. Such remedy, in order to oust or prevent the equitable jurisdiction, must be, in all respects, as satisfactory as the relief furnished by a court of equity. 1 Pomeroy's Equity Jurisprudence (3d Ed.) § 297. In the case at bar, if the plaintiffs were required to bring an action at law in ejectment or otherwise, and their right to the possession of the premises in dispute should be adjudged in their favor, then, in order to clear their title, they would have to bring a suit in equity to annul the legal title held by the appellant. Thus it is shown that an action at law would not be adequate, complete, and certain, and meet all the requirements of justice. One of the objects of our practice act and the provisions of our state Constitution in abolishing all distinctions between actions at law and suits in equity, and giving our district courts full and complete jurisdiction both at law and in equity, was to rid our system of a multiplicity of suits and a vexatious and cumbersome procedure and to give litigants full and complete relief in a single action, where under the old practice several suits were necessary to accomplish that result. And in the case at bar there is no good reason why the title may not be fully settled and determined between the parties. The provisions of section 4538, Rev. St. 1887, and the decisions of this court in *Shields v. Johnson*, 79 Pac. 393, *Johnson v. Hurst*, 77 Pac. 791, and *Fry v. Summers*, 39 Pac. 1118, 4 Idaho, 424, settle this contention, for under them we think every estate or interest known to the law in real property, whether legal or equitable, may be determined in an action of this kind.

The other errors assigned may be considered under the general head of the insufficiency of the evidence to sustain the decision. While the testimony of the appellant shows that she paid for the premises in question with money borrowed by her husband for her, which she repaid to the persons from whom it was borrowed, there is sufficient evidence in the record to throw decided suspicions upon that evidence and its utter inconsistency. Instead of taking the deed in her own name, she took the deed from the grantor in the name of herself and a Mrs. Granger, whose husband was the partner of Jaggars in the saloon business. Her explanation of that fact is very lame. While Granger himself testified that at the time of the said purchase Jaggars and himself were running a saloon. They were paying \$16 a month rent, and were not doing a very large business, and Granger proposed to Jaggars that they buy the hotel building in question, and Jaggars replied that he had been thinking about that, and it was there arranged that Jaggars should negotiate for said premises. A few days after that conversation Jaggars informed Granger that he had purchased

the premises. Granger asked him if he had money sufficient to pay for it. He replied that he had sufficient; that he had a check for something over \$70, and that he had sufficient. Granger replied that if he hadn't, he had a little at their home which he would let him have. Jaggars thereupon asked Granger if they hadn't better have it deeded to their wives and Granger replied that it did not matter to him. Granger further testified that his understanding was that he owned half of the premises, and that he thereafter sold it to Jaggars after they had dissolved partnership in the saloon business; that, in their agreement, Jaggars agreed to settle all bills owing by the partnership and was to take the property and continue the business. This partnership was dissolved a few days after the purchase of the said building and the partnership was indebted at that time in the sum of about \$200, and shortly before the trial of this cause, at the request of the appellant's attorney, Granger and his wife conveyed by quitclaim deed whatever title they held in said premises to Mr. Jaggars, and Jaggars thereafter conveyed it to his wife, the appellant.

The trial court, having seen the witnesses on the stand, observed their demeanor and heard them testify, is better qualified to judge of the weight to be given to the testimony of each than this court. That court evidently concluded that said premises were not the separate property of the appellant, and we think that the evidence was sufficient to sustain the judgment. The judgment is therefore affirmed with costs in favor of respondents.

STOCKSLAGER, C. J., concurs.

AILSHIE, J. (concurring). I concur with my associates in the conclusion reached as to the legal propositions involved in this case. As to the sufficiency of the evidence, however, to support the findings and judgment, I have considerable doubt. While there was some evidence supporting the judgment, it was principally hearsay, and incompetent as against Mrs. Jaggars, the only defendant in this case. The best that can be said for the evidence in the case is that it was desultory and highly circumstantial; rather below the standard of certainty that should be required before taking from a married woman the fruits of her daily labor.

Ex parte MOYER.

(Supreme Court of Idaho. April 14, 1906.)

1. HABEAS CORPUS—EXTRADITION—FUGITIVE FROM JUSTICE.

Where the accused is personally within the jurisdiction of the demanding state, and there applies to the court for his discharge on habeas corpus, he cannot raise the question as to whether or not he has been, as a matter of fact, a refugee from the justice of that state,

within the meaning of the federal Constitution and the act of Congress authorizing interstate extradition.

## 2. EXTRADITION—ACTS OF STATE OFFICERS—REVIEW.

The action and conduct of the chief executive of the state in which the accused was found in issuing the executive warrant, and of the executive and ministerial officers acting in aid of his warrant, is a matter for the consideration of the courts of his state, subject to the reviewing authority of the federal courts in so far as the federal question is involved, and is not a question open to examination or consideration by the courts of a foreign state.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Extradition, § 46; vol. 25, Cent. Dig. Habeas Corpus, §§ 90, 91.]

## 3. HABEAS CORPUS—WARRANT OF GOVERNOR—REGULARITY OF ISSUANCE.

The warrant of the chief executive of the state surrendering an accused person, whether issued lawfully or unlawfully, has accomplished its purpose and become functus officio as soon as the accused is delivered into the jurisdiction of the demanding state, and the regularity of its issuance thereupon ceases to be a question for the judicial inquiry on application by the prisoner for his discharge, where he is at the time held under due and legal process issued out of a court of competent criminal jurisdiction of the demanding state.

## 4. CONSTITUTIONAL LAW—INTERFERENCE WITH EXECUTIVE—EXTRADITION—MOTIVES FOR SURRENDER.

The motives which prompt the chief executive of a state to issue his warrant for the rendition of a prisoner are not proper subjects of judicial inquiry. Such inquiry would be opposed to public policy and the freedom of action of the executive department of government.

## 5. EXTRADITION—RIGHTS OF ACCUSED AFTER EXTRADITION.

The fact that a wrong has been committed against a prisoner in the manner or method pursued in subjecting his person to the jurisdiction of a state against the laws of which he is charged with having transgressed can constitute no legal or just reason, why he should not answer the charge against him, when brought before the proper tribunal. The commission of an offense in his arrest does not expiate the offense with which he is charged.

## 6. SAME.

The jurisdiction of a court in which an indictment is found or an accusation is lodged is not impaired by the manner in which the accused is brought before the court.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Extradition, § 54.]

## 7. EXTRADITION—PROCEDURE—PROCESS OF DEMANDING STATE.

In interstate extradition, the prisoner is only held under the extradition process until such time as he reaches the jurisdiction of the demanding state, and is thenceforth held under the process issued out of the courts of that state, and it necessarily follows that there is no longer a federal question involved in his detention.

## 8. HABEAS CORPUS—DETENTION OF PRISONER.

Returns of the officer and answer of the prisoner examined and considered in this case, and held, that the prisoner is being detained under process duly and regularly issued by a court of competent criminal jurisdiction, and that he is not entitled to a discharge on habeas corpus.

(Syllabus by the Court.)

Application of Charles H. Moyer for a writ of habeas corpus. Writ issued, and case heard and considered on the return and sup-

plemental return of the officer and the answer of the prisoner, after which writ is quashed, and the prisoner remanded to the custody of the officer.

Fred Miller, John F. Nugent, and Edmund F. Richardson, for petitioner. John J. Guheen, Atty. Gen., Owen M. Van Duyn, Pros. Atty., James H. Hawley, W. E. Borah, and W. A. Stone, for the State.

AILSHIE, J. The prisoner, Charles H. Moyer, applied to this court, through his counsel, for a writ of habeas corpus requiring E. L. Whitney, warden of the State Penitentiary, to produce the body of the prisoner at a time and place to be designated by the court, and to make true return of the cause or causes of his detention. A writ was thereupon issued, and the warden, at the time designated, produced the body of the prisoner in court and made return that he was detaining him under order of the probate judge of Canyon county, and for that purpose as the agent of the sheriff of Canyon county. The return contains a certified copy of the order made by the probate judge, wherein it recites that the Canyon county jail is an unfit place for the detention of the prisoner, and orders and directs that he be temporarily detained in the State Penitentiary at Boise City. The return further shows that on the 12th day of February, 1906, a complaint duly verified by Owen M. Van Duyn, prosecuting attorney in and for Canyon county, was filed with M. I. Church, probate judge of that county, charging the prisoner, Charles H. Moyer, with the crime of murder committed at Caldwell, Canyon county, on the 30th day of December, 1905. The return also shows that on the same date a warrant of arrest was duly issued out of the probate court of Canyon county for the apprehension and detention of the accused. The return indorsed on the warrant and made by the sheriff of Canyon county shows that the prisoner was, on the 21st day of February, 1906, arrested and taken before the court. It is further shown that, at the time of making the return, the grand jury of Canyon county was in session, and that the prisoner was held subject to the order of the district court in and for Canyon county, and that he had been from time to time, by order of the court, taken into court to be present at the impaneling of the grand jury. Before the final hearing on the return to this writ, the warden made a supplemental return to the effect that on the 7th day of March, 1906, the grand jury in and for Canyon county found a true bill of indictment against the prisoner, charging him with the commission of the crime of murder, at Caldwell, in Canyon county, on the 30th day of December, 1905, and that the indictment was thereupon duly filed in court, and that thereupon a bench warrant issued for the arrest of the accused, Charles H. Moyer, and that

the same was served, and the prisoner was thereafter, on the 9th day of March, arraigned before the court, and the time for pleading to the indictment was fixed for March 16th; and that the prisoner was thereafter by the sheriff of Canyon county returned to the State Penitentiary and temporarily placed in charge of the warden thereof for detention, and is now held under such authority. The petitioner answered the return and supplemental return made by the warden, admitting all the material and essential facts contained in the return. He also pleaded further separate and independent matter for the purpose of showing that his imprisonment and detention was illegal and unlawful. While quite voluminous, the substance of this additional and independent matter contained in the answer is that the petitioner is a citizen of the United States and of the state of Colorado, residing in the city and county of Denver, and that he has never been within the state of Idaho at any time since the 28th day of October, 1905, and that he was not in the state of Idaho on the 30th day of December, 1905, and was not a fugitive from the justice of the state of Idaho within the meaning of the federal Constitution and the act of Congress providing for interstate extradition, and that he was wrongfully and unlawfully removed from the state of Colorado to the state of Idaho in pursuance of an unlawful combination and conspiracy entered into between the Governors of the states of Idaho and Colorado, and the prosecuting attorney of Canyon county; that the Governor of Colorado wrongfully and unlawfully honored the requisition of the Governor of Idaho and wrongfully issued his warrant and order for the arrest of the prisoner by the authorities of the state of Colorado, and that the prisoner was neither given time nor opportunity to apply to either the state or federal courts for his discharge prior to his delivery to the authorities within the jurisdiction of the state of Idaho. Counsel for the state moved to strike from the answer of the petitioner all matters leading up to and involving the extradition of the petitioner, on the ground that the same is sham and irrelevant matter. After hearing exhaustive argument this motion was sustained, and it was announced from the bench at the time that a written opinion would thereafter be filed setting forth the views of the court on the questions presented. It is proper to first observe that the extradition proceedings and process by and under which the prisoner was brought into this state appear in all respects regular and in due form. With the foregoing statement of the case we will pass at once to a consideration of the questions of law involved.

We are of the opinion that after the prisoner is within the jurisdiction of the demanding state and is there applying to its courts

for relief, he cannot raise the question as to whether or not he has been, as a matter of fact, a fugitive from the justice of the state within the meaning of the federal Constitution and the act of Congress. A careful and diligent examination of the many authorities touching upon this subject and the reasons that exist for invoking the aid of the writ in such cases convince us that the question as to whether or not a citizen is a fugitive from justice is one that can only be available to him so long as he is beyond the jurisdiction of the state against whose laws he is alleged to have transgressed. It is a remedy which does not go to the merits of the case, and does not involve the inquiry as to whether or not he is, in fact, guilty or innocent of the offense charged. It is a remedy that merely goes to the question of his removal from the jurisdiction in which he is found to the jurisdiction against the laws of which he is charged with offending. If these views be correct, and we believe they are, it follows that so soon as the prisoner is within the jurisdiction of the demanding state, both the reason and object for invoking this principle of law have ceased, and can no longer have any application. It has been held that it ceases to be a federal question so soon as the prisoner invokes its aid within the state from which he is alleged to have fled. *In re Cook* (C. C.) 49 Fed. 841. It must also necessarily follow that the courts of the state demanding the prisoner have no jurisdiction to inquire into the acts of the executive of the state delivering the prisoner. The action and conduct of the chief executive of the state in which the prisoner was found and of all the executive and ministerial officers acting in aid of his warrant is a matter for the consideration of the courts of his state, subject to the reviewing authority of the federal courts in so far as the federal question is involved. The warrant of the chief executive of the state surrendering the prisoner, whether issued lawfully or unlawfully, has accomplished its purpose and becomes *functus officio* so soon as the prisoner is delivered into the jurisdiction of the demanding state, and its validity and the regularity of its issuance thereupon cease to be questions open to the consideration of the courts of the demanding state. The prisoner was regularly charged with the commission of a crime in Idaho and against her laws. The Governor of Colorado honored the requisition from the Governor of Idaho and thereupon duly and regularly issued his warrant for the arrest and surrender of the accused to the agent of the state of Idaho. This action of the Colorado Governor was at least quasi judicial. *In re Cook* (C. C.) 49 Fed. 841. It amounts to a determination that the accused was substantially charged with the commission of a crime, and was a fugitive from justice. *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291,

29 L. Ed. 544; *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 934. The motives which prompted the Governor of a state to take such action or make such determination are not proper subjects of judicial inquiry. Such inquiry would be opposed both to the plainest principles of public policy and the freedom of action by the executive within the constitutional authority of that department of government. Jurisdiction to take the action complained of is the test, and the jurisdictional facts are subject to review by the federal courts and courts of the surrendering state where they are applied to before the state whose laws it is charged have been violated acquires jurisdiction of the person of the accused. In the latter case the object has been accomplished and, as has been held in several cases, there is no process or authority for returning the prisoner to the state in which he was found. *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283, approved in *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 939; *In re Moore* (D. C.) 75 Fed. 824. One who commits a crime against the laws of a state, whether committed by him while in person on its soil or absent in a foreign jurisdiction and acting through some other agency or medium, has no vested right of asylum in a sister state (*Mahon v. Justice*, *supra*; *Lascelles v. Georgia*, 148 U. S. 543, 13 Sup. Ct. 687, 37 L. Ed. 551; *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421; *In re Moore* (D. C.) 75 Fed. 824; and the fact that a wrong is committed against him in the manner or method pursued in subjecting his person to the jurisdiction of the complaining state, and that such wrong is redressible either in the civil or criminal courts, can constitute no legal or just reason why he himself should not answer the charge against him, when brought before the proper tribunal. The prisoner does not represent in his person the sovereignty of either the demanding or surrendering state, and is in no position to speak for either; on the other hand, if any offense was committed in course of his rendition it was clearly an offense against the laws of one or both of those states; but neither state is here complaining. *People v. Pratt*, 78 Cal. 340, 20 Pac. 733.

No case has been called to our attention, and, in fact, we have been unable to find any instance where the prisoner has alleged as a ground for his discharge a like state of facts to those set up in the answer in this case and to which the motion is here directed. We have, however, examined several authorities in which the same course of reasoning adopted by the courts, in holding that the prisoner should not be discharged, is equally, and as logically, applicable to the facts of this case. Prof. Peabody, sometime lecturer on criminal law before the Harvard Law School, in his text on *Interstate Extradition*, at page 90, 19 Cyc., states the gen-

eral principle touching the rights of prisoners illegally brought into a jurisdiction as follows: "It is not a cause for exemption from prosecution for a crime that the accused was illegally arrested in another state and unlawfully brought within the jurisdiction of the state against which he offended. He is not protected from prosecution even if he is kidnapped in the other state and brought into the state without a semblance of right. It follows, therefore, that he is not wronged by being subjected to its jurisdiction, although the requisition proceedings were not strictly legal. As the state to which a person has been illegally brought may hold him to answer for his offenses against it, it may arrest and surrender him on extradition proceedings to answer for his offenses against another state. The state from which he was wrongfully taken has no redress except to demand the extradition of the abductors, that they in turn may be prosecuted by it." In *Mahon v. Justice*, *supra*, a case in which a controversy arose between the states of West Virginia and Kentucky over the kidnapping of the prisoner, Mahon, from the state of West Virginia, Justice Field, after stating the nature of the controversy, said: "The only question, therefore, presented for our determination is whether a prisoner indicted for a felony in one state, forcibly abducted in another state and brought to the state where he was indicted by parties acting without warrant or authority of law, is entitled, under the Constitution or laws of the United States, to release from detention under the indictment by reason of such forcible and unlawful abduction." In passing upon the question thus stated, that distinguished jurist said: "As to the removal from the state of the fugitive from justice in a way other than that which is provided by the second section of the fourth article of the Constitution, which declares that 'a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime,' and the laws passed by Congress to carry the same into effect—it is not perceived how that fact can affect his detention upon a warrant for the commission of a crime within the state to which he is carried. The jurisdiction of the court in which the indictment is found is not impaired by the manner in which the accused is brought before it. There are many adjudications to this purport cited by counsel on the argument, to some of which we will refer." The opinion closes as follows: "So in this case we will say that, whatever effect may be given by the state court to the illegal mode by which the defendant was brought from another state, no right, secured under the Constitution or laws of the United States,

was violated by his arrest in Kentucky and imprisonment there, upon the indictment found against him for murder in that state." In *Re Cook*, supra, the United States Circuit Court had under consideration the validity of an extradition granted by the Governor where the party, in fact, had not been in the demanding state at the time the offense was committed, and the court, speaking of the validity of the executive warrant, said: "His warrant, unassailed by competent authority, is complete justification for the arrest and surrender of the alleged fugitive. When so delivered by virtue of such warrant, his surrender is lawful, and the demanding state obtains rightful possession of his person, and may lawfully subject him to its criminal process for the offense charged. The executive warrant has then spent its force. It is no longer operative. The alleged offender is no longer subjected to deprivation of liberty by virtue thereof, but is rightfully held under the process of the state. When that has happened, no federal question remains. \* \* \* The fact of flight may be, in a sense, jurisdictional to removal, as one says a criminal court has jurisdiction only of crime. But such court has jurisdiction to determine whether a certain act charged to have been committed is or is not a crime. Its decision therein, although erroneous, is not void. So here, the jurisdiction to determine the fact of flight is lodged with the executive. He has jurisdiction of the subject-matter. His warrant is valid until his determination of the fact of flight is properly reversed. When, therefore, such valid warrant has been executed, the surrender thereunder is lawful, and the party lawfully subjected to the state jurisdiction." The latter case was appealed to the Supreme Court, and in *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 934, the lower court was affirmed, and Justice Brown, who wrote the opinion on appeal, made the following observation: "It is proper to observe in this connection that, assuming the question of flight to be jurisdictional, if that question be raised before the executive or the courts of the surrendering state, it is presented in a very different aspect after the accused has been delivered over to the agent of the demanding state, and has actually entered the territory of that state, and is held under the process of its courts." In *Ex parte Johnson*, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103, the court made the distinction between the service of civil process and that of criminal process where the party had been wrongfully brought into the jurisdiction, and said: "Indeed, there are many authorities which go to the extent of holding that in criminal cases a forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense and presents no valid objection to his trial in such court. \* \* \* The law will not

permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest." To the same effect see *Dow's Case*, 18 Pa. 37; *Ex parte Ker* (C. C.) 18 Fed. 167; *State v. Smith*, 19 Am. Dec. 679; 12 A. & E. Ency. of Law, 607; *Eaton v. West Virginia*, 91 Fed. 760, 34 C. C. A. 68; *Kingen v. Kelley*, 3 Wyo. 571, 28 Pac. 38, 15 L. R. A. 177; *Ex parte Barker*, 87 Ala. 4, 6 So. 7, 13 Am. St. Rep. 17; *State v. Ross*, 21 Iowa, 467; *State v. Patterson*, 116 Mo. 505, 22 S. W. 696; *Brooklin v. State*, 28 Tex. App. 121, 9 S. W. 737; *State v. Glover*, 112 N. C. 896, 17 S. E. 525.

Counsel for petitioner lay much stress on the proposition that neither an individual nor the state can be allowed to gain an advantage by means of an unlawful or wrongful act. That proposition is true, but to gain an advantage means to obtain a superiority of position or opportunity which would not appear to have been done in such a case as this, admitting all the facts charged to be true. Where the state accuses a person of the commission of an offense against its laws, the mere apprehension of the accused, although in an unlawful manner, and subjecting him to the jurisdiction of the courts to answer the charge, cannot amount to a legal advantage any more than if the accused had voluntarily surrendered himself to the authorities. The wrongful or unlawful means employed in making an arrest, however criminal they might be, could not be chargeable to the sovereignty, which can commit no crime, but would be the crime of the individual who committed the act, and would furnish no reason or justification for discharging the prisoner when brought before the court. If, therefore, a crime should be committed by any person in abducting, apprehending, or arresting the accused, such person may be held to answer in the proper jurisdiction for the commission of the offense. But the commission of the latter offense does not exonerate the former. Numerous authorities are cited on behalf of petitioner to the effect that a lawful rendition cannot be had of one who was not, in fact, within the demanding state when the offense is charged to have been committed. The latest and highest authority that has been brought to our attention on this phase of the case is *Hyatt v. New York*, 183 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657; *Id.*, 172 N. Y. 176, 64 N. E. 825, 60 L. R. A. 774, 92 Am. St. Rep. 706. As we have heretofore said, the question as to whether or not the prisoner was, in fact, a refugee from justice cannot arise at this time in the case at bar. Except for the construction placed on the second clause of section 2 of the fourth article of the Constitution of the United States, and section 5273, U. S. Rev. St. [U. S. Comp. St. 1901, p. 3597], by the highest court of the land, we should

undoubtedly incline to the belief that they were designed and intended to authorize the extradition of any person who has offended against the laws of one state and is thereafter found in another state. It would seem that by the language: "Who shall flee from justice." is rather meant a flight from a punishment—a penalty or condition which would follow capture and conviction—than a flight from a place or the territorial limits of the outraged commonwealth. The pursuing hand of justice demanding vindication and vengeance is a much stronger inducement to flight than the mere discomforts of place or the horrors or dislike of state lines. While the belief just expressed is the unanimous view of this court as to the real purpose and intent of the extradition clause of the federal Constitution, it amounts to the merest observation in this case, and in no respect influences its decision. We are not unmindful of the fact that the almost uniform current of authority, both federal and state, is to the effect that the flight must be from a place, namely, from the territorial limits of the state demanding the prisoner. It is worthy of note, however, that under that line of authority, as was suggested on the argument of this case, an assassin on the Oregon bank of the great waterway that marks our western boundary, might, by firing across the stream, murder numbers of our citizens and be exempt from extradition, and go free from punishment. In this respect the views expressed by Mr. Justice Clark in the extraordinary case of *State v. Hall*, 115 N. C. 811, 20 S. E. 729, 28 L. R. A. 293, 44 Am. St. Rep. 301, are worthy of consideration.

Counsel place considerable stress on *In re Robinson* (Neb.) 45 N. W. 267, 8 L. R. A. 398, 26 Am. St. Rep. 378, a case where the Supreme Court of Nebraska ordered a prisoner discharged because he had been forcibly brought into the state without requisition process. That case does not meet the facts of the case at bar; besides, it seems to rest on the rule adopted in civil cases, rather than that applied to criminal cases. The statement there made as to the current of authority on the question of interstate extradition leaves it open to the criticism that it is not a sound or carefully considered case. In fact, the weight of authority is entirely the other way, as will be seen from an examination of *Lascelles v. State of Georgia*, 148 U. S. 537, 13 Sup. Ct. 687, 37 L. Ed. 552; *Lascelles v. State*, 90 Ga. 347, 16 S. E. 945, 946, 35 Am. St. Rep. 216, 220. See 11 *Rose's Notes* (U. S.) 239.

The motion having been sustained, the case remains here on the answer of the warden, which is admitted to be true. The prisoner has been indicted on the charge of murder,

and for the purposes of this case, whether as a principal or accessory, is immaterial under our statute (sections 7697 and 7698, Rev. St. 1887, and *Territory v. Guthrie*, 2 Idaho, 432, 17 Pac. 39), as is also the question as to whether he was within or without the state at the time of the alleged commission of the offense (sections 6331 and 7481, Rev. St. 1887). The proceedings appear regular on the face of the returns, and in conformity with the laws of this state, and, since the prisoner is being held under process duly and regularly issued by a court of competent criminal jurisdiction, we are commanded by statute to remand him to custody.

The writ is quashed, and the prisoner is remanded to the custody of the officer.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

#### Ex parte PETTIBONE.

(Supreme Court of Idaho. April 14, 1906.)

Application by George A. Pettibone for a writ of habeas corpus. Writ quashed, and petitioner remanded to custody of officer.

Fred Miller, John F. Nugent, and Edmund F. Richardson, for petitioner. John J. Guheen, Atty. Gen., Owen M. Van Duyn, Pros. Atty., James H. Hawley, W. E. Borah, and W. A. Stone, for the State.

PER CURIAM. The facts in this case are substantially the same as in *Re Moyer* (just decided by this court) 85 Pac. 897; and upon the authority of that case, and for the reasons therein stated, the writ is quashed, and the prisoner is hereby remanded to the custody of the officer.

#### Ex parte HAYWOOD.

(Supreme Court of Idaho. April 14, 1906.)

Application of William D. Haywood for writ of habeas corpus. Writ quashed, and prisoner remanded to custody of officer.

Fred Miller, John F. Nugent, and Edmund F. Richardson, for petitioner. John J. Guheen, Atty. Gen., Owen M. Van Duyn, Pros. Atty., James H. Hawley, W. E. Borah, and W. A. Stone, for the State.

PER CURIAM. The facts in this case are substantially the same as in *Re Moyer* (just decided by this court) 85 Pac. 897; and upon the authority of that case, and for the reasons therein stated, the writ is quashed, and the prisoner remanded to the custody of the officer.

**NOBLE, State Veterinary Surgeon, v. BRAGAW, State Auditor.**

(Supreme Court of Idaho. April 15, 1906.)

**1. CONSTITUTIONAL LAW—PRESUMPTION OF VALIDITY OF STATUTE—STATUTES—AMENDMENT—REPUBLICATION.**

Before a legislative act is held unconstitutional, it should appear beyond a reasonable doubt that it infringes some provision of the Constitution. Section 18 of article 3 of the state Constitution prohibits the Legislature from revising or amending any act by mere reference to its title, and commands that the section, as amended, shall be set forth and published at full length.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 46.]

**2. STATUTES—EXTENT OF REPUBLICATION.**

Said section of the Constitution does not require the whole act containing the section amended to be republished in full; it only requires republication of the section amended.

**3. ANIMALS—PREVENTION OF DISEASE—STATUTORY REGULATIONS.**

An act approved March 6, 1905 (Sess. Laws 1905, p. 39), is an act for the suppression of contagious and infectious diseases among live stock, and repeals certain provisions of an act entitled: "An act to suppress contagious and infectious diseases of sheep, etc.," approved March 7, 1901 (Sess. Laws 1901, p. 142), and continues in force certain provisions of said act relative to the authority and duties of the state sheep inspector and his deputies, and imposes those duties on the state veterinary surgeon and those under him.

**4. STATUTES—REPEAL—REPUBLICATION.**

Under the provisions of said section 18, article 3 of the Constitution, a repeal may be made of a certain section or of an entire act without republishing the whole of the same, as said section of the Constitution has no application to repeals, but only to revisions and amendments.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 222.]

**5. ANIMALS—CONTAGIOUS DISEASES—STATUTES—CONSTRUCTION.**

Section 39, p. 53, of the act of 1905 provides, among other things, that its provisions should not be so construed as repealing any provision of the act of 1901 (Sess. Laws 1901, p. 142), not inconsistent with or in conflict with the provisions of the act of 1905, and then declares that the remaining provisions of the act of 1901 and the act of 1905 should be construed together for the purpose of carrying out the objects sought by each, to wit, the eradication of contagious and infectious diseases among the live stock in the state. That is only an announcement of the legislative intent, and correctly states the rule applicable to the construction of two acts or two laws bearing on the same subject.

**6. ANIMALS—PREVENTION OF DISEASE—STATUTORY REGULATIONS—STATE VETERINARY.**

The act of 1905 (Sess. Laws 1905, p. 59) abolishes the office of state sheep inspector and his deputies, and in their places creates the office of state veterinary surgeon, assistants, and live stock inspectors, and to that extent repeals the act of 1901 (Sess. Laws 1901, p. 142). Said act of 1905 prescribes many of the duties of said last-mentioned officers, and in addition requires them to perform all of the duties required by the act of 1901 to be performed by the state sheep inspector and deputies not repealed by said act of 1905.

**7. OFFICERS—OFFICES—CREATION AND ABOLITION—STATUTES—REPEAL AND AMENDMENT.**

The abolishment of an appointive office by

an act of the Legislature and imposing the duties of such office on another officer without enumerating in detail such duties, in no manner violates the provisions of section 18, art. 3, of the Constitution.

**8. STATUTES—REPEAL—REPUBLICATION.**

Neither express nor implied repeals come within the constitutional inhibition contained in said section 18, art. 3, of the Constitution.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 222.]

**9. SAME—LAWS RELATING TO SAME SUBJECT—CONSTRUCTION.**

Two or more laws relating to the same subject, or different parts of the same subject, are not necessarily amendatory to each other within the meaning of the provisions of said section 18 of article 3 of the Constitution, although they may be construed in *pari materia*.

(Syllabus by the Court.)

Original application by G. E. Noble for a writ of mandate to compel Robert S. Bragaw, as State Auditor, to issue a state warrant in payment of the state veterinary surgeon's salary. Writ granted.

Richards & Haga, for plaintiff. John J. Gubeen, Atty. Gen., and Edwin Snow, for defendant. Wood & Wilson, amici curiæ.

**SULLIVAN, J.** This is an application for a writ of mandate to the Auditor of the state to compel him to issue certain state warrants to the plaintiff on account of his salary as state veterinary surgeon, and for certain expenses connected with said office. The defendant answered the petition for the writ, and put in issue the constitutionality of the act creating the office of veterinary surgeon, which was approved March 6, 1905, and is entitled, "An act to suppress contagious and infectious diseases among live stock; creating a live stock sanitary board, and providing for its appointment; to create the office of state veterinary surgeon, providing for his appointment and fixing his compensation, providing for the appointment of assistant veterinary surgeons and live stock inspectors, and fixing their compensation; prescribing penalties for the failure to comply with the provisions of this act; creating a live stock sanitary fund and providing for the levying of a tax therefor." Sess. Laws 1905, p. 39. Said act was evidently passed pursuant to the provisions of section 1 of article 16 of our state Constitution. This act belongs to that class of legislation known as "Police Regulations," and is under the head of "Police Powers," which powers embrace the powers of the government to preserve and promote the public welfare, the safety, the health, good order, and happiness of the people, and authorize the establishment of such rules and regulations for the conduct of all persons, and for the use and management of all property as may be conducive to the public interest and welfare of the people. Said act contains 40 sections and appears to be a very carefully drawn act covering the entire subject contained in the title, its main purpose being to eradicate infectious and contagious

diseases from the live stock of the state. The principal contention arises over the provisions of section 39 of said act, which is as follows: "This act is intended to repeal those provisions of that certain act of the Legislature entitled 'An act to suppress contagious and infectious diseases of sheep, to create the office of sheep inspector and deputy sheep inspectors; to provide for the appointment of the same and to fix their compensation; making the doing of certain acts a crime and providing for the punishment of the same; and for other purposes, and repealing an act entitled, 'An act to suppress contagious and infectious diseases of sheep; to create the office of state sheep inspector and of deputy sheep inspectors, to provide for the appointment of the same and to fix their compensation; making the doing of certain acts a crime and providing for the appointment of the same and for other purposes,' approved February 25, 1899," which creates the office of sheep inspector and deputy sheep inspectors for the state of Idaho, but shall not be construed as repealing any other provision of said act not inconsistent or in conflict with the provisions of this act, but these acts shall be construed together for the purpose of carrying out the objects sought by each of said acts, to wit; the suppression and eradication of contagious and infectious diseases among live stock in this state, and the state veterinary surgeon shall possess all the authority granted to the state sheep inspector under said act and the assistant veterinary surgeons and inspectors to be appointed under this act shall possess all the powers of a deputy sheep inspector under the said act hereinbefore, in this section, referred to." The act referred to by title in said section 39 above quoted, is found on page 142, Sess. Laws 1901, approved March 7, 1901, and is entitled "An act to suppress contagious and infectious diseases of sheep, to create the office of sheep inspector, and deputy state sheep inspectors, to provide for the appointment of the same and fix their compensation; making the doing of certain acts a crime and providing for the punishment of the same and for other purposes, and repealing an act entitled 'An act to suppress contagious and infectious diseases of sheep; to create the office of state sheep inspector and of deputy sheep inspectors, to provide for the appointment of the same and fix their compensation; making the doing of certain acts a crime and providing for the punishment of the same and for other purposes,' approved February 25, 1899." That act applied to sheep only, while the act in question includes all live stock. It is contended by counsel for the defendant that said section 39 is amendatory of said act approved March 7th, 1901, and for that reason it violates the provisions of section 18 of article 3 of our state Constitution, which section is as follows: "No act shall be revised or amended by mere reference to its title, but

the section as amended shall be set forth and published at full length."

The rule is well established in this country that a legislative act is presumed to be constitutional until it is shown beyond all reasonable doubt that it is not so, and that presumption has been followed since the days of the great Chief Justice Marshall, when he declared that the question whether a law be void from its repugnancy to the Constitution, is at all times a question of much delicacy which ought seldom, if ever, to be decided in the affirmative in a doubtful case. And he stated in *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 3 L. Ed. 162, that "the opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other" before a court would hold a law unconstitutional. In *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 6 L. Ed. 606, the Supreme Court of the United States said: "It is but a decent respect due the wisdom, the integrity and the patriotism of the legislative body by which any law was passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt." In *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 265, the Supreme Court of the United States said: "Every possible presumption is to be indulged in favor of the validity of a statute." Then guided by that well-established rule, the question for decision is: Does said act conflict with said section 18 of article 3 of the state Constitution? That section provides that no act shall be revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length. The limitation therein contained is not upon the powers of the Legislature to legislate, but is upon the manner in which amendments shall be made. That section applies to revision or amendment. Where the revision or amendment of a certain section of an act is made, it cannot be done by mere reference to its title; but the section, as amended, must be set forth and published at full length. That section of the Constitution does not require the whole act containing the section amended to be republished in full; it only requires the republication of the section which it purports to amend. The evils intended to be prevented by the provisions of said section have so frequently been referred to by courts and text-writers that it is not necessary to quote from them here.

Prior to the adoption of such a constitutional provision as that contained in said section 18, the practice was very common to amend an act or section thereof by merely stating that certain words should be inserted at a certain place or places therein or certain words be stricken therefrom, and after several such amendments had been made, it naturally created great confusion in the law or the section so amended, and the

provisions of said section of the Constitution were for the purpose of preventing that evil and putting an end to that method of amendment. With those observations we will proceed to examine the act under consideration. Said act does not purport to amend any of the provisions of the law of 1901, or any other law except in minor or pro forma matters, which we will consider hereafter when we consider section 39 of said act. The latter act is complete in itself and contains 40 sections. The first 38 sections constitute a complete set. It creates the office of state veterinary surgeon, prescribed the qualifications of that officer, fixes his salary, defines his duties and his powers, and in great detail furnishes all the machinery required to carry those powers into effect, and the general appropriation act of 1905 makes an appropriation with which to pay the veterinary surgeon's salary. We find nothing in any of the sections of said act down to section 39 that in any manner conflicts with any provision of the Constitution of the United States or the Constitution of the state of Idaho. The question then arises, is there anything in the provisions of said section 39 that so contravenes the provisions of the Constitution as to nullify the entire act as expressed in the first 38 sections thereof. The legislative intent is clearly expressed in said section 39; that it was their purpose to repeal such parts of the act of 1901 as created the office of sheep inspector and deputy sheep inspectors of the state; that part of said section is not in conflict with the provisions of said section 18 of the Constitution, for it expressly repeals such parts of the act of 1901 as create the office of sheep inspector and deputy sheep inspectors. A repeal may be made of a certain section or of an entire act without republishing the whole of the same. Said section of the Constitution has no application to repeals, but only to revisions and amendments. Had the Legislature stopped there, there could be no question as to the constitutionality of the act and it would have left the state with a veterinary surgeon, with the offices of sheep inspector and deputy sheep inspectors abolished, but said section proceeds further to declare that the act in question should not be construed as repealing any other provision of the act of 1901 not inconsistent or in conflict with the provisions of the act of 1905, and then declares that these acts should be construed together for the purpose of carrying out the objects sought by each of said acts, to wit, the suppression and eradication of contagious and infectious diseases among live stock in the state. This is only an announcement of the legislative intent, and is the announcement of a correct rule of law when applied to the construction of the two acts or two laws bearing on the same subject. It is but the announcement of a rule of construction which this court always applies to statutes bearing upon the same

subject. Statutes that pertain to the same subject-matter should be construed together, unless they are in conflict, and in case they are, the latter or subsequent statute is deemed to repeal the former, and had section 39 ended at the point just suggested, we do not think the validity of the entire act would be questioned. In that case the office of state veterinary surgeon would have been established and the offices of state sheep inspector and deputy sheep inspectors would have been abolished by an express repeal of the provisions of the law creating them. But the Legislature in said section 39 proceeded further and declared that it was their intention that the veterinary surgeon should possess or be empowered with all of the authority granted to the state sheep inspector under the act of 1901, and therein lies the most difficult question in the case. By the latter provisions of that section the state veterinary surgeon is given the authority formerly possessed by the state sheep inspector. The powers and duties of the sheep inspector are prescribed in the act of 1901, and all of such powers and duties are not set forth and enumerated in the act under consideration. The question arises, then, should the Legislature have proceeded to set forth and enumerate the powers of state sheep inspectors that were conferred upon the state veterinary surgeon? It was not necessary for the Legislature to do that, for, as I view it, the office of sheep inspector has been abolished by the act under consideration and all of the duties imposed upon him by the act of 1901, in connection with others, are imposed upon the veterinary surgeon by the act in question. The abolishment of one appointive office and imposing the duties thereof on another without enumerating such duties in detail in the act abolishing the office, does not impinge in any manner upon said provisions of the Constitution.

In *Gilbert v. Moody*, 3 Idaho (Hasb.) 3, 25 Pac. 1092, which involved the constitutionality of an act substituting the word "state" for the word "territory" wherever it appeared in the Revised Statutes, and the word "auditor" for the word "comptroller," and imposing the duties of the comptroller on the auditor, was held not in conflict with said provisions of the Constitution. The leading case on the construction of the provisions of a Constitution similar to those under consideration here is that of *People v. Mahaney*, 13 Mich. 496. That decision was written by Judge Cooley, one of the most eminent authorities on constitutional law that this country has ever produced, and which decision is quoted with approval wherever the particular question here presented has been raised. Justice Cooley there said: "It is next objected that the law is invalid because in conflict with section 25 of article 4 of the Constitution, which provides that 'no law shall be revised, altered, or amended by reference to its title only;

but the act revised and the section or sections of the act altered or amended, shall be re-enacted and republished at length.' The act before us does not assume, in terms, to revise, alter or amend any prior act, or section of any act, but by various transfers of duties it has an amendatory effect by implication, and by its last section it repeals all inconsistent acts. We are unable to see how this conflicts with the provision referred to. If, whenever a new statute is passed, it is necessary that all prior statutes modified by it by implication should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the state would require to be republished at every session, and parts of it several times over, until, from mere immensity of matter, it would be impossible to tell what the law was. If, because an act establishing a police government modifies the powers and duties of sheriffs, constables, water and sewer commissioners, marshals, mayors, and justices, and imposes new duties upon the executive and the citizen, it has thereby become necessary to re-enact and republish the various laws relating to them all as now modified, we shall find before the act is completed, that it not only embraces a large portion of the general laws of the state, but also that it has become obnoxious to the other provisions referred to, because embracing a large number of objects, only one of which can be covered by its title. This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purports only to insert certain words, or to substitute one phrase for another in an act or section, which was only referred to, but not published, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the Constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision and cannot be held to be prohibited by it without violating its plain intent."

It is there said that the constitutional provision under consideration must receive a reasonable construction with a view to give it effect, and the mischief desired to be remedied was the enactments of amendatory statutes in terms so blind that legislators themselves are sometimes deceived in regard to their effect. There can be no doubt in regard to the effect of the act under consideration, and it simply imposes on the

state veterinary surgeon all of the duties that were imposed by the act of 1901 on the state sheep inspector and his deputies. The first three sections of that act do not refer to the duties of the sheep inspector, and are repealed by the act of 1905. Beginning with section 4 of the act of 1901, to and including section 28 of said act, we find the authority and duties of the sheep inspector and his deputies prescribed therein. Said duties are imposed by the act in question on the state veterinary surgeon and his assistants. It leaves those duties clear and concise. They are not blind to any one, nor would they deceive any one in regard to their effect. In *Evernham v. Hult*, 45 N. J. Law, 53, which is a case involving a provision of the New Jersey Constitution somewhat broader than that of our own, the court said: "A construction of this constitutional provision which would sustain the contention of the plaintiff on certiorari would lead to the most embarrassing results. It would be equivalent to holding that the Legislature can pass no act changing any part of the statute law in force in this state without re-enacting at length every section in the whole body of existing statutes that might be affected by the new legislation. Since the constitutional amendments went into effect, a considerable number of acts have been passed designed to simplify and make most efficacious the mode of making and collecting assessments for local improvement in the municipality of this state. These were subjects specially provided for in sections contained in their several acts of incorporation. General acts have always been passed providing for the assessment, collection and lien of taxes—subject specially provided for in sections incorporating cities, towns and townships, as well as in several parts of the general tax law of this state. In many instances provisions of this kind are contained in long sections, in which it is usual to express and define the general powers of corporations. Sometimes they are distributed in appropriate places in different sections of the acts. If this constitutional provision has made it necessary to the validity of a new statute on the subject that every prior statute on the same subject which may be altered or modified should be inserted in it at length, it would be quite impossible to legislate at all on the subject mentioned, or on kindred subjects; for a statute which would comply with such a requirement would probably be obnoxious to that other provision of the Constitution that every law should embrace but one object, and that object should be embraced in its title." See, also, *Denver C. R. R. Co. v. Nester* (Colo.) 15 Pac. 714; *State v. Scott* (Wash.) 73 Pac. 365. The act of 1905 does not amend, unless it be by implication, any of the sections of the law of 1901. It does, however, repeal certain sections of the latter act in full and others to the extent that it conflicts with them, but we think the

rule is that neither express nor implied repeals come within the constitutional inhibition found in said section 18, article 8. Under a constitutional provision similar to our own, the Supreme Court of Illinois, in *School Directors v. School Directors*, 135 Ill. 464, 28 N. E. 49, said: "Two or more laws relating to the same subject or different parts of the same subject-matter, are not necessarily amendatory to each other, within the meaning of this clause of the Constitution, although they may be construed together as in *para materia*. All laws on the subject of schools, in city charters or elsewhere, are necessarily parts of the school laws." Said act of 1905 is valid and constitutional, and the peremptory writ of mandate must be issued as prayed for, and it is so ordered.

STOCKSLAGER, C. J., concurs. AILSHIE, J., concurs to the extent only that the law of 1905 is valid and constitutional.

(12 Idaho, 238)

HILL et al. v. STANDARD MIN. CO. et al. (Supreme Court of Idaho. April 25, 1906.)

1. WATERS AND WATER COURSES—POLLUTION—ACTION FOR DAMAGES—COMPLAINT.

When a complaint states fully and concisely the nature of the damage, amount, and that it was caused by the unlawful, wrongful, and negligent acts of the defendants, *held*, that it states a cause of action.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 50; vol. 34, Cent. Dig. Mines and Minerals, § 246.]

2. COSTS—ON APPEAL—JUDGMENT ON DEMURRER.

When an appeal is prosecuted from a judgment on an order sustaining a demurrer to the complaint, no costs can be awarded to appellant, excepting the necessary costs in presenting such appeal.

(Syllabus by the Court.)

Appeal from District Court, Shoshone County; Ralph T. Morgan, Judge.

Action by Josiah Hill and J. S. Hill against the Standard Mining Company and others. Judgment for defendants, and plaintiffs appeal. Reversed.

A. G. Kerns, for appellants. Charles W. Beale, for respondents.

STOCKSLAGER, C. J. This is an appeal from a judgment rendered and entered on an order sustaining a demurrer to the complaint. It was the third effort of learned counsel for appellant to allege a cause of action against the defendants for damages to their lands located on the South Fork of the Coeur d'Alene river in Shoshone county. The complaint alleges: "(1) That at all the times hereinafter mentioned the defendant, Standard Mining Company, was and now is a corporation duly organized and existing under the laws of the state of Idaho. (2) That at all the times hereinafter mentioned the defendants were copartners doing business under the firm name of the Mammoth Min-

ing Company. (3) That during the three years prior to the commencement of this action the defendants as such mining partners cast about 550,000 tons of waste material, consisting of rock, earth, sand, stone, slime, and poisonous substances of lead and arsenic into Canyon creek, a tributary of the South Fork of the Coeur d'Alene river, ten miles above the lands of the plaintiffs hereinafter described, thereby filling the banks and polluting and defiling said stream; and by the natural flow of the waters of said Canyon creek said waste material so negligently cast into said stream by the defendants has been washed, carried, and deposited into the South Fork of the Coeur d'Alene river aforesaid, thereby polluting and defiling said stream and filling the banks thereof; and by the natural flow of the waters of said river said waste material has been washed and carried down said stream, and thereby causing the waters of said South Fork of the Coeur d'Alene river at high water during the aforesaid period of three years prior to the commencement of this action to overflow the natural banks of said stream where the same passes over, along, through, and across the lands of plaintiffs hereinafter described, and wash, carry, spread, and deposit over and across the said lands of the plaintiffs portions of said waste material so cast into Canyon creek by the defendants as aforesaid, thereby poisoning the said lands of the plaintiffs, so covered with waste, for agricultural, grazing, farming, townsite, and residence purposes, and poisoning and rendering the well water on said premises unfit for any use, and killing and blasting fruit trees, vines, groves, and other vegetation thereon, and rendering the use and occupation of said premises as a home dangerous to the health of the plaintiffs. (4) That the plaintiffs are now and at all the times since the month of March, 1886, have been in the possession and entitled to the possession of, and the owners of, the following described parcels of land situated along, contiguous, and adjacent to said South Fork of the Coeur d'Alene river, to wit:— Here follows full description of plaintiffs' land.

The defendants Standard Mining Company, James Leonard, and A. L. Scofield demurred to this complaint, to wit: "(1) That said amended complaint does not state facts sufficient to constitute a cause of action. (2) That said amended complaint is uncertain in this: (a) That it does not state any facts constituting carelessness or negligence or unskillfulness on the part of the said defendants, or any or either of them, or on the part of any authorized agent or representative of said defendants or any or either of them. (b) That it does not state any act or admission on the part of said defendants, or any or either of them, or on the part of any authorized agent or representative of said defendants, or any or either of them, constituting negligence or carelessness. (c)

That it does not appear therefrom of what value the lands mentioned therein were for agricultural, grazing, farming, townsite, or residence purposes, or of what value said lands were for any purpose whatever. (d) Nor does it appear therefrom when or during what years any of the waste material mentioned therein was washed, carried, spread, or deposited over, upon, or across the lands of the plaintiffs mentioned therein, or how much damage, if any, was caused thereby to the lands, or how much to the vegetation growing thereon. (e) Nor does it appear therefrom the date when said lands or any thereof were poisoned or destroyed for agricultural, grazing, farming, townsite, or residence purposes, or the date when the fruit trees, vines, groves, or other vegetation growing thereon, were killed and blasted, or the date when said premises were rendered unfit or dangerous as a home, or unfit or dangerous at all. (f) Nor does it appear therefrom the date when any of said lands were injured, poisoned, or destroyed, or the date when any crops or vegetation whatever growing thereon were injured or destroyed, or killed, or blasted, prior or subsequent to the date of the injury or destruction of said lands or any part thereof. (g) Nor does it appear therefrom how said lands could be poisoned or destroyed and at the same time be of any value for agricultural, grazing, or other purposes whatever, or how any crops, vegetables, fruit trees, vines, or groves could be killed, poisoned, blasted, or destroyed upon said lands subsequent to the date of the destruction thereof. (h) Nor does it appear therefrom what damage, if any, the lands of the plaintiffs suffered by the casting of waste material into Canyon creek; how much by the overflow of the South Fork of the Coeur d'Alene river; how much by the pollution of the waters of the South Fork of the Coeur d'Alene river; or how much by the high water of the said South Fork of the Coeur d'Alene river. Wherefore said defendants pray the judgment of this honorable court that they be dismissed hence, with their costs in this behalf sustained."

The complaint above referred to was filed June 30, 1905. The demurrer and affidavit of service thereof were filed July 6, 1905, and judgment for costs entered December 16, 1905; the above demurrer having been theretofore sustained. By the record it is shown that the first complaint in the action was filed September 30, 1903, in which practically the same allegations are contained as are shown by the third amended complaint which is before us for determination as to its sufficiency for a recovery of damages. After innumerable motions to quash the summons and service thereof, together with affidavits in support of the various motions, also motions to quash and set aside the alias summons and the service thereof with affidavits in support thereof extending from page 15 to 85 of the record, the defendants demurred

to the complaint; this demurrer was filed June 21, 1904, and sustained December 30, 1904. On the 31st day of December, 1904, plaintiffs filed what is termed their second amended complaint, in which all the allegations of the complaint and the amended complaint are alleged together with some additional allegations. A motion to strike this complaint from the files was overruled on the 29th day of May, 1905. On the 12th day of June, 1905, a demurrer was filed which was sustained on the 22d day of June, 1905, and plaintiffs given until June 30, 1905, in which to file an amended complaint. On that date plaintiffs filed their third amended complaint, the sufficiency of which is now under consideration. The reasons for the history of this case, together with the various motions, demurrers, rules, and orders, will hereafter be discussed in this opinion.

After a statement in justification of all the rulings of the court with reference to its action in quashing summons, alias summons, and other orders made in the earlier history of this case, learned counsel for respondents say: "We next come to the only question involved in this appeal, and that is as to the right of the appellants to maintain their alleged cause of action against respondents. \* \* \*" An inspection of the record, pleadings, and proceedings in this case leads us to the conclusion that this statement is correct. In other words, if the appellants are entitled to recover damages in any amount, the complaint is sufficient to put defendants on their proofs, and the demurrers should have been overruled and defendants required to answer.

It is earnestly urged by counsel for respondents that if this court should hold that there is error in sustaining the demurrers to the complaints, or either of them, it would result in "the depopulation of Shoshone county, the abandonment of all mining and milling therein, and the consequent bankruptcy of the inhabitants thereof." Deplorable as this might be, if true, it furnishes no excuse for the court to shirk its responsibilities in disposing of the question before us on the merits. The law is no respecter of persons, corporations, or individuals, and in its creation and enforcement reaches out and protects the lone settler in his rights, let them be ever so meager, as well as the capitalists, the corporation, or individual with it or his millions. If the law protects the appellants in their settlement on the public domain of the lands described in plaintiff's complaint for agricultural or other purposes, then their rights are as sacred and require the same application of the law and the same protection as is guaranteed to every citizen of this great nation and commonwealth. The law does not measure the rights of litigants by the amount involved, nor the manner in which it may affect others not parties to the litigation. It only deals with the questions as presented by the pleadings, and in

this case, if the plaintiffs can recover under any conditions or circumstances, then that right to recover cannot be measured by the damage defendants or others residing in Shoshone county may sustain by reason thereof. It is not a matter of sentiment, but what is the standing of the plaintiffs as shown by the pleadings, and have the defendants trespassed upon any rights guaranteed to them by the Constitution and laws of our state. With this view we will examine the law applicable to the cause. Mr Gould in his excellent work on Waters, § 122, says: "The general rule is that individuals are not entitled to redress against a public nuisance. The private injury is merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private persons. If, however, a public nuisance, such as an unlawful obstruction to a common passage, causes peculiar damage to an individual, he may maintain an action therefor. In such case, the declaration of complaint need not negative the lawfulness of the obstruction, or its continuance for a reasonable length of time, or that it was unavoidable because of inevitable accident, these being matters of defense to be set up by answer. But the particular damage is the gist of the action, and must be specially set forth in the declaration or complaint." This seems to us to be a very clear and concise statement of the law and is founded in justice and reason. Applying the rule laid down by this learned author to the case at bar, we find the appellants in the undisputed possession of the property described in their complaint; that said property is rendered valueless for agricultural, grazing, farming, townsite, and residence purposes, poisoning and rendering the well water unfit for use, killing and blasting fruit trees, vines, grass, and other vegetation thereon; and that plaintiffs were in such possession of said premises in March, 1886, and are at the present time in quiet and peaceable possession.

Counsel for respondents cites section 3, art. 15, of our Constitution, which reads: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose. And those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And, in any organized mining district, those using the water for mining purposes, or milling purposes connected with mining, shall have pref-

erence over those using the same for manufacturing or agricultural purposes." We cannot see the application of this provision of our Constitution to the case at bar. Appellants do not complain of the use of the waters of Canyon creek by respondents for mining and milling purposes. The complaint is that respondents cast enormous quantities of debris and poisonous substances into Canyon creek which follows the channel of that stream down to its confluence with the South Fork of the Coeur d'Alene river, and thence carried down that stream and deposited on the lands of plaintiff, thus causing the injury for which they ask to be compensated in damages. There is nothing in this provision of the Constitution, nor in any of its provisions, that authorizes or permits parties engaged in mining or any other occupation to fill up the natural channel of any of the public streams of the state to the injury of any other user of the waters of the stream. Our Constitution wisely provides that all the public waters of the state and their use shall be under the control of the state. Article 15, § 1.

Counsel for respondents with commendable energy and force, both in his brief and oral argument, insists that his clients were exercising a lawful right granted them by the Constitution and laws of the state in the use of Canyon creek as a dumping ground for the debris of their mines, and, in support of this theory, quotes all of section 1971, vol 3, of Mr. Elliott's excellent work on Evidence. If the contention of respondents is to be accepted as the law of this state—that is, that they have the right to use the public streams as a dumping ground for the debris of their mines—then this learned author sustains their contention. It will be observed that the text is based wholly on the theory that "such injury resulted to the complainant from the proper and careful exercise of a lawful right on the part of defendant." The author further says: "This rule has been variously stated as follows: 'An act done under a lawful authority, if done in a proper manner, will not, as a general rule, subject the party doing it to an action for the consequences which may follow from it.' \* \* \*" If it was the intention of the framers of our Constitution, when they provided that "in organized mining districts those using water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes," intended that the mine or mill owner should have exclusive use not only of the water but the stream for dumping the debris of their mines and mills, irrespective of the damage it might cause to others with vested rights in the waters of such stream, then the plaintiffs could not frame a complaint that would not be subject to demurrer.

The question of the preference right of the mine or mill owner over the manufacturer or

agriculturist to the use of water has never been before this court to our knowledge, and, in this case, plaintiffs do not question the right of the defendants to the use of the waters of Canyon creek for mining and milling purposes. The complaint is that they cast large quantities of debris and poisonous substances from their mines and mills into Canyon creek, which, by natural consequences, flows down that stream and finally over and upon their lands, which by reason thereof are rendered valueless. Hence it is not a question as to who shall have the preference right to the use of the water between the parties to this action, but how shall the respondents use it, or have they the right to dump the waste from their mines and mills into the stream, regardless of the results to lower occupants of the lands for agricultural or other purposes. This court has repeatedly held that an appropriator could not change his place of diversion of the waters of any stream, if such change in any manner affected a lower appropriator of the waters of such stream, even though the lower appropriator be subsequent in right. The reasons of such conclusion, it seems to us, are well founded. Where the lower appropriator makes his appropriation he has the right to assume the upper appropriator will continue the use of the water as he found it, and if any change would damage him in the use of his appropriation, the courts will protect him in his rights.

When respondents located their mines and erected their mills on or near Canyon creek, and began to cast the waste from either into such stream, they assumed all risk of damages to anyone below on that stream or any stream to which it is tributary who were in possession of property that might be damaged by such use of such stream at the time they began the use thereof for such purpose. It is urged that it is not shown by the complaint that appellants ever made an appropriation of the waters of Canyon creek or the South Fork of the Coeur d'Alene river of which it is tributary. Appellants are not complaining that they have been deprived of their use of water by respondents, they complain of the wrongful use of Canyon creek by respondents, not of the water, but of the stream for dumping purposes. So far as the record shows, appellants' land may produce crops by subirrigation, hence, never necessary to make an appropriation of any of the waters of the streams. In support of his contention that respondents have the right to use Canyon creek for dumping their waste from their mills and mines, counsel cites *Gibson et al. v. Puchta*, 33 Cal. 310. In this case all the land in controversy was mineral land. One party cleared off a portion of his claim and planted it to potatoes. In the irrigation of his crop the water percolated through and into the mining tunnel of plaintiffs, and they sought to restrain him from such use of his land. The court say: "The

defendant had the undoubted right to cultivate and plant this tract of land; and, having planted it, there can be as little question that he had the same right to irrigate it for the purpose of maturing his crop. In irrigating his land the defendant is subject to the maxim 'sic utere tuo ut alienum non ledas.' An action cannot be maintained against him for the reasonable exercise of his right, although an annoyance or injury may thereby be occasioned to the plaintiffs. He is responsible to the plaintiffs only for the injuries caused by his negligence or unskillfulness, or those willfully inflicted in the exercise of his right of irrigating his land." The facts in this case differ very materially from the case at bar. Defendant had a lawful right to plant and cultivate his crops, so says the court, and he could only be held for a willful, negligent, or unskillful manner of handling the water used for such purpose. If, in the case at bar, it were shown by the complaint that respondents were using the waters of Canyon creek for mining and milling purposes, that after such use the water percolated back into the creek carrying sediments or debris of any kind with it, and plaintiffs' lands were injured by such use of the water, it is possible that a demurrer should be sustained, unless it is shown that such use was willful and negligent.

Counsel calls our especial attention to *Barnard v. Shirley* (Ind. Sup.) 34 N. E. 605, 24 L. R. A. 568, 41 Am. St. Rep. 454. He says this case "supports in every detail the position taken by counsel for the respondent." We reproduce his entire quotation: "The foregoing case of *Coal Co. v. Sanderson* ([Pa.] 6 Atl. 453, 57 Am. Rep. 445) and the reasoning of the court seem to be clearly in point with the case at bar. In both cases the owners cause water to rise from the earth, to become foul, and then to be carried by an artificial drain, and discharged into a running stream, the natural water course of the basin or valley in which the water rises, and into which stream the water would naturally flow if left to itself. In both cases the owners were engaged in a lawful and necessary work of great advantage to mankind at large, and particularly to the community in which they operated; the one in mining out of the earth and distributing coal for heating and industrial uses, and the other also taking out of the earth mineral water for healing and curing the infirm. Both were free from fault or negligence in conducting their business, and in avoiding so far as possible all injury to others; the injury in each case being but the necessary incident of a lawful business. In each case there was no other place but the stream for the water to go, so that, if it were unlawful to discharge the water into the stream, then the enterprise itself would be at a standstill and a lawful business thus come to an end because it could not be lawfully carried on."

We have no such facts before us as were disclosed and described in the above quotation. If the facts do exist in this case, in order that it may be brought within the rule laid down above, it can only be done by answer. A statement of the existence of such facts in a demurrer or orally by counsel for respondents will not answer the allegations of the complaint, hence these authorities have no application in the present status of this case. Again, counsel quotes from a decision of Judge Beatty in *McCarty v. Bunker Hill & Sullivan Min., etc., Co.* (Mem.) Counsel says: "This is what Judge Beatty had to say upon a decision rendered by him last June in a denial of an application for a restraining order to close the mines and mills of Shoshone county: 'Without detailing the reasons, such order would mean the closing of every mine and mill, of every shop, store, or place of business in the Coeur d'Alenes. There are about 12,000 people, the majority of whom are laboring people dependent upon the mines for their livelihood; not only would their present occupation cease, but all these people must remove to other places, for the mines constitute the sole means of occupation, and when they finally close, Wallace and Wardner, Gem and Burke and their surrounding mountains will again become the abode only of silence and wild fauna. Any court must hesitate to so act as to bring such results.'" We are not informed of the precise question that was before Judge Beatty, only as stated by counsel for respondent. It will be observed from this statement that it was an "application for a restraining order to close the mines and mills of Shoshone county." No such application is before us; no prayer or demand that the mines and mills of Shoshone county be closed, or that respondents be enjoined from running their mills and mines.

Counsel for respondent insists that the complaint is lacking in a charge of willful or negligent acts on the part of respondents. We find in paragraph 3 of the complaint before us, after stating that respondents had "cast about 550,000 tons of rock, earth, etc., into Canyon creek, a tributary of the South Fork of the Coeur d'Alene river, about ten miles above the lands of the plaintiffs herein-after described, thereby filling the banks and polluting and defiling said stream; and by the natural flow of the waters of said Canyon creek said waste material so negligently cast into said stream by the defendants has been washed," etc., down to and upon plaintiffs' land, causing damage in the sum of \$12,000. No intimation that they want to enjoin the operation of the mines and mills, but a demand that they be paid for damages they have sustained by the operation of such mills and mines, and there is an allegation that the debris from such mills and mines was negligently cast into a natural stream of the state; that they have been damaged thereby. And again in paragraph

7 of the complaint it is alleged that defendants "have wrongfully, and unlawfully, etc., cast and deposited rock, earth, stone, tailings, slime, and poisonous substances, etc., into said Canyon creek."

Counsel next cites *Haner v. N. P. Ry. Co.*, 62 Pac. 1028, 7 Idaho, 305. This was an action against the defendant for the value of a cow alleged to have been negligently killed by one of defendants' locomotives. The complaint alleges that "the cow was killed because of the negligent and careless running of a locomotive and train of cars." The first clause of the syllabus says: "Where the complaint alleges negligence only in the running, managing, and operating a locomotive and train of cars, the right of recovery is limited to the negligence alleged. \* \* \*". Applying this rule to the case at bar, all that can be claimed for it is that the plaintiffs would be confined in their proofs to the allegation of negligence as used in the complaint, and we have already said the allegation of negligence was sufficient as used in the complaint. If respondents are able to establish by proof all the facts they set up in their demurrer they may be able to convince a jury that the plaintiffs should not recover, but in our view of the case it will be necessary for them to answer the complaint and meet the issue in that way rather than by demurrer. We are not without authority in this conclusion. In *Drake, Ex'r of McKirk, Deceased, v. Lady Ensley Coal, Iron & R. Co.*, an Alabama case reported in 14 South. 749, 24 L. R. A. 64, 48 Am. St. Rep. 77, the question discussed and decided was very similar to the one before us. The court held that the pollution of the waters of a stream by washing iron ore, whereby the water is laden with refuse and debris rendering it unfit for stock and drinking purposes and causing the deposit of a sediment upon portions of the farm of a lower proprietor, is an actionable injury to such proprietor." This quotation is from the first clause of the syllabus and is fully borne out in the opinion. In the body of the opinion it is said: "It is not more agreeable to the laws of nature that water should descend than it is that lands should be farmed and mined. The plaintiff had no right to insist upon his receiving waters which nature never appointed to flow there." It is further said: "Under the provisions of the Constitution, private property cannot be taken for public use or for corporations without just compensation being first made to the owner, except by consent. The courts—and it was never intended to be otherwise understood—are not 'masons' to 'chisel' away vested rights of property of private individuals however humble and obscure the owner, for the benefit of the public or great corporations. It is the pride of this republic that no man can be deprived of his property without due process of law, and the poorest citizen can find redress for an unlawful injury caused by his wealthy neigh-

bor by appealing to the courts of his county." A large number of cases supporting this contention are cited in the footnote, entitled "How Far Stream may be Polluted for Mining Purposes." Mr. Lindley, in his valuable work on Mines, at section 843, says: "While the deposit of mine tailings in running streams to a reasonable extent is permitted, subject to the limitations outlined in the preceding sections. The doctrine never has been extended so as to authorize the miner to flood his neighbor's lands, and by depositing thereon mining débris and 'slickens' deprive such neighbor of any substantial right or deprecate the value of his property." Again: "No person, natural or artificial, has a right, directly or indirectly, to cover his neighbor's land with mining débris, sand, or gravel, or other material so as to render it valueless." The above is a quotation from *Hobbs v. Amador & Sacramento Canal Company*, 66 Cal. 161, 4 Pac. 1147; *Carson v. Hayes*, 39 Or. 97, 65 Pac. 814. Again, the author says: "While the miner is entitled to the free use of the channel for the purpose of carrying away his waste and tailings, he has no right to fill the channel with débris, causing the stream to overflow, and thus deposit the material on the lands of the lower proprietor. The miner is entitled to use his claim in a lawful manner, but no use can be considered lawful which precludes others from enjoying their rights"—citing authorities. The author's discussion of this question, together with the authorities collected and cited will be found quite interesting and useful. *Woodruff v. North Bloomfield Gravel Min. Co.* (C. C.) 18 Fed. 753, is a well-considered case written by Judge Sawyer, and concurred in by Deady, J., Circuit Court, District of California. The leading cases bearing on the subject before us are discussed. We will only quote the nineteenth clause of the syllabus, which is as follows: "In granting relief where the complainants' rights are certain, and the invasion of them is clearly established, a court of equity cannot consider the inconvenience which will result to defendants from the relief, nor is it the province of the court to speculate upon or to consider or to suggest any possible modes by which defendants may avoid the injurious consequences of their acts, or to decide upon the conflicting opinions of scientific experts concerning the possibility or sufficiency of such suggested modes." The only duty of the court is to grant the relief to which the complainant is entitled upon the law and facts of the case. The first article and section of our Constitution provide as follows: "All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property, pursuing happiness and securing safety." The right to the use of a stream for depositing débris from mines is discussed in section 840, vol. 2, Lindley on Mines. Many cases

from the various states of the Union are cited and discussed by the author. He closes his text as follows: "No positive rule of law can be laid down to define and regulate such use with entire precision. As to this all courts agree. It is a question of fact to be determined by the jury." This conclusion certainly seems reasonable and logical. If all counsel for respondent says in his demurrer, brief, and oral argument is true, he should plead it in answer and submit the questions of fact to a jury. So says Mr. Lindley, and the decisions of nearly all of the states of the Union to which our attention has been called. Mr. Cooley in his valuable work on Torts (2d Ed., p. 675), discusses the question of deposits upon land. We quote the following: "So it is a nuisance if a riparian proprietor shall cast into the stream earth, sand, the refuse of his business, or other things, which by the flowing water are carried and deposited upon the land of a proprietor below. The tort here consists in the act of committing the rubbish to the stream. The deposit upon the land below is only the consequence from which a cause of action in favor of a particular individual rises. \* \* \*" A large number of American decisions are cited by the learned author in support of this text. A great many authorities have been cited by counsel for appellants, as well as respondents, that have not been discussed or referred to in this opinion. They have all been examined, and those only upon which respective counsel rely for a decision favorable to their contention have been quoted from and discussed.

Counsel for respondent insists that plaintiffs' action is barred by the statute of limitations. This is not true as shown by the pleadings; a continuing injury or damage such as is alleged to have existed in this case is not barred. The plaintiffs could have commenced their action when the damage first developed, or they may wait until their property is entirely destroyed and rendered valueless for any purpose and then sue to recover the value of the property in damage. Counsel also insists that plaintiffs should not recover in this action by reason of their laches. *Carson v. Hayes* (Or.) 65 Pac. 814-817, we think fully answers this contention. We quote from that opinion as follows: "It is said that plaintiffs made no objection to the expenditures of large sums of money by the defendants in opening up and developing their mines in the construction of hydraulic works and reservoirs for the operation thereof. But the mere silence of the plaintiffs is not sufficient to estop them from now asserting their rights because of such expenditures by the defendant. They were not acting under any license or agreement with the plaintiffs, but upon their own responsibility; and the plaintiffs had a right to assume that they did not intend, by their operation of their mine, to interfere with any of their rights." The bar of the statute of limitations as well

as the laches of the plaintiffs can be raised by an answer, and in that way all the facts brought before the court for determination.

The judgment is reversed, with instructions to overrule the demurrer and to require the defendants to answer within — days. Respondents to pay all costs of this appeal except 110 pages of the transcript, which must be paid by appellants, being no part of the record necessary to present the appeal.

SULLIVAN, J., concurs.

ALLSHIE, J. (concurring.) The nature of the argument employed in the majority opinion, and the conclusion at which such a course of reasoning would inevitably arrive, lead me to express briefly the grounds of my concurrence. While the burden of the complaint really seems to be that the waters of the stream have become poisoned from their use in the milling and concentrating processes employed by defendants, still I think there is sufficient stated in the complaint to constitute a cause of action for wrongfully dumping and depositing rock, earth, sand, and waste material into the stream and filling up the natural channel of the stream, and thereby causing the same to wash over and upon the lands of the plaintiff. There seems to me to be a wide difference between the natural pollution or poisoning of waters which may necessarily and unavoidably result from the employment of the usual processes of reducing ores; and the dumping of rock, earth and debris into the channel of a stream and filling it up, and thereby causing it to overflow and flood the lands of others. It should be remembered in this case that the plaintiff claims no right whatever to the use of any of the waters of the stream. The riparian doctrine, which prevails in most of the states, having been abrogated in this state, the plaintiff is in no position to insist that the waters of this stream should flow down to and through his lands in their natural condition and state. He may insist, however, that they shall not be diverted from their natural channel in such a manner as to be poured in floods over his lands. There is no doubt in my mind but that the defendants were exercising a legal right guaranteed to them both by the Constitution and statute when they were applying and using the waters of Canyon creek in milling and concentrating the ores taken from their mines. It is equally clear that any poisonous matter which may dissolve in and mingle with the water as a necessary and unavoidable result of the usual method of working and reducing such ores, must be regarded, in law, as resulting from the exercise of a lawful right, for the effects of which no damages can be recovered. Lumber and grain may be transported to any point for manufacturing purposes; live stock may be taken to any place for slaughter, but mines must be worked where mineral can be found, and

it must follow, from the very nature of the things and the requirements of the conditions, that what would constitute either a nuisance or trespass in conducting and operating the one industry might be the exercise of a lawful right in operating the other. If A. should erect and operate a soap factory on a lot alongside of my residence, he would depreciate the utility, comfort, and value of my property, and I would have my right of action because he could establish his business at a place where he would not injure me; but if he should bore and tap oil or natural gas on the same premises he would thereby render my home valueless and uninhabitable, and still I should have no right of action against him for the reason that he can neither remove his oil or gas well nor find it elsewhere. In *Barnard v. Shirley*, 41 Am. St. Rep. 460, 135 Ind. 555, 34 N. E. 605, 24 L. R. A. 568, the Supreme Court of Indiana, in discussing this principle of law, said: "Mines and mineral springs, natural gas and oil wells, cannot be removed. They must be operated where they are, or totally abandoned. Where, therefore, a work is lawful in itself, and cannot be carried on elsewhere than where nature located it, or where public necessity requires it to be, then those liable to receive injury from it have a right only to demand that it shall be conducted with all due care, so as to give as little annoyance as may be reasonably expected, and any injury that may result notwithstanding such care in the management of the work must be borne without compensation. It is, then, a case in which the interests and convenience of the individual must give way to the general good." For authorities in line with this view, see *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445; *Gibson v. Puchta*, 33 Cal. 310; *West Cumberland Iron Co. v. Kenyon* (1879) 11 Ch. Div. 782, 48 L. J. Ch. 793; 3 Elliott on Ev. § 1971.

The framers of our Constitution, when adopting section 3 of article 15, were mindful of the fact that in some sections of this state agriculture would predominate, and that the use of the waters for such purpose must have a preference right, while in other sections, as in the Coeur d'Alene, mining would be the principal industry, and they accordingly ordained that a preference right to the use of the water should follow the prevailing industry. It must be conceded that the members of the constitutional convention understood the meaning of the word "milling" and the manner and method of using water for such purpose when they embodied that term in the organic law of the state. It would follow that in an agricultural section a miner would not be permitted to use the waters of an irrigation stream in milling and concentrating ores if the result would be to poison or pollute the water so as to injure growing crops on irrigated lands below.

As previously indicated, I do not con-

ceive it necessary to the successful operation of a milling and concentrating plant that thousands of tons of rock, earth, and debris should be dumped into the stream from which water is taken. But, if it should be shown that no other dumping ground could be had, then it would seem clear that diligence and care should be exercised in impounding such debris.

#### STATE v. SIMES.

(Supreme Court of Idaho. April 26, 1906.)

##### 1. WITNESS—MENTAL CAPACITY.

Under section 5957, Rev. St. 1887, which provides that persons "of unsound mind at the time of their production" cannot be witnesses, a person who can apprehend the obligation of an oath and is capable of giving a fairly correct account of the things he has seen or heard is competent as a witness, although he may be afflicted with some form of insanity.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 99.]

##### 2. SAME—TESTING COMPETENCY.

The examination of the person offered as a witness, for the purpose of testing his competency, should be made with special reference to the scope of inquiry and subject-matter about which the witness is to testify.

##### 3. SAME.

Incapacity to give intelligent and legal consent to the commission of an act does not necessarily imply incapacity to thereafter correctly and truthfully narrate the facts constituting the commission of the act.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 99.]

##### 4. SAME.

The fact that the state accuses a defendant of rape, in having had carnal knowledge of a female who was at the time of unsound mind and incapable of giving consent, does not per se establish the incompetency of such female to testify against the accused.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 99.]

##### 5. SAME—EXAMINATION OF WITNESS.

In such case the accused may object to the witness testifying on the grounds of incompetency, and the court will examine into and pass upon the grounds of the objection in the same manner and to the same extent as if made against the competency of any other witness.

##### 6. SAME.

Where objection is made as to the competency of a witness to testify, the court should examine the witness for the purpose of determining his competency, and may call and examine other witnesses touching such question.

##### 7. CRIMINAL LAW — QUESTIONS FOR JURY — CREDIBILITY OF WITNESS.

After the court has determined that a person is competent to testify as a witness, the credibility of the witness immediately becomes a question to be determined by the jury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1719.]

##### 8. WITNESSES—EXAMINATION—LEADING QUESTIONS.

The action of the trial court in permitting leading questions is largely discretionary, and is properly exercised in the allowance of such questions in the examination of a feeble or simpleminded person.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 795, 847.]

(Syllabus by the Court.)

Appeal from District Court, Latah County; Edgar C. Steele, Judge.

Milt Simes was convicted of crime, and appeals. Affirmed.

Wm. M. Morgan and Albert L. Morgan, for appellant. J. J. Guheen, Atty. Gen., William E. Stillinger, Co. Atty., Edwin Snow, and Phillip R. Huldman, for the State.

**AILSHIE, J.** The accused in this case was charged by information of the public prosecutor with the crime of rape, in that he did, at a time and place designated, "have sexual intercourse with a female not his wife, to wit, one Bessie Jones, being then and there a female not the wife of the said defendant and incapable through lunacy and unsoundness of mind of giving legal consent." Section 6765, Rev. St. 1887, as amended by act of February 7, 1899 (Sess. Laws 1899, p. 167), defines rape as follows: "Rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances. \* \* \* Second. Where she is incapable through lunacy, or any other unsoundness of mind, whether temporary or permanent, of giving legal consent." At the trial the state produced as its first witness the prosecutrix, Bessie Jones, and, after she was sworn, the attorney for the defendant called the attention of the court to the fact that the witness about to be examined by the state was the prosecutrix, and that the information charged her with lunacy and unsoundness of mind, and counsel thereupon requested the court "to propound such questions to her as will determine her ability to understand them." To which request the court replied: "The court refuses. You may do so." Counsel for defendant replied: "We don't wish to. We except."

This action of the court is the principal error assigned. The prosecuting attorney thereupon proceeded to examine the witness and defendant's counsel cross-examined her, from all of which evidence as the same occurs in the record, it is quite clear that the witness, though very simple and childlike, was competent to testify. Section 5957, Rev. St. 1887, provides that: "The following persons cannot be witnesses: (1) Those who are of unsound mind at the time of their production," etc. It is to be observed that the unsoundness of mind required to disqualify such witness must exist "at the time of their production" for the purpose of giving testimony. The statute does not undertake to prescribe or define the amount or degree of mental unsoundness that must exist in order to disqualify the witness, but the reason for the existence of such a statute should be invoked, and we interpret that reason to require that the witness should have some apprehension of the obligation of the oath, and that he shall be capable of giving a fairly correct account of the things he has seen or heard, and this test should be made with special

reference to the field of inquiry and character of the subject on which the witness is to give testimony. It would be clearly unfair to test the competency of the witness on the particular subject on which he is insane, when in fact he would not be called upon to testify on that subject, and, indeed, he might be perfectly rational and clear on other subjects. We think, as was said in *Clements v. McGinn* (Cal.) 83 Pac. 923, that "an insane person is competent to be a witness, if he understands the nature of an oath, and has sufficient mental power to give a correct account of what he has seen or heard." *Dist. of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618; 1 *Wigmore on Ev.* §§ 492-497; *Wright v. Express Co.* (C. O.) 80 Fed. 85; *Pittsburg & W. Ry. Co. v. Thompson*, 82 Fed. 720, 27 C. C. A. 333; *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. 164; 2 *Elliott on Evidence*, §§ 751-791; *City of Guthrie v. Shaffer*, 7 Okl. 459, 54 Pac. 698; *Walker v. State*, 97 Ala. 85, 12 South 83; *Underhill Cr. Ev.* §§ 202-203; 30 A. & E. *Ency. of Law* (2d Ed.) 934. For a learned and interesting case stating the modern English rule, see *Reg. v. Hill*, 5 Cox, Cr. Cas. 259; *s. c.* 2 Den. & P. C. 254.

This brings us to the question as to whether or not the fact that the state charges by the information that the female on whom the offense was committed was, at the time, incapable of giving legal consent, by reason of unsoundness of mind, of itself, disqualifies her as a witness or raises the presumption that she is incompetent to testify. Since no conviction can be had without the state establishing beyond a reasonable doubt that the female was of unsound mind at the time of the commission of the alleged offense, and every presumption must be resolved in favor of the accused until overcome by legal and competent evidence, it would seem to follow, as a logical conclusion, that the prosecutrix, when produced as a witness, should, in the eye of the law, stand on the same footing as any other witness, sharing the same credit for sanity and competency as is *prima facie* accredited to all persons. The defendant in such a case, if he is going to enter a plea of not guilty and stand a trial, must thereupon proceed upon the presumption which the law accredits him. He cannot go to trial on the plea that he is innocent, and, the moment the state produces a witness against him, interpose an objection based upon the theory that the state has already established by its pleading one of the material and essential facts against him. When a witness is produced it is a right and privilege accorded to the adverse party to object to the examination of such witness upon the ground of incompetency to testify. The question of competency is clearly one of law and must be determined by the court. *Section 7883, Rev. St. 1887*; *Wigmore on Ev.* § 497; 2 *Elliott on Ev.* § 753; *Underhill Cr. Ev.* § 203; *Cannady v. Lynch*, *supra*; *Holcomb v. Holcomb*,

28 Conn. 177. There is no fixed or established rule for determining such question. It seems, however, to be the usual practice, and, we think, the proper and orderly way to proceed, for the court to examine the witness for the purpose of ascertaining his condition of mind and ability to truthfully and correctly narrate the facts concerning which he is called to testify; and, in the determination of this fact, it may often be found proper and necessary to call other witnesses to testify. After the court has determined that the witness offered is competent to testify, the question of his credibility immediately becomes a matter for the consideration and determination of the jury. The mental condition of a witness, as manifested by him on the witness stand, almost invariably influences the jury as to the weight they will give his testimony. The manner in which a witness tells his story, the advantages he appears to have had for gaining accurate information on the subject, the accuracy and retentiveness of his memory, his capacity for consecutive narration of acts and events, his apparent frankness and intelligence, and numerous other considerations, all go to make up the sum total of credibility that the jury will give to the evidence of any particular witness. It should be borne in mind, too, that the mental capacity of the female to give her consent to the act for which the defendant is prosecuted is a question of fact for the jury to determine along with all the other questions of fact submitted to them by the evidence. Counsel for appellant argues, however, that, if the prosecutrix was so weak minded and mentally unsound as to render her incapable of giving an intelligent assent to the violation of her person, she must have been, for the same reason, incapable of giving competent testimony concerning the commission of that act. While there is apparent reason for such an assumption, and in many cases it would undoubtedly be true, we don't think the position tenable as a rule, nor that the latter conclusion necessarily follows the existence of the former fact. It would seem that a female, although of mature years, and fully developed physically, might be so far insane and mentally deranged as not to realize or appreciate the impropriety or effect of the illicit act, and still might be capable of giving a substantially correct and truthful statement of the occurrence and conditions under which it took place. Incapacity to give intelligent and legal consent to an act does not necessarily imply incapacity to thereafter correctly narrate the facts constituting the commission of the act. Counsel for appellant cite *Lee v. State* (Tex. Cr. App.) 64 S. W. 1047, as authority for their position, but an examination of that case at once discloses the fact that it is based on a statute materially different from ours. The Texas statute under consideration in that case provided that no one could testify who was in an "in-

sane condition of mind when the events happened of which they are to testify."

Where timely objection is made to a witness testifying on the grounds of incompetency, it is unquestionably the duty of the court to make such examination as will satisfy him as to the competency or incompetency of the witness to testify in the case, and thereupon to rule on the objection accordingly. In this case the court refused to do so, but allowed the witness to testify, which act amounted to a ruling that the witness was competent. While the defendant was entitled to have his objection examined into and passed upon by the court, it is apparent to us that he has suffered no injury or loss of right on account of the action of the court (*Wright v. So. Exp. Co.*, supra), for the reason that the record discloses such facts as convince us that the witness was competent to testify. The credibility of the witness was properly left to the jury, and has been determined by them. The prosecutrix was corroborated in several material respects. It was shown that she was an unmarried woman. Pregnancy and parturition were established, as well as the defendant's acquaintance and somewhat intimate association with her. It was also shown that both before and after his arrest he had made the statement that he was willing to marry her. Other damaging statements were also shown.

Appellant complains of the action of the trial court in permitting the prosecutor to examine the witness Bessie Jones, by leading questions. There was no error in permitting leading questions asked this witness. In *McLean v. City of Lewiston*, 8 Idaho, 427, 69 Pac. 478, this court held that the allowance of such questions was a matter addressed to the sound discretion of the court, and, unless abused, would not afford grounds for reversal. And there are particular and peculiar cases, of which this is one, where the exception to the general rule is essential and is necessarily invoked. See discussion and note in 1 *Wigmore on Ev.* §§ 760-779.

We think the judgment in this case should be affirmed, and it is so ordered.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

DAHLSTROM et al. v. PORTLAND MINING CO. et al.

(Supreme Court of Idaho. Feb. 23, 1906.)

#### 1. REVIEW—WHEN WRIT ISSUES.

Under the provisions of section 4962, Rev. St. 1887, a writ of review will be issued upon proper application when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, § 1.]

#### 2. SAME—REQUISITES.

Under the provisions of said section two things must appear before a writ of review will be issued: (1) That such tribunal, board or officer has exceeded its jurisdiction; and, (2) that there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, §§ 4, 5.]

#### 3. APPEAL—SUPREME COURT—JURISDICTION.

Under the provisions of section 9, art. 5 of the Constitution, the Supreme Court is empowered to review, upon appeal, any decision of the district court or the judges thereof. Some orders, however, are only reviewable on an appeal from the judgment or order granting or denying a new trial.

#### 4. SAME—APPEALABLE ORDER.

The order of the court sought to be reviewed was made after judgment, and plaintiffs had an appeal therefrom.

#### 5. MOTIONS—ORDERS.

Under the provisions of section 4880, Rev. St. 1887, an "order" is defined to be every direction of the court or judge made or entered in writing and not included in a judgment.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Motions, § 59.]

#### 6. REVIEW—QUASHING WRIT.

When it appears that the plaintiff has an appeal that is adequate from an order, a writ of review on motion will be quashed.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, §§ 4, 5, 153, 158.]

(Syllabus by the Court.)

Application by Cora Markle Dahlstrom and others for a writ of review against the Portland Mining Company and others. Writ denied.

W. B. Heyburn and W. W. Woods, for Cora Markle Dahlstrom. John P. Gray, for R. T. Morgan, Judge, and A. H. Featherstone. A. G. Kearns, for the Portland Mining Co.

SULLIVAN, J. This is an original application in this court for a writ of review. It is set forth in the complaint or petition for the writ on September 2, 1895, the Portland Mining Company executed promissory notes aggregating \$49,338.64 to Cora Markle Dahlstrom, and notes aggregating \$39,476.26 to Alvin Markle, and secured all of said promissory notes by mortgages on property in Shoshone county, Idaho; the mortgage being given to the Markle Banking & Trust Company of Hazleton, state of Pennsylvania, as trustee; that on December 5, 1902, a judgment decreeing the foreclosure of said mortgages to satisfy the amount due thereon was duly rendered by the district court of the first judicial district of the state of Idaho, in Shoshone county; that on January 10, 1905, the said Cora Markle Dahlstrom and Alvin Markle made, executed and delivered to the said Portland Mining Company a satisfaction in writing of the said judgment and decree of foreclosure, and in consideration thereof and a stay of proceedings, the Portland Mining Company on said date executed, acknowledged and delivered to said Cora Markle Dahlstrom a confession of judgment in writing for \$49,338.64 principal; \$28,616.41 in

interest: \$7,795.50 attorney's fees, and \$49.55 costs, aggregating \$85,800.20, to bear interest at 7 per cent. from December 5, 1902, and at the same time delivered a like confession of judgment to Alvin Markle for \$39,476.26 principal, \$22,896.23 interest, \$6,237.24 attorney's fees and \$10.30 costs, aggregating \$68,620.03, to bear interest at 7 per cent. from December 5, 1902; that on April 11, 1905, said satisfaction of judgment was filed in said district court, and the decree of foreclosure was satisfied of record, and on the same date several confessions of judgment were duly and regularly filed and entered of record in said court: that on July 1, 1905, Hon. R. T. Morgan, judge of the said district court, acting wholly without jurisdiction and in excess of the jurisdiction of the said district court, without service of process on the part of the Portland Mining Company or the Markle Banking & Trust Company, or Cora Markle Dahlstrom or Alvin Markle, and upon a petition by one Albert H. Featherstone, who was not a party to said suit, made a pretended order vacating and setting aside the satisfaction of decree of foreclosure of December 5, 1902, and at the same time and with a lack of jurisdiction, pretended to make and did make and sign as such judge and cause to be entered on the records of said court, a pretended order decreeing said Featherstone to be the equitable assignee of the decree of foreclosure of December 5, 1902, to the extent of \$5,987.24, with interest at 7 per cent. from December 5, 1902, and declared the claim of the said Featherstone a lien upon said judgment, and directed the sale of the mortgaged premises to satisfy said claim; that on September 20, 1905, execution issued out of the said district court on said pretended order of July 1, 1905, and the mortgaged premises were advertised for sale by the sheriff to satisfy said claim of Featherstone in preference to the remaining portions of the said decree; that the sole consideration for the confessions of judgment aforesaid was the satisfaction of the decree of foreclosure and a stay of proceedings until the expiration of an existing obligation to purchase said premises or the exercise of such obligation, for a sufficient sum to pay off said confessions of judgment, and said confessions of judgment remain unsatisfied and a lien on the former mortgaged premises; that said action of said judge has clouded and confused the liens against the mortgaged premises and impairs the property rights and contract obligations of these petitioners, and purports to give an unlawful and unjust preferred lien against said premises, and that petitioners have no appeal or other plain, speedy or adequate remedy in the premises.

Upon the foregoing allegations a writ of review was issued. A return to said writ was made by the defendants which sets up the pleadings in the original action of Cora Markle Dahlstrom and Alvin Markle, plaintiffs, against the Portland Mining Company,

and the Markle Banking & Trust Company, defendants, and all of the proceedings had in said action in said district court, and also all proceedings connected with said case of which the plaintiffs in this proceeding complain. Counsel on behalf of A. H. Featherstone and the judge of the said district court, files their motion herein to quash the said writ of review and to dismiss the petition or complaint on four grounds: (1) That the plaintiffs and petitioners had no standing herein for the reason that they have a plain, speedy, adequate and complete remedy at law by appeal; (2) for the reason that a writ of review will not lie to review a judgment after the expiration of the time limit for an appeal, unless circumstances of an extraordinary character intervene, none of which have been shown to exist by the petition; (3) for the reason that the order sought to be reviewed is a special order made after final judgment, and is appealable under the Revised Statutes of the state of Idaho and the constitution of this state; (4) for the reason that it appears that the court had jurisdiction of the subject-matter of the suit and of the parties, and therefore jurisdiction to make and enter the order sought to be reviewed. Under the provisions of section 4962, Rev. St. 1887, a writ of review may be granted by any court, except a probate or justice's court, when an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy. It will be observed that two things must be shown to exist before a writ of review will be issued: The first is that an inferior tribunal, board or officer exercising judicial functions has exceeded its jurisdiction; and, second, that there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy. If, in the case at bar, the petitioners had an appeal, the motion to quash the writ must be granted. Under the provisions of section 9 of article 5 of the Constitution of Idaho, the Supreme Court is empowered to review, upon appeal, any decision of the district courts or the judges thereof. Then conceding that the court had no jurisdiction to make the order complained of and the petitioners having the right to appeal, they are not entitled to have the order of the court or judge reviewed upon writ of certiorari.

Section 4880 defines an "order" as every direction of a court or judge made or entered in writing and not included in a judgment. It appears that at the time of hearing the motion for said order, Cora Markle Dahlstrom appeared specially by her attorneys, and the Portland Mining Company appeared specially by its attorney, and resisted the said motion. After that hearing the court made the order complained of, and the petitioners had the right to an appeal, which we think would have been an adequate rem-

edy in the matter. Said order was made on the 1st of July, 1905, and an appeal therefrom could have been heard at the October, 1905, term of this court. The petition for the writ of review was filed in this court on October 3, 1905, some days after the time for taking such appeal had expired. The court does not intend to pass upon the merits of the main controversy in this matter. We simply hold that the petitioners had the right to appeal from the order complained of and should have taken an appeal. The statute provides that appeals from certain orders must be taken within 60 days, while the review of certain other orders may be had on an appeal from the judgment or from the order granting or refusing a new trial. It was not intended that a separate appeal should be taken from every order made in the trial of a case, but it was intended to give the supreme court jurisdiction to review every decision of the district court. All orders that could as well be reviewed on an appeal from the judgment or from the order granting or refusing a new trial as on separate appeals, should be reviewed on appeals from the judgment or the order granting or denying a new trial. It appears from the record before us that the time has expired for an appeal from the order of July 1, 1905; but it appears that a decree of judgment was entered after said order was made. An appeal may be taken from that judgment within a year after the entry thereof. The motion to quash the writ is granted, with costs in favor of A. H. Featherstone.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

(12 Idaho, 219)

SMITH et al. v. MOUNTAIN GULCH MINING & MILLING CO. et al.

(Supreme Court of Idaho. April 11, 1906.)

MINES AND MINERALS—ANNUAL ASSESSMENT WORK.

Under the evidence in this case, held, that the annual assessment work on the quartz mining claims located and known as the "Mother Lode," the "Northeastern Extension of the Mother Lode," and "Canary," mining claims for the year 1902, was done.

(Syllabus by the Court.)

Appeal from District Court, Latah County; Edgar C. Steel, Judge.

Action by F. C. Smith and another against the Mountain Gulch Mining & Milling Company and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

George G. Pickett, for appellants. Forney & Moore, for respondents.

SULLIVAN, J. This action was brought by the appellants Smith and Robins against the Mountain Gulch Mining & Milling Company, and Chas. G. and John H. Taylor, respondents, on May 10, 1904, to quiet the

title to the Eureka, Nonparell, and Excelsior, quartz mining claims, situated in Hoodo Mining District, Latah county, Idaho. It appears from the record that said Chas. G. and John H. Taylor located the Mother Lode and the Northeastern Extension of the Mother Lode, mining claims in said district, in June, 1898, and thereafter, in the month of September, 1899, the said John H. Taylor located the Canary quartz mining claim; and that, between the dates of the original location of those mining claims and the institution of this suit, the respondent the Mountain Gulch Mining & Milling Company, a corporation, was duly organized under the laws of the state of Washington, and acquired whatever interest the said Taylors had in and to said mining claims. It appears from the record that, since the location of said mining claims, the respondents have occupied and worked the aforesaid mining claims each year and had expended about \$8,000 thereon in erecting a mill, cabins, shops, making roads and trails, and driving tunnels and inclines thereon. In the month of February, 1903, the appellants, Smith and Robins, went upon the said Mother Lode mining claim, and the Northeastern Extension thereof, and the Canary mining claim, and located the identical ground covered by said locations in the name of the "Eureka," "Nonparell," and "Excelsior." Their reason, as shown by the record, for making said locations, was that the annual assessment work on said Mother Lode and Northeastern Extension thereof, and the Canary, had not been done by the respondents for the year 1902. On the trial of the case evidence was submitted on two issues, to wit: (1) That no valid location had been made by the respondents; and (2) that the annual assessment work for the year 1902 had not been performed. Both issues were found in favor of the respondents and judgment was entered in their favor. A motion for a new trial was denied, and this appeal is from the order denying such motion.

The question as to the validity of the locations made by respondents was abandoned, and the only question presented for decision on this appeal is whether the annual assessment work for the year 1902 had been performed. It is contended by counsel for appellants that the evidence clearly shows the respondents performed 68 days work upon said three claims for the annual assessment work for the year 1902. He also contends that the evidence shows that the wages for such labor was at most but \$3.50 per day, and therefore \$300 worth of work was not done in the year 1902 on said claims. It appears from the evidence that in the year 1902 the respondents made the equivalent of 47 feet of tunnel and incline, and the evidence shows that said work was worth \$9 per foot, or \$423. The appellants' witness Northrup testified that he had worked on

the said Mother Lode claim, and had a contract there for 45 feet of tunnel; that he received \$9 per foot for that work, and "that he earned his money; that it was well worth \$9 per foot." There is some other evidence to show that said work was not worth more than \$7 or \$8 per foot. But, even at \$7 per foot, 47 feet of tunnel would cost \$329. Thus, at the lowest estimate, there was more than \$300 worth of work done on said claims in the year 1902 by the respondents. The trial court found that more than \$300 worth of work had been done that year, and we think the evidence fully supports the finding of the court on that point.

The judgment is affirmed, with costs in favor of the respondents.

STOCKLAGER, C. J., and AILSHIE, J., concur.

#### CALIFORNIA CONSOL. MINING CO. v. MANLEY, Sheriff, et al.

(Supreme Court of Idaho. April 11, 1906.)

##### APPEAL—DISMISSAL.

When the transcript on appeal has not been filed with the clerk of this court within the time provided by the rules, and it does not appear that an extension of time has been granted, a motion to dismiss the appeal will be sustained.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2721, 3126.]

(Syllabus by the Court.)

Appeal from District Court, Shoshone County; Ralph T. Morgan, Judge.

Action by the California Consolidated Mining Company against Charles Manley and others. Judgment for defendants, and plaintiff appeals. Dismissed.

See 81 Pac. 50.

J. H. Forney, for appellees.

STOCKSLAGER, C. J. Defendants move to dismiss the appeal in this case on the ground that the transcript was not filed with the clerk within the time required by the rules of this court. In support of this motion they file the certificate of the clerk of the district court of Shoshone county, in which he certifies that a "final judgment dated July 24, 1905, in conformity with a decision rendered by the Supreme Court of Idaho, rendered May 8, 1905, was filed and recorded in the above-named court in the above-entitled action on August 1, 1905; that a notice of appeal therefrom to the Supreme Court of the state of Idaho and an undertaking on appeal in due form for \$300 costs were filed October 6, 1905, by plaintiff; that plaintiff's praecipe for a transcript of the record for use on appeal was filed November 21, 1905, and on November 24, 1905, a duly certified transcript of the record on appeal was furnished plaintiff."

Upon the foregoing certificate, and it not appearing that an extension of time to pre-

pare and file a transcript had been granted, the motion to dismiss the appeal is sustained. Costs to defendant.

AILSHIE and SULLIVAN, JJ., concur.

#### BANK OF COMMERCE, Limited, v. ADA COUNTY ABSTRACT CO.

(Supreme Court of Idaho. Feb. 8, 1906.)

##### 1. APPEAL—TRANSCRIPT—CONTENTS.

Under the provisions of section 4818, Rev. St. 1887, where an appeal is from a final judgment only, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case upon which he relies.

##### 2. SAME—ERRORS OF LAW.

Such bill of exceptions or statement may be used on appeal for determining whether errors of law had been made in the trial of the case.

##### 3. PARTNERSHIP—SALE OF BUSINESS—LIABILITY FOR OLD DEBTS.

Where a partnership was formed under the name of the Ada County Abstract Company, and was composed of Prinn, Wickersham, and Ellsworth as partners, who all sell and transfer their interests in such partnership to Wright and the Capital State Bank, the incoming partners are not liable for any of the debts of the old firm, unless they have assumed or agreed to pay such indebtedness.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 489, 491.]

##### 4. SAME.

One who loans money to a partnership, which is thereafter invested in office furniture and other property by such partnership, which partnership thereafter sells and transfers said property to others, the one loaning the money cannot pursue the property for such debt, unless he has retained some lien thereon recognized by the laws of the state.

(Syllabus by the Court.)

Appeal from District Court, Ada County; George H. Stewart, Judge.

Action by the Bank of Commerce, Limited, against the Ada County Abstract Company. Judgment for plaintiff. Defendant appeals. Reversed.

Ira E. Barber, for appellant. George M. Parsons and Edwin Snow, for respondent.

SULLIVAN, J. This is an action on a promissory note dated March 14, 1903, for \$250, signed as follows: "Ada County Abstract Co., by Wm. R. Prinn, Mgr. Wm. R. Prinn." At the time of the execution of said note the Ada County Abstract Company was a partnership engaged in the business of making abstracts of title and writing insurance, and the members of such partnership were Wm. R. Prinn, C. O. Ellsworth, and J. H. Wickersham. Subsequent to the execution of the said note, and prior to the commencement of this action, each of the said copartners sold and disposed of their entire interests in the copartnership property as follows: Wickersham to E. E. Wright May 23, 1903, Ellsworth to E. E. Wright November 7, 1903, and Prinn to E. E. Wright, as trustee for the Capital State Bank, February 17,

1904. The business was continued under the old name of the "Ada County Abstract Company." This action is entitled "Bank of Commerce, Limited, Plaintiff, v. Ada County Abstract Company, Defendant." The complaint contains the usual allegations of a complaint on a promissory note. The answer denies the indebtedness of defendant upon the note, and avers that the defendant was a nontrading partnership; that its alleged entity had been changed; that the original partners had sold out subsequent to the making of the note, and that the company, as constituted at the time the suit was brought, consisted of E. E. Wright and E. E. Wright as trustee for the Capital State Bank; that the original partners had sold out long prior to the action against the company; that the new partners did not assume any part of the said indebtedness as expressed by said note, and that it was no part of the purchase price; and on information and belief it was alleged that Prinn executed said note without knowledge of his partners, that this was done in express violation of the partnership agreement, and that no part of the money was used for partnership purposes. Upon the issues thus made the cause was tried by the court with a jury, and a verdict and judgment was rendered and entered for the plaintiff. This appeal is from the judgment, and the assignments of error involve only questions of law.

In limine the question as to what papers the record on appeal should contain is presented. The transcript contains the pleadings, the verdict of the jury, the judgment of the court, the notice of appeal, a bill of exceptions, and a stipulation of counsel. Section 4818, Rev. St. 1887, provides, among other things, that in an appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, the judgment roll, and of any bill of exceptions or statement in the case upon which the appellant relies, and also makes further provisions where the appeal is from an order granting or denying a new trial; but in the case at bar a new trial was not asked for. The bill of exceptions contained in the transcript contains much of the evidence given on the trial, and said bill of exceptions may be used upon this appeal in determining the assigned errors of law, although it may have been settled after the judgment roll was made up. It was held in *Caldwell v. Parks*, 47 Cal. 640, that a bill of exceptions, based upon alleged errors of law occurring at the trial settled within 30 days after judgment was rendered, became a part of the record on appeal from the judgment, and might be used for determining whether errors of law had been made in the trial of the case. So, under the provisions of said section 4818, the record on appeal, when the appeal is from a final judgment, must contain the judgment roll and any bill of exceptions or statement in the case upon which the appellant relies.

In our view of this case it is not necessary for us to specifically pass upon each of the errors assigned. It is conceded that the appellant, the Ada County Abstract Company, is a partnership, and at the time the promissory note sued on herein was executed was composed of three persons, to wit, Prinn, Wickersham, and Ellsworth; and it appears without contradiction, and is conceded by counsel for the respondent, that before the commencement of this action said three partners had sold their interest in said business to E. E. Wright and the Capital State Bank. After purchasing said business, said Wright and the Capital State Bank continued the same under the former name, the Ada County Abstract Company. It appears from the record that said Wright purchased the interests of Wickersham and Ellsworth, and thereafter made a contract for the purchase of the said Prinn's interest; but it is not shown that said Wright, on the purchase of the two-thirds interest in said business from Ellsworth and Wickersham, agreed to pay any of the indebtedness of the said firm, but it is contended that in his contract of purchase of Prinn's one-third interest said Wright agreed to pay certain indebtedness of the said abstract company, among which was the indebtedness evidenced by the promissory note sued on herein. But it is not contended, nor is it shown, that Wright in his purchase of the interest of Wickersham and Ellsworth agreed to assume any of the indebtedness of the said firm, and we do not consider that the clause in the contract between Prinn and Wright in regard to the indebtedness of the old firm, would bind the new firm for the payment of the said promissory note. Then the question is directly presented to the court whether in this action the Ada County Abstract Company, a partnership composed of Wright and the Capital State Bank, could be held liable to the creditors of the Ada County Abstract Company, a partnership which was composed of Prinn, Wickersham, and Ellsworth, unless it be first shown that there was an agreement upon the part of the new firm to pay the debts of the old. The record does not show that there was any such agreement, and the authorities are uniform in holding that, in order to bind an incoming partner, there must be a special promise to pay prior debts of the firm. In 1 *Lindley on Partnership* (4th Ed.) 392, it is stated: "In order to render an incoming partner liable to the creditors of the old firm, there must be some agreement, express or tacit, to that effect, entered into between him and the creditors, and founded on some sufficient consideration. If there be such agreement, the incoming partner will be bound by it; but his liabilities in respect of the old debts will attach by virtue of the new agreement, and not by reason of his having become a partner. And the agreement to be proved must be an agreement with the creditor, and of such an agreement an arrangement be-

tween the partners is of itself no evidence." In order to hold an incoming partner for outstanding liabilities of the firm of which he becomes a member, it must affirmatively appear that he in some way assumed the firm obligation. *First National Bank v. Simmons* (Cal.) 33 Pac. 197; *Fuller v. Rowe*, 57 N. Y. 23. The partnership known as the "Ada County Abstract Company," which was served in this case with summons and appeared at the trial, was not composed of either of the members of the firm of the Ada County Abstract Company that executed the promissory note sued on herein. The Ada County Abstract Company which was made defendant in this case was not the Ada County Abstract Company served with the summons in the case. It appeared at the trial that the latter was the successor of the former, and, being only a partnership, it cannot be held for the indebtedness of the old partnership, unless it be first shown that they assumed and agreed to pay that indebtedness.

It is contended that the money for which the promissory note sued on was given was invested in the office furniture, etc., of the Ada County Abstract Company, composed of Prinn, Wickersham, and Ellsworth, and that, as they sold said furniture and property to the new partnership, the respondent ought to be permitted to pursue that property and hold it for debt. We know of no law that would permit them to do that, unless they had such a lien thereon as is recognized by the laws of this state, and it is not claimed in this case that they had such a lien.

The judgment must be reversed, with directions to dismiss the action as to the Ada County Abstract Company composed of Wright and the Capital State Bank. Costs are awarded to the appellant.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

#### DEWEY et al. v. SCHREIBER IMPLEMENT CO.

(Supreme Court of Idaho. April 16, 1906.)

##### 1. COURTS—PROBATE COURTS—JURISDICTION.

Under the organic act of the territory of Idaho from its passage to December 13, 1870, the probate courts of the territory of Idaho had no jurisdiction to hear and determine civil cases, but had original jurisdiction in all matters of probate, settlement of estate of deceased persons, and appointment of guardians. On the 13th day of December, 1870, Congress passed an act (16 Stat. 355, c. 1), giving to the probate courts of Idaho territory, in addition to their probate jurisdiction, jurisdiction to hear and determine all civil cases wherein the debt or damage claimed did not exceed the sum of \$500, exclusive of interest, and jurisdiction in criminal cases arising under the laws of the territory that did not require the intervention of a grand jury.

##### 2. SAME.

Under the provisions of section 21, art. 5, of the state Constitution, probate courts are given original jurisdiction in all matters

of probate, settlement of estates of deceased persons, and appointment of guardians, and also jurisdiction to hear and determine all civil cases wherein the debt or damage claimed does not exceed the sum of \$500 exclusive of interest, and concurrent jurisdiction with justices of the peace in criminal cases.

##### 3. SAME—CIVIL CASES.

The civil cases referred to in said section are such cases as are required to be settled in actions at law, and does not include suits in equity for the foreclosure of liens or mortgages on real estate.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 476.]

##### 4. SAME—COURTS OF RECORD.

Probate courts are courts of record only in matters of probate, settlement of estates of deceased persons, and the appointment of guardians, and is not a court of record in proceedings in civil and criminal actions.

##### 5. ACTIONS—LAW AND EQUITY—ABOLITION OF DISTINCTION.

While by the provisions of section 1, art. 5 of the state Constitution the distinctions between actions at law and suits in equity and the forms of such actions and suits are prohibited, that does not abolish the rules of law and equity.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, §§ 156-159.]

##### 6. COURT—PROBATE COURTS—JURISDICTION.

The legislative act approved February 27, 1903 (Sess. Laws 1903, p. 94), amending the ninth subdivision of section 3841, Rev. St., wherein it extends the jurisdiction of the probate court to try and determine actions to enforce mechanics' and laborers' liens and mortgages and other liens upon real property, held unconstitutional and void.

(Syllabus by the Court.)

Appeal from District Court, Latah County; Edgar C. Steel, Judge.

Action by Elmer R. Dewey and others against the Schreiber Implement Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Stewart S. Denning and George G. Pickett, for appellants. Forney & Moore and W. M. Morgan, for respondents.

SULLIVAN, J. This action was brought in the probate court of Latah county to foreclose two laborers' liens against the appellant Jones, who was the employer, upon the same crop of grain. The other appellants were interpleaded as defendants. The complaint contained the usual allegations of a complaint in this kind of an action. The appellant Jones appeared and demurred and, his demurrer being overruled, made no further appearance in the case. The respondents Miller and Mannerling did not appear, and the appellant, the Schreiber Implement Company, answered and put in issue the material allegations of the complaint, and for an affirmative defense they denied the jurisdiction of the Probate Court to hear and determine an action for the foreclosure of laborers' liens, and also that the claim of the respondent Brewster was fraudulent. Other matters of affirmative defense were set up, but it is not necessary to state them here. After a trial of the case the court entered

judgment and decree foreclosing said laborers' liens. The appeal is from the judgment, and the main question for decision involves the jurisdiction of the probate court to hear and determine equity suits foreclosing liens upon real estate and the constitutionality of an act approved the 27th day of February, 1903 (Sess. Laws, p. 94 amending section 3841 of the Revised Statutes relating to the jurisdiction of the probate courts). Prior to that amendment it is not contended that the probate court had equity jurisdiction to hear and determine equity cases. In order to determine this question we shall trace the jurisdiction of our probate courts during our existence as a territory and state. The organic act was the Constitution of the territory up to the time Idaho was admitted as a state. Prior to December 13, 1870, the probate courts of the territory of Idaho had no jurisdiction to hear and determine civil cases, but on that date Congress passed an act (16 Stat. 395, c. 1), giving to probate courts, in addition to their probate jurisdiction, jurisdiction to hear and determine all civil cases wherein the debt or damage claimed did not exceed the sum of \$500, exclusive of interest, and jurisdiction in criminal cases arising under the laws of the territory that did not require the intervention of a grand jury. In that act of Congress it is also provided as follows: "That they (probate courts) shall not have jurisdiction in any matter in controversy when the title, tenure or right to the peaceable possession of land may be in dispute, or in chancery or divorce cases. \* \* \*" That act of Congress continued in force and defined the jurisdiction of probate courts up to the time of Idaho's admission as a state. We will observe here the territorial Legislature passed an act conferring appellate jurisdiction upon the probate courts in civil cases, and in *Moore v. Koubly*, 1 Idaho, 55, the Supreme Court of the territory held said act in conflict with the organic act of the territory and void. The opinion in that case is an interesting one and holds that the probate courts of the territory of Idaho as established by the organic act were tribunals of limited jurisdiction, and that the name or terms by which those courts are designated have a clearly defined or well-known meaning in our jurisprudence. And the nature and scope of authority possessed by the probate courts are well understood by the name of those courts, and it is there stated, "And yet no one would contend for a moment that because the Legislature are not inhibited by express terms, therefore they may confer, for instance, chancery powers upon Justices' Courts." And the conclusion reached in this case was that when Congress used the terms by which they designated the probate courts, they intended to and did use those terms by which such courts were denominated with reference to their well-known and uniformly accepted definition, and they intended to confer upon

and invest these courts, respectively, with such jurisdiction and such power only as legitimately and properly belonged to them as indicated by their titles, and the court there held said act of the Legislature in conflict with the organic act. After that decision was rendered in 1866, and no doubt sufficient reason appearing therefor, Congress passed the act of 1870 above referred to, conferring additional jurisdiction on the probate courts in that it gave them jurisdiction to hear and determine civil cases wherein the debt or damage did not exceed \$500, and criminal jurisdiction concurrent with justices of the peace. See, also, *Ferris v. Higley*, 20 Wall, 375, 22 L. Ed. 383.

The framers of the Constitution of the state of Idaho, by section 2 of article 5, have declared that the judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district court, probate courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law for an incorporated city or town. By section 9 of that article the jurisdiction of the Supreme Court is defined. By section 20 it is provided that district courts shall have original jurisdiction in all cases both at law and in equity, and such appellate jurisdiction as may be conferred by law. Section 21 of said article is as follows: "The probate courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and appointment of guardians; also jurisdiction to hear and determine all civil cases wherein the debt or damage claimed, does not exceed the sum of five hundred dollars, exclusive of interest, and concurrent jurisdiction with justices of the peace in criminal cases." We do not think that the framers of the Constitution intended to grant equity jurisdiction to probate courts, outside of whatever equity jurisdiction they may have in all matters of probate, settlement of estates of deceased persons and appointment of guardians. It is suggested that the probate courts of the state of Colorado, under the provisions of the Constitution of that state, have been given equity jurisdiction at least as far as the foreclosure of liens and mortgages are concerned. But it will be observed that section 23, art. 6, of the Constitution of that state is different from said section 21, art. 5, of the Constitution of Idaho, and provides that "county courts shall be courts of record and shall have original jurisdiction in all matters of probate \* \* \* and such other civil \* \* \* jurisdiction as may be conferred by law. \* \* \*" That Constitution there provides that other jurisdiction may be conferred on the county courts by law. Said section of the Colorado Constitution is cited by the Supreme Court of Colorado in *Arnett v. Berg*, 71 Pac. 636, and it is said in that case that "a recognition of the equitable

jurisdiction of the county court appears throughout our Constitution and statutory law. Were it necessary to invoke it, the unchallenged practice in the state during more than a quarter of a century could be given weight in support of the conclusion we have reached." That statement could not be applied to the probate courts of this state, for I do not think the legal profession or courts of this state ever considered that the probate courts of the state had an equitable jurisdiction in civil cases, at least prior to the amendment of said section 3841 of the Revised Statutes made in 1903 and above referred to. The unchallenged practice of this state during Idaho's existence as a territory and state would give weight in support of the conclusion that the probate courts of the state have no equity jurisdiction.

The probate courts of this state are courts of record only in all matters of probate, settlement of estates of deceased persons, and appointment of guardians, and section 3842, Rev. St. 1887, provides that the proceedings of probate courts are construed in the same manner and with like intendments as the proceedings of courts of general jurisdiction, and to its records, orders, judgments, and decrees there is accorded like force and effect and legal presumptions as to the records, orders, judgments, and decrees of district courts, and it is there provided that said section shall be applicable to probate proceedings, records, orders, judgments, and decrees only. The probate court is not a court of record in the trial of civil and criminal cases, but its records and judgments in those matters are placed on the same footing with the records and judgments of justices of the peace. By an act of the Legislature which became a law on the second day of February, 1905 (Sess. Laws 1905, p. 29), it is provided that in all civil suits and within its civil jurisdiction all proceedings in the probate court, rules of practice, pleading, and procedure shall be the same as that provided by law for justices of the peace. The pleadings in justices' courts, by the provisions of section 4606, Rev. St. 1887, are not required to be in any particular form and may be oral, except the complaint; and the lawyer, as well as the layman, cannot fail to understand in what an uncertain condition the title to real estate might be left and placed by giving jurisdiction to foreclose liens and mortgages to courts where the practice proceedings and records are as loose and uncertain as they are in the justice's court. This suggestion, however, would not affect the constitutionality of said act extending the jurisdiction of probate courts if that was warranted by the Constitution. If the contention of the respondent is correct, then the Legislature has the authority to confer general equity jurisdiction on the probate court in all civil cases where the debt or damage does not exceed \$500, and might give them jurisdiction to hear and

determine divorce cases. If probate courts have jurisdiction in such cases the title to real estate involved in the foreclosure of liens and mortgages would, to a certain extent, be dependent upon the records of a court that is not a court of record, would be shadowy and very uncertain indeed, and not as permanent as our law contemplates such titles should be. We do not think that was the intention of the framers of the Constitution, but it is clear to us that the intention was to confer only jurisdiction to hear and determine actions at law where the debt, or damage exclusive of interest, does not exceed \$500. While we recognize the fact that the distinction between suits in equity and actions at law have been prohibited, and that in this state there is but one form of action for the enforcement or protection of private rights or redress of private wrongs, which is denominated as civil action. That, however, does not abolish the rules of law or rules of equity, they remain, although the distinction between actions at law and suits in equity and the forms of such actions and suits are prohibited by our Constitution.

We therefore conclude that the amendment to paragraph 9, § 3841, Rev. St. 1887, granting to the probate court jurisdiction to hear and determine actions to enforce mechanics' and laborers' liens, mortgages, and other liens upon real and personal property, is in violation of the provisions of the clearly implied prohibition of Section 21, art. 5 of the state Constitution, and void.

The judgment is therefore reversed, and the case remanded, with instructions to dismiss the action. Costs in favor of the appellant.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

#### TOWN OF JULIAETTA v. SMITH.

(Supreme Court of Idaho. April 17, 1906.)

##### 1. HIGHWAYS—CREATION BY USER.

Under the provisions of section 851, Rev. St. 1887, five years' use of a road or highway constitutes a public highway.

##### 2. SAME—BY PRESCRIPTION.

By the amendment to section 851 (Sess. Laws 1883, p. 12), five years' use and work by the proper authorities is required to constitute a public highway by prescription.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 8-13.]

(Syllabus by the Court.)

Appeal from District Court, Latah County; Edgar C. Steele, Judge.

Action by the town of Juliaetta against H. M. Smith to remove an obstruction from a street or highway and for damages. Judgment for plaintiff, and defendant appeals. Affirmed.

Daniel Needham, for appellant. Orland & Smith, for respondent.

STOCKSLAGER, C. J. Respondent commenced this action in the district court of Latah county for the purpose of preventing the alleged obstruction to a certain traveled highway in the town of Juliaetta, claiming that the tract traveled was and is a highway by user, and that the road has been used by the general public for travel since March, 1887, and for more than five years before the filing of the plat of the town of Juliaetta by Rupert Schuffer. It is alleged that appellant has placed certain obstructions and threats to continue to place such obstructions over a portion of the street or highway in the town of Juliaetta thereby interfering with the free use of the street or highway. It is further alleged in paragraph 9 of the complaint "that if defendant is permitted to maintain the said fence and thus obstruct that portion of the highway used and worked as the public highway street for so long a period through said town, the safety of the citizens of Juliaetta, and of the traveling public as well, will be endangered, and the town be liable for damages arising from injuries caused by said obstruction over said highway." Appellant denied all the allegations of the complaint and justified all his acts by pleading ownership of the land in controversy. On the 21st day of June, 1905, the case was tried without a jury. The ninth finding is that the travel over said strip or tract of land extends upon lots 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, of block B, and the obstruction by fencing, by the said defendant, covers that strip of land over said lots and upon the part thereof which has been used and traveled by the public as a highway. The tenth finding is "that said obstruction placed by defendant upon and across said lots prevents the public from the use of said strip of land over which the public have been accustomed to travel, that the said strip of land described in the findings has been used and traveled by the public for such length of time that the same has become a highway by user, and that said strip of land is a public highway." As conclusions of law the court finds "that the obstructions placed upon such highway are a nuisance and should be abated, and the defendant enjoined from further obstructing said highway." Judgment and decree were entered in compliance with the foregoing facts and conclusions. The appeal is from the judgment and from an order overruling a motion for a new trial.

It is admitted that the appellant is the owner of the ten lots described in the finding 9, and that he purchased them from R. Schuffer, the original owner of the townsite of Juliaetta, in 1903. The controlling question in this case is whether the public or the town of Juliaetta could acquire the right to any portion of these lots for use as streets or highways by user. On the 27th day of November, 1891, Rupert Schuffer made the following certificate of dedication: "Know all men by these presents, that I, Rupert

Schuffer, have laid off and platted as townsite, the land shown by annexed plat and description to be known as the town of Juliaetta, in Latah county, Idaho, and I do hereby dedicate to the public use, until lawfully vacated the streets and alleys as shown on said plat. The sizes of lots, blocks, streets and alleys are marked on plat." On the 26th day of March, 1892, a petition to incorporate the town of Juliaetta was filed with the clerk of the board of commissioners, and on the 19th day of April, 1892, the prayer for such incorporation was granted. It is shown by the plat, which is a part of the record, that the lots in dispute are between Main and State streets, and that there is an alley running between the streets and through the center of block B. A number of errors are assigned in the record, but it occurs to us that the settlement of one law question practically disposes of the case. If the town or public can acquire private property for public use by user, then the judgment must be sustained, as we think it is abundantly shown by the record that the portion of the lots in dispute have been used as a highway more than the required statutory time to give the right to use by user, elsewhere than in an incorporated city, village, or town. We are also of the opinion that the proceedings of the board of county commissioners in their acts and orders relative to the incorporation of the town of Juliaetta were a practical compliance with the statute. Even if not organized by a strict compliance with all the provisions of our statute, it would still be a municipal corporation by prescription. *Bassett v. Porter*, 4 Cush. (Mass.) 487; *Bow v. Allenstown*, 69 Am. Dec. 491; *Robie v. Sedgwick*, 35 Barb. (N. Y.) 319; *People v. Maynard*, 15 Mich. 463; vol. 28 Am. & Eng. Ency. of Law (2d Ed.) 288. As to the right of appellant to question the irregularities, if any, in the organization of the town, see vol. 28, Am. & Eng. Ency. of Law (2d Ed.) p. 239. The author says: "Irregularities in the organization of a town may be waived by the public, and a private person cannot question the regularity of a town's existence"—citing authorities. *Sess. Laws 1890*, p. 213. § 97, dealing with city and village plats, says: "The acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for street or other public use."

Learned counsel for appellant insists that "when the plat of Juliaetta was recorded, and lots sold in accordance therewith, the dedication became complete, and when the town incorporated it, accepted the plat, and streets and alleys delineated thereon at once became the public thoroughfares of said town, and all persons who bought property in said town had notice as to what said incorporation claimed for its streets and alleys, and would be estopped to claim anything other or different than that shown on the plat, such

being the case with purchasers, the same doctrine will hold good as to the corporation, for, should the theory of plaintiff obtain in this case, then every person who buys a lot in accordance with a plat in an incorporated town or village in this state would have to inclose the same at once or stand guard over his property to keep the public from acquiring title thereto by user." There is much force, reason, and equity in this contention, and unless the public had acquired a right to the use of this land for a public highway prior to the time Mr. Schuffer platted the townsite of Juliaetta and dedicated the streets and alleys to the use of the public, the judgment is erroneous and should be reversed. The eighth finding of the court is "that the defendant has obstructed said strip of land over which the general public have traveled since about the month of March, 1887, by building, erecting, and maintaining a fence over said land, and over and across said land where and upon that part of said strip of land which the public were and have been during said time been in the habit of traveling, and over and across that part where the track has been situated, and has by such fence obstructed and prevented the public from traveling from the beaten track of said road, or traveling upon that part of said strip where the general public have traveled since about the month of March, A. D. 1887." A number of witnesses testified with reference to the use of the land in controversy as a highway from March, 1887, and since the platting and incorporation of the town of Juliaetta until it was fenced by appellant in 1903. There are conflicts in the evidence as to the use of this land for highway purposes; but an examination of the evidence shown by the transcript we think fully supports finding 8, above quoted, hence, became a public highway by prescription prior to the filing of the plat and dedication of the streets and alleys for the use of the public. There is nothing in the record showing that Mr. Schuffer ever objected to the use of these lots for a highway, or that there was any opposition from any one until appellant purchased the lots and built his fence and inclosed what he believed to be his property. Section 851, Rev. St. 1887, providing what shall be roads and highways in this state, says: "Roads laid out and recorded as highways by order of the board of commissioners, and all roads used as such for a period of five years are highways." This section was amended by the second session of the state Legislature as follows: "Roads laid out and recorded as highways by order of the board of commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners are highways." Sess. Laws 1893, p. 12. By the finding of the court, the road or highway in controversy was a public highway within

the meaning of the general statute of 1889, or the act of the Legislature at its second session (state) in 1893. The Supreme Court of California in *Bolger v. Foss*, 65 Cal. 250, 3 Pac. 871, construed a statute relative to roads and highways and what constituted them. The first clause of the syllabus says: "Section 2619 of the Political Code which provided that 'all roads used as such for a period of more than five years are highways.'" In the opinion it is said: "But where there is a statute that roads shall be deemed public highways which have been used as such for a named period, the right of the public to continue to use them as public roads is fixed and established"—citing "Angell on Highways, § 131." Again in *McRose v. Bottyer*, 81 Cal. 122, 22 Pac. 393, the same doctrine is announced. See, also, *Freshour v. Hihn*, 90 Cal. 443, 34 Pac. 87. In *Getchell v. Benedict* (Iowa) 10 N. W. 321, it is said in the syllabus: "When plaintiff received a conveyance of a certain lot according to a plat which did not recognize a highway dedicated by acts in pais prior to the filing of such plot, held that they were not thereby estopped from asserting the existence of such highway." It is held in *City of Louisville v. Brewer's Adm'r* (Ky.) 72 S. W. 9: "Where a county road was taken into a city by annexation of the territory which it traversed, it became a city street without formal action on the city's part." See, also, 2 *Dillon's Mun. Corporations* (4th Ed.) § 637. Also, section 1009, same volume. In *Ford v. Chicago, etc., Ass'n* (Ill.) reported in 39 N. E. 651, at page 657 (27 L. R. A. 298), it is said: "A public highway arises by prescription where there has been an adverse user of the easement continued for a period fixed by law." Citing 19 *Am. & Eng. Ency. of Law*, p. 7, where it is said: "Prescription is made by acquiring title to incorporated hereditaments by immemorial or long-continued use." See, also, page 11, same volume. *Gross v. McNutt*, 4 Idaho, 286, 38 Pac. 935, is decisive of this case.

We do not deem it necessary or useful to prolong this discussion or cite additional authorities. It is apparent from the record that the findings of fact were justified by the evidence, and from the authorities above cited and quoted from we think the court reached the proper conclusion of law. Many assignments of error occurring at the trial are contained in the record, but it is unnecessary to pass upon them in our view of the case. The only serious question presented by the record is whether the road passing over the property in controversy is a public highway within the meaning of our statute as amended by Session Laws of 1893, *supra*, and since we have found under the evidence and authorities that such is true, it ends the controversy.

Judgment is affirmed, with costs to respondent.

AILSHIE and SULLIVAN, JJ., concur.

**RUSSELL v. CHAMBERLAIN et al.**

(Supreme Court of Idaho. April 18, 1906.)

**1. MALICIOUS PROSECUTION — DEFENDANTS JOINED—ALLEGATIONS OF COMPLAINT—DEMURRER.**

It is not necessary, in an action for malicious prosecution, to allege that all of the defendants combined in instituting the proceedings complained of. If, after the proceedings were commenced, they without probable cause and with malice participate voluntarily in the prosecution, they may be joined in an action as defendants with the person or persons who instituted the action.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, §§ 3, 4, 83.]

**2. SAME—PROBABLE CAUSE—MALICE.**

Want of probable cause and malice must co-exist.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, §§ 21, 59, 80.]

**3. SAME.**

Actions for malicious prosecution are not favored in law, and have been hedged about by limitations more stringent than in many other acts causing damage to another.

**4. SAME—COMPLAINT.**

*Held*, that the complaint states a cause of action and that the court erred in sustaining the demurrers thereto.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; Ralph T. Morgan, Judge.

Action by William J. Russell against A. V. Chamberlain and others for malicious prosecution. Demurrer to the complaint sustained. From the judgment, plaintiff appeals. Reversed.

R. E. McFarland, for appellant. McClear & Burgan and Robert H. Elder, for respondents.

**SULLIVAN, J.** This is an action to recover damages for an alleged malicious prosecution. Demurrers to the amended complaint were sustained and judgment of dismissal was entered, and the plaintiff appeals therefrom. All of the defendants, except Frank M. Crandall, were served with summons and appeared. The defendant Crandall was not served and did not appear. It is alleged in the complaint that on the 11th day of April, 1904, in Kootenai county, the said Crandall made, signed, swore to, and filed with a justice of the peace, in said county, a certain complaint or information in writing charging and accusing the plaintiff with having unlawfully, willfully, maliciously, and feloniously set fire to, and caused to be burned, in the nighttime, a certain mercantile warehouse, situated in Coeur d'Alene City, with the intent then and there to willfully, maliciously, and feloniously destroy said building, and caused said justice of the peace to issue a warrant for the apprehension and arrest of the plaintiff upon said charge, and that the plaintiff was arrested by virtue of said warrant; that the acts of said Crandall therein were malicious and without reasonable or probable cause. Then follows an

allegation that on or about the 11th day of April, 1904, the defendants, contriving and maliciously intending to injure plaintiff in his good name and reputation, caused him to be imprisoned without any reasonable or probable cause therefor, and wickedly conspired, combined, and agreed together among themselves to prosecute plaintiff upon said charge, and procured the plaintiff to be examined before said justice of the peace upon said charge, and by said justice of the peace held over to answer said charge at the next term of the district court in and for said county, and caused him to be imprisoned, informed against, and prosecuted in said district court upon said charge; that in pursuance of said conspiracy, the defendants still contriving and maliciously intending to injure plaintiff in his good name and reputation, and to cause him to be imprisoned without any reasonable cause, therefor, "employed and procured certain detectives to secure the attendance of certain persons to attend before said justice of the peace at said examination and testify under oath against plaintiff, and that said detectives did accordingly procure certain persons to attend and under oath give false and perjured testimony before said examining magistrate against plaintiff in said prosecution." It is also alleged that the defendants procured and employed as private and special counsel an attorney from Spokane, Wash., to assist in the prosecution of the plaintiff. It is also alleged that, pursuant to the said conspiracy, the defendants, without reasonable or probable cause, corruptly and wrongfully solicited, requested, and induced said justice of the peace to hold plaintiff to answer said charge and to fix his bail in a sum beyond his ability to furnish, and that the justice of the peace did so and fixed his bail at \$5,000; that in pursuance of said conspiracy, the defendants procured the county attorney for said county to make and file in the district court an information in writing charging the plaintiff with said crime, and that thereafter the plaintiff appeared in the district court ready and willing to stand his trial upon said information, whereupon the county attorney did, on the 25th day of February, 1905, after consulting and advising with the defendants, and at their request, did then and there move said district court to discharge said plaintiff, which was done, and the plaintiff discharged out of custody, and that said prosecution is wholly ended and determined in favor of the plaintiff. In the eleventh paragraph of the complaint it is alleged that all of the acts of said defendants alleged in the complaint "were malicious and without any reasonable or probable cause therefor, and with the exception of the making and filing of the said complaint or information with said justice of the peace as aforesaid, were committed by the said defendants jointly." Then follows specific allegations of damage,

and it is alleged that, by reason of the acts complained of, the plaintiff has been damaged in the sum of \$20,000, and prays judgment for that amount. Two demurrers were filed by respective defendants, and the main ground of demurrer in each was that the amended complaint does not state facts sufficient to constitute a cause of action. Those demurrers were sustained and judgment of dismissal was entered. Two errors are assigned: (1) The court erred in sustaining said demurrers; and (2) the court erred in entering the judgment of dismissal.

It is first contended by counsel for defendants that, as the other defendants did not join with Crandall in instituting the criminal prosecution against the plaintiff, they cannot be properly joined with Crandall as defendants in this action. There is nothing in that contention, for in this class of cases it is not necessary to prove that all of the defendants were originators of the proceedings complained of. If, after the proceedings were commenced, they voluntarily conspired and maliciously joined in such prosecution without probable cause, they may be held liable. 1 Kinkaid on Torts, par. 55; Stansbury v. Fogle, 37 Md. 369; Mauldin v. Ball (Tenn. Sup.) 58 S. W. 248; Dreux v. Domec, 18 Cal. 83; Finley v. St. L. R. & W. G. Co., 99 Mo. 559, 13 S. W. 87; Porter v. Martyn (Tex. Civ. App.) 32 S. W. 731. In order to recover, want of probable cause and malice must coexist, and must be alleged and proved.

The only remaining question before us for decision is whether the amended complaint contains facts sufficient to constitute a cause of action. In limine the action for malicious prosecution is not favored in law, and hence has been hedged about by limitations more stringent than in the case of almost any other act causing damage to another. Small v. McGovern (Wis.) 94 N. W. 651; Grant v. Deuel, 38 Am. Dec. 228. In order to recover in this action the plaintiff must allege and prove (1) that there was a prosecution; (2) that it terminated in favor of the plaintiff; (3) that the defendants were prosecutors; (4) that they were actuated by malice; (5)

that there was a want of probable cause; and (6) the amount of damages that plaintiff has sustained.

Upon a careful consideration of the allegations of the complaint, we conclude that they state a cause of action. The judgment and the order sustaining the demurrers must be set aside, and the case remanded with instructions to the trial court to permit the defendants to answer within a reasonable time. Costs of this appeal are awarded to the appellant.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

### HORNER v. CHAMBERLAIN et al.

(Supreme Court of Idaho. April 18, 1906.)

Appeal from District Court, Kootenai County; Ralph T. Morgan, Judge.

Action by Fred J. Horner against A. V. Chamberlain and others. Judgment for defendants, and plaintiff appeals. Reversed.

R. E. McFarland, for appellant. McClear & Burgan and Robert H. Elder, for respondents.

SULLIVAN, J. This action was commenced to recover damages for malicious prosecution, and the pleadings and questions involved herein are substantially the same as in the case of Wm. J. Russell, Appellant. v. A. V. Chamberlain et al., Respondents, decided at this term of this court, and reported in 85 Pac. 926, and by stipulation of counsel this case was to follow the decision in the said case of Russell v. Chamberlain. On the authority of that case, the judgment in this case must be reversed, and the case remanded, with direction to the trial court to overrule the demurrers and to give the respondents a reasonable time in which to answer. Costs awarded to appellant.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

## WILSON v. DOYLE.

(Supreme Court of Idaho. April 18, 1906.)

## 1. JUSTICES OF THE PEACE—APPEAL—BOND—STAY.

Where an appeal is taken from a justice's court and the appellant claims a stay of proceedings, under section 4842, Rev. St. 1887, it is necessary to give two obligations (which may both be in the same undertaking); one in the sum of \$100, to cover costs of the appeal, and the other in twice the amount of the judgment, including costs.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, §§ 550, 606.]

## 2. SAME—SUFFICIENCY.

An undertaking in twice the amount of the judgment, including costs, for the stay of proceedings is ineffectual for any purpose where there is no obligation "for the payment of the costs on the appeal," and in such case the appeal is properly dismissed.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; Ralph T. Morgan, Judge.

Action by T. H. Wilson against William Doyle. From a judgment for plaintiff before a justice, defendant appeals, and on dismissal of the appeal by the district court appealed to the Supreme Court. Affirmed.

Chas. L. Heitman, for appellant. Thos. M. Wilson, in pro. per.

AILSHIE, J. This case was instituted in the justice's court of Harrison precinct, Kootenai county. Judgment was entered for the plaintiff, and the defendant appealed to the district court. On motion of the plaintiff the appeal was dismissed by the district court and judgment of dismissal was thereupon entered, from which the defendant has appealed to this court. It is contended by the respondent here that the appeal was properly dismissed for the reason that the defendant and appellant failed to give an undertaking on appeal as provided by section 4842, Rev. St. 1887, and if that contention is correct the judgment of the lower court in dismissing the appeal should be affirmed. The judgment entered in the justice's court was for \$80.00, principal, and \$3.80 costs. The undertaking on appeal was given for the sum of \$200. The conditions of the undertaking which are material to the consideration of the bond under discussion are as follows: "And, whereas, the above defendant is desirous of appealing from the decision of said justice to the district court at Rathdrum, in and for the county of Kootenai, state of Idaho, and a stay of proceedings is claimed: Now, if the above defendant, William Doyle, shall well and truly pay, or cause to be paid, the amount of said judgment and all costs, and obey any order the said district court may make therein, if the said appeal be withdrawn or dismissed, or pay the amount of any judgment, and all costs that may be recovered against the said district court, then this obligation

to be null and void; otherwise to remain in full force and virtue."

The appellant contends that while the undertaking was not sufficient to stay proceedings in the justice's court, that it did constitute a sufficient undertaking on appeal. Respondent, on the other hand, contends that under section 4842, the undertaking is, if anything, merely a stay bond and is in no respect an appeal bond. The Supreme Court of California in *McConky v. Superior Court of Alameda County*, 56 Cal. 83, in construing section 978 of the Code of Civil Procedure of that state, which is the same as section 4842 of our statute, held that, "the word 'or' in section 978 of the Civil Code of Procedure, joining the clauses referring respectively to the undertaking for costs on appeal and an undertaking for a stay of proceedings, is to be read 'and,' and in all cases the former undertaking is essential." Our own Supreme Court in *Numbers v. Rocky Mountain Bell Tel. Co.*, 7 Idaho, 408, 63 Pac. 381, said: "We think it is best, however, to suggest that said section 4842 of the Revised Statutes, of 1887, requires, in cases of appeal from justices' courts to the district court, where execution of the judgment is to be stayed, two obligations [maybe in the same undertaking]; one in the sum of \$100 to cover costs of appeal, the other, for double the amount of the judgment and costs in the justice court, to secure the payment of whatever judgment and costs may finally be recovered by the respondent against the appellant." It is clearly apparent from the context of section 4842, that where an appellant seeks a stay of proceedings, it is necessary to have two obligations—which, of course, may both be in the same undertaking; one to cover costs of appeal, and the other in double the amount of the judgment and costs entered in the lower court. In this case the undertaking is not sufficiently large for both purposes. The obligation of the sureties on the bond is to pay the judgment, including costs, entered in the lower court, or the amount of any judgment and costs entered in the appellate court. The statute, however, requires an appeal bond in the sum of \$100 "for the payment of the costs on the appeal," which is an entirely different thing from the payment of the judgment and costs entered in the lower court. The undertaking given in this case would doubtless be sufficient for a stay of proceedings, but since there is no undertaking on appeal, there is nothing to be stayed. The bond is not a sufficient appeal bond. It is too indefinite and uncertain a construction that would make it cover the appeal.

We therefore conclude that there was no error in the district court dismissing the appeal, and the judgment will therefore be affirmed. Costs awarded to respondent.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

(149 Cal. 60)

**McCONNELL v. CORONA CITY WATER CO.** (two cases). (L. A. 1,495, 1,496.)

(Supreme Court of California. March 27, 1906. Rehearing Denied July 9, 1906.)

**1. CONTRACTS—COMPENSATION—EXTRA WORK.**

Where plaintiff contracted to construct a tunnel according to specifications of the engineers of defendant and agreed that the tunnel should be timbered in a thoroughly workmanlike and practical manner to protect it against outward and inward pressure, and defendant furnished the materials, and during the process of the work plaintiff protested that the timber furnished was defective and the specifications insufficient, he was not responsible for the caving in of the tunnel, but was entitled to recover for extra repair work rendered necessary thereby.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 1428, 1429.]

**2. APPEAL—DISPOSITION OF CAUSE—MODIFICATION OF JUDGMENT.**

In an action for work performed under a contract for construction of a tunnel, where the judgment awarded an amount greater than the plaintiff's evidence showed that his expenditures amounted to, the judgment will be modified by deducting the difference.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4498-4501.]

**3. DAMAGES—BREACH OF CONTRACT—PROSPECTIVE PROFITS.**

In an action for breach of a contract for the construction of a tunnel, in that the defendant prevented its completion, where the evidence showed that the plaintiff was receiving a profit of a certain amount per foot in the preparing of soil he was working, and the number of feet remaining to be dug, the prospective profits were a proper element of damage for the defendant's breach of contract.

Department 2. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Actions by A. L. McConnell against the Corona City Water Company. From judgments in favor of the plaintiff, defendant appeals. Modified.

E. W. Freeman (A. D. Laughlin, of counsel), for appellant. J. V. Hannon and Munday & Redd, for respondent.

**HENSHAW, J.** Plaintiff engaged himself to build for defendant a tunnel "in a good, substantial, and workmanlike manner to completion," as far as the defendant might direct; "it being the intention to construct the said tunnel for the distance of about 1,200 feet to the artesian wells, unless water in sufficient quantities is encountered before reaching that point." It was stipulated "that said tunnel shall be constructed on the grades and according to the specifications of the engineers of the party of the second part in charge of the work. The tunnel will be timbered in a thoroughly workmanlike and practical manner so as to protect against outward and also inward pressure." The defendant agreed to furnish all the lumber needed and required by the plaintiff for the tunnel, the lumber to be delivered on the ground at the shafts where it was to be used. The defendant also agreed to make progress payments

during the performance of the work on the first of each and every month of 75 per cent. of the work completed during the previous month at the agreed rate. Work was prosecuted under this contract until some 764 feet of tunnel had been driven, the progress payments being made upon the report of defendant's engineers. At this point of the work the tunnel caved, and repair work upon it became necessary. This work was done by the plaintiff. The case L. A. No. 1,496 is to recover from defendant the value of such work done up to March 20, 1902. The other action (L. A. No. 1,495) is for similar work done after that date, and also for damages for loss of estimated profits occasioned by defendant's failure and refusal to allow plaintiff to proceed and complete the tunnel.

The action L. A. No. 1,496, for convenience, may first be considered. Plaintiff recovered judgment in the sum of \$2,000 as the value of such extra work, and the defendant appeals. Its principle contention is that the contract for the construction of the tunnel was entire and indivisible; that under it, notwithstanding the provision for partial payments, as the work progressed, it became the duty of plaintiff to turn over to defendant a completed tunnel, driven and supported in a thoroughly workmanlike manner, in particular, that plaintiff had agreed to timber the tunnel in a thoroughly workmanlike and practical manner so as to protect against outward and inward pressure; that the caving of the tunnel afforded evidence that it was not properly timbered; that it became the duty, therefore, of the plaintiff, at his own cost, to do this repair work; that it was repair work within the terms of the contract for which, treating the contract as indivisible, plaintiff had no cause of action, and the cost of which he should himself have borne. In support of this position, appellant cites many cases such as *Cox v. W. P. R. Co.*, 44 Cal. 18; *Boyle v. Agawan Canal Co.*, 33 Am. Dec. 749; *Seguin v. Debon*, 5 Am. Dec. 735, to the effect that where a contractor agrees to do certain work, as the grading of a certain section of railroad, in the first case, or the construction of a certain part of a canal, as in the second case, even though the contracts may provide for progress payments, such contracts are entire and the provision for progress payments does not make them divisible. The soundness of these cases and of the proposition of law which they enunciate are not to be doubted, and in the case at bar if the question were whether the contract for the construction of this tunnel was entire and indivisible, there would be no hesitation in saying that it was. But this conclusion does not advance us in the determination of the real question in dispute between the parties. That question may be thus stated: Treating the contract as entire, was the extra work necessitated by the caving of the tunnel, work within the contemplation of the contract, for which, therefore, the contractor was entitled

to no remuneration, or was it work without the contemplation of the contract, for the doing of which he is entitled to compensation? To answer this question, in addition to the provisions of the contract, resort must be had to the evidence. First, as to the terms of the contract, it will be noted that while the contractor agrees to timber in a thoroughly workmanlike and practical manner, so as to protect against outward and also inward pressure, he is controlled in this by the further provisions that the tunnel is to be constructed according to the specifications of the engineers of the company in charge of the work, and that the material for timbering is to be furnished him by defendant. The evidence shows that the plaintiff did drive the tunnel and timber it under the directions and specifications of the supervising engineers of defendant; that progress payments were made upon the certificate of the engineers of the completion according to the terms of the contract of certain portions of the tunnel; that the contractor complained of the inferior quality of the timber which defendant persisted in delivering to him, and of the inadequacy of the timber work which the engineers directed should be done, all without avail; that he was obliged to use the inferior lumber which was furnished; and that the timbering was done under the directions of and to the satisfaction of defendant's engineers. Under such circumstances, notwithstanding that the contract is indivisible, there can be no hesitation in saying that the contractor's responsibility for any completed portion of the work, so done under the direction and to the satisfaction of the engineers, relieves him from responsibility for such an accident as that which befell, that the responsibility for such action must rest on the defendant, and that, notwithstanding that the contract was entire and indivisible, plaintiff was under no more compulsion to perform the extra work of repairing the cave in the tunnel so occurring than he would have been if it had been occasioned by a willful act of destruction upon the part of the defendant. The work became necessary to enable the contractor to proceed under his contract. It was occasioned by the failure of the defendant to furnish suitable timbers and by the mistake of their engineer as to the strength of the timbering required. As the contractor was doing his work under the directions and specifications of those engineers he cannot be held responsible for their errors or miscalculations.

Appellant further contends that while the court awarded a judgment in the sum of \$2,000 for the value of the work and labor so done up to the 20th of March, 1902, the undisputed evidence offered by plaintiff himself shows that only \$1,024.60 was actually so expended. To this contention respondent makes no answer, and the record seems to bear out appellant's position in this regard.

It is not necessary, however, that a new trial should be ordered. It is sufficient to order, and it is ordered, that the judgment be modified in this regard, with an allowance to plaintiff of the sum of \$1,024.60, instead of \$2,000, and that, as so modified, it stands affirmed. The appellant will recover his costs upon this appeal.

L. A. No. 1,495. The complaint in this action charged in two counts: The first for the value of the extra labor performed as in L. A. No. 1,496, after March 20, 1902; the second, for the profits of which the contractor was deprived by the refusal of the defendant to allow him to proceed with the construction of the tunnel to its completion as contemplated in their agreement. The court allowed \$1,024.60 as the value of such labor, whereas the record discloses that the only testimony in relation thereto was that offered by the plaintiff himself, and his items of expenditure show an aggregate of \$898.10. There must be a modification of the judgment in this regard by the difference between \$1,024 and \$898.10.

The second count sets up a breach of the contract by defendant in refusing and neglecting to furnish the additional lumber needed and required by plaintiff in timbering the tunnel, by which neglect and refusal the defendant rendered it impossible for the plaintiff to perform his part of the contract. The court found, upon sufficient evidence, that the defendant did violate its contract in this regard, and as the furnishing of suitable timber when required by the contractor was a material part of defendant's agreement, the breach justified the plaintiff in treating the contract as at an end. One who has been injured by a breach of contract has an election to pursue any of three remedies. He may treat the contract as rescinded and may recover upon a quantum meruit so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In this last case, the contract would be continued in force for that purpose. 7 Am. & Eng. Ency. of Law (2d Ed.) p. 152; *Fountain v. Semi-Tropic L. & W. Co.*, 99 Cal. 680, 34 Pac. 497. It was the last of these remedies which plaintiff elected to adopt and pursue. But appellant contends that his damages for loss of prospective profit are too speculative and remote to justify the award which the court made, and cites numerous cases where this and other courts have refused to allow prospective profits as an element of damages upon the ground that they were too speculative and remote. Such is the undoubted rule, but it is to be noted that this is not an objection to the inclusion of profits as a proper element of damages, but is a declaration

merely that when they are too speculative and remote to be capable of anything like reasonable ascertainment, when they are collateral merely and do not arise directly or by natural consequence out of the tort complained of, they cease to become a proper element in the admeasurement of damages. No one may contest the soundness of this principle, but the converse of it is equally true, that where prospective profits are not too speculative and remote, where they do arise directly and as a natural consequence out of the injury, they are always allowed as an element of damage. Says this court in *Shoemaker v. Acker*, 116 Cal. 244, 48 Pac. 64: "An examination of the authorities will show that the cases in which future profits were rejected as 'speculative' or 'too remote' were cases where the asserted future profits were entirely collateral to the subject-matter of the contract, and not consequences flowing in a direct line from the breach of such contract." And again in *Martin v. Deetz*, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151, the syllabus, correctly summarizing the views of this court, declares that remote results produced by intermediate sequences of cause are beyond the reach of any just or practical rule or damages, and financial embarrassment and loss of prospective profits are too remote, contingent, speculative, indirect, and uncertain to come within a legal measure of damages for an alleged wrong in refusing to act as a director of a corporation and inducing others not to participate in the organization. An instructive analysis of the question and of the cases is found in *Howard v. Stilwell & Bierce Mfg. Co.*, 139 U. S. 200, 11 Sup. Ct. 500, 35 L. Ed. 147. But where, as in this case, the loss of profit can, with reasonable certainty be shown, both as to the fact and as to the amount, such loss of profits is properly an element of damage. Thus, says this court, in *Fountain v. Semi-Tropic L. & W. Co.*, 99 Cal. 680, 34 Pac. 498. "If, however, the breach be of a covenant, the nonperformance of which will render it impossible for the other party to perform, or will frustrate the whole purpose of the contract on his part \* \* \* he may decline to proceed in performance and sue for damages, in which case he may recover all loss occasioned by the breach, including profits he would have made if the contract had been performed." And says *Sutherland (Damages, vol. 1, p. 113)*: "A party to a contract is entitled to recover, against the other party who violated it, damages for the profits he would have made out of it had it been performed. It is no objection to their recovery that they cannot be directly and absolutely proved. In the nature of things, the defendant having prevented such profits, direct and absolute proof is impossible." And, still further (vol. 1, pp. 117, 118), the same learned author very justly says: "Where a party has contracted to perform labor from which a profit is to spring as a direct result of the work done at

a contract price, and he is prevented from earning this profit by the wrongful act of another party, the loss of this profit is a direct and natural result which the law will presume to follow the breach of the contract; and he is entitled to recover it without special allegations in his declarations. This he will be entitled to establish by showing how much less than the contract price it will cost to do the work or perform the contract." Plaintiff showed that, in the character of the soil through which he was tunneling—water-bearing soil—his profit over and above the contract price was \$4.40 per foot. The court found upon evidence that there was about 1,422 feet of tunnel yet to be dug, and gave judgment for the profits upon this at the rate of \$4.40 per foot. It is true that the character of the soil might have changed in that distance, and with the change in the character of the soil to nonwater-bearing, the profits of the contractor might have been decreased. It is true, also, that water in sufficient quantities might have been encountered before 1,422 feet additional had been driven, in which case, under the contract, the defendant had the right to order a cessation of the work; but as these were matters which could not be determined except by a completion of the contract, which defendant's conduct had prohibited, the court was justified in accepting the evidence, which under the circumstances was the best and most convincing that could be offered.

The judgment in L. A. No. 1,495 is therefore modified by reducing the amount allowed for extra work from \$1,024 to \$898.10, and in all other respects it stands affirmed. The appellant will recover its costs upon this appeal.

We concur: LORIGAN, J.; McFARLAND, J.

7 Cal. Unrep. 246

DARLINGTON v. BUTLER (KOHN, Intervener).

(Court of Appeal, Third District, California. March 1, 1906.)

APPEAL—DISMISSAL.

The consideration of a motion to dismiss an appeal by an intervener, on the ground that he is not a party aggrieved, will be postponed, where some of the questions involved in the appeal will have to be considered in determining the motion.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3161-3166.]

Appeal from Superior Court, El Dorado County; N. D. Arnot, Judge.

Action by Abe Darlington against Sarah Butler; Nathan L. Kohn, intervener. From the judgment rendered, the intervener appeals. Original application to dismiss appeal. Consideration postponed.

Wm. F. Bray, for appellant. Chas. A. Swisler, for respondent.

**BUCKLES, J.** This is an original application to dismiss the appeal pending in this court, brought here by Nathan L. Kohn, the intervener in the court below. The motion is made by the respondent upon the ground that said intervener is not a party aggrieved by the judgment and order appealed from, and that he has no right to appeal. As some of the questions involved in the appeal would have to be considered in determining this motion, we think the further consideration of the motion should be postponed, and be taken up with the appeal when it is presented.

It is therefore ordered that the determination of the motion to dismiss the appeal be postponed, to be taken up with the appeal when said appeal is presented and determined at that time.

We concur: **CHIPMAN, P. J.; McLAUGHLIN, J.**

3 Cal. App. 382

**SOUTHERN CALIFORNIA RY. CO. v. O'DONNELL.**

(Court of Appeal, Second District, California. April 4, 1906.)

**1. MINES AND MINERALS—LODE MINING LOCATION—ACTIONS—FINDINGS—CONSTRUCTION.**

Where, in an action to determine adverse interests in real property, defendant's claim to the property was based solely on a lode mining location, a finding that defendant ever since the spring of 1883 was and had been the owner and in possession of a specific portion of the disputed premises was an implied finding that the mineral location was actually made in 1883, as alleged, that the land was mineral in its character, that the claim was properly monumented, that the annual work was done thereon as provided by law and the mining regulations, and that the claim was not abandoned.

**2. APPEAL—FINDINGS OF COURT—CONCLUSIVENESS.**

Where on an appeal there is evidence in the record tending to support each of certain implied findings of the court, the facts so found are to be considered as established.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3979.]

**3. MINES AND MINERALS—FEDERAL RIGHT OF WAY ACT—MAP OF LOCATION—FILING—INTERVENING RIGHTS.**

Right of Way Act Cong. March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], provides for the granting of a right of way through the public lands to any railroad company, etc., and in section 4 (18 Stat. 483 [U. S. Comp. St. 1901, p. 1569]) that any railroad desiring to secure the benefits of the act shall, within a certain time, file with the register of the land office for the district where such land is located, a profile of its road, and that, on the approval thereof by the Secretary of the Interior, the same shall be noted on the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject thereto. Rev. St. U. S. § 2322 [U. S. Comp. St. 1901, p. 1425], declares that the locators of all mining locations shall have the exclusive right of possession and enjoyment of all of the surface included within the lines of their location. *Held*, that prior to the filing of a right of way map of definite location and the approval thereof, as provided in said section 4, the lands covered by the map

were free from the right of way and subject to mineral location.

**4. SAME—RIGHTS OF LOCATORS.**

The rights of one entering upon the public domain and locating and working a mineral claim are of as high order as those of a settler, each of whom is in possession under rights initiated which may by the observation of precedent conditions ripen into the right to a final patent.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, §§ 66, 68.]

**5. SAME—AREA OF LOCATION—LINES.**

Where the vein within a mining claim ran in a northerly and southerly direction, and the location was crosswise of the vein, the side lines were really end lines, considering the direction of the lode on the surface, and the rights of the locators were restricted to the area within the side lines 300 feet on each side of the vein or lode.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 78.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by the Southern California Railway Company against Charles O'Donnell. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

T. J. Norton and U. T. Clotfelter, for appellant. Henry M. Willis, for respondent.

**ALLEN, J.** Action to determine adverse interests in real property. Findings and judgment in favor of defendant as to certain of the premises described, from which plaintiff appeals, as well as from an order denying a new trial.

The claim of defendant to the property is based solely upon a lode mining location. The finding of the trial court that defendant, ever since the spring of 1883, was and has been the owner of and in possession of a specific portion of the disputed premises can only be taken as impliedly finding that the mineral location was actually made in 1883, as alleged; that the land was mineral in its character; that the claim was properly monumented; that the annual work was done thereon as provided by law and the mining regulations; and that the claim was not abandoned. *Trevaskis v. Peard*, 111 Cal. 603, 44 Pac. 246. Evidence appears in the record tending to the support of each of such implied findings and to the general finding to the extent of the ground covered by the mineral location; and upon this appeal we must accept those facts as established.

The principal contention of appellant is that, notwithstanding the entry and location of defendant's mine, under the act of Congress known as "the right of way act," approved March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], the lands included in defendant's location were not open to mineral location, but had been previously granted to plaintiff. The first section of the right of way act provides:

"That the right of way through the public lands of the United States is hereby granted

to any railroad company duly organized under the laws of any state \* \* \* which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proof of its organization under the same, to the extent of one hundred feet of each side of the central line of said road. Also the right to take from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad. Also ground adjacent to such right of way for station buildings, depots, machine shops, side-tracks, turn-outs and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

"Sec. 3. That the Legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands may be condemned," etc.

"Sec. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a profile of its road; and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass, shall be disposed of subject to such right of way. Provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

Plaintiff corporation came into existence in 1882, a year preceding the mineral location of the defendant. It did not, however, procure an approval of its map of definite location by the Secretary of the Interior until December, 1885, until which date no right to select the premises in question as station grounds existed. *Lillienthal v. Southern Cal. Ry. Co.* (C. C.) 56 Fed. 703. The language employed in the first section of the right of way act, when used in other acts granting to specified corporations rights of way and other lands, has been uniformly held to be a grant in present; and it is well settled that when the map of definite location is subsequently filed the rights of the grantee attach under the doctrine of relation at the date of the passage of the act and cuts off any and all intervening rights claimed by third parties. A different construction of the right of way act has been announced in *Lillienthal v. Southern Cal. Ry. Co.*, supra, *Washington & I. R. Co. v. Osborn*, 160 U. S. 103, 16 Sup. Ct. 219, 40 L. Ed. 346, and *Spokane Falls & N. Ry. Co. v. Ziegler*, 167 U. S. 65, 17 Sup. Ct. 728, 42 L. Ed. 79, and this different construction is made necessary by reason of

the provisions of sections 3 and 4 of the right of way act, which are not found in any of the specific grant acts. It will be observed that by section 4 of the right of way act there is reserved to the United States the right to dispose of its public lands free from such right of way until a map of definite location is filed and approved; for it provides that after such filing and approval all of such lands shall be disposed of subject to such right of way. "The intention could only have been to confer the right over such public lands as were not disposed of when the roads were actually located." *Radke v. W. & St. P. R. Co.* (Minn.) 39 N. W. 624. If, therefore, the lands between the terminal of the road as expressed in the articles of association are subject to disposal until the route is approved, it can only be upon the theory that they still remain in part of the public domain. If they, therefore, still remain a part of such public domain, subject to sale, they must of necessity be subject to settlement and to rights of mineral location; for, that land may be open to location, three things are essential; "(1) It must be land containing valuable mineral deposits. (2) It must belong to the United States. It must be a part of the public domain at the time of the location. (3) It must be unoccupied and unappropriated by others under claim of right." *Barringer & Adams on the Law of Mines and Mining*, p. 197. Rights of mineral locators are possessory rights. Section 2322 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1425] declares that "the locators of all mining locations \* \* \* shall have the exclusive right of possession and enjoyment of all of the surface included within the lines of their location." That the doctrine of relation will not be extended to cut off settlers intermediate the passage of the act and the filing of the articles of association is determined in *Washington & I. R. Co. v. Osborn*, 160 U. S. 103, 16 Sup. Ct. 219, 40 L. Ed. 346, and this upon the theory that Congress would not, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their road at pleasure, regardless of the rights of settlers. The rights of one entering upon the public domain and locating and working a mineral claim are of as high order as those of a settler, each of whom is in possession under rights initiated which may, by the observation of precedent conditions, ripen into the right to a final patent. The mere possessory right involved in *Doran v. Central Pacific R. Co.*, 24 Cal. 246, and *Southern Pacific Co. v. Burr*, 80 Cal. 282, 24 Pac. 1032, was held in *Washington & I. R. Co. v. Osborn*, supra, to be of such character as under the act of 1875, to establish an equity which would preclude the application of the doctrine of relation in so far as it affected such rights; while in the *Ziegler* and *Lillienthal* Cases, before cited, the rights of each of the claim-

ants attached intermediate the filing of the map of definite location and the filing of the articles of association, as in this case.

We are of opinion, therefore, that to the extent of the proper area of defendant's mineral location the court properly found defendant to be the owner and in possession thereof. While, as before stated, we are of opinion that the trial court correctly found that defendant was the owner of the land embraced within his mineral location, yet in its findings and judgment specifying the area of such location the same are excessive. The court finds that the mineral claim of defendant is in the shape of a parallelogram about 1,350 feet in length east and west and 300 feet in width north and south. It is conceded that the vein or lode within defendant's claim runs in a northerly and southerly direction and the location was crosswise of the vein. This being true, the side lines are really end lines, considering the direction of the lode on the surface. *Argentine Co. v. Terrible Co.*, 122 U. S. 485, 7 Sup. Ct. 1356, 30 L. Ed. 1140. The location is valid, but the rights of the locator are restricted to the area within the side lines 300 feet on each side of the vein or lode. It is not possible from the record to determine with sufficient exactness to warrant us in a modification of the decree where the vein or lode is actually situated.

An order will, therefore, be made reversing the judgment of the court and remanding the cause for a new trial.

We concur: GRAY, P. J.; SMITH, J.

PER CURIAM. In accordance with the opinion filed in this case, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

(74 Kan. 101)

#### RAIT v. FURROW.

(Supreme Court of Kansas. June 9, 1906.)

##### 1. WATERS AND WATER COURSES — NATURAL WATER COURSE.

Where water runs in a well-defined channel, with bed and banks, made by the force of the water, and has a permanent source of supply, it is to be regarded as a natural water course, although the stream may be small, its course short, and it may have existed for only a short time.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 30.]

##### 2. SAME.

The source of supply may be springs, surface water, or a pond formed by surface water; but, whatever the source, if it has the element of permanence, it becomes a natural water course where the water comes to, or collects on, the surface and flows in a well-defined channel and bed, with such banks as will ordinarily confine the water and cause it to run in a definite direction.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 30.]

##### 3. SAME—PERMANENCE.

While the element of permanence is necessary, great age is not an essential attribute of a water course.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 30.]

##### 4. SAME.

A stream may be a natural water course, although its outlet be over the unchanneled surface of low land, and not into another water course.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 30.]

(Syllabus by the Court.)

Error from District Court, Geary County; O. L. Moore, Judge.

Action by J. G. Furrow against A. C. Rait. Judgment for plaintiff, and defendant brings error. Affirmed.

Action by J. G. Furrow to enjoin A. C. Rait from maintaining an embankment and thereby obstructing what is called a "natural water course," flowing through his land and upon that of Rait. The trial court made findings of fact, from which it appears that Furrow owns a farm in Geary county, and adjoining it on the east is a farm owned by Rait. The south part of the two farms is hilly land, and the remainder is bottom land which is nearly level. Two ravines, beginning in the hills, come down on Furrow's land and are designated "West creek" and "East creek." West creek is conceded to be a water course. East creek drains about 800 acres of land in the hills, and has a well-defined course, with banks from one to three feet deep, until it reaches the level land. In an early period, and when there were heavy rains, the water ran down East creek to Furrow's land, and from there followed a depression until it reached and spread out over Rait's land. There was then no well-defined channel over the bottom land and along the course which the water ran but it passed over a depression in Furrow's land for about 1,300 feet before it reached Rait's land. Along this depression there were numerous erratic wet-weather springs, which appeared and disappeared from time to time, but, except during wet weather, these springs did not furnish sufficient water to make a current or channel extending to and upon defendant's land. The water which came down this depression spread out over the depression on Rait's land, and, without forming a definite channel or taking a common course, worked a distance of 200 or 300 yards to the southeast, where it usually formed a pond of water in a deeper depression on Rait's land, and from this point the water worked its way eastward and northeastward toward the river, without forming any definite or visible course, until it left defendant's land. About 23 years ago, the parties cut an artificial ditch from East creek at the foot of the hills, over to West creek, in an effort to convey the water from the former over to the channel of the latter. This was suffi-

cient for that purpose, except during heavy rains, until the floods of 1903. Prior to that year, and during the heavy rains, the water would overflow the banks of this ditch and run down the depression on Furrow's land and on that of Rait. It did not, however, break through the turf or make a definite channel. There were some holes and irregular and disconnected ditches near the wet-weather springs, but prior to 1903 these springs only produced running water during wet seasons, but it did not appear that the water from the springs reached Rait's land through any definite channel. When the freshets of 1903 came, the water broke over the banks of the artificial ditch connecting the two creeks, near an old road. When that happened it cut a ditch or channel down through the depression by the springs on Furrow's land and to Rait's farm. In one of its findings the court states particularly the character of the channel and stream in question: "From about 10 or 15 feet from where the water left the old road, to the east line of plaintiff's land, there is a visible well-defined channel, cut through the turf, with banks, through which water has been continually running since the said floods of 1903. This water comes from the plaintiff's land and not from the hills. There are no visible springs from which the water comes. It either originates from springs invisible, in the bottom of the ditch, or it oozes or seeps out of the soil. From the evidence I am unable to tell which. It is a continuous stream, from about 10 feet from the said old road to the east side of plaintiff's land, and it increases in volume as it approaches defendant's line. At defendant's line the stream is sufficient to carry over onto the defendant's land as much as a half a barrel of water every minute." The water runs about 1,200 feet in the channel through Furrow's land and over to Rait's land with a descent of  $6\frac{1}{2}$  feet. Where the stream reaches Rait's land he built an embankment which throws the water back upon Furrow's land to his damage. The water finally finds its way around the embankment and into a large hole on Rait's land on the opposite side from where the stream strikes the embankment, and extending eastward 15 or 20 feet. From the east end of this hole there is no regular channel worn by the water, but there is a depression extending eastward. Rait has constructed an artificial ditch from the hole which carries the water beyond his land. Although the water has continued to run in the stream since the spring of 1903, it is shown that for a considerable part of the time the rainfall has been below normal for the same months of many years. In conclusion the court found that the channel or stream across which Rait constructed the embankment is a natural water course, and that the embankment obstructing the water course is a nuisance which should be abated, and this was the judgment rendered.

Humphrey & Humphrey, for plaintiff in error. Thos. Dever and Roark & Roark, for defendant in error.

JOHNSTON, C. J. (after stating the facts). Is the stream in question a natural water course? If it is, the embankment which obstructed its flow is a nuisance which was properly enjoined, but, on the other hand, if it is a vagrant outburst, which temporarily overflowed the surface of the land, it is to be treated as surface water, a common enemy against which Rait was entitled to fence. A water course consists of a channel, with banks, and bed, and running water. There must be a source of supply, a defined channel and permanence of flow. In *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241, a general definition was given: "Again, for a water course there must be a channel, a bed to the stream, and not merely low land or a depression in the prairie over which water flows. It matters not what the width or depth may be. A water course implies a distinct channel, a way cut and kept open by running water, a passage whose appearance, different from that of the adjacent land, discloses to every eye on a mere casual glance the bed of a constant or frequent stream." See, also, *Palmer v. Waddell*, 22 Kan. 352; *Railway Co. v. Dyche*, 31 Kan. 120, 1 Pac. 243; *Railway Co. v. Riley*, 33 Kan. 374, 6 Pac. 581; *Railroad Co. v. Morrow*, 42 Kan. 339, 22 Pac. 413; *Railway Co. v. Steck*, 51 Kan. 737, 33 Pac. 601; *Railway Co. v. Scott* (Kan.) 81 Pac. 1131. East creek, the stream in question, has a well-defined channel, with bed, and banks, in which there has been a steady flow of water since the early part of 1903. Prior to that time the upper part of that stream, which drained the hill country, had a well-defined course, with banks, until it reached the bottom land, from which place it passed down a depression in Furrow's land, and extending to the land of Rait. In this depression the water followed no distinct course, and there was no well-defined channel. From the facts found it cannot be said that the flow of water through Furrow's land prior to 1903 constituted a stream with the attributes of a water course. Water did issue from some springs, but only in wet weather, and the water which passed down the depression near the springs left no impress of permanent running water. Since the flood of 1903, however, there has been a regular channel, with banks, and bed, and the flow of water has been so steady and persistent as to show that the stream has a well-defined and substantial existence.

It is argued that the supply of water is not so permanent in character as to make it a water course. The court does find that ordinarily the water in the stream does not come from the hills; that it either comes from invisible springs in the bottom of the channel or from seepage, but from which of the two sources the evidence did not disclose.

It is argued that seepage is no more than surface water, and that, as the court could not say that springs existed, its finding was the equivalent of a holding that there was no permanent supply. To constitute a water course it is necessary that there be a permanent source of supply. *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Jeffers v. Jeffers*, 107 N. Y. 650, 14 N. E. 316; *Gregory v. Bush*, 64 Mich. 37, 31 N. W. 90, 8 Am. St. Rep. 797. The source may be springs (*Pyle v. Richards*, 17 Neb. 180, 22 N. W. 370; *Mitchell v. Bain*, 142 Ind. 604, 42 N. E. 230; *Wolf v. Crothers* [Pa.] 21 Pa. Co. Ct. R. 627) or it may be surface water (*Arthur v. Grand Trunk Railroad Co.*, 22 Ont. App. 89, 95; *Beer v. Stroud*, 19 Ont. 10; *McKinley v. Union County Freeholders*, 29 N. J. Eq. 164; *Kelly v. Dunning*, 39 N. J. Eq. 482; *Eulrich v. Richter*, 41 Wis. 320; *Barnes v. Sabron*, 10 Nev. 217; 2 *Farnham on Waters*, § 457; *Gould on Waters* [3d Ed.] § 263), or a pond formed by surface water (*Neal v. Ohio River R. Co.*, 47 W. Va. 316, 34 S. E. 914). If, as the court found, the flow of water was continuous and has the element of permanence, it is immaterial whether it reaches the channel by seepage or from springs. It is enough that there is a living source, a steady supply which is regularly discharged through a well-defined channel made by the force of the waters. Whether the water comes from a spring, subterranean vein, or surface water, it becomes a water course from the point where it comes to or collects on the surface and flows in a well-defined channel or bed, with such banks as will ordinarily confine the water and cause it to run in a definite and certain direction. The Supreme Court of Ohio, in defining surface water and its transition into a water course, said: "Surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters, whether derived from the surface or springs; and it then becomes the running water of a stream and ceases to be surface water." *Crawford v. Rambo*, 44 Ohio St. 282, 7 N. E. 431. In *Mitchell v. Bain*, *supra*, it was remarked: "Even surface water becomes a natural water course at the point where it begins to form a reasonably well-defined channel, with bed, and banks, or sides, and current, although the stream itself may be very small and the water may not flow continuously. *Gould on Waters*, § 263; *Churchill v. Lauer*, 84 Cal. 233, 24 Pac. 107." The question is not to be determined alone from the origin of the water, for streams may be composed wholly of surface water or that which falls in the shape of rain or snow. In *Arthur v. Grand Trunk Railroad Co.*, 22 Ont. App. 89, it is said: "If a stream is traced up towards its source, a point will always be reached where it ceases to be de-

finable by a bed and banks; but, until that point is reached, it must be a water course, whether its origin be a spring or several springs, or the rain or snowfall of a district collected naturally and flowing away for the first time in a visible course of channel. All our lakes, rivers, and streams have their source in the clouds of the sky, precipitated in the form of rain or snow, and the sole question in every case is whether the water thus precipitated has formed for itself a visible course or channel, and is of sufficient magnitude or volume to be serviceable to the persons through or along whose land it flows. It is immaterial that it may be intermittent in its flow, or that at certain seasons of the year there may be little or even no flow of water." So it has been held that, when surface waters collect into a pond, which is of a permanent character, they cease to be surface waters. *Neal v. Ohio River R. Co.*, *supra*; *Schaefer v. Marthaler*, 34 Minn. 487, 26 N. W. 726, 57 Am. Rep. 73; *Alcorn v. Sadler*, 66 Miss. 221, 5 South. 694.

It is plausibly contended that the water has not flowed in the stream for such length of time as to indicate permanence; that, as it has not flowed from time immemorial, it cannot be regarded as an ancient water course. It is not essential that a water course shall have all the characteristics and attributes of every other water course. 2 *Farnham on Waters*, § 455. It is not uncommon for a stream to leave its channel and make for itself a new course. The test is not the age of the stream, nor the length of time its waters have followed a particular channel, but it is whether it has the characteristics of permanence. The waters of the Missouri river frequently leave portions of its accustomed bed and cut a new channel far away from the former one, and occasionally they shift back again and pass through the old channel. In such cases the new channel does not require great age to give it the character of a water course, and there can be no distinction between that river and a running stream of less magnitude. East creek has been a regular flowing stream in all seasons, wet and dry, since the spring of 1903. While the volume of water is not large, it is large enough to be serviceable, as it flows at the rate of half a barrel a minute, and to throw it back upon the land of the plaintiff would necessarily work great injury. If it had only flowed during freshets, or in wet seasons, there would be more reason to treat it as a temporary stream, but the matter of permanence was a question of fact for the trial court, and, although its existence originated in a flood, and only a year or two ago, the facts stated appear to be sufficient to support the finding of the court.

The fact that East creek does not continue in a definite channel, across Rait's land, and until it reaches the river, is pressed upon the attention of the court. It is not shown

to flow through a well-defined, natural channel much beyond Furrow's land, nor that it discharges into another water course. But is it important or necessary that a water course should extend to and find its outlet in another water course, and thence to the sea? Ordinarily a stream of water, flowing in a definite channel, discharges itself into a river or some other water course; but the fact that a stream may spread out over the land, percolate into the soil, or lose itself in some subterranean channel, does not deprive the part which flows regularly through a channel of its character of a water course. In a Vermont case, it appeared that water from springs ran down a hillside, formed a small pond, and from thence by a distinct course down a ravine to a point where it was discharged upon a meadow. Ordinarily the stream was only two or three inches deep and about six inches wide, and, while the volume of water was small, its distance very short, and its outlet the unbroken surface of a meadow, it was held to be a water course. *Hawley v. Sheldon*, 64 Vt. 491, 24 Atl. 717, 33 Am. St. Rep. 941. Subterranean currents of water emerge from the ground and flow through surface channels, and, again, running streams sometimes sink away and are no longer traceable on the surface. The outlet of a stream may be unknown, but if its course on the surface, so far as it runs, is well defined, and has the element of permanence, it must be regarded as a water course, and its surface flow at least cannot be interrupted nor diverted from its natural channel. In *Mansford v. Ross*, 4 New Zealand Law Reports, 290, it is held that a stream which empties itself into a swamp, where all definite channel is lost, and there is a channel emerging from the other side, the stream running into the swamp is a water course, and the owner of the land through which that stream runs cannot divert the water and defeat the riparian rights of those on the lower stream on the other side of the swamp. In *Mitchell v. Bain*, *supra*, it is said: "A stream does not cease to be a water course and become mere surface water because at a certain point it spreads over low ground, several rods in width, and flows for a distance without a definite channel, with banks, before flowing again in a definite channel." See, also, *Ferris v. Wellborn*, 64 Miss. 29, 8 South. 165; *Hebron Gravel Road Company v. Harvey*, 90 Ind. 192, 46 Am. Rep. 199; *Washington Water Co. v. Garver*, 91 Md. 398, 46 Atl. 979; *Case v. Hoffman*, 84 Wis. 438, 54 N. W. 793, 20 L. R. A. 40, 36 Am. St. Rep. 937.

But, whatever may be the rule, as to subterranean currents or waters, passing through the ground by percolation, there can be no question but that surface currents of living water, running in defined channels, and having the element of permanence, are to be regarded as water courses, whether the out-

lets are through defined channels over the surface, or by subterranean channels, or even by percolation, through the earth. In *Straight v. Brown*, 16 Nev. 317, 40 Am. Rep. 497, it was decided that a creek having its source in springs, which ran a short distance through a natural surface channel, and then discharged into a large slough, which had no natural surface outlet, was a water course, and that the waters running in the surface channel could not be diverted to the injury of the lower owners. The character of the outlet beyond the land of Furrow cannot materially affect the character of the stream flowing through Furrow's land, and that stream, under the findings of the trial court, must be regarded as a natural water course.

The judgment of the court will therefore be affirmed. All the Justices concur.

#### STATE v. DE MOSS.

(Supreme Court of Kansas. June 9, 1906.)

##### 1. CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESSES.

An application for a continuance made by defendant in a criminal action on the ground of the absence of material witnesses is properly overruled when it merely appears from the affidavit for continuance that the absent witnesses have left the state to avoid prosecution for the same offense, and that defendant expects, if delay is granted, to take their depositions and believes they will testify that they are guilty and he is innocent.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1322, 1332.]

##### 2. INTOXICATING LIQUORS—MAINTAINING LIQUOR NUISANCE.

The evidence examined, and held to be sufficient to support a conviction of the offense of keeping and maintaining a nuisance under the prohibitory liquor law.

(Syllabus by the Court.)

Appeal from District Court, Wilson County; L. Stillwell, Judge.

E. M. De Moss was convicted of maintaining a liquor nuisance, and appeals. Affirmed.

S. S. Kirkpatrick and H. A. Scott, for appellant. C. C. Coleman, Atty. Gen., E. D. Mikesell and J. B. Wilson, for the State.

PORTER, J. The information in this case charged Martin Peters, N. C. Binford and appellant with maintaining a common nuisance in violation of the prohibitory liquor law. Peters and Binford are fugitives from justice, having avoided arrest. From a conviction appellant appeals and assigns several errors, but relies chiefly upon two: The refusal of the court to grant him a continuance, and the denying of the motion for a new trial, on the ground that the verdict and judgment are not sustained by the evidence. The application for a continuance recited that the testimony of Peters, Binford, and Emmet M. De Moss, a brother of appellant, was necessary to establish his defense that

he was not the proprietor, owner, or in any manner connected with the business; that his brother had also fled the state for fear of arrest for assisting in maintaining the same nuisance, and he asked for time to take depositions of these witnesses. It also appears from the affidavit for a continuance that appellant had been informed that Peters was located in Glasgow, Mo.; that Binford would probably never return to the state, but was preparing to take up his residence in New York; and that Emmet M. De Moss was arranging to locate in Kansas City, Mo. Three months had passed since his arrest. No diligence was shown in an effort to procure the testimony of the absent witnesses except that they were absent from the state, and that he had only a few days prior thereto learned where one of them was. No probability was shown that if a continuance were granted the testimony could be obtained, save the statement of his belief to that effect. As a part of appellant's affidavit for a continuance, there is attached a written statement of what each of the absent witnesses would swear to in case they could be located and induced to halt for a length of time sufficient to arrange for and take their depositions. From this statement it appears they would swear that they were associated together and conducted the business at the place mentioned in the information, but that appellant had nothing to do with it. While it is not within our province to weigh the probability of these absent witnesses thus testifying to their own guilt, we think the application was properly denied.

The evidence connecting appellant with the business was circumstantial, but sufficient in our opinion to sustain the verdict of the jury. He unlocked the door and invited customers to come inside. He had the keys to the room and surrendered them to the officers when the place was raided. He claimed to own the cash register and water filter and carried them away. When the inventory was taken he designated what kind of liquor was in the particular boxes and bottles. He tried to employ the Assistant Attorney-General, Mikesell, to abandon the temperance people, and accept a retainer and enter "our employ." He exercised acts of ownership over the place and the stock of liquors, and tried to negotiate with the officers to have everything left as it was, pending a settlement of the cases which he endeavored to make. These circumstances were sufficient to overcome the denial of appellant, and the force of negative testimony offered of several witnesses in his behalf who never saw him behind the bar or in the act of making sale. He was charged with keeping and maintaining a nuisance, and proof of actual sales was not necessary.

The judgment will be affirmed. All the Justices concurring.

(74 Kan. 180)

## STATE v. WILLIAMS.

(Supreme Court of Kansas. June 9, 1906.)

1. **LIBEL—PERSONS INJURED—CORPORATIONS.**  
A private corporation, as well as an individual, is included in the word "person," as used in section 2271, Gen. St. 1901, defining the crime of libel.

2. **SAME—PROOF OF TRUTH.**

Where, on the trial of a criminal charge of libel, a part of a printed circular has been introduced in evidence, portions of which are libelous and portions not libelous, it is not necessary for the defendant to prove or show the truth of such portions as would not in fact be libelous if not true.

3. **SAME—INSTRUCTIONS.**

In such case, if the court in its instructions calls the attention of the jury to the portion of such printed matter which would not in fact be libelous, if not true, and instructs the jury that, before the defendant can justify the publication of this circular, it must appear from the evidence that such portion is true, such instruction constitutes material error.

4. **SAME—EVIDENCE—LIBELOUS PUBLICATION.**

On the trial of such case, all portions of the circular which in any way relate to the subject-matter of the portion or portions alleged to be libelous should be introduced in evidence by the state in proving its case, in connection with the portion alleged to be libelous; but, where any portion of the circular is upon an entirely different subject, and in no way qualifies or explains the portion or portions alleged to be libelous, it is within the discretion of the trial court to exclude such portion.

(Syllabus by the Court.)

Appeal from District Court, Labette County; Thos. J. Flannelly, Judge.

A. B. Williams was convicted of criminal libel, and appeals. Reversed.

W. D. Atkinson, for appellant. C. C. Coleman, Atty. Gen., E. L. Burton, S. H. Allen, and J. D. Milliken, for the State.

SMITH, J. The appellant was arrested upon an information filed by the county attorney and tried and convicted in the district court of Labette county on eight counts charging different publications of the following printed circular: the portions of the circular which are alleged in the information to be libelous being inclosed in brackets below, to wit:

• "Buncoed!

"[Startling Exposure of the Methods Employed by the Farmers' Alliance Insurance Company, of McPherson, Kansas.

"[The Victim a Prominent Farmer Residing Near Parsons.

"[Parsons, Kansas, June 28, 1905.

"[A matter of vast importance to the insuring public, especially the farming classes, has recently developed in connection with the loss sustained by Mr. A. J. Higginbottom, a prominent farmer residing about three miles northeast of this city.

"[Mr. Higginbottom purchased the John Brooks farm, and the insurance which Mr. Brooks carried on the property was transferred to Mr. Higginbottom, part of it being in-

sured in the Farmers' Alliance Insurance Co., of McPherson, Kansas, a so-called "mutual" company.

"[In the month of March a windstorm damaged the barn and dwelling to the amount of \$170, at least that was the amount of damages as estimated by the adjuster for that company. Mr. Higginbottom expected pay to the full amount of his damages, naturally, and based his expectation upon the policy, as he understood it, in which he carried \$800 on the dwelling and \$200 on the barn.

"[Mr. Higginbottom was dumfounded when he was informed by the adjuster that he could only draw pay for just one-half of the amount of his loss, but such was the case. This was brought about by the fact that his policy was subject to any changes that the company saw fit to make, and as it had been changed he was unable to obtain pay for more than one-half of his damages, consequently he received only \$85, although his loss was estimated at double that sum.

"[Over a year ago Mr. Higginbottom's attention was called to that clause in his Alliance policy wherein the conditions could be changed on him, without his consent or knowledge, but Mr. Higginbottom deemed it of too little importance to consider, in fact thought it an impossibility. He has since discovered that A. B. Williams informed him correctly about having a changeable policy, as evidenced by the following statement:

"[A. J. Higginbottom carried \$1,000 insurance against fire, lightning and tornado, in policy No. 39,467 of the Farmers' Alliance Insurance Co., of McPherson, Kansas; \$800 was on dwelling and \$200 on frame barn. In the month of March, 1905, a windstorm demolished the barn, and damaged the dwelling some. The adjuster for that company estimated the damage at \$150 on the barn and \$20 on dwelling. According to the conditions in the policy held by Mr. Higginbottom he was entitled to the full amount of his damages, but he was compelled to accept one-half of the estimated damages, on account of the fact that the company had changed the conditions of his policy, after it had been issued several months. The conditions of his policy had been changed, and he was not aware of it until the adjuster informed him after the loss occurred.

"[Mr. Higginbottom found, upon a close inspection of his policy, that it was subject to be changed, at the option of the company's directors, at least four times a year, without his knowledge or consent.

"[State of Kansas, County of Labette—ss.

"[I, W. W. Thompson, a free-holder, residing in Labette County, Kansas, declare that I heard the foregoing statement read to Mr. A. J. Higginbottom on this 7th day of June, 1905, and that Mr. Higginbottom declared that the statement was true, and that it set forth the facts in the case. (Signed) W. W. Thompson.

"[Subscribed and sworn to before me, a Notary Public, in and for Labette County, Kansas, this 7th day of June, A. D. 1905. Lella L. Wilson, Notary Public. (Seal.)

"[My commission expires September 28th, 1907.

"[It develops that this company has been issuing policies of insurance which can be changed four times annually, even after being issued, and the assured is compelled to abide by the changes, which he has no voice in making, and no means of knowing anything about until he has a loss and settling time comes, then he is informed; at least that was as soon as Mr. Higginbottom had knowledge of a change in his policy.]

"This company poses before the insuring public, especially the farming classes, as the benefactor of the Kansas farmers, claiming to be operated for the benefit of the insuring public, and on the "mutual interests" plan, and instead of treating its members alike, as they should do, they seem to have no settled plan on which to write insurance, charging some of its members almost double the amount it charges others for the same kind of insurance. Some of its members are charged \$2.00 per hundred for combined insurance for 5 years, while others are charged \$2.75, \$3.00 and \$3.50 per hundred on the same kind of property. Some of its members are charged an advance cash payment of 20 per cent. of the full amount of their note, while others are charged 26, 27, 30, 35 and even 40 per cent. of the gross premiums, in advance.

"Policy No. 23,992 was issued to Isaac W. Galyen for 5 years, and he was charged only \$2.00 per hundred for fire, lightning and tornado, while G. W. Guyton was charged \$3.50 per hundred for 5 years for fire, lightning and tornado, in policy No. 24,846.

"G. W. Gruell was charged \$1.50 per hundred for tornado for 5 years, in policy No. 28,565, while Isaac W. Galyen was charged \$1.00 per hundred for tornado for 5 years, in policy No. 39,469.

"D. G. Daigh was charged \$2.75 for fire, lightning and tornado, in policy No. 29,693, for 5 years, while Arthur Smith was charged \$3.50 for fire, lightning and tornado for 5 years, in policy No. 31,225.

"Harry W. Lumm was charged a 35 per cent. advance cash payment on policy No. 42,047, while T. C. Joseph was only charged 27 per cent. advance payment on policy No. 31,591.

"S. R. Barker's advance cash payment was 20 per cent. under policy No. 28,242, W. A. Oler's 26 per cent. under policy No. 36,756, Arthur Smith's was 30 per cent. under policy No. 31,225, Chas. Bramer's 31 per cent. under policy No. 33,835, N. D. Tower's was 35 per cent. under policy No. 42,228, and Isaac W. Galyen's was 40 per cent. under policy No. 39,469.

"Mr. Grant Hume, who owns a suburban home near this city, was charged \$3.00 per

hundred for combined insurance for 5 years, as was also Mr. E. E. Lugeanbeal, who resides in the village of Montana, this county.

"These two properties are what is known as detached risks, that is, no hazard from other property.

"Mr. J. S. McEntire, of South Mound, and Mr. F. M. Liston, of Altamont, Kansas, both carried a policy in the Alliance on property much more hazardous than was Mr. Hume's or Mr. Lugeanbeal's, yet they were charged a much less rate.

"This is only a few samples of what has been done by this Alliance company and its agents around Parsons, and there are scores of similar cases. They seem to have no settled plan on which to write insurance, charging all kinds of rates, issuing a changeable policy, having some of its members to pay more than others; in fact, doing business on a "happy-go-lucky," "hit-or-miss" plan, and it is difficult to understand where all the members are getting the "mutual" benefits, about which the agents of that company talk so much. Where do you come in on that, brother?

"The farmers have been woefully misled by this company. A close inspection of their policies and methods of doing business will show this, and it is no wonder that 4,366 members quit that company in 1903. Look at your annual statement for that year and see if those figures are not right.

"[The annual statement of this company for the year 1902, shows at items 6 and 7, in "Resources", that "cash in office and in bank December 31st, 1902", amounted to \$1,818.07.

"[Their statement for the year 1903 shows in item "I" in "Income" that "cash in company's office and deposited in bank December 31st, 1902", amounted to \$64,468.07, a discrepancy of \$62,650 for the same items and the same time.

"[The company made affidavit that each of these were correct. You men who are insured in the Alliance company, just get your statements and see if this is correct, and then make up your minds as to which one of these statements the company means to go by, as evidently their affidavit is wrong in one or the other. Ask them to explain.

"[For additional facts and figures in regard to the methods employed by this "wonderfully constructed" Farmers' Alliance Insurance Co., and for the best farm insurance obtainable, call on or address A. B. Williams, Parsons, Kansas.]"

The first assignment of error urged is that the court erred in overruling the motion to quash the information for the reason that section 2271, Gen. St. 1901, which defines the crime of libel, does not make the defamation of a corporation a crime; that the word "person" does not include a corporation. Section 2271, Gen. St. 1901, provides: "When the term 'person' or other word is used to designate the party whose property is the subject of an offense, or against whom any

act is done with intent to defraud or injure, the term may be construed to include the United States, this state, or any other state or territory, or any public or private corporation, as well as an individual." The charge of criminal libel is the charging of an act done with intent to injure, and the word "person," as used in this section defining the crime, includes a private corporation as well as an individual. *State v. Herold*, 9 Kan. 194; *State v. Boogher*, 3 Mo. App. 442.

Again, it is urged that the court erred in not requiring the prosecution to introduce all or none of the "bunco" circular in evidence. The portion inclosed in brackets was offered by the state and was admitted by the court over defendant's objection that the whole, if any, of the circular should be read. The part of the circular relating to different charges for insurance to different policy holders seems particularly to explain and qualify a portion of the caption, viz.: "Startling exposure of the methods employed by the Farmers' Alliance Insurance Company, of McPherson, Kansas." These lines of the caption being included in the portion of the circular alleged to be libelous, all matter in the circular relating to the same subject or in any way qualifying the alleged libelous portion should have been offered in evidence by the state and admitted by the court. The last paragraph, however, of the circular in no way explains or qualifies any portion thereof which is alleged to be libelous, and, as there is a measure of discretion in the trial court in the matter, we cannot say the court erred materially in overruling the objection as made.

Among the instructions complained of is the following: "The circular introduced in evidence headed 'Buncoed' is libelous and contains various libelous charges: First. The word 'bunco' means to swindle or to rob by the game bunco or in a similar manner; and the word 'buncoed' used at the head of the circular in question means that some one had been swindled, robbed, defrauded of his money or property, in the manner stated in the circular. Second. That the conditions of the policy of insurance held by A. J. Higginbottom issued by the Farmers' Alliance Insurance Company had been changed by the company after the policy had been issued, and by reason of such change the said A. J. Higginbottom had been defrauded of one-half the loss under his policy caused by a windstorm. Third. \* \* \* Each of the three charges above mentioned contained in this circular is libelous of itself. \* \* \* In order that the defendant may justify the publication of the circular, it must appear from the evidence that each and all of the three charges above referred to are true." A reading of the circular will disclose that the part of the instruction, headed "Second," does not contain a fair statement of the portion of the circular to which it refers. The effect of that portion of the circular is

that by the terms of the policy held by Mr. Higginbottom the company had a right to change the conditions thereof; that Higginbottom's attention had been called to that fact over a year before; that, on close inspection of his policy, he found this to be the fact. This does not charge a wrongful change in the policy, but a rightful change, and does not charge that Higginbottom was defrauded thereby, and the instruction is materially erroneous in this respect. A malicious defamation of a corporation made public by any printing tending to expose it to public hatred, contempt, or ridicule, or to deprive it of the benefits of public confidence, is a libel, and on the trial of a case, where a printing is introduced in evidence which so tends, it is proper for the court to instruct the jury that it is libelous, if not true. The portion of the circular referred to under the head of 'Second' is not libelous per se, as before indicated. And the instruction of the court that, in order to justify the publication, it must appear from the evidence that this part of the charge is true, is erroneous.

It seems unnecessary to discuss other errors assigned.

The judgment of the district court is reversed, and a new trial is ordered. All the Justices concurring.

#### NAGLE v. TIEPERMAN.

(Supreme Court of Kansas. June 9, 1906.)

##### 1. TAXATION—HUSBAND AND WIFE—DUTY TO PAY TAXES.

The mere fact that the relation of husband and wife exists does not impose upon either spouse a legal or moral obligation to pay taxes upon real estate owned by the other.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 179.]

##### 2. SAME—REAL PROPERTY.

One spouse has no estate in the real property of the other, and has no interest therein by virtue of such relation, which imposes a legal or moral obligation to pay taxes upon the real estate of the other.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 179.]

##### 3. SAME—SALE FOR TAXES — PURCHASE BY WIFE.

A wife, not being in possession or receiving the rents, and not being under any other legal or moral obligation to pay taxes, may acquire title to land owned by her husband and others by purchase at a sale for taxes, or by purchasing a tax sale certificate; provided, such purchase is made in good faith and with her own money.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1357.]

Johnston, C. J., and Greene, J., dissenting.

(Syllabus by the Court.)

Error from District Court, Stafford County; J. W. Brinckerhoff, Judge.

Action by Paul R. Nagle against Louis Tieperman. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff in error brought this suit in the district court of Stafford county against

the defendant in error, claiming to be the owner of a two-thirds interest in a one-half section of land in said county, that the defendant was in possession of the same and owned an undivided one-third interest therein, and that defendant entirely excluded the plaintiff from the possession thereof. The petition also asked for a partition of said lands according to the interests alleged. It appears without controversy that in 1883 J. W. Fike and Henry Fike and their sister, Anna Fike, became joint owners of the land in equal portion, but that the legal title was taken in the names of the two brothers. That in 1887 J. W. Fike and his wife, Katie M. Fike, and the brother, Henry Fike, conveyed an undivided one-third interest in the land to their sister, Anna Fike. The deed of conveyance was not recorded until May 15, 1901. None of the Fikes ever resided in the state of Kansas. The taxes for the year 1888 not having been paid, the land was sold for taxes in 1889, and a tax sale certificate issued therefor to one W. P. Peter. In August, 1902, Katie M. Fike, the wife of J. W. Fike, out of her own separate estate and individual funds, procured an assignment of such tax sale certificate to herself, and a tax deed was issued by the county clerk of said county to her for said land on the 5th day of December, 1892, and the tax deed was recorded on the same day. Immediately after receiving said tax deed she took actual possession of the land and continued in the possession thereof until she sold the same to the defendant. In February, 1889, Katie M. Fike and her husband, in consideration of \$1,600, made and delivered to the defendant a general warranty deed for all of the real estate in controversy, and said deed was recorded in Stafford county on the 4th day of April, 1899. That on the 29th day of April, 1901, Henry Fike and Anna Fike by separate quitclaim deeds, in consideration of \$50 each, conveyed, or attempted to convey, an undivided one-third interest in said lands to the plaintiff in error. This action was commenced on the 17th day of May, 1901. The case was tried at the February, 1905, term of the district court of Stafford county and resulted in a judgment in favor of the defendant, and the plaintiff, as plaintiff in error, brings the case here. Since this action was commenced in this court the defendant, Louis Tieperman, has died, and the action has been revived in this court in the name of his lawful heirs.

T. W. Moseley, for plaintiff in error. Geo. A. Vandever and F. L. Martin, for defendant in error.

SMITH, J. (after stating the facts). This is, in effect, an action to have a tax deed issued to Katie M. Fike adjudged void, at least as to a two-thirds interest in the land in question. If the tax deed is void, the plaintiff is entitled to recover an interest in the land, otherwise the defendant, as the court below adjudged, was the sole

owner of the land at the time of the commencement of the action. If the plaintiff is entitled to recover any interest in the land, the judgment of the court below should be reversed. Otherwise it should be affirmed. Section 7680, Gen. St. 1901, provides: "Any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of lands sold for taxes, or to defeat or avoid a sale or conveyance of lands for taxes, except in cases where the taxes have been paid or the land redeemed as provided by law, shall be commenced within five years from the time of recording the tax deed, and not thereafter." The tax deed in question had been recorded nearly twice five years before the commencement of this action, and the taxes had neither been paid, nor had the land been redeemed "as provided by law," unless Katie M. Flke, as the wife of one of the co-tenants, is by reason of such marriage relation disqualified from acquiring the title to the land by a tax deed, and her attempt to do so amounts to a payment of the taxes or to a redemption. The question, then, to which the plaintiff asks an affirmative answer, and the defendant a negative answer, is the sole question for our consideration in the case: Where the marriage relation exists, can one spouse who is not in the possession and is not deriving benefits from the land of the other, in good faith and with his or her separate means, acquire the title to such land of the other or to land of which the other is a co-tenant, by a tax deed? The answer to this question depends upon whether or not one spouse has such an interest or estate in the real property of the other, by virtue of such relationship alone, as imposes upon him or her either a legal or a moral obligation to pay taxes upon the real estate of the other. The common law and the decisions of the courts of sister states, where marital relations and the rights of the spouses are essentially different from such relations and rights under the Constitution and laws of this state, afford us little or no aid in arriving at the proper determination of this case. The decisions of the courts of this state, and indeed the decisions of this court, have been conflicting upon the question, and it is hoped by this decision it may be satisfactorily settled, and that property rights involved may be permanently determined. It is of great importance that a right so frequently called in question should be settled and determined.

At the very formation of our state a radical departure from the common-law relations between husband and wife was provided for. Section 6, art. 15, of our Constitution, reads: "The Legislature shall provide for the protection of the rights of women, in acquiring and possessing property, real, personal and mixed, separate and apart from the husband; and shall also provide for their equal rights in the possession of their children." In the obedience to this constitutional mandate, the

Legislature enacted the "married woman's act" which reads as follows:

"Section 1. The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise or bequest, or the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts.

"Sec. 2. A married woman, while the marriage relation subsists, may bargain, sell and convey her real and personal property and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property.

"Sec. 3. A woman may, while married, sue and be sued, in the same manner as if she were unmarried.

"Sec. 4. Any married woman may carry on any trade or business; and perform any labor or services, on her sole and separate account; and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used and invested by her in her own name."

Gen. St. 1901, c. 62, §§ 4019-4022.

The spirit and intent of the constitutional provision should be recognized by the courts in the interpretation of the law relating to married women as implicitly as it was the duty of the Legislature to regard it in passing a law to give it effect. And the courts of this state should ignore any principle of the common law and the decisions of any sister state, although sustained by never so high authority, if they conflict with the spirit of this constitutional provision or with the letter or spirit of this statute. And this in the main is the history of the decisions of this court. Step by step these decisions have discarded the shackles which the common law placed upon married women, and, passing beyond the mere letter of the statute by interpretation, have advanced toward the real spirit of the constitutional provisions. With the added powers and rights they have accorded to married women, they have also imposed upon them added responsibilities. And with the decreased power of the husband over the person and property of the wife have come decreased responsibilities, especially for the care of her property. If she participates in crime, it is no longer presumed that she does so by the compulsion of her husband. She is as fully amenable to the law as he; judgment is rendered against her on her promissory note, although she may only be a surety; she may contract her services and skill in the future, and is liable for damages, if she fails to perform

the contract, and, if she perform it, may recover the value of her services. Without any separate estate she may purchase property on credit, and her obligation to pay is valid. She is liable upon her covenants of warranty in a deed in which she joins with her husband for the conveyance of his land. Indeed, it is almost literally true, as said by Justice Valentine, in *State v. Hendricks*, 32 Kan. 564, 4 Pac. 1053: "And in Kansas, women have all the rights and privileges that men have, except merely that they cannot vote at general elections." In *Harrington v. Lowe* (Kan.) 84 Pac. 570, a well-considered opinion, by Justice Burch, unanimously concurred in by the other members of the court, it is said: "Therefore the one-person idea of the marriage relation, as expounded by the common-law authorities, can no longer be made the touchstone of a married woman's rights or capacities in this state. Her powers and responsibilities do not depend upon the principle of unity, but upon the principle of diversity." Conversely, it is evident that the above excerpt, if applied to the rights, capacities, powers, and responsibilities of a married man, would be equally true. He is no longer, by virtue of his relation, the owner, nor even the trustee, of his wife's property. He may sell to or buy from her as freely as with a third person, and if his contracts with her are in good faith and for a fair consideration his and her creditors are as helpless to interfere as they would be to interfere with his dealings with a third person.

In view of the profound admiration, and even veneration, which every true lawyer must feel for that grand system of jurisprudence known as the common law, which has indicated the high-water mark of advancing civilization for at least four centuries, and has been illuminated by the reasoning and refinement of the greatest minds of those ages, it is not strange that, in the advancing march toward a higher civilization and a greater freedom for one-half of the people of Kansas provided for them in the Constitution of Kansas, even the highest court in this state should occasionally take a backward glance and a receding step. This is in accord with all the impulses of our nature and with the history of all social and judicial advancement. Thus we find that, after this court had decided, in *Broquet v. Warner*, 43 Kan. 48, 22 Pac. 1004, 19 Am. St. Rep. 124, in accordance with the numerous previous decisions of this court as to the right of husband and wife to invest, manage, and control his or her separate fortune independent of the other, that the mere fact of marriage does not impose upon the husband any obligations to pay taxes upon his wife's land, and of itself does not disqualify him from acquiring title thereto by tax deed, this court, in *Warner v. Broquet*, 54 Kan. 640, 89 Pac. 228, overruled the former decision. Let us, then, examine these two

decisions, since both cannot be right, to see which, if either, is in accord with the constitutional provision and with the statute enacted thereunder. The statute above quoted guaranteed to every married woman that the property which she had at her marriage, with the rents, issues, and profits thereof, should remain her sole and separate property and not subject to disposal by her husband nor liable for his debts; that she might bargain, sell, and convey her property and might enter into any contract with reference to the same, to the same extent and effect as might any married man; that she might carry on any trade or business; and that her earnings from a trade or business, labor, or services would remain her separate property and might be used and invested by her in her own name. This court, by repeated decisions, has interpreted this statute to mean that a woman may not only sell and convey her property, but may buy it for cash or on credit or may barter for it. Mrs. Fike bought the tax certificate from W. P. Peter, and, since it is agreed that she bought it with her own money, the presumption is that the money was derived from property which she had at the time of her marriage, or had inherited, or that she had acquired it by her own labor, trade, or business, or from the profits of her individual investments. In either case she had the absolute, unqualified right under the statute to invest it in her own name, and that it should not be subject to the disposal of her husband nor liable for his debts. She did invest it in her own name, and, if the statute means anything, she was entitled to the benefits of her investment, which was the title to the land sold for taxes, provided it was not redeemed according to law.

Harking back to the rule of the common law, it is contended that, as her husband could not acquire the title of his co-tenants to the land in question, Mrs. Fike could not so acquire such title. It is said in *Warner v. Broquet*, supra: "Both husband and wife have an interest, either direct or indirect, in each other's real estate. These interests and the mutual confidence which ought to exist between husband and wife forbid either from obtaining a tax title upon the real estate of the other." To apply this rule to this case would be to deny to Mrs. Fike arbitrarily, and in deference to a common-law rule, a right which the statute expressly confers upon all married women. It would subject her money or property to disposal by her husband, and would make the same liable for the payment of his debts. If she obtained no title by the purchase of the tax sale certificate, the securing of the deed, and the payment of taxes on the land for many years, any creditor of her husband could have levied upon and sold his interest in the land as could also the creditors of his co-tenants their interests, free and clear of any lien or claim of hers. If it was a

voluntary payment of her husband's and his co-tenants' taxes, she would have no remedy to recover the money paid from him or them. And, in case of the partition of the land between the husband and his co-tenants, he would have no recourse to recover from them the taxes which his wife had voluntarily paid for them. Again, Katie M. Fike never having been a resident of the state, her husband and his co-tenants could have sold and conveyed the entire interest in the land without her consent and free from any lien or claim in her favor, even as the co-tenants have attempted to do in this case. Furthermore, as Katie M. Fike has sold and by warranty deed conveyed to the defendant in error the land in question for the consideration of \$1,500, if she acquired no title by her tax deed, she is responsible in damages to her grantor under her warranty. Thus the common-law theory not only denies to a married woman the rights accorded to her by the laws of the state, but, if applied to this case, would become the instrument of fraud. It would render the records of the county unreliable as an evidence of title to land. The tax deed had been of record much more than five years. It contained no information that the grantee therein was the wife of one tenant in common of the land. The county treasurer's book showed neither that the taxes had been paid or that the land had been redeemed according to law. Lawyers advised that all action against the tax deed was barred, and that the grantee therein had and could convey good title. Relying on these records, and thus advised, the defendant bought the land for \$1,500. If the theory should prevail, he could pocket his loss or seek his remedy against his guarantor in a distant state, there, perchance, to discover she is insolvent. On the other hand, Henry and Anna Fike are entitled to little consideration. Knowing their land was subject to taxation, they gave it no attention for 13 long years. Their grantee, the plaintiff in error, has no greater equities. For a trifling consideration, he bought a lawsuit, hoping to reap where, not he, but others, had sown.

Katie M. Fike's interest in the land, prior to her purchase of the tax sale certificate, was quite analogous to the interest of an heir. Suppose that she and her husband had a son, an only child. She being a nonresident of the state, the husband and father could have disposed of his interest in this land without the consent of the wife or of the son. Upon the death of the husband and father, if the land had not been conveyed prior thereto, and had not been necessary for the payment of his debts, the wife and son would each inherit one-half in value of said land. It could not be contended that the son would have been incapable of procuring title to his father's land by tax deed. A mortgagee might have had an interest in this land of far greater value than the inchoate

interest of the wife, yet, as has been repeatedly held by this court, he could have acquired title to the entire fee by tax deed. It is said in *Busenbark v. Busenbark*, 33 Kan. 372, 7 Pac. 245: "While the wife's right and interest in the real estate of her husband, not occupied by the family as a homestead, is inchoate and uncertain, yet it possesses the element of property to such a degree that she may maintain an action during the life of her husband to prevent its wrongful alienation or disposition under fraudulent judgments procured and consented to by the husband with the object and for the purpose of defeating the wife's right." This was an action for divorce by the wife against her husband, and to set aside fraudulent judgment, which he had consented to and procured to be rendered against him for the purpose of defrauding his wife of her rights in case of divorce. Upon granting a divorce to the wife, it is by statute made the duty of the court to award to the wife all of her separate property, and the court may further award her such portion of the husband's property, or may award her such sum in money as alimony, as seems equitable. If the wife has no separate property, the court may award her such portion of his property or sum in money out of his estate as seems equitable. The judgment in this case might, as well, have been based upon the personal obligation of the husband to support and maintain his wife. A judgment creditor would under the same circumstances have had the same right to maintain an action to prevent the wrongful alienation or disposition of his debtor's property under fraudulent judgments procured and consented to by the debtor, yet it would not be contended that a judgment creditor has such an interest in the real estate of his debtor that he could not acquire title thereto by a tax deed. The case of *Busenbark v. Busenbark*, supra, and *Munger v. Baldrige*, 41 Kan. 236, 21 Pac. 139, 13 Am. St. Rep. 276, base the argument that the wife has a present interest and property in the real estate of her husband upon the provision of the statute of descents and distributions, which provides: "One-half of all the real estate in which the husband at any time during the marriage had a legal or equitable interest which has not been sold on execution or other judicial sale, and not necessary for the payment of debts and of which the wife has made no conveyance, shall under direction of the probate court be set apart by the executor as her property in fee simple upon the death of the husband if she survives him." Gen. St. 1901, § 2510. The argument is fallacious. The conclusion does not follow that the wife has a present property interest in the real estate of her husband. If so, it would not only be repugnant to the fourteenth amendment to the Constitution of the United States, in that the property interests of the wife could be sold on an execution

against her husband in an action to which she is not a party. This is not due process of law. It would also be repugnant to the Constitution and statutes of Kansas hereinbefore cited. At most this statute creates an interest in the husband's real estate which attaches, not during his lifetime, but upon his death. It has been frequently decided that the husband has the same rights in the property of the wife that the wife has in his property upon the death of either, respectively. In fact, section 2529, Gen. St. 1901, expressly so provides. Yet the Constitution of our state before cited commands the Legislature to make provision to protect the rights of women to acquire and possess real property, separate and apart from the husband, and, as before said, the Legislature has complied with the mandate, and to that extent the act of the Legislature has the potency of a constitutional provision. Now it is impossible for a married woman to own real estate separate from her husband, and at the same time for the husband to have a property interest in the same. It seems more logical to say that the statute last above quoted was enacted for the protection of purchasers. The husband and the wife each having the right not only to acquire real estate from others, but to sell and convey one to the other, it may have been anticipated that it would be difficult for third parties to determine their respective rights in lands to which either held the legal title. It is a matter of public policy that land titles should be kept free from doubt, and that the public records should be a reliable index to the condition of such titles. However this may be, the argument of present interest fails when applied to this case. Under the proviso to the section of statute last above quoted, it is not requisite that the wife should sign her husband's deed to his land to divest her of her contingent interest, when at the time of the conveyance she had never been a resident of this state.

If we are right, in our conclusions thus far, that the wife has no present interest in the real estate of her husband which forbids her from obtaining a tax title on his real estate, there only remains to determine whether or not the "mutual confidence," the remaining ground for the decision in *Warner v. Broquet*, *supra*, forbids the same. As a complete answer to this contention, attention is again called to *Harrington v. Lowe*, *supra*. Also the following from the opinion of Chief Justice Johnston, in *Munger v. Baldridge*, *supra*: "The statutes of Kansas recognize no conflict of interest between [husband and wife], no necessity to protect the wife against the act of the husband. They do not contemplate that she may be led to convey her interest through fear, compulsion, or the undue influence of her husband, and hence we have no enactment, as some states do, that in making a conveyance she must undergo a private examination by an officer to learn

whether she is intimidated by her husband or is executing the conveyance against her will. On the contrary, the law proceeds upon the theory of confidence, good faith, and honest dealing between husband and wife. \* \* \*" In other words, there is no presumption that the mutual confidence which should exist between husband and wife has been betrayed by either, and any denial of the right to either, based on such assumption, is a wrong. The utmost good faith and fair dealing should be and is demanded of each in dealing with the other, and, if either is wronged by a breach of the trust and confidence which the other has a right to rely upon, the courts of our state are sensitive to afford speedy relief. Instead of it being a fraud or wrong upon the rights of the husband to maintain the title of the wife, acquired under the tax deed in this case, it would, as before indicated, be a great wrong to him as well as to her to deny her the rights guaranteed to her under the Constitution and laws of the state. He has recognized her title to the land and has executed with her a deed of general warranty therefor to the defendant. The principle here enunciated has been asserted in *Broquet v. Warner*, 43 Kan. 48, 22 Pac. 1004, 19 Am. St. Rep. 124, and has been denied in *Warner v. Broquet*, 54 Kan. 649, 39 Pac. 228. The latter case, so far as it overrules the former, should in turn be overruled, and the former should stand as a correct interpretation of the laws of this state.

The judgment of the district court is affirmed.

PORTER and GRAVES, JJ., concur.

GREENE, J. (dissenting). I cannot assent to the conclusion arrived at by the majority of the court in this case. That we may understand the question to be decided, let us state the facts upon which it arises: J. W. Fike, Henry Fike, and Anna Fike were brothers and sisters and tenants in common of the land in controversy. None of them were ever in Kansas. While it was thus owned, the land was sold for taxes. Before a tax deed had matured, Katie M. Fike, the wife of J. W. Fike, purchased the tax sale certificate with her own separate funds and caused it to be assigned to her. Afterwards and at the proper time she procured a tax deed which she recorded more than five years before the present action was commenced. Subsequent to the recording of the tax deed she conveyed the land by warranty deed to the defendant. After such conveyance Henry Fike and Anna Fike conveyed by quitclaim deed, each an undivided one-third interest in the land, to Paul R. Nagle, the plaintiff in error. Nagle commenced this action to partition the land, claiming to be the owner of an undivided two-thirds interest by reason of his deeds from Henry and Anna Fike. The defendant was in possession and

pleaded the tax title to Katie M. Fike and the warranty deed from Katie M. Fike to himself as a complete title to the entire tract of land. The case finally turned upon the question whether Katie M. Fike, the wife of J. W. Fike, one of the tenants in common, could acquire a tax title to land in which her husband was an owner of an undivided one-third interest as tenant in common, and the answer to this question depends upon whether a wife has a present property interest in the land of her husband, other than the homestead, situated in Kansas. This question is answered by the majority in the negative, and consequently it is held that one of the spouses may acquire a tax title to the lands of the other, situated in Kansas, provided the tax title holder has used his or her own money in the purchase thereof. From this conclusion I dissent, and prefer to adhere to the well-settled law of the state that a wife has a present existing property interest in all lands belonging to her husband situated in Kansas.

A very considerable portion of the opinion is devoted to the discussion of the rights of married women in Kansas. The right of a married woman to invest her money in property or business independent and apart from the control of her husband does not arise in this suit. It is not decisive of any question in this controversy. Under the laws of Kansas, a married woman may sell and convey her real and personal property, and enter into any contract with reference thereto in the same manner and to the same extent and with like effect as a married man may in relation to his real or personal property. Whether either has a present property interest in the lands of the other situated in Kansas, other than the homestead, is an entirely different and independent question. It is not deniable that, where two or more persons are united in interest in real estate, irrespective of the nature, quality, or extent of the respective interests, neither can acquire a tax title thereto against the other. It is the unity of interest in the subject of taxation that deprives one of the spouses from acquiring a tax title to lands belonging to the other, and not the unity of persons. The question whether a wife has a present property interest in the real estate of her husband was first presented to this court in *Busenbark v. Busenbark*, 33 Kan. 572, 7 Pac. 245. That was a case where the wife sued for a divorce on the grounds of extreme cruelty and gross neglect of duty. She also alleged that her husband had fraudulently and collusively permitted two of his children by a former wife to procure a judgment against him in a large amount, upon which an execution had been issued under which such judgment creditors were attempting to sell a large amount of her husband's lands, other than their homestead, and thus defraud her of her interest therein, and prayed for an injunction to restrain the commission of such

acts. A temporary injunction was granted. The defendant answered denying the fraudulent intent and also asked for a divorce. The judgment creditors also answered. Upon a final hearing the trial court made the injunction perpetual. It clearly appeared that the defendant had sufficient other personal and real property to provide for himself and wife. The injunction was granted upon the theory that a wife has a present property interest in all the lands belonging to her husband situated in Kansas which she may protect and preserve by an appropriate action. It was not upon the theory, as suggested in the opinion of the majority, that: "Upon granting a divorce to the wife it is by statute made the duty of the court to award to the wife all of her separate property, and the court may further award her such portion of the husband's property or may award her such sum in money as alimony as seems equitable." There was no divorce granted in that case, nor were any lands set apart to the wife or any award of money made. The possession and use of the homestead was awarded to her, and a few articles of personal property, but the entire real estate was not apportioned, but was cleared of the fraudulent judgment, and the wife's interest thereby preserved. The defendants prosecuted error to this court, and the question decided was that a wife had a present property interest in all lands owned by her husband situated in Kansas. In the opinion, at page 577 of 33 Kan., page 248 of 7 Pac., is found the following language by Chief Justice Horton, speaking for the court: "We now go further, and declare that, although the wife's right and interest in the real estate of her husband not occupied as a homestead is inchoate and uncertain, yet it possesses the element of property to such a degree that she may maintain an action during the life of her husband for its protection, and for relief from fraudulent alienation by her husband." The same question was again presented to this court in *Munger v. Baldrige*, 41 Kan. 230, 21 Pac. 159, 13 Am. St. Rep. 273. The *Busenbark* Case was reviewed, and the court, speaking through the present chief justice, used the following language: "The interest of the wife in the real estate of her husband during marriage is a contingent one, it is true, but it is unquestionable property, and no reason has been advanced why she may not empower the husband to act for her, and in conjunction with himself convey it away. In *Busenbark v. Busenbark*, 33 Kan. 572, 7 Pac. 245, the nature of this interest was considered, and it was determined that, while it was inchoate and uncertain, it still possessed the elements of property which may be in connection with the husband the subject of contract and bargain, and was of such a character that the wife might during marriage maintain an action for its protection and for relief from fraudulent alienation by her husband. That it is an existing interest, and

one which may be the subject of conveyance by the wife during marriage, is expressly recognized by the statute defining the same, as follows." The precise question involved in this case was passed upon in *Warner v. Broquet*, 54 Kan. 649, 39 Pac. 228, where it was held that both husband and wife have an interest either direct or indirect in each other's real estate, and in passing on the question the court used the following language: "These interests and the mutual confidences which ought to exist between husband and wife forbid either from obtaining a tax title upon the real estate of the other."

For twenty years the doctrine that a wife has a present property interest in all real estate belonging to her husband situated in Kansas has been adhered to both by the bench and bar, and property rights have been settled both in and out of courts upon the presumption that such was the settled law of the state. The majority opinion tells us, however, that the reasoning by which the courts reached this conclusion was fallacious. And in attempting to show the fallacious reasoning which led this court, in the *Busenbark*, *Munger*, and *Broquet* Cases, to conclude that a married woman had a present interest in the lands of her husband situated in Kansas, the following statute is quoted: "One-half in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest, which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executor as her property, in fee simple, upon the death of the husband, if she survives him; provided, that the wife shall not be entitled to any interest, under the provisions of this section, in any land to which the husband has made a conveyance, when the wife, at the time of the conveyance, is not or never has been a resident of this state." Gen. St. 1901, § 2510. And then it is said: "At most the statute creates an interest in the husband's real estate which attaches, not during his lifetime, but upon his death." The confusion, which is discernible throughout the opinion, that an "interest in lands" and an "estate in lands" are synonymous terms, stands out prominently in this quotation. This statute creates a present interest in the wife in lands owned by the husband, not an estate, which interest ripens into an estate only upon the death of the husband. Neither J. W. Fike nor his wife had ever been a resident of the state. It is therefore held that the rule for which I contend cannot apply in this case because of the proviso in the section. This proviso was intended only to deprive the wife from claiming an interest in lands which had been conveyed by her husband before she became a resident of the state. It was enacted to protect innocent grantees of land, and, as held in *Buffington*

*v. Grosvenor*, 46 Kan. 730, 27 Pac. 137, 13 L. R. A. 282, is only a rule of conveyancing. The proviso does not discriminate against the nonresident wife. Her interest in the lands of her husband situated in Kansas is as great as if she actually resided in the state, and upon his death her estate in lands of which he died seised is the same as if she had been an actual resident, subject to all the conditions imposed by the statute upon resident wives or widows, with one addition, namely, that the husband has not conveyed it, before his death, and, as suggested, this additional condition was imposed to protect innocent purchasers, and not to discriminate against the nonresident wife or widow. The opinion in *Steffins v. Stewart*, 53 Kan. 92, 36 Pac. 55, may appear upon a cursory examination to so minimize the interest of the wife in the real estate of the husband as to be antagonistic to the principle for which I contend. But, upon a closer examination, it will be discovered that such is not the case. In that case the husband, who was the owner of the land, had unsuccessfully litigated the right of the city to levy a special assessment upon his land, and, after a final judgment against him, his wife commenced her action to relitigate the same question. This right was denied her, not because she did not have an interest, but because she had no such separate and independent interest in the real estate of her husband that she could maintain a separate action in her own name after the question involved had been litigated to a final determination by, and in the name of, her husband. This is in line with all the authorities. The interest of the wife in the real estate of her husband is a joint interest with his, and not separable and independent from his, and it is only in cases, where because of neglect or refusal on the part of the husband to perform some act or duty the neglect or non-performance of which would entirely defeat her interest, and in cases of fraudulent conduct of the husband detrimental to or destructive of her interests, that the courts recognize the right of the wife to her action. I insist that the wife has a property interest in all the lands of her husband, jointly with him, and that the husband has a joint property interest in the lands belonging to the wife, and therefore neither can acquire a tax title to the lands of the other. Mrs. Katie M. Fike being incapable of acquiring a tax title to the lands, the deed was void, and recording it did not start the statute of limitation. *Carithers v. Weaver*, 7 Kan. 110.

The judgment of the lower court should be affirmed. I am authorized to say that Chief Justice JOHNSTON joins me in this dissent.

BURCH, J. (concurring). In my judgment the syllabus of the opinion, written by Mr. Justice SMITH, clearly and accurately states the law. But the argument in support of the conclusions reached appears to me to be unduly pressed against the case of *Busen-*

bark v. Busenbark, 33 Kan. 572, 7 Pac. 245, and its congeners. If it were proposed to do so, I would not agree that they may be overruled. The premise of the dissenting opinion of Mr. Justice GREENE is antagonistic to the decisions holding that a mortgagee may take a tax deed of the mortgaged premises. A mortgagee has a very large and substantial present property interest in the land covered by the mortgage. He may prevent waste and the like. He may redeem from taxes, and his interest may ultimately extinguish all the title of the mortgagor; still, he may take a tax deed, and I am not in favor of overruling the decisions of this court to that effect. The syllabus of the case of Steffins v. Stewart, 53 Kan. 92, 36 Pac. 55, tells what was there decided, and reads as follows: "A wife has no such interest in the lands of her husband, other than the homestead, as will support an action by her alone, in her own name, to enjoin the collection of special taxes assessed against such lands." In the opinion the point at issue was stated thus: "The question we are now called upon to decide is whether Catherine Stewart has such interest in the lands of her husband as will enable her to maintain this action." The circumstance of former litigation by the husband concerning the same matter is not noted in these quotations. It was not the controlling fact in the case at all, and was referred to merely to illustrate the far-reaching consequences of conceding to the wife anything beyond her naked statutory right. I think the case is an authority against the position taken in the dissenting opinion, and am not in favor of weakening its force. One source of the confusion attending discussions of this subject is the employment of names to designate an unnamed thing. The statute creates and defines the relation of a married woman to her husband's land other than the homestead. Whenever an attempt is made to speak of that relation, familiar law words are used—"right," "interest," "property," "estate," and the like—every one of which contains implications not warranted by the statute. Then arguments are made from the implications, and so the effect of the statute may be magnified or minimized. In Warner v. Broquet, 54 Kan. 649, 39 Pac. 228, the subject was further complicated by viewing it in the light of obsolete law concerning the marriage relation. I am willing to say, without naming it, that the statutory relation of a married woman to her husband's land, other than the homestead, is such that she is not prohibited from taking a tax deed of it; but, if that relation should be wrongfully invaded, as in the Busenbark Case, the courts should upon her application duly protect it.

MASON, J. (concurring specially). The reasoning of the opinions of Mr. Justice SMITH and Mr. Justice BURCH is to me convincing that a wife is not disqualified to

acquire a tax title to her husband's land, by whatever name her rights with respect to it may be described, and I therefore think, as suggested in the latter, that it is unnecessary to consider whether or not such rights amount to what may technically be called an interest.

#### FIKE v. NAGLE et al.

(Supreme Court of Kansas. June 9, 1906.)

Error from District Court, Stafford County; J. W. Brinckerhoff, Judge.

Action by Katie M. Fike against Paul R. Nagle and Francis E. Miller. Judgment for defendants, and plaintiff brings error. Reversed.

Geo. A. Vandever and F. L. Martin, for plaintiff in error. T. W. Moseley, for defendants in error.

PER CURIAM. The only question in this case, which has not been disposed of by the decision in the case of Nagle v. Tieperman (just decided) 85 Pac. 941, is the contention that the tax deed is void on its face because of a misdescription of the land. The land in controversy is the southeast quarter of section 31, town 22 south, of range 13 west, of the 6th principal meridian, containing 160 acres more or less. This is the description under which it appears to have been assessed, advertised, and sold, and the description which is contained in the deed. It is true the form of the tax deed is intended to be used, if necessary, for the conveyance of several distinct tracts of land, and in some places it contains such expressions as "each separate tract and parcel of said real property," "Separately exposed to public sale at the county seat," and "each one of the separate tracts and parcels as above described," and similar expressions which would be proper in a tax deed where several tracts are actually conveyed; but the land in dispute is a single tract, and all that matter in the deed, which would be proper if several tracts were actually included, may be regarded as surplusage, and does not invalidate the deed.

The judgment must therefore be reversed on the authority of Nagle v. Tieperman, supra.

#### LEIGH v. TERRITORY.

(Supreme Court of Arizona. March 30, 1906.)

##### 1. JURY—QUALIFICATION OF JURORS—OPINION.

Pen. Code, § 910, provides that a juror may be challenged for cause for the existence of a state of mind which will prevent him from acting with entire impartiality, and section 915, declares that when a challenge is made for the above reason no person shall be disqualified by reason of having formed or expressed an opinion founded upon public rumor, statements in public journals or common notoriety, provided it be a qualified opinion and it appears to the court that the juror will act

impartially. *Held*, that existence of an unqualified opinion, derived from any source whatever, disqualifies the juror, but a qualified opinion, whether founded upon public rumor, statements in public journals, common notoriety, actual knowledge of the facts, or statements by a party or witness, does not disqualify if, in the opinion of the court, the juror can nevertheless act fairly and impartially.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 461-479.]

**2. CRIMINAL LAW—APPEAL—DISCRETION OF LOWER COURT—COMPETENCY OF JURORS.**

The discretion of the trial court exercised in determining whether or not a juror who has formed an opinion is able to act with impartiality will not be disturbed on appeal unless the determination is clearly erroneous.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3056.]

**3. JURY—COMPETENCY OF JURORS—OPINIONS.**

In a criminal case, a juror who testified on cross-examination that the opinion which he had was formed on what he had heard about the case; that it was not a fixed opinion; that it would take evidence to remove it; that it was not an unqualified opinion; and that he had not expressed a settled opinion of the guilt or innocence of the defendant, as well as a juror who testified that he had not talked with the witnesses but had formed an opinion on hearsay, which could be changed by evidence, and who finally stated that he had no fixed and settled opinion, was not subject to challenge for cause on the ground of partiality.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 461-479.]

**4. SAME.**

In a criminal case, a juror who testified that he had formed an opinion which could be removed by evidence; that the opinion was founded on facts which he had heard, and was a fixed opinion, if the facts were true, but could be changed if the facts were not true, was not necessarily disqualified although at the close of his cross-examination he acceded to a statement of counsel that he had a fixed and unqualified opinion.

**5. SAME—STATING GROUND OF CHALLENGE.**

Pen. Code, § 910, enumerates the causes for which a juror may be challenged and section 914, declares that in every challenge for any of the causes specified in section 910, the particular cause must be stated. *Held*, that the provisions of section 914 are mandatory and the cause of the challenge must be specified in order to bring to the attention of the trial court the cause on which the challenge is based, and to enable the party to present for review the action of the trial court in respect to the challenge.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 559.]

**6. JURY—COMPETENCY OF JURORS—SCRUPLES AGAINST DEATH PENALTY.**

Under Pen. Code, § 910, subd. 14, declaring that in a trial for an offense punishable with death, the entertaining of such conscientious opinions as would preclude a juror from finding a defendant guilty shall render the juror disqualified, a juror who has conscientious scruples against the infliction of the death penalty is not competent on the trial of an offense which may in the option of the jury be punished by death or imprisonment for life.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 491.]

Appeal from District Court, Mohave County; before Justice Sloan.

C. C. Leigh was convicted of murder, and appeals. Affirmed.

Leroy Anderson, for appellant. E. S. Clark, Atty. Gen., for the Territory.

KENT, C. J. The only questions raised by the appellant in his assignment of errors, and upon the incomplete record which we have before us, are as to the correctness of the rulings of the trial court upon the challenges for cause to certain jurors. The first assignment of error is as follows: "The court erred in not sustaining the challenge for cause of defendant to the jurors: G. S. Haskins, Frank Irwin, Geo. W. Miller, and Peter F. White, and caused defendant to exercise a peremptory challenge upon each of the above named jurors, to his harm, for the reason that said jurors had expressed on unqualified opinion concerning the guilt or innocence of defendant, and that it would take evidence to remove said opinion." By section 910 of our Penal Code it is provided that either party may challenge any individual juror for any of the various causes set forth in fifteen subdivisions of said section. The thirteenth subdivision of said section provides as a cause for such challenge: "For the existence of a state of mind on the part of the juror in reference to the case, or to the defendant, or to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party." By section 915 of the Penal Code it is provided: "When a challenge is made for the cause mentioned in subdivision thirteen (13) of section 910, no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or acts to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety; provided: It be a qualified opinion, and it appears to the Court that such juror will act impartially and fairly upon the matter to be submitted to him. The Court shall instruct the jurors as to the distinction between a qualified and an unqualified opinion, and if the person has formed or expressed an unqualified opinion, he shall be excluded."

Where therefore a juror has formed or expressed an unqualified opinion—that is, a fixed, settled, and abiding conviction as to the guilt or innocence of the defendant—it is a cause for his disqualification as a juror; and the court, upon objection properly taken, must exclude him. The source of such opinion, or the grounds upon which it is based, is unimportant: the fact that it is an unqualified opinion disqualifies the juror. Where a juror has an opinion less strong than a fixed or settled conviction, or, in other words, a qualified opinion, it becomes important for the court to ascertain, not only the strength of such opinion, but upon what such opinion is founded. If it be

founded upon public rumor, statements in public journals, or common notoriety, the juror is competent to serve, if it shall appear that he will act fairly and impartially upon the matter to be submitted to him. If it be founded upon actual knowledge of the facts, or upon statements made to him by a party, or by witnesses in the case, or upon other definite knowledge or information, it is nevertheless for the court to determine whether or not such knowledge or information has in fact brought about in the juror a state of mind which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party, even though it appears from the testimony of the juror that he considers that he can so act. That the juror will carry such opinion into the jury-box, or that it will take evidence to remove the opinion so formed, are not, in themselves, grounds of disqualification. The question is can the juror act fairly and impartially, irrespective of the opinion that he holds, or is it such an opinion, by reason of its strength or the grounds upon which it is based, as has produced in the juror a state of mind prejudicial to the substantial rights of the party. This is a question which must be left largely to the wise discretion of the trial court; and the determination of the trial court in that regard will not be disturbed on appeal, unless it appears to be clearly erroneous. As we said in *Brady v. Territory* (Ariz.) 60 Pac. 698: "It has been frequently held that a juror, stating he has formed an opinion as to the merits of a case, which it would take evidence to remove, is nevertheless competent if it appears that he can decide the case impartially, without reference to what he has heard or the opinion which he has formed. *State v. Morse* (Or.) 57 Pac. 631; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95; *Ortwein v. Com.*, 76 Pa. 414, 18 Am. Rep. 420; *State v. Millain*, 3 Nev. 409; *State v. Lawrence*, 38 Iowa, 51. The challenge raised an issue of fact upon which the court had to determine whether the nature and strength of the opinion formed was such as would prevent the juror from acting with entire impartiality. The finding of the trial court upon that issue should not be set aside by the appellate court unless the error is manifest. 'No less stringent rules,' says Mr. Chief Justice Waite, 'should be applied by the reviewing court in such case than those which govern in consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not, in law, be deemed impartial. The case must be one in which it is manifest the law left nothing to the conscience or discretion of the court.' *Reynolds v. U. S.*, 98 U. S. 145, 25 L. Ed. 244. The trial judge heard the statements of the juror, had an opportunity to observe

his manner, temperament, intelligence, and personal peculiarities, as exhibited on his examination—important factors in determining his qualification—and ruled in favor of his competency. There is nothing in the record which would warrant us in disturbing that finding."

The assignment which we are considering alleges error in the refusal of the court to sustain the challenge for cause, in that the jurors had expressed an unqualified opinion, and is not based upon the existence of a qualified opinion such as would prevent the jurors from acting impartially. If there was any such unqualified opinion in the mind of any of the jurors, it was the duty of the court to sustain the challenge. An examination of the record before us discloses that the jurors, upon their voir dire, stated in substance as follows: Juror Haskins stated, on his direct examination, that from what he had heard he had not formed or expressed an opinion of the guilt or innocence of the defendant; that he had no fixed opinion, because he knew nothing of the case, and no bias of prejudice against the defendant. Upon cross-examination, he stated that the opinion he had was formed upon what he heard about the case; that it was not a fixed opinion; that it would take evidence to remove it; that he would go into the case with an opinion from what he had heard; that it was not an unqualified opinion, but it would take evidence to remove it; and that he had not expressed a settled opinion of his guilt or innocence. The juror Miller testified, on his direct examination, that as to the facts in the case he only knew what he had read and heard; that he had formed or expressed an opinion as to the guilt or innocence of the defendant; that that was not a fixed, unqualified opinion. On cross-examination, he testified that he had not talked with the witnesses, but he formed his opinion on hearsay; that his opinion could be changed by the evidence; that he did not know as it was a fixed, definite opinion; that he expressed the "opinion the same as anybody else." And to the question put by the court: "Have you now a fixed and settled opinion of the guilt or innocence of the accused?" He answered: "I don't know as I have; no, sir." The juror Irwin testified, on direct examination, that he had heard of the facts in the case, and from what he had heard he had formed an opinion; but that such an opinion was not a fixed, unqualified opinion, and that he could enter the jury-box and try the case fairly and impartially. Upon cross-examination, the following questions and answers appear: "Q. You have heard about this case? A. Yes, sir. Q. And you have formed an opinion? A. Yes, sir. Q. What kind of an opinion is that? A. Well, it could be removed by evidence. If what I heard is not true— Q. If what you heard is true, then you have a fixed opinion? A. Yes, sir. Q. Is there any condition to the

opinion you have now? A. Well, not if the facts I have heard are true. Q. Then, from what you have heard, you have a fixed, unqualified opinion, haven't you? A. Yes, sir; I think I have."

It is apparent that the opinion of the jurors Haskins and Miller were not fixed and settled opinions as to the guilt or innocence of the defendant, but that they were qualified opinions formed upon rumor and common notoriety. They were clearly competent, qualified jurors. As to the juror Irwin, it is true that in answer to the last question put to him on his examination, he acceded to the statement of counsel, that he had a fixed, unqualified opinion; but he says that his opinion was fixed and settled only if what he had heard was true. The opinion, therefore, was not absolutely fixed and settled, but was hypothetical, dependent upon whether the statements that he heard were true or false; if true, his opinion was fixed and settled; if not true, it was not fixed and settled, and such opinion as he had could be removed by evidence. We think, therefore, that the opinion that the juror had was a qualified, and not an unqualified, one. The testimony given by the juror does not disclose the source of his opinion, or how it was founded. The juror stated that his opinion could be removed by the evidence in the case, and that he could enter the jury-box and try the case fairly and impartially. The trial court, with the juror before it, determined that the juror could act impartially and fairly upon the matter, and that his qualified opinion would not prejudice the defendant. There is nothing in the record before us that warrants us in disturbing the conclusion so reached. The juror White testified that he did not know whether his opinion was a fixed and unqualified opinion, or not; that it would take "pretty heavy evidence to remove it"; that he did not know that he could discard his opinion, if sworn as a juror in the case, and he thought it might influence him some in his verdict. If a challenge was interposed to this juror by the defendant, the record does not show it: neither does the record show any action by the court with regard to this juror. It does appear from the record in the case, however, that when the list of jurors was submitted to counsel to exercise their peremptory challenges, the name of the juror White was not upon the list, and he did not form one of the number upon whom the peremptory challenges were exercised. It is apparent, therefore, although the record is silent in that respect, that the juror was not deemed qualified and was excused by the court; the appellant therefore can have nothing to complain of in that regard.

In considering this assignment of error, we have treated the matter as if proper challenges for cause had been interposed by the defendant. In each instance, after the ex-

amination of the juror, a challenge was interposed in the following form: "We challenge the juror." Section 914 of the Penal Code provides as follows: "In every challenge for any of the causes specified in section 910, the particular cause must be stated." This provision is for the purpose of bringing to the attention of the trial court the ground upon which the challenge is based, and is mandatory in its terms, and must be followed, in order to enable a party to present for review on appeal the action of the trial court in respect to such challenge, or to predicate error thereon.

The second assignment of error is as follows: "That the court erred in allowing a challenge for cause of the territory to the juror J. W. Thompson, and the juror John Musser, for the reason that said jurors were not disqualified under our statute as to the conscientious scruples concerning the death penalty. And for the further reason that said jurors did not entertain any such conscientious opinions as would preclude them from finding the defendant guilty of murder in the first degree. For the further reason that under our statute the jury may find the person guilty of murder in the first degree, and fix his punishment at either death or imprisonment, and the objections to conscientious scruples must be that the juror would be precluded from finding the defendant guilty, and not that he would dislike to hang a man." Subdivision 14 of section 910 of the Penal Code, provides, as a ground of challenge for cause: "If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror." The record shows that both these jurors stated that they entertained such conscientious opinions as would preclude them from finding the defendant guilty. The juror Thompson, however, on further examination, stated that his opinion would not prevent his finding the defendant guilty and fixing the punishment at imprisonment for life, if the evidence warranted it; but that the opinion he held would preclude him from fixing the death penalty. This qualification did not bring the juror outside the clear meaning and intent of the statute. Although the jury may fix the punishment for murder in the first degree at either death or imprisonment for life, the offense of murder in the first degree is, nevertheless, one "punishable with death," and the entertaining of such a conscientious opinion as precludes the juror from the infliction of the death penalty precludes the juror from finding the defendant guilty of an offense punishable with death, and brings him within the statute which requires the court to exclude him. Nor does it follow, as contended for by the appellant, that the enforcement of this rule compels a

defendant to accept a jury all the members of which are of the opinion that, if he were guilty of murder in the first degree, his penalty should be death. The rule only forces a defendant to accept a jury free to impose either the death penalty or imprisonment for life; and the territory has the right to a jury that will impose the graver penalty if warranted by the circumstances, untrammelled by any conscientious opinions against its infliction.

These are the only errors, as alleged, discussed in the appellant's brief, or which are presented to us upon the record as it is before us.

The judgment of the district court is affirmed.

DOAN, CAMPBELL, and NAVE, JJ., concur.

### PHEBY v. LAKE SUPERIOR & ARIZONA MIN. CO.

(Supreme Court of Arizona. March 30, 1906.)

#### 1. MINES AND MINERALS—MINING CLAIMS SALE—BONA FIDE PURCHASERS—NOTICE.

Defendant, knowing that a corporation was in possession of a mining claim under an option to purchase and that it was about to exercise the option, stated to the corporation's president that he (defendant) would have had an interest in the claim if L. had done as he agreed, whereupon the president informed him that if he had any misunderstanding with L. at the time to arrange it before the money was paid over. *Held*, that defendant's statement was insufficient to charge either the corporation or its president with notice of defendant's interest in the claim.

#### 2. MINES AND MINERALS—QUIETING TITLE—EQUITABLE INTEREST—BONA FIDE PURCHASER.

Where plaintiff holding the legal title to certain mining property sued under a statute to quiet its title in which action, defendant answered, admitting plaintiff's legal title, but claiming an equitable interest, and asked affirmative relief, in that such interest be confirmed and that the legal title held by plaintiff be conveyed to defendant, defendant thereby assumed the attitude of one seeking to enforce an equitable interest as against the legal title, in which situation plaintiff was entitled to rely on the fact that it was a bona fide purchaser for value without notice.

Appeal from District Court, Pinal County; before Justice Doan.

Action by the Lake Superior & Arizona Mining Company against F. S. Pheby. From a judgment for plaintiff, defendant appeals. Affirmed.

Cox & Franklin (Chas S. Wheeler, Guy C. Earl, and Thomas B. Pheby, of counsel), for appellant. Hereford & Hazzard, for appellee.

SLOAN, J. The Lake Superior & Arizona Mining Company, a corporation, brought suit against F. S. Pheby in the court below to quiet its title to the Golden Eagle & Golden Eagle Extension mining claims, situated in the Pinal mining district, Pinal county.

Pheby set up in his answer an equitable claim to a one-fourth interest in said property, and asked that this equitable estate be confirmed by the court and a conveyance to him of the legal title to such interest be required of the plaintiff. To this answer the plaintiff pleaded, among other matters, that it was an innocent purchaser for value of the entire property without notice actual or constructive, at the time of the purchase, of any interest legal or equitable held or claimed by Pheby. The trial court found the issue thus raised by the answer of the defendant, and the reply made thereto by plaintiff in favor of the latter, and gave judgment quieting its title. The defendant moved the court to grant him a new trial, which motion was denied and an appeal was thereupon taken by him from this ruling and from the judgment.

The questions raised by appellant in his assignment of errors and presented in the briefs of his counsel are: (1) The sufficiency of the evidence to sustain the finding that appellee was an innocent purchaser without notice of defendant's claim of title. (2) The question of law whether the findings support the judgment. The facts which bear upon the question of notice on the part of appellee of any outstanding claim made by appellant at the time of the purchase were these: The Golden Eagle mining claim was located January 1, 1898, by George Lobb and C. C. Woolf. On November 18, 1899, the Golden Eagle Extension claim was located by George Lobb. On May 31, 1902, one W. A. Holt obtained a lease and bond of the Golden Eagle & Golden Eagle Extension from Lobb, acting for himself and as attorney in fact for Woolf, and in consideration thereof paid the sum of \$1,000 in cash. The contract of lease and bond by its terms was for a term of 18 months, and gave to Holt, his agents or assigns, the right of possession, operation, and development of the claims, and also an option to purchase the same at any time during the life of the agreement for \$31,000. Lobb, for himself and as attorney in fact for Woolf, agreed in the contract of lease to execute a good and sufficient deed to the mining claims, and to deposit the same in escrow to be delivered to Holt or his assigns upon the payment of the \$31,000 within the time specified in the contract. In pursuance of this agreement a deed was executed by Lobb, for himself and as attorney in fact for Woolf, and deposited in the Bank of Globe to be held in escrow under the terms of the contract. Holt, thereafter, assigned his lease and option to one Angus W. Kerr who, in October, 1902, assigned the same to the Lake Superior & Arizona Mining Company. In November, 1903, the latter company made the payment called for in the option agreement and obtained the deed from Lobb and Woolf, held in escrow by the Bank of Globe, and placed the same of record. It also appears that from the time Holt took possession of

the property to the month of April, 1903, there was expended upon the property by Holt and the company the sum of \$60,000 in development work. It was conceded that neither Holt nor Kerr, while they were holders of the option or prior thereto, had any notice, actual or constructive, that Pheby had or claimed any interest in the property. If the Lake Superior & Arizona Copper Company, prior to its paying the purchase price and obtaining the deed in escrow, had notice of such claim it was derived solely from an interview between Frank S. Carleton, president of the company, and F. S. Pheby at the Copper Queen hotel in Bisbee during the month of April, 1903, at which interview Joseph J. Pheby, brother of F. S. Pheby, was present. F. S. Pheby testified that at this interview he informed Carleton that he was a part owner in the Golden Eagle & Golden Eagle Extension and gave him in detail the facts which entitled him to an equitable one-fourth interest therein. Joseph J. Pheby corroborated his brother, and testified substantially to the same effect. The testimony of Carleton was that he met Pheby and his brother at the Copper Queen Hotel in April, 1903, at the request of the Phebys to talk over a proposition relating to the purchase of the Silver King mine; that during the conversation George Lobb was mentioned, and that F. S. Pheby then said that Lobb was a man who did not fulfill his word, and to instance this stated that if Lobb had done as he agreed to do he, Pheby, would have had an interest in the property in question; that he stated to Pheby that his company had taken over the option for the purchase of the property which would not expire until November, 1903, and the balance of \$30,000 would then be paid to the order of Lobb, and advised Pheby if he had any misunderstanding with Lobb that the time to arrange that would be before the money was turned over; that he also informed Pheby that the records had been carefully examined, and the title appeared to be clear; that thereupon Pheby again said that if Lobb had done as he agreed to do he would have had an interest in the two mining claims; that no other information was given him by Pheby as to his claim of interest than the above, and that Pheby did not state to him at any time during the interview that he then had or claimed any interest in the property. Carleton did not tell of this conversation to any other member of the company, nor was it mentioned by him at any meeting of the board of directors of the company for the reason, as stated by him, that the impression left upon his mind by the conversation with the Phebys was that F. S. Pheby did not claim any interest in the property at the time.

The trial court accepted the testimony of Carleton, and rejected that of the Phebys. It was clearly within the province of the trial court to take the testimony of the one

witness as against the testimony of other witnesses. The question arises, therefore, whether, under the testimony of Carleton, notice of Pheby's interest in the property can be imputed to the appellee. Disregarding the question whether notice sufficient to put the company on inquiry, when given to its president, not in a matter pertaining to the business of the company but incidentally, can be imputed to the company, we think the testimony of Carleton fails to show such notice. Carleton had a right to assume that Pheby as an honest man would disclose fully his interest or claim of interest under the circumstances. Good faith would require this on the part of Pheby when informed by Carleton of the company's possession of the property under the option. Pheby's declaration, under these circumstances, that he, Pheby, would have had an interest had Lobb done as he agreed, might properly be construed as a declaration that he did not, in fact, possess or claim such interest at the time, and would tend to allay rather than to arouse a suspicion that he had not disclosed fully his relation to the title. We do not find as a matter of law that the facts testified to by Carleton were sufficient to put him or his company upon notice of Pheby's interest or claim of interest.

It is argued by counsel for appellant that, conceding want of notice on the part of the company of Pheby's interest or claim of interest prior to its purchase of the property in question, this fact can afford no ground for relief. They invoke the doctrine that in equity want of notice of an outstanding interest in real estate is but a shield in the hands of an innocent purchaser which he may use in defense of his title when it is attacked, and is not a weapon which he may use to support his claim of title in any proceeding brought by him to establish such title. Without regard to the effect which modern registration acts may have had in changing the doctrine of a bona fide purchaser from a rule of inaction, as it is sometimes termed, into a rule of property the soundness of this contention, as applied to the practice in courts of equity, must be conceded. This case is, however, not one which calls for any modification of the equitable rule in order that the judgment of the trial court be sustained. The appellee sued under the statute to quiet its title. This title is a legal one. The appellant in his answer admitted that the appellee held the legal title to the property in controversy, but set up an equitable interest and asked that this interest be confirmed, and that the legal title held by appellee be conveyed to him. Appellant, therefore, assumed the attitude of one seeking to enforce an equitable interest as against the legal title held by the plaintiff. Obviously, therefore, the situation thus presented was the same as if appellant were the plaintiff. Appellee could, therefore, under the doctrine invoked, protect its legal

title as against the claim of appellant by setting up that it was a bona fide purchaser for value without notice.

We find no error in the record, and the judgment is therefore affirmed.

CAMPBELL and NAVE, JJ., concur.

### McGUFFIN v. COYLE & GUSS.

(Supreme Court of Oklahoma. Jan. 8, 1906.)

#### 1. TRIAL—DEMURRER TO EVIDENCE.

Where a cause of action is founded alone on a promissory note, and where, from the wording of the note, when construed in the light of all the evidence in the case, it appears that it is one on which no cause of action could be maintained, and, where the language of the note and all the evidence in the case clearly shows that it is against public policy, a demurrer to the evidence should be sustained, and this cannot be cured by a defect in the pleadings.

#### 2. BILLS AND NOTES—PAYEE—PRESUMPTIONS.

Where a note is made payable to a certain person or persons named as payee therein, and there is nothing in the wording of the note to indicate, and no showing in the evidence, that any other person has any interest therein, the presumption will be that the note is for the personal benefit of the payee named therein.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1669.]

#### 3. SAME—CONSIDERATION—PUBLIC POLICY.

When a note is made payable to a director or officer of a railroad company, in his personal capacity and for his personal benefit, on condition that a railroad is built to a certain point by a certain time, such note is void as against public policy, and no recovery can be had thereon.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 225; vol. 11, Cent. Dig. Contracts, §§ 538, 540.]

Burwell, J., dissenting.

(Syllabus by the Court.)

Error from District Court, Payne County; before Justice John H. Burford.

Action by Coyle & Guss against L. K. McGuffin. Judgment for plaintiffs, and defendant brings error. Reversed.

This action was commenced in the district court of Payne county, Okl. Ter., by W. H. Coyle, and U. C. Guss, partners under the firm name and style of Coyle & Guss, against L. K. McGuffin, on a promise to pay \$250 when the Atchison, Topeka & Santa Fé Railroad Company should build its road into the town of Cushing, Okl. The petition is as follows, omitting the caption: "Comes now the above named plaintiffs and complain of the above named defendant, L. K. McGuffin, and for cause of action against said defendant, allege and say: That the said defendant on the 23d day of July, 1901, for a valuable consideration, executed and delivered to the plaintiffs his certain promissory note in writing, of that date, whereby said defendant promised to pay to the order of the said plaintiffs on July 1, 1902, the sum of two hundred and fifty dollars (\$250.00) at Cushing Bank, Cushing, Oklahoma. That said note was executed and delivered by defendant

to the plaintiffs on condition that the Santa Fé Railroad (meaning thereby the Atchison, Topeka & Santa Fé Railroad) should be built to the town of Cushing by July 1, 1902. Plaintiffs allege that the said condition in said note has been fulfilled and performed in every particular, and that the said railroad was built to the said town of Cushing prior to July 1, 1902. That said railroad was fully equipped for the operation of trains, and provided with all the necessary facilities for the transportation of passengers and freight, and that the regular trains were out in operation on said railroad to the town of Cushing prior to July 1, 1902. Plaintiffs allege that they are the owners and holders of said promissory note, and that there is now due them on said note from said defendant the sum of \$250, with interest thereon at the rate of 7 per cent. per annum from the 1st day of July, 1902, and that the defendant, although often requested, has failed and refused to pay the same. A copy of said note is hereto attached, referred to herein, and made a part of this petition, and marked 'Exhibit A.' Wherefore, plaintiffs pray judgment against said defendant L. K. McGuffin for the sum of \$250 with interest at the rate of 7 per cent. per annum from the 1st day of July, 1902, and for the costs of this action. Henry E. Asp, J. R. Cottingham, J. B. Furry." The note referred to in the petition as "Exhibit A" is as follows, to wit: "Cushing, Okla., 7, 23 day, 1901. \$250.00. July 1st, 1902, if Santa Fé R. R. is built to Cushing by this date (July 1, 1902), A., T. & S. F. R. R. to Cushing, Oklahoma, in consideration of its being built, for value received, as principals promise to pay to the order of Coyle & Guss, two hundred and fifty dollars, at Cushing Bank, Cushing, Oklahoma. This note is given upon condition that a failure to comply with the above requirements shall render this note void. L. K. McGuffin." To this petition defendant demurred, which demurrer was overruled, to which defendant excepted. Defendant then filed an answer setting up failure of consideration, and fraud in obtaining said note. The following evidence was introduced on the part of the plaintiff. First, the charter of the Eastern Oklahoma Railroad Company. Then evidence was introduced showing that the Atchison, Topeka & Santa Fé Railroad Company was the principal stockholder in the Eastern Oklahoma Railroad, and that the stock subscribed by the different stockholders in the Eastern Oklahoma Railroad Company was at the request of the Atchison, Topeka & Santa Fé Railroad Company and that the Atchison, Topeka & Santa Fé Railroad Company purchased the right of way, and that the Eastern Oklahoma was completed to Cushing within the time designated in the note. The defendant demurred to this evidence, which was overruled by the court, and judgment given for the plaintiff, to which the defendant excepted. Motion for

new trial was made in due time, filed, argued, overruled, and exceptions saved. To all of which the defendant excepted, and brings the case here for review.

Chas. E. Bush and Jno. Devereux, for plaintiff in error. Henry E. Asp, Charles H. Woods and Geo. M. Green, for defendants in error.

IRWIN, J. (after stating the facts). Plaintiff in error insists that this case should be reversed on three grounds. First, that the evidence shows that U. C. Guss, one of the plaintiffs, was a stockholder in the Eastern Oklahoma Railroad Company, and any contract by which he was to receive a personal benefit for the location of that road at a certain point was against public policy and void; second, because the evidence fails to show that the Atchison, Topeka & Santa Fe Railroad Company has ever built a railroad to Cushing, and therefore the condition on which the note was to be paid has never been fulfilled; and, third, because the petition fails to show any consideration for the promise. Counsel for defendant in error insist that this demurrer to the petition should have been overruled, because the pleadings did not raise the question of the legality of the note in question, and they cite a number of authorities to sustain this position. But we think this position is not tenable, because we believe the true rule to be that where a cause of action is founded alone on a promissory note, and where from the wording of the note, in the light of all the evidence in the case, it appears that the note is one on which no cause of action could be maintained, and where the language of the note and all the evidence in the case clearly shows that it is against public policy, a demurrer to the evidence should be sustained, and this cannot be cured by a defect in the pleadings. Such seems to be the holding of the United States Supreme Court in the case of *Oscanyan v. Arms Company*, 103 U. S. 261-266, 26 L. Ed. 539, where that court say: "The position of the plaintiff that the illegality of the contract in suit cannot be noticed, because not affirmatively pleaded, does not strike us as having much weight. We should not deem it worthy of serious consideration, had it not been earnestly pressed upon our attention by learned counsel. The theory upon which the action proceeds is that the plaintiff has a contract, valid in law, for certain services. Whatever shows the invalidity of the contract shows that in fact no such contract as alleged ever existed. The general denial under the Code of Procedure of New York, or the general issue at common law, is therefore sustained by proof of the invalidity of the transaction which is designated in the complaint or declaration as a contract." Further on in the opinion, at page 267 of 103 U. S. (26 L. Ed. 539), the court says: "Here the action is upon a contract which, according to the view of

the judge who tried the case, was a corrupt one, forbidden by morality and public policy. We shall hereafter examine into the correctness of this view. Assuming, for the present, that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded on services rendered in violation of common decency, public morality, or the law. History furnishes instances of robbery, arson, and other crimes committed for hire. If, after receiving a pardon or suffering the punishment imposed upon him, the culprit should sue the instigator of the crime for the promised reward, if we may suppose that audacity could go so far, the court would not hesitate a moment in dismissing his case, and send him from its presence, whatever might be the character of the defense. It would not be restrained by defects of pleadings, nor, indeed, could it be by the defendant's waiver, if we may suppose that in such a matter it would be offered. What is so obvious in a case of such aggravated criminality as the one supposed is equally true in all cases where the services for which compensation is claimed are forbidden by law or condemned by public decency or morality." And in the case of *Coppell v. Hall*, reported in 7 Wall. 542, on page 558, 19 L. Ed. 244, the Supreme Court of the United States again says, in the opinion: "The instruction given to the jury, that, if the contract was illegal, the illegality had been waived by the reconventional demand of the defendant, was founded upon a misconception of the law. In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, 'Ex dolo malo non oritur actio,' is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Whenever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

Counsel for defendant in error in their brief say, as to the first ground for a reversal argued by counsel for plaintiff in error: "It is submitted that, upon this point, the only answer that is necessary is that the record discloses that there is not a scrap of

evidence from which even an intimation might be drawn that any personal benefit accrued to Guss through this particular transaction. It is true that Guss was one of the stockholders of the company, and also that he is named as one of the payees of the note; but there is not an iota of evidence to show that he was to receive this money in his personal capacity and for his personal benefit, and certainly none to the effect that he was to receive it for his personal benefit at the expense of the company for which he was working, and to which he owed his duty." Now, by the use of this language in their brief, it would seem that, non constat, if the evidence did show that the note was for the personal benefit of Guss, and that he was one of the stockholders of the company, and that the said note was for his personal benefit, given to him in his personal capacity, their views would be different. Counsel for defendant in error insist, and base their defense entirely upon the proposition, that the note in question is a subscription not entered into on behalf of and for the benefit of the railroad company, intended to aid it in the construction of its road. And they insist that such a contract, entered into by or on behalf of the railroad company, looking toward its location at one point rather than another, is not void, or against public policy, or that the public is necessarily affected to its detriment by such contract, and they say this is especially true in Oklahoma, where by statute railroad companies are permitted to hold real estate, to take and hold such voluntary grants of real estate and other property, either with or without this territory, as may be made to them to aid in the construction, maintenance and accommodation of their railroad. This point in the argument of counsel for defendant in error will be considered later on in this opinion.

From a careful examination of the brief of the defendants in error it will be seen that their claim that this note is valid and not in contravention of public policy is based entirely upon the theory that this is a subscription note, and while, by its terms, it purports to be given to Coyle & Guss, it is in fact given for the benefit of the railroad company, and not to Coyle & Guss in their individual or partnership capacity, nor for their personal benefit or for the benefit of either of them; that the real beneficiary of the note is the railroad company, and not Coyle & Guss, or U. C. Guss. Thus it will be seen that in deciding this case we are at the very outset confronted by two propositions—two questions upon the answers to which the ultimate decision of this case rests, when to these answers is applied the correct principles of law. The first question is, to whom is this note actually given? And, second, who is the beneficiary thereof? In determining these questions we must be governed entirely by the plain language employed in

drawing up the note in question. Where language is plain and unambiguous, and no uncertain terms are used, we take it that the ordinary and commonly accepted meaning of the words is intended. Now a reading of this note shows that, so far as the promise of the payment of money goes, it is in the ordinary form of a promissory note, and is made payable to Coyle & Guss, and we have made a very careful examination of the entire note, and we can find no language in it which by any reasonable construction can be interpreted to mean that any other person or persons was intended by the maker of the note to have any benefit therefrom. Coyle & Guss are made the payees of the note, without any qualifications, or without attaching any conditions that the proceeds of the note are for the benefit of anybody else. So far as defining the payees of the note, the statements of the note are unqualified, and there is certainly nothing in the note itself which would indicate that Coyle & Guss, or either of them, were acting in the interests of anybody else, as agent or otherwise. Then, if nothing in the note indicates that Coyle & Guss are not the real payees and beneficiaries, there is only one place for us to look for the evidence of such intention, and that is to the evidence in this case. We have read and re-read this evidence, and we fail to find a word or a syllable which to any degree or to any extent indicates that Coyle & Guss took this note as the agent of the Atchison, Topeka & Santa Fé Railroad Company, or any other railroad company or corporation, or took it in any other capacity than their individual capacity as the firm of Coyle & Guss. When we refer to this evidence, we find, first, that the charter of the Eastern Oklahoma Railroad was the first evidence, and in that it states that U. C. Guss, one of the payees of this note, was a stockholder in the Eastern Oklahoma Railroad Company, and a director therein. The only other testimony is that of Henry E. Asp, attorney for the Atchison, Topeka & Santa Fé Railroad Company; and the only testimony given by him concerning the payees of this note is found on page 23 of the case-made, where it says that Guss signed the articles of incorporation of the Eastern Oklahoma Railroad Company and was a subscriber for one share of stock, and that he (Guss) signed the articles of incorporation and became a member of the corporation at the request of him (the said Asp), and the witness says he thinks Guss had some talk with the officers of the Atchison, Topeka & Santa Fé Railroad Company in Chicago concerning the matter; and on page 25 the same witness testified that he made a contract with Coyle & Guss to procure the right of way and that the Atchison, Topeka & Santa Fé Railroad Company paid for the same. Now this is the entire evidence on this point. No other evidence of any kind or character is introduced touching this

point. Now can it be said that the mere fact that Guss subscribed for stock in the Eastern Oklahoma Railroad Company at the request of the Atchison, Topeka & Santa Fé Railroad Company, and that he was employed for the purpose of assisting in procuring the right of way for that railroad company, is sufficient in itself to authorize the court in holding that this note was given to the railroad company, and not to Guss, and that the same is not for Guss' personal benefit, in the face of the plain unequivocal language of the note itself? Plaintiffs in the court below, in their petition filed in this case and on which this case is based, offer this note, not as the note of the railroad company, but as the personal property of Coyle & Guss. Coyle & Guss are the plaintiffs in the case. No one else is mentioned as plaintiff, and in the petition this language is used: "Plaintiffs allege that they are the owners and holders of said promissory note, and that there is now due them on said note the sum of two hundred and fifty dollars (\$250.00), with interest thereon. \* \* \*"

Now we take the true rule of law to be that where a note is made payable to a certain person or persons as payee therein, and there is nothing in the wording of the note to indicate, and no showing in the evidence, that any other person has any interest therein, the presumption will be that the note is for the personal benefit of the payee named therein.

We think, from the unmistakable language of the instrument itself, in the absence of any evidence to vary, change, or explain that language, any reasonable, fair-minded person must come to but one conclusion from a reading of the note, and that is that it is the personal property of Coyle & Guss and for their personal benefit. They might, it seems to us, as consistently and just as reasonably say that it was for the benefit of the Cushing Bank, of Cushing, Okl., because that bank is named as the place of payment in the body of the note, as to say that it was a note given to the Atchison, Topeka & Santa Fé Railroad Company. Before we could indulge in the presumption that this note did not intend or mean what it plainly and unmistakably says, we should have something to base such a presumption on. That presumption could only be based upon something in the language of the note itself, or from something in the evidence in the case. This case is brought in the district court in the name of Coyle & Guss, in the individual capacity of the firm. In their petition they allege that they are the owners and holders of this note. Nowhere in the petition is any allegation made that any other person or persons has any interest directly or indirectly therein. We have before us all the evidence that was before the district court. On the evidence introduced before the district court could any other or different judgment have been ren-

dered, provided the note was otherwise unobjectionable, than a judgment in favor of Coyle & Guss? Would the district court have been warranted on that evidence in finding that any other person or corporation had any interest in this note? If it would not, then why should we, on the same evidence, be authorized in making such finding? This note is payable by its terms to Coyle & Guss, or order. Now let us for a moment consider the attitude of the Atchison, Topeka & Santa Fé Railroad Company, provided they are the real beneficiary of this note, and that the note was made in the name of Coyle & Guss for their benefit. There is no way known to the law by which they could get what justly belongs to them out of the proceeds of this judgment, except upon an order from Coyle & Guss. Would it be likely that a great business concern, like the Atchison, Topeka & Santa Fé Railroad Company would do business in this precarious, unsafe, and uncertain manner? If this note was really given for the benefit of the Atchison, Topeka & Santa Fé Railroad Company, and was not intended for the personal benefit of Coyle & Guss, then what consistent reason can be given for the note being taken in the name of Coyle & Guss, without any language therein to preserve or protect the rights of the railroad company? Is there any prohibition in law that would prevent the railroad company from taking notes and contracts for their own benefit in their own name? Have we any right under the evidence to indulge in a presumption which neither the instrument itself, nor the evidence in the case would warrant? Then, again, if this note was intended to be for the benefit of the railroad company, why should they take and use as one of the payees of the note, Coyle, who so far as this record shows has no connection with the Santa Fé Railroad Company, save and except that he was employed at one time to assist in the purchase of right of way for the railroad? Then, again it would seem to us that this note would not have been intended to be a note given either for the purpose of assisting in the procuring of the right of way, or to aid in the construction of the railroad, because by the terms of the note it is not payable until both these conditions have been performed, because it is not payable to anybody until the road is built to Cushing. Now it is a self-evident fact that the purchase of the right of way must be a condition precedent to the construction of the railroad, and it is a fact, made manifest by the language of the note, that the construction of the road is a condition precedent to anything being due on the note. This, it seems to us, is a complete answer to the proposition that this is a subscription note given to the Atchison, Topeka & Santa Fé Railroad Company to aid in the construction of its railroad. And it seems that the only reasonable construction that can be placed upon the note and the

evidence in support thereof is that it is the property of Coyle & Guss in their individual capacity, and for their personal benefit.

As to the second proposition urged by plaintiff in error for a reversal of this case, attorneys for defendant in error say in their brief at page 5: "But the argument of counsel is that the fact that this was a contract of subscription with Guss & Coyle for the location of a railroad at a certain point, and that Guss was one of the directors of that railroad company, is enough in itself to render this contract void on the ground of public policy; and this, in view of the fact that there was not a jot of evidence to contradict the evidence of the plaintiff that in acting in these right of way matters (Guss & Coyle acted for and in behalf of the railroad company)." We have examined the brief of counsel for plaintiff in error carefully, with a view to ascertain if this was their argument, and we think that this statement in the brief of counsel for defendant in error is not warranted. We have heretofore given our view of the evidence as to this note being the individual and personal property of Guss & Coyle. Counsel for plaintiff in error, in their brief, insist all through the brief that it is not a subscription contract with the company, but is a note given to Coyle & Guss for their personal benefit. On page 5 of plaintiff in error's brief, they say: "Any contract by which he [meaning Guss] was to receive a benefit personally for the location of that road was against public policy and void." Nor do we find anything in the evidence that would warrant the conclusion that this note was a subscription note to the company, but counsel for defendant in error say on page 5 of their brief: "There was not a jot of evidence to contradict the evidence of the plaintiff that, in acting in these right of way matters, Guss & Coyle acted for and in behalf of the railroad company." We cannot understand the purpose of this statement, or what possible significance it can have in this case, for the reason that there is absolutely nothing in the note itself which in any way indicates, or has any connection, however slight, with the subject of the buying of the right of way, and we have repeatedly read this entire evidence from beginning to end, and there is not a scintilla of evidence that in any way connects this note with the purchase of the right of way, or even indicates or hints that it has any reference to that subject. Hence we think that there is no force in the statement of counsel for defendant in error that the evidence does not tend to contradict the evidence of plaintiff that they were acting in right of way matters for the Santa Fe Railroad Company, because it is immaterial whether they were, or were not, unless in some way this note is connected with the subject of the right of way; and, as we have heretofore said, from the wording of the note itself, it must be evi-

dent that this note was not intended as an aid to the purchase of the right of way.

As to the contention of counsel for defendant in error that not every contract entered into by or on behalf of a railroad company, looking towards its location at one point rather than another, is void, we have this to say: That many respectable authorities are cited by counsel to sustain this position, among which are the cases of McClure v. Gulf Railroad Company, 9 Kan. 373, Railroad Co. v. Baab, 9 Watts (Pa.) 458, 36 Am. Dec. 132, Berryman v. Trustees Cincinnati Southern Railway, 14 Bush (Ky.) 755, Racine County Bank v. Ayers, 12 Wis. 512, and Bank v. Hendrie, 49 Iowa. 402, 31 Am. Rep. 153. And on an examination of these authorities it would seem that most, if not all, of them sustain that position. But, on the contrary, we are cited to a line of respectable authorities which seem to hold the contrary doctrine. But, under our view of this case, so far as presented by the record, this question does not arise in this case, and we are inclined to the belief that "sufficient unto the day is the evil thereof," and will content ourselves with a discussion and decision of those questions only which are germane to the issues of this case. When the question of the right of the railroad company to take notes or contracts of subscriptions for the construction of their road, conditioned upon the location thereof at a certain point rather than at another point, comes to us upon the issues involved in the case, it will be time enough to decide that question; but at present we do not deem it necessary or advisable to try to reconcile what seems to be a conflict of authorities on this proposition. We think the true principle of law is that a note made payable to an officer of a railroad company, in his personal capacity and for his personal benefit, on condition that a road is built on a certain line, to a certain point, by a certain time, is void as against public policy, and that no recovery can be had thereon. In the case of Eldred v. Malloy, 2 Colo. 320, 20 Am. Rep. 752, in passing upon the validity of a note almost identical in terms with the one in this case, the note there under consideration reading as follows: "Golden City, Col. Ter., May 20, 1870. Nine months after date, for value received, I promise to pay J. A. Remington, or order, five hundred dollars, without defalcation or discount, at Golden City, Colorado. The consideration of the above is that if the railroad is completed and cars running to a point inside the Table Mountains, at Golden City, Colorado Territory, on or before 20th of February, A. D. 1871, the above sum will be duly paid to the before mentioned J. C. Remington; otherwise, the obligation to be null and void. Stephen Eldred"—the court, speaking through Judge Belford, said: "Notwithstanding the fact that contracts of wager have been regarded as valid at common law, a disposition has been steadily growing in all respectable courts to discoun-

tenance and ignore them. It is generally conceded that the principle was ingrafted on that system at a time when but little consideration was given to the subject, and the right to recover in such cases quite fully established before any searching inquiries were made into the moral tendencies of the doctrine. While bowing to the authority of Lord Mansfield, such able jurists as Ellenborough and Campbell and Le Blanc have declined to entertain such cases, while other judges have refused to proceed as long as anything else could be found to do, constantly declaring that, were the question a new one, the rule would be different. The manifest disfavor extended to these contracts by the English judges and the unremitting efforts that are being made to get rid of a rule established through the inadvertency of their predecessors convinces me that in upholding these contracts the earlier decisions were founded on a misapprehension of the common law. The courts of this territory have enough to do without devoting their time to the solution of questions arising out of idle bets made on dog and cock fights, horse races, the speed of ox trains, the construction of railroads, the number on a dice, or the character of a card that may be turned up." And that court there reversed the finding and judgment of the district court, and held such a note to be void, without remanding the case, holding that no recovery could be had, and ordered the costs taxed to the plaintiff in the court below.

But for the purpose of this case it will not be necessary to follow the Colorado court to the extent which they have gone, as this decision seems to be at variance with almost all the English and a great many of the American cases, and it is not necessary to put this note in the category of a wager. It is sufficient that this note, upon its face, shows that it was given to a stockholder and director of the railroad company, and by its form such stockholder and director is to receive the benefit for the location and construction of a railroad at a certain point. And this court in a case recently before it, involving to some extent the same principle as the case at bar, being case No. 1,570, *Enid Right of Way & Townsite Company v. Lille*, 82 Pac. 810, said: "A railroad company, chartered by authority of law, is a quasi public corporation, and the public have an interest in the location of their lines of road and depots. In the discharge of this duty to the public said railroad should recognize it as a paramount duty to establish and maintain their depots at such points and in such manner as to best subserve the public necessities and conveniences. We take it to be the policy of the law that a railroad company charged with this duty occupies a trust relation with the public to the extent of fairly, freely, and honestly discharging that duty to the best interests of the public, and any contract which has a tendency to limit or restrict the action of the

railroad company in the discharge of that duty is against public policy. The location and establishing of its lines and the location and establishing of railroad stations and depots is a duty which it owes to the public." And while in that case (which is still officially unreported) a little different state of facts existed, as that note was given to the *Enid Right of Way & Townsite Company*, conditioned that a depot or station on the *Denver, Enid & Gulf Railroad* should be located at a certain point, still the principle is practically the same, and this court in the opinion said: "Now this is a contract, not with an officer of the *Denver, Enid & Gulf Railroad*, but with another person, to wit, the *Enid Right of Way & Townsite Company*. It is reasonable to presume that the maker of this note supposed that the right of way and townsite company had some influence with the railroad company, and it provided for the location of this depot by the railroad company. Hence we fail to see why it does not fall clearly within the class of cases first cited in the brief of plaintiff in error, which they admit and cite authorities to prove, that if it does fall within that class of cases it is void as against public policy." The court further on in the opinion says: "We think that one of the strong reasons why contracts of this character are against public policy is because of their corrupt tendencies, whether by lawful or unlawful means, to prevent the free exercise of discretion by the railroad company in locating their railroad stations and depots for the best interests of the public and the interests of the people. The law in its wisdom we think has a tendency to close the door of temptation by refusing to recognize contracts which in any way hamper the faithful discharge of the trust which the railroad company owes to the people in the location of public conveniences. Directors of railroad corporations occupy a two-fold relationship—first, to the stockholders of the road; and, second, with the public. They will not be permitted, on the one hand, to enter into contracts for their own pecuniary gain. Neither will they be permitted to compel payment from the people for doing that which the law requires them to do. Under the law the directors of the *Denver, Enid & Gulf Railroad Company* were required to establish and maintain their stations and depots wherever the public interests and conveniences would be best subserved, and the rule, we take it, is elementary that the performance of an act which the party is under legal obligations to perform cannot constitute a valid consideration for a promise. \* \* \* We think the policy of the law is decidedly against the enforcement of contracts which permit those intrusted with the discharge of a public duty to exact tribute from the people for doing that which the law required them to do. If such contracts were enforceable, the building of every new railroad through this territory would subject

the officers of that railroad to the temptations of every mercenary person who had some selfish motive for the location of all the depots and railroad stations along the line for the benefit of their own private interests, and to carry out this selfish designers would enter into contracts of pecuniary advantage to any officer who might have in charge the duty of locating such public conveniences, and the question of the best interests of the public would be lost sight of in the great individual struggle to locate such conveniences for private, and not public, benefit. Hence we think that the only safe doctrine is to hold that any contract, either with a railroad corporation or with any person presumed to have influence with such corporation, whereby such corporations are to be limited, restricted, or hampered in the faithful discharge of their duty to the public in the way of locating railroad stations and depots along its line, are things to be held not enforceable in the courts."

In the case of *Woodstock Iron Co. v. Richmond & Danville Extension Co.*, 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819, the question was whether an agreement with the plaintiff in error to pay the defendant in error \$30,000 to build a railroad by its works, which would make the railroad about 5 miles longer, was valid. In that case it is held that agreements upon pecuniary considerations or the promise of them to influence the conduct of officers charged with duties affecting the public interest, or with duties of a fiduciary capacity to private parties, are against the policy of the state to secure fidelity in the discharge of all such duties, and are void. In the opinion in that case, on page 662 of 129 U. S., and page 409 of 9 Sup. Ct. (32 L. Ed. 819), the Supreme Court of the United States, after reviewing the authorities presented, uses this language: "There is no exception in any decision called to our attention as to the character of a contract, when, for a pecuniary consideration, directors, stockholders, or agents of a company undertake to influence its conduct in these matters. Indeed, the law in general is that agreements upon pecuniary considerations, or the promise of them, to influence the conduct of officers charged with duties affecting the public interests, or with duties of a fiduciary character to private parties, are against the true policy of the state, which is to secure fidelity in the discharge of all such duties. Agreements of that character introduce mercenary considerations to control the conduct of parties, instead of considerations arising from the nature of their duties and the most efficient way of discharging them. They are, therefore, necessarily corrupt in their tendencies."

In the case of *Tool Co. v. Norris*, 2 Wall. 48-56, 17 L. Ed. 868, the Supreme Court of the United States say "that all agreements for pecuniary considerations to control the business operations of the government, or

the regular administration of justice, or the appointment to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution." It will be noticed that in these cases the grounds upon which these decisions are rendered are not that the proof shows that any interests of the public have been jeopardized, or any injury has been done, but on the ground of the corrupt and improper tendency of such contracts; not on what has been done, so much as what might be done—the probability of such contracts tending to the injury of the public. In support of this, we call attention to the language of the Supreme Court of the United States in the case above cited (*Woodstock Iron Co., v. Extension Co.*, 129 U. S. 643-661, 9 Sup. Ct. 402, 32 L. Ed. 819), where it is said: "If, as a third contingency, the choice lay between this line and another equally good, but not better, and they were influenced by this contract to adopt this line, then, although neither the company nor the public has been injured, yet the defendants have made their official power an instrument of private emolument in a manner which no court of equity can sanction. In this particular case no wrong may have been done, and yet public policy plainly forbids the sanction of such contracts, because of the great temptation it would offer to official faithlessness and corruption."

In the case of *Linder v. Carpenter*, 62 Ill. 309, the Supreme Court of that state say in the syllabus: "A contract made with officers of a railroad company, acting in their individual capacity, to induce them to establish the line of the road at a certain point, for the purpose of promoting the private advantage of the contracting parties, is against public policy, as tending to sacrifice the interests of the stockholders and the public, and will not be enforced in equity." The same doctrine is held in the case of *Bestor et al. v. Wathen et al.*, 60 Ill. 138, and the court in the body of the opinion, at pages 140 and 141, use this language: "On this question there is slight room for doubt. When the people, through the Legislature, grants to a company the right of eminent domain for the purpose of constructing a railway, the grant is made because it is supposed the road will bring certain benefits to the public. When the company is incorporated, and subscriptions are made to the stock, the money is subscribed upon the understanding that the officers intrusted with the construction of the road will so locate its line and establish its depots as to bring the highest pecuniary profit to the stockholders, compatible with a proper regard to the public conveniences. These, and these alone, are the considerations which should control the actions of the president and directors of the road, and so far as they permit their official actions to be swayed by their private

interests they are guilty of a breach towards the stockholders and of a breach of duty to the public at large."

In the case of *Holladay v. Patterson*, reported in 5 Or., at page 177, that court says in the syllabus: "A contract to donate money to secure the location of a railroad depot is void. H., being a director and president of the Oregon & California Railroad Company, and the owner of a controlling interest in the stock of said company, agreed with P., that in consideration of a certain sum of money, he would cause the line of said road to be located on a certain route, and a depot to be built at a certain place, instead of adopting another route then surveyed, which was shorter, and over which said road could be constructed at less expense. Held, that such a contract is contrary to public policy." And in the body of the opinion, at page 180, the court there says: "'Public policy' is a vague expression, and few cases can arise in which its application cannot be disputed. Mr. Story, in his work on Contracts (section 546), says: 'It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. This rule, however, may be safely laid down, that wherever any contract conflicts with the morals of the times, and contravenes any established interests of society, it is void as being against public policy.' In illustration of this rule, he says (section 576): 'When, therefore, a person occupying a public office agrees for a reward to exercise his official influence in questions affecting both public and private rights, so as to bring about the private advantage of persons interested, the contract would be void. For every public officer is bound to be disinterested in the consideration of all public questions, and any contract which interferes with the free and unbiased exercise of his judgment in relation to a question of trust and confidence reposed in him, is against public policy and good morals.' Railroad companies are defined to be quasi public corporations, and the directors act in a double capacity, to wit, as the agents for the company and also as trustees for the public, clothed with an important public trust. 1 Redfield on Railways, 577, § 140, says: 'The general duty of railway directors is an important and a public trust, and, whether undertaken for a compensation or gratuitously, imposes a duty of faithfulness, diligence, and truthfulness in discharge of its functions, in proportion to its difficulty and responsibility.' It is, among other things, argued that this contract is not against public policy, because contrary to public interest, as the deflection of the line of the road from the more direct route of the original survey would best subserve the public interests, and promote the welfare of the community through which the road passes. The question of the validity of the contract does not, however, depend upon the circumstance whether it can be shown that

the public has in fact suffered any detriment, but whether the contract is in its nature such as might have been injurious to the public."

In the case of *Elkhart County Lodge et al. v. Crary*, reported in 98 Ind., at page 238, in the body of the opinion, on page 240 (49 Am. Rep. 746), the Indiana Supreme Court says: "It has long been established that a contract against public policy will not be enforced. This principle is firmly fixed, and has often been applied to contract. There can, therefore, be no doubt as to the existence of the rule. The only question is as to its applicability to the facts in this case. When the general public has an interest in the location of an office, a railroad station, or the like, a contract to secure its location at a particular place is held to be against public policy, and not enforceable. There are very many cases holding that an agreement to locate a railroad station at a designated place is not enforceable, because against public policy. *St. Louis, etc., R. R. Co., v. Mathers*, 104 Ill. 257; *Williamson v. Chicago, etc., R. R. Co.*, 53 Iowa, 126, 4 N. W. 870; s. c., 36 Am. Rep. 206 (vide authorities note 214). The principle upon which these cases proceed is that the public good, and not private interest, should control in the location of railroad depots, and this principle certainly applies with full force to an office of a purely public character, such as a post office. We find in these railroad cases, and there are very many of them, the principle which applies the rule governing such a case as the present. It is true that there is some difference in the views of the courts upon the question whether an agreement for the location of a depot is valid when it does not restrict the location to the place named, and no other; but upon the general principle there is entire harmony. In the present case the difference in the opinions of the courts is an unimportant consideration, for here the location is restricted to one place, and no other, for a period of ten years, and the case, therefore, falls within the holding of the cases most favorable to the appellant. We say that the location is restricted to one place, for the reason that it is a matter of judicial knowledge that but one post office can be located in the city of Goshen. While the cases of which we have spoken establish a principle which rules this case, there are others which in their general features more nearly resemble the one at bar. Closely analogous in principle are those cases which hold that contracts which may tend to the injury of the public service are void. \* \* \* There are many phases of injury to the public service, and we do not deem it necessary to examine the cases upon the subject; for we think it quite clear that a contract which is made for the purpose of securing the location of an important office connected with the public service for individual benefit, rather than for the public good, tends to the in-

jury of the public service. The case made by the evidence falls fully within the principle that contracts which tend to improperly influence those engaged in the public service, or which tend to subordinate the public welfare to individual gain, are not enforceable in any court of justice. Pollock, Prin. of Cont. 279; Anson, Cont. 175; 1 Whart. Cont. §§ 402-414, inclusive. A wholesome rule of law is that parties should not be permitted to make contracts which are likely to set private interests in opposition to public duty or to the public welfare. This rule is recognized in our own case of *Magulre v. Smock*, 42 Ind. 1, 13 Am. Rep. 353, where it was held that an agreement to pay a consideration to a property owner for signing a petition to secure the improvement of a street was void, although there was no fraud, and although the person to whom the promise was made was really in favor of the improvement. It is not necessary that actual fraud should be shown, for a contract which tends to the injury of the public service is void, although the parties entered into it honestly and proceeded under it in good faith. The courts do not inquire into the motives of the parties in the particular case to ascertain whether they were corrupt or not, but stop when it is ascertained that the contract is one which is opposed to public policy. Nor is it necessary to show that any evil was in fact done by or through the contract. The purpose of the rule is to prevent persons from assuming a position where selfish motive may impel them to sacrifice the public good to private benefit. An English author says: "But an agreement which has an apparent tendency that way, though an intention to use unlawful means be not admitted, or even be nominally disclaimed, will equally be held void." Pollock's Prin. of Contracts, 286." And in this case the Indiana Supreme Court cites with approval the case of *Tool Co. v. Norris*, by the Supreme Court of the United States, heretofore cited in this opinion.

In the case of *Peoria & Rock Island Railway Co. v. Coal Valley Mining Co.*, 68 Ill. 489, it was held "that the duties which railroad corporations owe to the public, and which are the considerations upon which their privileges are conferred, cannot be avoided by neglect, by refusal, or by agreements with other persons or corporations, and that any contract to prevent the faithful discharge of any such duties will be against public policy and void."

Among the many cases cited by counsel for defendant in error to sustain their position, we find some which it seems to us clearly sustain the views expressed herein. From an examination of these authorities it would seem to us that counsel for defendant in error, in citing them, was laboring under what seems to us a misapprehension of the facts in the case as shown by the evidence, and had in mind an entirely different contract than the contract which the evidence in this

case shows was the consideration of this note. If the contract which was the basis of this note was a subscription contract, given to the railroad company to aid in the construction, operation, or maintenance of its railroad, then the authorities cited by counsel for defendant in error would be in point; but, as we view it, this is an entirely different kind of a contract, and it is a contract entered into with a director and stockholder of a railroad company, conditioned upon the building of a railroad at a certain point by a certain time, and under the authorities above cited we believe it is void as against public policy.

Among the authorities cited us by counsel for defendant in error is the case of *Pacific Railroad Co. v. Seely*, reported in 45 Mo., at page 212, 100 Am. Dec. 360. In the syllabus, the court used the following language: "A. agreed with the Pacific Railroad Company to deed it a certain lot of ground for purposes of speculation, in consideration that the company would locate a freight and passenger depot on his land. There was no evidence that the land was to be used for the general business of locating, constructing, managing, and using the road. Held that, although in one sense the company was a private corporation, yet its chartered privileges were granted in part to subserve great public interests; that such an agreement might be superinduced by prospects of mere gain, and thus the general welfare and good of the public might be sacrificed to subserve mere private interest; that for this reason, such an agreement was void as against public policy." And the Supreme Court of Missouri, in the opinion, at page 217 of 45 Mo. (100 Am. Dec. 369), uses this language: "But the broad position is that the company is a private corporation, and has the right to buy and hold all kinds of property, the same as an individual. This position is wholly indefensible. Whilst it is true, in one sense, that it is a private corporation, yet the public is deeply interested in it. Its chartered privileges and franchises were not granted solely and exclusively for private emolument, but to subserve a great public interest. In *Walther v. Warner*, 25 Mo. 277, this court decided that the building of a railroad by a private corporation under the authority of the Legislature for the public accommodation was a public use for which private property might be lawfully taken. In all these enterprises there is a mingling of both public and private benefit, and the interests of the public are not to be sacrificed to mere private gain. In the case of *Fuller v. Dame*, 18 Pick. (Mass.) 472, the action was on an agreement made in consideration of certain services in procuring the location of a depot at a certain place. It was a contract entered into between D. and F., and recited that D. was the owner of land which would be enhanced in value if the Boston & Worcester Railroad Corporation should establish their depot on certain flats,

and that, in order to procure the corporation to make such location of the depot, it would be necessary to form a joint-stock company to purchase the flats and give a portion thereof to the railroad company for the depot, and that F. had agreed to aid in getting up such a company, and in causing the railroad company to fix its depot on the flats, it being understood that he was of the opinion that the railroad corporation, with a view to the public good and the interests of the stockholders, ought to have its depot there; and D. agreed to make F. a pecuniary compensation so soon as the depot should be located on the place specified. A company was accordingly formed and incorporated, with power to purchase and hold the flats, and to give a portion thereof to the railroad corporation as an inducement to establish a depot thereon, and an agreement was made between the two corporations, by which the depot was located on the flats. F. was a member of the railroad corporation at the time when he made the agreement with D. and subsequently became a member of the joint-stock company. Although the court had previously sustained conditional subscriptions to stock, as heretofore noted, yet they held that this agreement was contrary to public policy and to open, upright, and fair dealing, because it tended injuriously to affect the public interest in having the fittest location of the depot, and the interests of the two corporations, and consequently it was invalid. Shaw, C. J., speaking for the whole court, gave the subject the following lucid exposition: "The case in question is, briefly, clearly within the operation of this salutary principle. Without considering other aspects of the contract, we are of the opinion that it was contrary to public policy and to upright and fair dealing, as it tended injuriously to affect the public interest in establishing the fittest and most suitable location for the termination of the Worcester Railroad, for the accommodation of public travel; (2) as it affects the interests of the proprietors of the Worcester Railroad; (3) as it affected the interests of the joint-stock company incorporated under the name of the South Cove Corporation. The Boston & Worcester Railroad was established for the public accommodation and convenience in the transportation of passengers and merchandise. Like a country road, it was in many respects a common highway. It has been so held in case of turnpike roads. *Commonwealth v. Wilkinson*, 16 Pick. (Mass.) 175, 26 Am. Dec. 654. It may be said that it was to be constructed and located by the corporation. True, as in the case of a turnpike road, it is constructed in the first instance at the expense of a private company of adventurers, under the sanction of the Legislature, incorporated for that express purpose, and they are to be reimbursed by a toll levied and regulated by law for their remuneration. The work is not the less a public work, and the public accommoda-

tion is the ultimate object. It is also true that it was left to the corporation and directors to fix the termination and place of deposit. In doing this, a confidence was reposed in them, acting as agents for the public—a confidence which it seems could be safely so reposed, when it is considered that the interests of the corporation as a company of passenger and freight carriers for profit was identical with the interests of those who were to be carried and had goods to be carried; that is, with the public interest. This confidence, however, could only be safely so reposed under the belief that all the directors and members of the company should exercise their best and their unbiased judgment upon the question of such fitness without being influenced by distinct and extraneous interests, having no connection with the accommodation of the public, or the interests of the company. Any attempt, therefore, to create and bring into efficient operation such undue influence, has all the injurious effect of a fraud upon the public, by causing a question which ought to be decided with a sole and single regard to public interest to be affected and controlled by considerations having no regards to such interests.' The agreement in this case was to give the company an interest in town lots, provided it would locate its station at a specified place. It is easy to perceive how such a transaction might be perverted so as to operate most injuriously to the public. Speculators and landed proprietors, for the purpose of enhancing their property, would always be on hand to obtain locations, and forcing people to their premises, regardless of the consideration whether they were the most fit and convenient; and the companies, tempted by the prospect of gain, would accede to these propositions, and thus the general welfare and good of the public would be sacrificed to subserve mere private interests. Whilst conditional subscriptions to stock may be entirely valid, I do not think agreements of this character should be upheld."

In the case of *Workman v. Campbell*, cited by defendant in error, reported in 46 Mo. 305, that court cites with approval the above case of *Pacific Railroad Company v. Seely*, and adds this to what was said in the former case: "The company have a deep interest in these transactions, and the directors and members of the corporation will not be permitted to reap a private gain or benefit at the expense of the public convenience, and to the detriment of the community."

In the case of *Berryman v. Trustees of the Cincinnati Southern Railway*, reported in 14 Bush (Ky.), at page 755, cited by defendant in error, which was a case sustaining their position that public policy does not prohibit voluntary contributions to railroads for the purpose of construction, etc., or render void a contract based upon the consideration that the road shall be located in or through a certain locality, unless the public inter-

est is to be sacrificed by it, the court, in the body of the opinion, at page 761, uses the following language: "The cases in which an agreement to pay has been declared void and against public policy are those where the officers of a corporation, for the advancement of their own private interests, have agreed to accept a consideration for locating such improvements in a particular locality. In the case of *Fuller v. Dame*, 18 Pick. (Mass.) 472, Dame, the owner of the land, promised Fuller, a member of the corporation, a certain amount of money if he would influence the location of the road. This was a mere private agreement between the two, and the court held that it might cause an improper influence to be exerted by the stockholders, and an agreement to pay for such exercise was void. In the case of *Holladay v. Patterson*, 5 Or. 177, Holladay was the president and director of the Oregon & California Railroad Company, and agreed with Patterson, in consideration of a certain sum of money, that he would cause the line of the railway to be located on a particular route and a depot to be built at a certain place. In the case of *Pacific Railroad v. Seely*, 45 Mo. 212, 100 Am. Dec. 369, it was agreed to give to the company a tract of land to be divided into town lots for the purpose of speculation, on condition that a depot should be built at a certain point. The court held that such speculations were incompatible to the object that brought the corporation into existence. In all these cases, there is a plain departure from the object contemplated by the charter, or the facts developed the existence of contracts by which the officers or stockholders of corporations have in some way violated their trust. The trustees in this case were attempting to devise the means for constructing this great line of railway, and were influenced alone by their desire to succeed in the enterprise, from which no private gain is sought, at least by this contract; but the public interest is subverted and the objects of the charter accomplished, in obtaining their contributions in aid of its completion. The interest of the road is alone looked to, without any individual benefit to the trustees, or any violation of their official duties. In the case of *Cumberland Valley R. R. Co. v. Baab*, 9 Watts (Pa.) 458, 36 Am. Dec. 132, the subscription (not of stock) was made on condition that the company would locate its bridge across the river at a particular place. The contract is held to be valid and not against public policy. A contract to convey real estate to a railroad company for the purposes of the railway, provided it built the road to a certain point and its depot in a certain town, was also held to be a valid contract. *McClure v. Gulf Railroad Co.*, 9 Kan. 377. Public policy does not prohibit voluntary contributions to railroads for purposes of construction, or render void a contract based upon the consideration that

the road will be located in or through a certain locality, unless the public interest is to be sacrificed by it. The prospective business of the road must to a certain extent control its location; and when the means may be insufficient to complete it, or the advantages to be derived from its location may be insufficient to induce voluntary donations, or subscriptions, based upon a consideration that the road will be so located as to confer the benefit, we see no reason for holding such agreements void; but when officers of such corporations, who are also trustees of the public, undertake to receive donations for their own private use, or make contracts by which they are to be paid for using an influence that will or may locate a line of railway in a particular locality, there is a necessity for holding such contracts void."

It would seem from a reading of the brief of counsel for defendant in error that the views herein expressed as to a note payable to a stockholder or director of a corporation for his personal benefit, depending for its consideration upon the location of a railroad at a certain point, being void as against public policy, was shared in by them and was believed by them to be the true rule of law, because we find in their brief, on page 10, the following language: "Contracts made with an officer of a railroad corporation, and for his personal benefit, to induce him to secure a particular location, stands upon other and different grounds, and is not upheld. \* \* \*" While it is true that this language is used in the brief of counsel for defendant in error as a quotation, and the authorities are cited from which they quote, we have carefully examined these authorities, and fail to find therein this language. But, however this may be, this language is cited with approval by counsel for defendant in error in their brief; hence we have the right to presume that they deem it applicable and pertinent to the issues involved in this case. We have carefully examined all the authorities cited by counsel for defendant in error, and we have not found any authority which holds that a contract made with a director of a railroad company that for a pecuniary consideration to himself a railroad shall be located at a certain point is not void as against public policy. neither do we think such an authority can be found.

It is argued by counsel for the defendant in error that, as in this case there is no evidence to show that the public interests are to be in any way injured, for this reason the contract should not be declared void, but we think this contention is fully answered in the cases above cited, where almost universally the authorities lay down the rule that it is not necessary that affirmative proof should be made that some public interest is being injured; but the mere fact that the contract by its terms and in its effect would tend to produce that result, and would be offering an

improper inducement for the exercise of discretion which should be honestly and faithfully exercised with a view to the protection of public and private interests, and should not be hampered by any consideration of personal pecuniary gain. It is not, as the authorities say, so much what the effect actually is, as what it is likely to be, and what the tendency of such contracts would be, that the policy of the courts is to remove from all cases where parties are called upon to exercise discretion involving public and private interests the element of temptation to improper action occasioned by pecuniary and mercenary motives.

Hence we think, for the reasons herein expressed and the authorities herein cited, that the action of the district court in overruling the demurrer to the evidence was erroneous, and, as this case must be reversed on this ground, it is not necessary for us to enter into the discussion of the question whether the fact that the Atchison, Topeka & Santa Fé Railroad Company were the principal owners and principal stockholders of the Eastern Oklahoma Railway, and the construction of the road by that company to the point mentioned in the note on and prior to the time mentioned in the note, is a compliance with the terms of the note or not.

For the reasons herein expressed, the decision of the district court is reversed, and remanded, with directions to sustain the demurrer to the evidence and render judgment in favor of the defendant and against the plaintiff for costs. All the Justices concurring, except BURFORD, C. J., who having tried the case below, took no part in this decision. BURWELL, J., dissenting, and BEAUCHAMP, J., absent.

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#### PIPER v. CHOCTAW NORTHERN TOWNSITE & IMP. CO.

(Supreme Court of Oklahoma, Feb. 14, 1906.  
Rehearing Denied June 9, 1906.)

##### 1. ACTION—PETITION.

Where the conditions of a contract are such as to provide for the maintenance of the thing contracted for after construction, a petition in an action brought upon a contract to recover the consideration for such contract, is not demurrable for the reason that the petition states that the contract has been and is being performed, the words "is being performed" having reference to the maintenance of the thing contracted for.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 1664-1669.]

##### 2. RAILROADS—SUBSCRIPTIONS IN AID—ENFORCEMENT.

A railroad company for the purpose of aiding in the construction of its line of road, may accept and enforce an obligation payable to it conditioned upon the construction of its line of road to a given point within a given time, and the establishment and maintenance of a depot there.

##### 3. SAME—DEMURRER TO EVIDENCE.

A contract was given to the Watonga & Northwestern Railway Company promising pay-

ment of \$250 to it if a line of railroad should be built from Geary, O. T., to Watonga, O. T., by June 1, 1901, and a depot established and maintained there. The charter of said railway company was afterwards amended changing the name of the corporation to the Choctaw Northern Railway Company, under which last name the line of road provided for in the contract was constructed. *Held*, that a demurrer to the evidence for that reason was properly overruled.

##### 4. PLEADING—AMENDMENT OF ANSWER—DISCRETION OF COURT.

It is not an abuse of discretion for a trial court during the trial of a cause, to refuse an amendment to an answer, which sets up a new and additional defense, where no reason is given therefor other than that the trial court refused to allow the evidence desired to be introduced under a general denial.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 772, 794.]

Hainer, J., dissenting.

(Syllabus by the Court.)

Error from District Court, Blaine County; J. L. Pancoast, Judge.

Action by the Choctaw Northern Townsite & Improvement Company against W. B. Piper. Judgment for plaintiff, and defendant brings error. Affirmed.

Noffsinger & Hinch, for plaintiff in error.  
J. B. Cheadle, for defendant in error.

GILLETTE, J. This action is brought to enforce performance and payment of the following contract:

"Contract. As a matter of inducement for the purpose of securing a railroad and aiding in the construction of the same, said railroad to be constructed from at or near Geary, Blaine county, Oklahoma Territory, to the town of Watonga, Blaine county, Oklahoma. I do hereby promise to pay to the Watonga & Northwestern Railroad Company, its successors or assigns, the sum of two hundred and fifty dollars, as follows to wit: One hundred and twenty five dollars to be paid on or before October 1, 1901, and one hundred and twenty five dollars to be paid on or before January 1, 1902; upon the condition that said railroad shall be constructed and in operation to said Watonga by June 1, 1901, and upon the further condition that said railroad shall establish and maintain a station within 450 feet of Main street as at present located in said Watonga. And I do hereby agree that no representations by any one other than the representations made herein shall be binding on the said company. This contract is entered into for and in consideration of the said railroad's being constructed as aforesaid. Witness my hand on this 11th day of February, 1901. W. B. Piper."

Indorsed on contract: "Pay to the order of Choctaw Northern Townsite & Improvement Company. Choctaw Northern Railroad Company, by J. W. McLeod."

Upon the trial of the cause it was disclosed by the evidence that the railroad was built and put in operation as contemplated by the contract, and the station established at Watonga as provided for by the foregoing

agreement. In short, it is not claimed by the defense offered in the case, but that the provisions of the contract to be performed by the railroad company had been fully and literally complied with. The defense offered was purely technical, and raised no issue upon the merits of the case. This is a character of defense not greatly favored by appellate courts, but the strict legal rights of the party will nevertheless be protected.

The first objection urged is that the trial court erred in overruling the defendant's demurrer to plaintiff's amended petition, and this for the reason that it averred the railroad mentioned in the contract was in process of construction at the time the contract was executed, and therefrom infers a variance between the contract and the averments of the petition. We find nothing in the contract which determines whether the railroad was then in process of construction or was not. Neither are we able to see how the defendant could be injured by the fact that the railroad, which he undertakes to aid in the construction of, was already in process of building.

A second proposition presented upon the demurrer is that the petition recites that the conditions of the contract sued on "has been and is being performed." It is urged that this is not an allegation of perfect performance of the contract, citing the provisions of the Oklahoma statute as follows: "In pleading the performance of the conditions precedent in a contract, it shall be sufficient to state that the party duly performed all of the conditions upon his part." The language of this statute is not, as urged by counsel for plaintiff in error, equivalent to a provision that an action cannot be maintained upon a contract except upon an allegation that all the conditions of the contract have been performed by the party pleading. The statute provides simply what is a sufficient allegation of the facts. It is unreasonable to suppose that this language of the statute was intended to preclude other conditions which entitled the party to recover, than those of complete performance of the contract, and in the contract under consideration there is an apt illustration, for the contract provides among other things, as a condition to liability thereon "that said railroad company shall establish and maintain a station within 450 feet of Main street, as at present located in the said city of Watonga." The words "establish and maintain" mean that a depot shall be established and thereafter maintained. The word "maintained" as therein used means a continuing obligation, and the pleader manifestly, by the language used, intended to declare that all the conditions had been performed by the railroad company, and the language used, "and is being performed," refers to the maintenance of the station at the point where the contract requires one. In view of the language of the contract sued on, we do not

think there was error in overruling the demurrer on this ground.

The plaintiff in error also upon his demurrer to the petition presents the argument that a contract to locate a depot at a certain point is void, as being contrary to public policy; and the argument is presented "that where a corporation like a railroad company has granted to it by a charter a franchise intended in a large measure to be exercised for the public good, any contract which disables the corporation from performing these functions, without the consent of the state, is a violation of the contract with the state, and is void as against public policy." The proposition here presented is not identical with the question presented this court in *Enid Right of Way & Townsite Co. v. Lile*, 82 Pac. 810, and *L. K. McGuffin v. Coyle & Guss* (not yet officially reported; decided January term, 1906) 85 Pac. 954. In the first the question presented was the power of a right of way and townsite company to take from a citizen an obligation to pay it a sum of money, which obligation was to be due and payable when a railroad should be completed to the point designated in such obligation, and in consideration of a railroad station and depot being located there; and in the second case the cause was presented and determined upon the question of the right of an officer of a railroad company to enforce an obligation payable to himself conditioned upon the railroad company's construction of a line of railroad to a point named in the obligation. This court held in each of said cases that such obligation was void upon the ground of public policy, and could not be enforced. That the railroad company affected thereby was a quasi public corporation with fixed duties as such, to the public and its stockholders, and an obligation entered into between third parties and its agents or officers, for their use and benefit by which transaction it was tended to influence the railroad company to build its line of road and locate a station at a particular point, was a species of bribery prohibited under the law, and non-enforceable to the same extent that such contract or agreement would be nonenforceable with any other public officer.

This case deals with quite a different problem, and squarely presents the proposition as to whether or not a railroad company for the purpose of aiding in the construction of its line of road may accept and enforce an obligation payable to it, conditioned upon the construction of its line of road to a given point within a given time and the establishment and maintenance of the depot there. There are many respectable authorities which affirm this proposition. See *James D. McClure v. Mo. River, Ft. Scott & Gulf Railroad Co.*, 9 Kan. 373; *Railroad Co. v. Baab*, 9 Watts. (Pa.) 458, 36 Am. Dec. 132; *Berryman v. Trustees Cinn. Southern Railway*, 14 Bush (Ky.) 755; *Racine County Bank v. Ayers*, 12

Wis. 512, and *Bank v. Hendrie*, 49 Iowa, 402, 81 Am. Rep. 153, and in the judgment of this court it is nearer in consonance with sound reasoning in this case to hold that under the facts presented the contract is not void, and therefore is enforceable. If the law were otherwise it would be equivalent to a declaration that a community desiring the advantages of a line of railway, where chartered privileges permit its construction, would be under the law prevented and prohibited from inducing such construction by aiding the same. A railroad company is only a quasi public corporation, and, as such, it must not only take into consideration the public welfare, but the private welfare of its shareholders as well, in the location and construction of its line of road. A donation to its assets which enables it to build a contemplated line immediately, and a consideration in part of its immediate construction, or which enables it to build its line upon a route that it might not otherwise be able to build, could not be held to be void upon the ground of public policy, and in this respect it must be held to be the privilege of a railroad company in determining its duty towards the public and its shareholders to determine what line and between what points its line shall be constructed. Where, as in this territory, a railroad corporation may take and hold voluntary grants of real estate and other property to aid in its construction, it may, we think, determine its line of construction, taking into consideration such voluntary grants of property or property rights. See section 1022, *Wilson's Rev. & Ann. St. 1903*, authorizing a transaction of this kind: "Every corporation formed under this article, and every railroad corporation authorized to construct, operate, or maintain a railroad in this territory shall also have power to take and hold such voluntary grants of real estate and other property either within or without the territory, as may be made to it; to aid in the construction, maintenance, and accommodation of its railroad." With this view of the law, it was not error for the trial court to overrule the demurrer to the petition upon the ground that the contract entered into and which is sought to be enforced is void, because it is against public policy.

A second assignment of error by the plaintiff in error is based upon the order of the court overruling a demurrer to plaintiff's evidence. The plaintiff in support of its cause of action proved the execution and delivery of the contract sued upon, the construction of the railroad in full compliance with the contract, and the refusal of the defendant upon demand to make payment in accordance with the terms of the contract, and the assignment of said contract by the Choctaw Northern Railway Company to the plaintiff. Under this assignment of error it is urged that there is a failure of evidence sufficient to entitle the plaintiff to recover, because it is not shown that the road con-

structed was constructed by the Watonga & Northwest Railroad Company. It is we think a sufficient answer to this proposition that the contract does not provide for the construction of a line of railroad by said company. The contract is a promise to pay to the Watonga & Northwestern Railway Company, its successors and assigns, the amount named, for the purpose of inducing and aiding in the construction of a railroad from Geary to Watonga by June 1, 1901, and the establishment of a depot at Watonga. These conditions of the contract, we think, were shown by the plaintiff's evidence to have been fully complied with; but it is urged under this assignment of error that the contract was made with the Watonga & Northwestern Railway Company, and the evidence does not show that the plaintiff is a successor in interest or assignee of such company, and the proof is insufficient, in that it showed that the instrument sued on was assigned to the plaintiff by the Choctaw Northern Railway Company. Touching this question, it was shown in evidence that after the execution of the agreement, and after the passage by the Legislature of Oklahoma of chapter 11, p. 79, of the Laws of 1901, being an act, "authorizing incorporated companies to amend their articles of incorporation" the Watonga & Northwestern Railway Company, pursuant to said act of the Legislature, amended its articles of incorporation in several particulars, among which was the change of its name from the Watonga & Northwestern Railway Company to the Choctaw & Northern Railway Company. Such change was authorized by law, and by force and reason of it the Watonga & Northwestern became the Choctaw & Northern Railway Company. If there was any change the Choctaw Northern was the successor of the Watonga & Northwestern Railway Company and succeeded to all of its property rights and franchises. This carried the defendant's contract to the Choctaw Northern Company, which company thereby became the owner, and by its assignment properly passed the title to the plaintiff. In fact we think the indorsement of the Choctaw Northern of the contract sued on to the plaintiff was the indorsement of the Watonga & Northwestern, for it is the same company changed in name by authority of law. It is urged in this connection that there was a mistake made in the procedure by which the articles of incorporation of Watonga & Northwestern were amended in this, that the statute requires that the new articles should be signed by all the directors and officers of the company, and one of the directors did not sign the same, and therefore the Choctaw & Northern Company was an unincorporated concern. Let this be as it may, the obligation of the plaintiff in error was not canceled thereby, and probably the territory alone would have the right to complain of an unauthorized franchise. The plaintiff in error we think could

not defeat his obligation for such cause. He gave an obligation which was valid to the Watonga & Northwestern Railroad Company, and his obligation was not discharged because such company attempted to change its articles of incorporation, and failed because of some slight error in an attempted compliance with the law authorizing such change. The provisions of a statute passed subsequent to the making of a contract could not have the effect to change the obligations of the parties under such contract, and there was here no attempt at such a change. The plaintiff in error contracted to pay the amount stipulated in consideration of the construction of a railroad which has been constructed, and his liability is thereby fixed.

The third assignment of error presented in the brief of plaintiff in error is based upon the ruling of the court in refusing to admit evidence tendered by the plaintiff in error. The ruling here complained of was based upon an attempt by the plaintiff in error to show that the Watonga & Northwestern Railroad Company under that title had nothing to do with the construction of the road. That it was built under contract with the Choctaw & Northern was unquestioned, and the court held that it was immaterial under the circumstances whether the Watonga & Northwestern by name figured in the contract for construction. In this we think the court held correctly.

The fourth assignment of error as argued in plaintiff in error's brief is that the court erred in refusing to admit evidence of the conditional delivery of the instrument sued on. Touching this fourth assignment of error, the defendant presented his defense to the court and jury under a general denial, and offered to show thereunder that at the time of the delivery of the instrument sued on that he attached conditions to the delivery, and the offer of proof of these conditions was rejected by the trial court upon the theory that the terms of the instrument delivered could not be varied by parol, and for the reason that no defense was pleaded which authorized the introduction of such proof. The plaintiff in error thereupon asked leave to amend his answer for the purpose, as we understand from the record, of allowing evidence of a conditional delivery of the contract which would vary the terms of liability thereunder. This the court refused, and it is argued that such refusal was an abuse of discretion. Our statute (section 829, Willson's Rev. & Ann. St. 1903), provides: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." The instrument was delivered to Seymore Foose, who was a director of the railroad company. The court authorized proof showing nondelivery, but denied proof showing conditions of delivery which varied the terms of the instrument. We are unable to determine upon consideration of all the facts and circumstances of this case

that the refusal of the court to permit such amendment to be made for the purposes stated was an abuse of discretion which would justify a reversal of the judgment entered.

Finding no reversible error in the record, the judgment of the court below is affirmed. All the Justices concurring, except PAN-COAST, J., who presided in the trial court, and HAINER, J., dissenting.

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CLARK v. APEX GOLD MIN. CO. et al.  
(Supreme Court of New Mexico. March 2, 1906.)

1. PLEADING — ANSWER—DENIAL—INFORMATION AND BELIEF—SUFFICIENCY.

The denial of any knowledge or information sufficient to form a belief in relation to a material allegation of a complaint puts the plaintiff to the proof of it.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 245-248.]

2. APPEAL—REVIEW—FINDINGS OF FACT.

A finding on a question of fact by a trial court without a jury stands in place of a verdict, and a judgment founded on it will not ordinarily be reversed by this court, if there is any substantial evidence to support it.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3979-3982.]

3. CORPORATIONS—ACTION BY STOCKHOLDER—WHEN LIENS.

To enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself and in which it is the appropriate plaintiff, there must exist and be established by evidence, as a foundation of such suit, some actual or contemplated action by the directors, or other acting managers, or by a majority of the stockholders themselves, which is beyond their lawful power, or fraudulent and subversive of the interests of the corporation itself or of the other shareholders.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Corporations, §§ 783-790.]

(Syllabus by the Court.)

Appeal from District Court, Lincoln County; before Justice Edward A. Mann.

Action by Orson E. Clark against the Apex Gold Mining Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The plaintiff, Orson E. Clark, alleges in his complaint that in May, 1902, by the purchase of certain stock he became, and that he still is, a shareholder in the Apex Gold Mining Company, a corporation organized under the laws of New Mexico, August 6, 1894; that said company, August 10, 1894, became the owner of certain tracts of land in Lincoln county, N. M., then and at the time of filing his complaint of the value of \$75,000; that from the beginning the affairs of said company were carelessly, negligently and extravagantly managed by its directors; that they contracted debts, suffered various judgments to be taken out against it, one in particular for taxes alleged to be due on the property of the company, of \$1,475, entered originally in October, 1899, and as amended August 29, 1901, which the plaintiff

tiff says was invalid; and that all such acts and omissions were for the purpose of enabling the directors and a few shareholders to get possession of the property of the company and to cheat and defraud the other shareholders. The complaint, however, does not specify who the directors or shareholders were who were guilty of such fraudulent acts or purpose, or who were the shareholders against whom those acts were directed prior to November 7, 1900, and does not connect the plaintiff or any of the defendants in the case at bar with the affairs of the company until the date last named, when, it is alleged, the defendants A. F. Smith, and S. P. Wardwell, with Charles M. Putnam, were elected directors and the former was chosen president; that thereupon the said Smith and Wardwell at once combined and confederated together to cheat and defraud the minority shareholders in said company and in furtherance and execution of such purpose acting especially with and through Louis G. Brockway and William Watson, two others of the defendants, allowed and had a pretended sale of the property of the company under an execution issued on said tax judgment, had a conveyance made to the said Watson, that he immediately gave a deed of the same to the said Brockway, and he, the said Brockway, conveyed it to the Lynn Mining & Industrial Company, a corporation organized under the laws of the territory of New Mexico, one of the defendants, which the plaintiff says was organized for the purpose of, and as an instrument in, carrying out the alleged fraudulent purpose of the defendants, Smith and others, especially Smith. The plaintiff alleges various acts of the defendants as details of the combination and conspiracy to defraud, which it sets up, and prays that the execution on the tax judgment above named, which was issued from said district court September 9, 1901, the sale on said execution made October 12, 1901, the deed to William Watson made in pursuance of said sale October 14, 1901, and the deed made by the latter to the Lynn Mining & Industrial Company December 20, 1902, be adjudged and decreed null and void, and for further relief on the same lines. The Lynn Mining & Industrial Company, William Watson, and John G. Brockway appeared and answered. The other defendants were defaulted.

George W. Prichard, for appellant. Hewitt & Hudspeth, for appellees.

ABBOTT, J. (after stating the facts). It is claimed by the appellant that the allegations in his complaint, sufficient to establish his cause of action and right to the relief prayed for, are not denied by the answer. That claim is based, in part, on the form of the denial used, which is that the defendant has not "knowledge or information sufficient to form a belief" as to the matter alleged. Such an answer is sufficient to put the plaintiff to the proof of the material fact as

to which it is made. Subsection 10, § 2083, Comp. Laws 1897; 1 Enc. Pl. & Pr. pp. 808, 809, 877; Bliss on Code Pleading, § 326.

We come next to the question whether the plaintiff has established by evidence his right to maintain in his own name, as a shareholder in the Apex Gold Mining Company, an action which ordinarily could be brought only in the name of the company itself. That question was determined by the trial court in the negative. It found as a fact that there was not sufficient evidence submitted in the cause to sustain the allegation of fraud on which the plaintiff based his action and his right to maintain it as an individual shareholder. Findings of the trial court without a jury on questions of fact have the same standing as the verdict of a jury in this court, and a judgment based on such finding will not ordinarily be reversed, if there is any substantial evidence to support it. *Torlina v. Trorlicht*, 5 N. M. 148, 21 Pac. 68, and cases cited. *Field v. Romero*, 7 N. M. 630, 41 Pac. 517; *Givens v. Veeder*, 9 N. M. 256, 50 Pac. 316; *Romero v. Coleman* 11 N. M. 533, 70 Pac. 559; *Ortiz v. First National Bank of Las Vegas* (N. M.) 78 Pac. 529; *Candelaria v. Miera* (decided at the present term) 84 Pac. 1020. Certainly it cannot be said that there is no sufficient evidence to support the finding now in question.

There were, it is true, circumstances disclosed by the evidence which, unexplained, might well have led the plaintiff to suspect the existence of the fraud and collusion which he alleged in his complaint. It appears affirmatively from the evidence, however, that the tax judgment, which the plaintiff asks to have set aside, was in existence months before the defendants who were charged with fraud and collusion in relation to it had any part in the management of the affairs of the Apex Gold Mining Company; that apparently there was no one sufficiently interested in it to furnish money for the payment of that or other claims against it, except the defendant Smith, who, after he became president, in November, 1900, made some advances for such purposes from his own funds; that the defendant Brockway had no authority from the Apex Gold Mining Company, or its directors, for anything he did in the premises; that he did not use its money for the purchase of the real estate sold under the tax judgment, nor did Watson use its money, or that of any one of the defendants, in the purchase of it. The claim of the plaintiff to the contrary rests mainly on the evidence that Brockway, prior to the sale under said judgment, said he had come to New Mexico to settle the claims against the Apex Gold Mining Company, and showed the money which he said he had brought for the purpose. It may be that he came with that intent and found the affairs of the company in such condition that his purpose was abandoned; but, certainly, the

fact, if it was one, that he once made such a statement, could not outweigh the direct testimony that he did not finally act under the authority or with the funds of the company. There remains, therefore, no ground alleged in the complaint on which the plaintiff can maintain this action under what we understand to be the prevailing rule as stated in the case of *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, and given in substance in the syllabus. See, also, 4 *Thompson on Corporations*, § 4501.

Such being our conclusion, we do not think it necessary to consider the other questions raised by the appellant, except that relating to the allowance of costs by the district court. Assuming that the motion to retax the costs was seasonably made, we still see no reason for interfering with the decision of the district court in the matter of charging the plaintiff with the amount paid the custodian of the property in controversy, during the litigation, who was appointed by the court, on motion of the plaintiff, as part of the costs. The decision of the trial court in such a question is generally treated as final, unless there has been a clear abuse of discretion. *Pearce v. Chastain*, 3 Ga. 226, 46 Am. Dec. 423; *Clark v. Reed*, 11 Pick. (Mass.) 446; *Shields v. Bogliolo*, 7 Mo. 136; *Trustees v. Greenough*, 105 U. S. 538, 26 L. Ed. 1157.

Judgment of the district court affirmed.

MILLS, C. J., and McFIE, PARKER, POPE, JJ., concur. MANN, J., having heard the case below, did not participate in this decision.

#### BANK OF COMMERCE v. BAIRD MIN. CO., Limited.

(Supreme Court of New Mexico. March 2, 1906.)

#### 1. CORPORATIONS—AUTHORITY OF MANAGING AGENT—BILLS OF EXCHANGE.

The managing agent of a mining corporation has no implied power to pledge the credit of his principal by drawing and cashing bills of exchange, and if he does so it must be by reason of some special authorization.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1645.]

#### 2. SAME—DEALINGS WITH AGENT.

One who discounts a bill of exchange drawn by the managing agent of a mining corporation in the name of the principal, without inquiring into the authority of the agent, does so at his peril.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1645.]

#### 3. TRIAL — SPECIAL FINDINGS — TRIAL BY COURT.

A general finding of facts by the court, where a jury is waived, is sufficient upon which to base a judgment, and the court is not bound to make special findings in the absence of a request therefor.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 916.]

(Syllabus by the Court.)

Appeal from District Court, Bernalillo County; before Justice Ira A. Abbott.

Action by the Bank of Commerce against the Baird Mining Company. Judgment for the mining company, and the bank appeals. Affirmed.

The Bank of Commerce is a corporation duly organized and doing a general banking business at Albuquerque, N. M. The Baird Mining Company, Limited, is a corporation organized under the laws of the province of Ontario, Dominion of Canada, authorized to do business in this territory and has been operating placer mines at Golden, N. M., where its property is situated. Some time in the year 1900 an account was opened with the Bank of Commerce by a Mr. Woodworth, the manager of the Baird Mining Company in New Mexico, in the name of Woodworth as manager, which account was kept open and deposits made and checks drawn against it in the ordinary course of business for some two years. In the meantime, Mr. Woodworth removed to Denver, the account standing with a small overdraft. On June 2, 1902, Mr. E. B. Ryckman, the secretary-treasurer of the Baird Mining Company, wrote the bank as follows: "Toronto, Canada, May 28th, 1902, Bank of Commerce, Albuquerque, N. M., U. S. A.—Dear Sirs: Enclosed you will please find New York draft for \$200, which I shall be glad if you will place to the credit of the Baird Mining Co., Limited, and against which I understand that Mr. W. S. Rishworth, as manager of the company intends to draw. I shall also be obliged to you if you will be good enough to let me have a full statement, both debit and credit, of the account of the company with your bank to the present time. I know that this may mean some little labor on your part, but I shall esteem it a great favor if you will comply with my request. Yours very truly, E. B. Ryckman, Secretary-Treasurer Baird Mining Company, Limited." The money was deposited to the credit of the company as requested, and a new account opened with the company direct, and against this account Mr. Rishworth drew his checks as manager. Shortly after the receipt of the above letter and the opening of the last-mentioned account, Mr. Rishworth commenced drawing sight drafts in the name of the Baird Mining Company by himself as manager through the Bank of Commerce. The first two or three were taken by the bank for collection and were paid upon presentation to Mr. Ryckman, in Canada; the others (some 10 or more) were credited at once to the company's account at Rishworth's request and sent on by the Bank of Commerce, through its New York correspondent, as its own paper. These drafts were all paid by Mr. Ryckman, upon presentation and demand, except the last three, for \$150, \$300, and \$150, respectively, upon which payment was refused by Mr. Ryckman, whereupon the drafts went to protest, and it is for the money so

advanced on these three drafts, with protest fees and interest, that the bank brings this action. There was no other correspondence between the parties as to Rishworth's authority, and there is no evidence that Ryckman or the company knew that the money on any of the drafts had been advanced to Rishworth before the same were collected. The proceeds of the drafts were drawn out by Rishworth on the company's checks, but it is not clear that the money was used for the purposes of the company. The district court found generally for the defendant Baird Mining Company, Limited, and rendered a judgment in its favor against the Bank of Commerce, and it appeals to this court.

William B. Childers, for appellant. Thomas N. Wilkerson, for appellee.

MANN, J. (after stating the facts). The only question involved in this case is whether the Baird Mining Company, Limited, is liable for the acts of Rishworth in drawing the three sight drafts in question and authorizing the bank to credit the same to the company's account, or in other words whether Rishworth had the authority, or the seeming authority from the acts and conduct of the company, to pledge its credit to the bank. There can be no doubt that the Baird Mining Company had held Rishworth out as its managing agent in New Mexico, and that it is bound by such acts as came in the direct scope of his authority as manager of the company; but a managing agent of a corporation, other than a cashier of a bank, has no implied power to bind the corporation by making, accepting, or indorsing negotiable paper, and when such a power in him is claimed it must be sought for in some special authorization, or in such a continued exercise of it as amounts to a holding out of him by the corporation as possessing it, raising the implication of it as a previous authorization or a subsequent ratification. 10 Cyc. 292; *New York Iron Mine v. First Nat. Bank*, 39 Mich. 644; *The Floyd Acceptances*, 7 Wall. 668, 19 L. Ed. 169; 4 Thompson on Corp. § 5746. It is a well-settled rule of law that those dealing with a known agent of a corporation or of an individual, do so at their peril, as to his authority, where the act is not within the regular scope of the ordinary power of an agent. In *The Floyd Acceptances*, 7 Wall. 668, 19 L. Ed. 169, Mr. Justice Miller lays down the rule as follows: "An individual may, instead of signing with his own hand, the notes and bills which he issues or accepts, appoint an agent to do these things for him. And his appointment may be a general power to draw or accept in all cases as fully as the principal could, or it may be a limited authority to draw or accept under given circumstances, defined in the instrument which confers the power. But, in each case, the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see

that the paper on which he relies comes within the power under which the agent acts." The case of *Bank of Deer Lodge v. Hope Mining Company*, 3 Mont. 146, 35 Am. Rep. 458, is a case somewhat similar to the case at bar, the question there being as to the right of an agent to draw a bill of exchange for his principal. Mr. Justice Blake, speaking for the court at page 150 of 3 Mont., 35 Am. Rep. 458, says: "Some of the principles, which are applicable to these questions have been announced by this court in the case of *Herbert v. King*, 1 Mont. 475. It was held that the principal is responsible for the acts of his agent, when they have been done within the scope of his authority, and that courts will not tolerate any enlargement of this liability. The bill shows that Alger claimed to be the agent of the respondent, and it was the duty of the officers of the appellant to ascertain the extent of his power before they discounted it. In *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 18 N. Y. 631, Mr. Justice Comstock says: 'Whoever proposes to deal with a security of any kind, appearing on its face to be given by one man for another, is bound to inquire whether it has been given by due authority, and if he omits that inquiry he deals at his peril.'"

It is not seriously contended that Rishworth had any express authority to discount these drafts, or have them treated as cash items by having the bank advance the money upon them before they were presented for payment, but the contention of the bank is that the Baird Mining Company, having allowed him to do so in several instances, making no objection thereto and paying the drafts upon presentation, thereby ratifying such acts, held Rishworth out as having such authority and are estopped to deny it. That the company might be bound by the unauthorized acts of its agent, if ratified by them with knowledge of his acts, or if they had knowingly indulged him in obtaining money by the method used, there is no doubt. Principals who knowingly permit their agents to pledge their credit repeatedly in a certain way, and receive the benefit of such acts, certainly should, and would be held responsible for such acts, but in the case at bar, while Rishworth had cashed several drafts exactly like the ones in controversy, the evidence shows that it was without the knowledge of the Baird Mining Company. The testimony of Mr. Strickler shows that no officer of the company ever was informed by the bank that it was advancing the money on these bills, before they were presented for payment, and Ryckman, the secretary-treasurer of the company, swears positively that the company had no knowledge of such facts. There was nothing about the drafts so drawn which were paid, that indicated that they were cash items belonging to the bank, and not merely held by it for collection. We must conclude that the Baird Mining Company

had no notice that Rishworth was cashing these drafts at the bank before presentation for payment, and that the payment of some of them by Ryckman, its secretary-treasurer, without such knowledge, was not a ratification of the acts of Rishworth.

Appellants assign as error that the court did not make special findings of fact and conclusions of law as provided by section 2999 of the Compiled Laws of 1897. The attention of the trial court, however, was not called to this omission by the motion for a new trial or otherwise, and plaintiff will not be heard to complain of such omission here. Again, section 2999 of the Compiled Laws of 1897 is not mandatory. The Supreme Court of South Carolina has construed a statute of that state which in language is almost identical with section 2999 as being directory merely, and not mandatory. *Stepp v. National Association*, 37 S. C. 417, 16 S. E. 134; *Joplin v. Carrier*, 11 S. C. 329; *Briggs v. Briggs*, 24 S. C. 377.

The judgment of the lower court in dismissing plaintiff's cause of action was right, and is affirmed.

MILLS, C. J., and McFIE, POPE, and PARKER, JJ., concur. ABBOTT, J., did not sit.

#### SHIELDS v. JOHNSON et al.

(Supreme Court of Idaho. May 24, 1906.)

##### 1. TRIAL—NONSUIT—GROUNDS.

If it is shown by the record that the demand for damages should under the statute have been litigated in a former action between the same parties, a motion for a nonsuit on that ground should be sustained.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 339.]

##### 2. SAME—WAIVER.

Where it is shown that a motion for nonsuit is interposed at the close of plaintiff's evidence on the ground that the subject-matter of the action could have been litigated in a former suit between the same parties, and after such motion is denied the defendant submits evidence in support of his defense, he waives his motion for a nonsuit, and must accept the verdict of the jury, unless he renews such motion at the close of all the evidence.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 982.]

(Syllabus by the Court.)

Appeal from District Court, Latah County; Edgar C. Steele, Judge.

Action by M. J. Shields against Frank M. Johnson and Frank Frazier. Judgment for plaintiff, and defendants appeal. Affirmed.

Stewart S. Denning and Geo. G. Pickett, for appellants. Forney & Moore, for respondent.

STOCKSLAGER, C. J. For a statement of the entire history of this case, and some of the facts important here, see 79 Pac. 391, 394. It will be observed by a reference to

these two decisions that the parties to this litigation have not been idle, so far as the courts are concerned, since their first business acquaintance out of which the cause now before us has ripened. It is correctly stated by learned counsel for appellants that the first action was commenced in the district court of Latah county on the 24th day of April, 1904, by respondent as plaintiff and against appellants as defendants, to quiet title to certain real estate described in his complaint, and, in addition to his demand that the title and right of possession of such real estate be quieted in him, that he have damages in the sum of \$500 against the defendants and each of them as a second cause of action. It is shown by the record in *Shields v. Johnson* (Idaho) 79 Pac. 391, 394, that at the time of the trial the question of damages was waived by plaintiff with the consent of defendants, and all allegations in the complaint as to damages were eliminated therefrom. It seems the case was tried on the 3d day of August, 1904. On the 18th day of July, 1904, respondent commenced this action, alleging damages in the sum of \$2,000. The fourth allegation is "that during the summer season of 1904 there was growing upon said lands and premises 120 acres of tame grass known as 'Bromus Innermis' and also 40 acres of alfalfa, which the plaintiff had theretofore at great cost and expense sown upon said premises for the purpose of harvesting the same for seed, and that said crop of grass so grown upon said premises was valuable for seed." The fifth allegation is "that about March or April, A. D. 1904, while this plaintiff was entitled to the possession, and was in the possession of said premises, the said defendants went thereon and plowed up about 50 acres of said land sown with 'Bromus Innermis' as above set forth, and sowed thereon a crop of oats, and also plowed up the 40 acres land sown to alfalfa, all of which acts and things were done without the knowledge or consent of this plaintiff." The sixth allegation is "that on or about July 11, 1904, without plaintiff's knowledge or consent, the said defendants entered upon said premises and cut down about 40 acres of said grass sown as above alleged, by this plaintiff, and known as 'Bromus Innermis'; that all the acts and things done by the said defendants as above set forth were done without the knowledge or consent of this plaintiff, and by said acts upon the part of the said defendants this plaintiff has been damaged in the sum of \$2,000." Then follows an allegation of the insolvency of the defendants; that they are unable to respond in damages, and unless enjoined and restrained will cut and remove the balance of the "Bromus Innermis," and otherwise damage plaintiff. The prayer of the complaint is that plaintiff have judgment for \$2,000 damages, and that defendants be restrained and enjoined from further acts of waste, and for costs.

Appellants applied to the court for an order dissolving the temporary restraining order issued by the court on the complaint and prayer of plaintiff. The application was denied, and an appeal from the order was prosecuted in this court, and the action of the lower court affirmed. *Shields v. Johnson* (Idaho) 79 Pac. 394. In May, 1905, the question of damages was tried, and the jury returned a verdict in favor of the plaintiff for the sum of \$275, for which amount judgment was entered in favor of the plaintiff. At the close of plaintiff's evidence appellants' counsel made the following motion: "Comes now the defendant and moves the court to peremptorily instruct the jury to bring in a verdict for the defendant, or to order a nonsuit upon the ground that the evidence of the plaintiff himself shows that he is estopped from maintaining this action." This motion was overruled, which ruling is assigned as error, and the only assignment in the record. Counsel for appellants in their brief say: "Can a party bring an action to quiet title, with one of his causes of action alleging \$500 damages for trespass and wrongful holding, and then, before the action is tried, dismiss his right to damages, and immediately turn round and file another action claiming damages and injunction?" An answer to this question disposes of this case, as it is the only question brought here for consideration, unless the contention of counsel for respondent that, when appellants introduced evidence after the court had denied their motion for nonsuit, they thereby waived their motion, or that the motion of appellants is too indefinite and uncertain, not specifying wherein and by what acts the respondent was estopped from maintaining his action, shall be accepted as the law of this case. The law does not encourage a multiplicity of suits. Subdivision 1, § 4184, Rev. St. 1887, referring to a counterclaim, provides: "A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." We do not understand from respondent's brief that he questions the requirements of this statute. It has been construed a number of times by this court. *Beane v. Givens*, 5 Idaho, 774, 51 Pac. 987; *Stevens v. Home Savings & Loan Ass'n*, 5 Idaho, 741, 51 Pac. 779, 986; *Murphy v. Russell*, 8 Idaho, 151, 67 Pac. 427. If the cause of action for damages existed at the time the plaintiff commenced his original suit, the statute required him to plead it, and when he dismissed his second cause of action, alleging \$500 damages for waste, he is estopped from again pleading that element of damage, or any other damages that may have existed at the time he commenced his action; and if such facts are shown by the record, the motion for nonsuit should have been sustained, unless appellant waived his motion for nonsuit by offering proof in support of the defense shown by his answer, or unless it is

shown by the record that the elements of damage alleged in the complaint were sustained by plaintiff after he filed his original complaint.

From the record in this case the important and controlling question is dependent on the force and effect of respondent's contention that, "when appellant introduced his evidence after his motion for nonsuit was overruled, he waived all his statutory rights given him on such motion." Section 4354 says: "An action may be dismissed or a judgment of nonsuit entered in the following cases: \* \* \* (5) By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury. \* \* \*" In *Chamberlain v. Woodin*, 2 Idaho, 642, 23 Pac. 177, Mr. Justice Beatty, speaking for the court, said: "Motion for nonsuit on account of insufficiency of evidence is waived by the subsequent introduction of testimony by the mover. Did the court err in overruling the motion for nonsuit? The motion, as above stated, was based upon the alleged insufficiency of the evidence. In the determination of this question, examination of the testimony is unnecessary; for any error the court may have made in this matter was entirely waived by the subsequent introduction of appellant's testimony. It is so settled by the highest authority, to which for the justification of our ruling we refer." Whilst the court in this opinion which was unanimous does not directly refer to the statute above quoted as one of the reasons for the conclusion reached, we assume it was construed in connection with the United States authorities cited, to wit: *Bradley v. Poole*, 98 Mass. 170, 83 Am. Dec. 144; *Ry. Company v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; *Insurance Co. v. Crandal*, 120 U. S. 530, 7 Sup. Ct. 685, 30 L. Ed. 740. Section 242, div. 1, Comp. St. Mont. 1887, is in the same language as our subdivision 5, § 4354. This section was construed by the Supreme Court of Montana, and thereafter by the Supreme Court of the United States in *Bogk v. Gasert*, 149 U. S. 17, 23, 13 Sup. Ct. 738, 739, 37 L. Ed. 631, Mr. Justice Brown delivered the opinion, and says: "The practice of Montana (Comp. St. div. 1, § 242) permits a judgment of nonsuit to be entered 'by the court upon motion of the defendant, when, upon the trial the plaintiff fails to prove a sufficient case for the jury.' Without going into the question whether the motion was properly made in this case, it is sufficient to say that defendant waived it by putting in his testimony. A defendant has an undoubted right to stand upon his motion for a nonsuit and have his writ of error, if it be refused; but he has no right to insist upon his exception after having subsequently put in his testimony and made his case upon the merits, since the court and jury have the right to consider the whole case as made by the testimony. It not infrequently happens

that the defendant himself, by his own evidence, supplies the missing link, and, if not, he may move to take the case from the jury upon the conclusion of the entire evidence." In addition to the cases cited by Mr. Justice Beatty in *Chamberlain v. Woodin*, supra, Mr. Justice Brown cites *Northern Pac. Ry. Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296; *Union Ins. Co. v. Smith*, 124 U. S. 405-425, 8 Sup. Ct. 534, 31 L. Ed. 497-505; *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405. Our attention is not called to any authority in conflict with the rule as above announced, the reasons for which are so clearly stated in the quotation from *Bogk v. Gassert*, supra.

Again, the record does not inform us what evidence was submitted to the jury by defendants nor what was shown by plaintiff on rebuttal; hence not a complete record of all the proceedings or all the facts submitted to the jury upon which they returned a verdict in favor of plaintiff. If the defendant had refused to offer any evidence after his motion for nonsuit was denied, the record would be complete; but, as stated by Mr. Justice Brown above quoted, the defendant by his own evidence may have "supplied the missing link," and thus aided the jury in finding against him. The rule that defendant may introduce evidence after his motion for nonsuit has been denied, and after the introduction of any rebuttal evidence offered by plaintiff, renew his motion and bring the entire record up for review, has support in the authorities above cited. If we should review the evidence disclosed by this record with a view of reversing the judgment, it would not only be unfair to the jury but the trial court as well, as they had the benefit of all the evidence in the case and we only have that part of it offered by the plaintiff in chief.

The judgment is affirmed, with costs to respondent.

AILSHIE and SULLIVAN, JJ., concur.

#### KESTER v. SCHULDT et al.

(Supreme Court of Idaho. Dec. 30, 1906. On Rehearing, May 3, 1906.)

#### 1. SALES — CONDITIONAL SALE — TITLE OF PROPERTY.

A promissory note providing that the express condition of the sale and purchase of the goods for which the notes were given is such that the title, ownership or possession, does not pass until the note and interest is paid in full, and that the payee has full power to declare the note due and take possession of the goods at any time he may deem himself insecure even before the specified maturity of the same, retains ownership in the payee of the note.

#### 2. JUDGMENT—RES JUDICATA.

Where it is shown that defendants in original suit filed an answer alleging title to the personal property in dispute in *Geo. H. Kester*, and defendants were prevented from making such showing by evidence, such evidence being rejected on objection from counsel for plaintiff there and defendant here, it is not a bar to an

action thereafter commenced by Kester against plaintiff in that action for the possession of such property, and to enjoin the sale thereof on the judgment in an original action.

#### 3. EXECUTION—ENFORCEMENT—INJUNCTION.

An injunction will issue to restrain and enjoin the sheriff from selling personal property, where it is shown that the plaintiff has no plain, speedy, and adequate remedy at law, or that the defendant is insolvent, and not able to respond in damages.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, §§ 497, 498.]

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by George H. Kester against William Schuldt and others. Judgment for plaintiff, and defendants appeal. Modified and remanded.

James E. Babb and Daniel Needham, for appellants. J. N. Smith, for respondent.

STOCKSLAGER, C. J. This action involves the title and right of possession of certain property heretofore used on what is known as the "Salem Barr" mine. This mine is a placer property, and at the time the property in dispute was placed thereon, was owned and operated by the Salmon River Mining & Development Company. It is alleged in the complaint that the Salmon River Mining & Development Company has no right, title, or interest in or to said property, and that it was never owned by said Salmon River Mining & Development Company, and as a foundation for this allegation, two promissory notes of \$450 each, dated April 9, 1900, payable to Geo. H. Kester, respondent herein, signed "Salmon River Development Company, by its President and Secretary," due July 11, 1900, with interest at the rate of 1 per cent. per month. The two notes above referred to are what are termed conditional sale notes, and contained a description of the property in controversy alleged to have been sold as above indicated, except the 700 feet of pipe. On the 20th day of August, 1902, \$150 was paid on one of the notes, and on September 21, 1902, \$100 was paid on the same note. The condition of the notes was that title to said property should remain and be in said Kester, and the ownership and right of possession thereof, shall likewise remain and be in Kester until both were fully paid.

It is alleged in the eighth paragraph of the complaint that the "Salmon River Mining & Development Company," at no time ever complied with the conditions of said contracts, nor did they ever pay the purchase price of said machinery. The ninth allegation is "that the property last above hereinbefore described is now owned by the plaintiff by virtue of the foreclosure of the chattel mortgage heretofore existing upon said property, and the subsequent transfer of said property to this plaintiff, which transfer was made long prior to the levy on the

order of sale above referred to." Exhibit D purports to be a chattel mortgage given by the Salmon River Mining & Development Company, to the Lewiston National Bank, describing the property in dispute, save the 700 feet of pipe, and as an additional description says: "All piping, belts, and belting and all tools, implements, and appurtenances of property hereinbefore described, or used herewith." This mortgage was given to secure a promissory note for \$300, dated March 28, 1901, due on demand, with interest after date at the rate of 1 per cent. per month. It is then shown by the complaint that on the 21st day of May, 1903, respondent Schuldt, as sheriff, by virtue of an affidavit and notice of foreclosure, took possession of the property in dispute, which description includes 700 feet, 16-inch gauge pipe. On the 28th day of May, 1903, as such sheriff, he sold said property to the highest bidder and realized from the proceeds of such sale, after paying all expenses, the sum of \$100.35, and that he paid said sum of \$100.35 to the Lewiston National Bank and received the following receipt: "Lewiston, Idaho, May 29, 1903. Received from William Schuldt, sheriff, one hundred and <sup>35</sup>/<sub>100</sub> dollars, proceeds of sale in cause of Lewiston National Bank vs. Salmon River Mining & Development Company. Lewiston National Bank, Geo. H. Kester, Cashier."

Plaintiff claims the 700 feet of pipe by reason of the sale of this property to the First National Bank of Lewiston by the sheriff under the chattel mortgage, claiming that he bought the property from the bank after its purchase at the sale. The answer denies that plaintiff is the owner of the property in dispute, including the 700 feet of pipe. Avers that respondent Phillips, on the 8th day of December, 1903, secured a judgment and decree of foreclosure and sale against the Salmon River Mining & Development Company, for the sum of \$999.30. Avers that the property levied upon by the sheriff was the property of the Salmon River Mining & Development Company. The answer then sets up affirmative defense by alleging the lien of respondent Phillips, its record and judgment thereon, against the Salmon River Mining & Development Company, on the 8th day of December, 1903. It is alleged that the chattel mortgage given to the bank was subsequent to the filing of the lien of respondent Phillips, and hence subject to such lien; "that the pretended sale of said property under said pretended chattel mortgage was made subject to all liens on said property, as appears from the return of sale thereof." It is alleged in the affirmative answer that plaintiff in this action being the cashier of the First National Bank of Lewiston, had notice of all the transactions between the Salmon River Mining & Development Company and the Bank, and that he also had notice of the judgment rendered against the Salmon River Mining & Develop-

ment Company in favor of respondent Phillips, and on information and belief alleges that on the 22d day of January, 1904, a motion to modify said modified decree was filed in the district court. \* \* \* Said motion was overruled and denied, and thereafter on the 6th day of April, 1904, an appeal from said order was taken to the Supreme Court, but was afterward abandoned, in which motion and appeal plaintiff Kester was in fact the moving party. See Phillips v. Salmon River Mining & Development Co. (Idaho) 72 Pac. 886. On these pleadings the case was tried, and findings of fact and conclusions of law filed, upon which decree was entered in favor of the plaintiff.

The second finding of fact is that on April 9, 1900, plaintiff, Geo. H. Kester was and now is the owner of that certain property described. (Then follows a description of all the property excepting the 700 feet of pipe.) "And that plaintiff is now and was at the time of the levy hereinafter complained of the owner of 700 feet, more or less, of No. 16 gauge 8-inch pipe, all of which said personal property was then and now is situated in Nez Perce county, state of Idaho."

The ninth finding after setting out the mortgage and notes in full claim of lien of respondent Phillips, ends with the following clause: "Said chattel mortgage was foreclosed before the sheriff of Nez Perce county of the state of Idaho, by the affidavit and notice in due form to the property covered thereby, last above described, and all property affected thereby was transferred to Geo. H. Kester prior to the rendition of the said judgments and levy prior to the issuance of the order of sale.

The twelfth finding is that the order of sale above set forth was issued in a case heretofore tried in the above-entitled court, wherein W. D. Phillips was plaintiff and the Salmon River Mining & Development Company was defendant, and in this cause the plaintiff was not shown as a party nor was he thereafter ordered to appear in said court, nor has he had his day in court, in relation to or in respect to said property, and that the said cause wherein W. D. Phillips was plaintiff and the Salmon River Mining & Development Company was defendant, the question of the ownership of the personal property concerning which this action is instituted, was expressly ruled out, and not litigated in said cause at the request of the attorney for the said W. D. Phillips.

The fifteenth finding is that the Salmon River Mining & Development Company never complied with the terms and conditions of the conditional sale notes, and at no time did the Salmon River Mining & Development Company ever own any of said property described in said notes; that no part thereof nor the machinery or personal property affected by this cause were ever treated or regarded as real property or as fixtures to real property, nor were they ever fixtures to said

mines, nor did the said property described in the conditional sale notes, ever constitute part of the mining property described in the claim of W. D. Phillips against the Salmon River Mining & Development Company, nor was any work or labor done or claimed in said claim of lien ever done or claimed to be done in such manner as to give said W. D. Phillips a claim of lien on said machinery and personal property, other than such pretended claim of lien as might arise by reason of the fact that said machinery is claimed to have affixed to the said mining claim as a part thereof.

As conclusions of law the court states that the said Geo. H. Kester is entitled to the decree and judgment pending the injunction heretofore issued herein and awarding him costs in this cause. Much of the former history of the subject-matter of this litigation will be found in *Phillips v. Salmon River Mining & Development Company* (Idaho) 72 Pac. 886. It will be observed, however, that the questions before us in the case at bar were not litigated in that action. It is urged by counsel for appellant that the plaintiff in his action through his attorney, I. N. Smith, asked to be entered as counsel for plaintiff herein in that action, and was granted leave to file an amended answer therein in which it was alleged, among other things, that "Geo. H. Kester was the owner of all the machinery, etc., situated on and forming a part of the property upon which said claim of lien was filed." This fact does not seem to be denied, but the court finds that the question of the ownership of the property was not litigated in that action for the reason that counsel for appellant objected to a consideration of that question in the trial of that cause and that the objection was sustained. So far as the record discloses, the facts of this case furnish the plaintiff the first opportunity he has ever had to litigate his right and title to the ownership and possession of the property, and it is so found by the court. The fact that respondent was the owner of the property in controversy, excepting the 700 feet of pipe, at the time he sold and delivered it to the Salmon River Mining & Development Company, taking as security therefor the two conditional sale notes is not questioned. That these conditional notes retained the title of the property in plaintiff on the property sold. See *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285; *Means v. MacKinzie* (Idaho) 73 Pac. 135; *Studebaker Bros. v. Mau* (Wyo.) 80 Pac. 151. If it were shown by the record that by any act of the plaintiff in the former litigation of the property involved in this action, or by anything he said, appellant Phillips was misled or deceived as to the claim of Kester to the property in controversy, then we think this judgment would be erroneous, but it is shown that an answer in the original action of *Phillips v. Salmon River Mining & Development Company* was filed by defendants

in which it was averred that plaintiff (Kester) was the owner of the property in dispute, and there attempted to litigate his claim of title to the personal property, but was prevented from doing so by the plaintiff in that action, appellant here. There are a number of disputed facts in the oral evidence; but the trial court finds for the plaintiff on the entire record, hence has passed upon the oral evidence in the light of other facts in the case, and we do not feel inclined to disturb that finding. We think the facts alleged in the complaint were sufficient to warrant the court in granting relief by injunction. The judgment is affirmed, with costs to respondent.

AILSHIE, J., concurs. SULLIVAN, J., sat at the hearing, but took no part in the decision

AILSHIE, J. A rehearing was granted in this case, and it was again argued at the March term. There seems to be some uncertainty as to the effect and extent of the perpetual injunction granted against the sale of the property levied on by the sheriff in the foreclosure proceedings of *Phillips v. Salmon River Mining & Development Company*. In order that there may be no misunderstanding or uncertainty as to the scope and extent of the decree, we will order and direct that it be so modified as to limit and restrict its application to the specific property described in the conditional sale notes held by respondent against the Salmon River Mining & Development Company and the 700 feet of 16-inch pipe claimed in addition thereto. In all other respects the judgment must be affirmed, and the opinion of this court previously filed will stand as the opinion of the court.

There are two reasons why the judgment of the lower court must be affirmed as above indicated. First. It is nowhere shown that the respondent ever consented to the Salmon River Mining & Development Company, or any one else, attaching or affixing the personal property or machinery to the realty for the purpose of making it, in point of law, a fixture and therefore a part of the mine. On the other hand, the terms of the conditional sale notes would, in the absence of other evidence, tend to disprove that theory. Second. It is nowhere shown by any evidence that would bind the respondent, that he ever waived his right to reclaim the property or ever in any manner vested the title in the conditional vendee. If any one of the foregoing facts had been shown by competent evidence, we might hold as appellant contends; but in the absence of any such showing, we must affirm the judgment.

While the chattel mortgage through which respondent claims title to the 700 feet of piping was subsequent in point of time to the Phillips lien, still it does not appear from the record that the piping had become a

fixture or a part of the realty in such manner as to be holden by the lien as against a chattel mortgage.

The case will be remanded to the trial court, with directions to modify the decree as above indicated, and the costs of appeal will be divided equally between appellant and respondent.

STOCKSLAGER, C. J., concurs. SULLIVAN, J., took no part in the decision.

STATE ex rel. GIBSON, County & Pros.  
Atty., v. CORNWELL.

(Supreme Court of Wyoming. June 12, 1906.)

1. CRIMINAL LAW — RULINGS ADVERSE TO STATE — REVIEW—PROCEDURE—PETITION IN ERROR.

Under Rev. St. 1899, §§ 5378-5381, authorizing review of exceptions taken by the prosecuting attorney in a criminal prosecution on a bill of exceptions filed on leave of the Supreme Court, and declaring that the judgment of the trial court shall not be reversed, but that the decision shall determine the law to govern in any similar case, the jurisdiction of the Supreme Court rests on the bill of exceptions so filed; and hence the filing of a petition in error is improper.

2. SAME.

A petition in error in criminal cases can be filed only in a proceeding to vacate, modify, or annul a final judgment, as provided by Laws 1901, p. 65, c. 63, § 1.

3. SAME—ENTITLING CAUSE.

Where a bill of exceptions is filed in the Supreme Court to review rulings in a criminal case adverse to the state, as authorized by Rev. St. 1899, §§ 5378-5381, the case should be entered in the Supreme Court under the same title by which it was known in the trial court, and not as an independent proceeding by the state on relation of the county attorney, as plaintiff in error, against accused, as defendant in error.

4. SAME—SUMMONS IN ERROR.

In proceedings by the state to review adverse rulings in a criminal case on a bill of exceptions filed as provided by Rev. St. 1899, §§ 5378-5381, no summons in error is required.

5. SAME — BILL OF EXCEPTIONS — SEALING — STATUTES.

Rev. St. 1899, § 5378, authorizes the prosecuting attorney to take exceptions to any opinion or decision of the court during the prosecution of a criminal cause and that the bill containing the exceptions on being presented shall, if conformable to the truth, be signed and sealed by the court which shall be made a part of the record, etc. *Held*, that an unsealed bill of exceptions prepared under such section was fatally defective, though a defendant in a criminal case is authorized to present an unsealed bill by section 5377.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2837.]

6. SAME—REVIEW—MATTERS OF RECORD—NECESSITY OF BILL.

Where a ruling which sustained a demurrer to an information was sought to be reviewed by the state on a bill of exceptions, as authorized by Rev. St. 1899, §§ 5378-5381, but the bill was fatally defective, the ruling could not be reviewed though it was matter of record without a bill of exceptions.

7. ATTORNEY GENERAL — DUTIES — APPEARANCE IN SUPREME COURT.

A criminal case brought to the Supreme Court on exceptions of the prosecuting attorney,

as authorized by Rev. St. 1899, §§ 5378-5381, is "a criminal case" within section 99 creating the office of Attorney General, and requiring him to represent the state in all criminal cases in the Supreme Court.

Error to District Court, Albany County; Charles E. Carpenter, Judge.

Proceedings in error by the state, on relation of Thomas H. Gibson, county and prosecuting attorney of Albany county, against Bailey Cornwell for the review of exceptions taken by the prosecuting attorney to rulings in a proceeding by the state against Cornwell. On motion to strike the bill of exceptions and petition in error, and to dismiss the cause. Granted.

W. E. Mullen, Atty. Gen., for plaintiff in error. H. V. S. Groesbeck, for defendant in error.

POTTER, C. J. This is a proceeding brought in this court for the determination of certain questions arising upon a bill of exceptions taken by the county and prosecuting attorney of Albany county in a criminal case heard and determined in the district court of that county, wherein one Bailey Cornwell was defendant. The authority for such a proceeding in this court is found in sections 5378 to 5381 of the Revised Statutes of 1899, which read as follows:

"Sec. 5378. The prosecuting attorney may take exceptions to any opinion or decision of the court during the prosecution of the cause; and the bill containing the exceptions upon being presented, shall, if it be conformable to the truth, be signed and sealed by the court, which shall be made a part of the record, and be in all respects governed by the rules established as to bills of exceptions in civil cases, except as herein provided.

"Sec. 5379. The prosecuting attorney may present such bill of exceptions to the Supreme Court and apply for permission to file it with the clerk thereof, for the decision of such court upon the points presented therein; but prior thereto he shall give reasonable notice to the judge who presided at the trial in which the bill was taken, of his purpose to make such an application, and if the Supreme Court shall allow such bill to be filed, such judge shall appoint some competent attorney to argue the case against the prosecuting attorney, which attorney shall receive for his service a fee not exceeding one hundred dollars, to be fixed by such court, and to be paid out of the treasury of the county in which the bill was taken.

"Sec. 5380. If the Supreme Court shall be of the opinion that the questions presented should be decided upon, they shall allow the bill of exceptions to be filed and render a decision thereon.

"Sec. 5381. The judgment of the court in the case in which the bill was taken shall not be reversed nor in any manner affected, but the decision of the Supreme Court shall determine the law to govern in any similar case

which may be pending at the time the decision is rendered, or which may afterwards arise in the state."

The application for permission to file the bill was filed in this court on December 28, 1904, by Thomas H. Gibson, the then prosecuting attorney for Albany county, who had, in that capacity, taken the exceptions and procured the bill. Said application was granted by this court on December 29, 1904, and the bill was filed on that date with the clerk of this court. At the same time and in the same proceeding the prosecuting attorney filed a petition in error, and an application for an order directing the clerk of the district court to transmit the original papers in the cause wherein the bill of exceptions was taken, together with a transcript of the journal entries. The order for such papers and transcript was thereupon issued by the clerk of this court, and in response thereto said papers and transcript were transmitted, and were filed in this proceeding January 12, 1905. The original papers so transmitted seem to contain all the papers filed in the cause in the district court, excepting the bill of exceptions aforesaid, which had been previously presented to the court and filed with the clerk, as above stated. The transcript of the journal entries exhibits an order of January 4, 1905, entered by the judge who presided at the trial in the district court, reciting the fact of service upon said judge of a notice of the purpose of the prosecuting attorney to apply to the Supreme Court for permission to file his bill of exceptions; and the fact that the Supreme Court had allowed the bill to be filed and had so notified said judge, and thereupon appointing H. V. S. Groesbeck to argue said cause in the Supreme Court against the prosecuting attorney, and fixing his fee for such service.

Briefs in support of the exceptions were filed by the Attorney General November 17, 1905. Thereafter counsel who had been appointed to argue in opposition thereto filed a motion to strike the petition in error and the bill of exceptions from the files, and to dismiss the cause in this court, on several grounds. The hearing was had upon that motion. It will be unnecessary to consider any of the grounds of the motion relating particularly to the petition in error, for the reason that upon what we conceive to be a more substantial ground than any specifically suggested in the motion, the petition in error should be stricken from the files. In the statute above quoted providing for a proceeding of this character there is no provision or authority for filing such a paper or pleading, nor is authority therefor to be found in any other statute applicable to such proceeding. To the extent and for the purpose explained in the statute, the jurisdiction of this court is invoked through the filing of the bill of exceptions; and a petition in error is neither necessary nor proper. The statute under which this proceeding was instituted was

enacted when Wyoming was a territory, and a reference to the record in the two reported cases decided pursuant to its provisions by the Supreme Court of the territory discloses that a petition in error was not then deemed essential to the court's jurisdiction in such a proceeding. *Territory v. Conley*, 2 Wyo. 331. *Territory v. Nelson*, 2 Wyo. 346. A petition in error was not filed in either of those cases. And it appears that the court assumed jurisdiction upon the filing of the bill. As the statute stood with reference to criminal appeals at the time of the revision of 1899, it was provided that in all criminal cases, within one year after the rendition of final judgment, writs of error, on good cause shown, might be allowed by the Supreme Court or any justice thereof, on the application of the defendant. Rev. St. 1899, § 5422. There existed no provision for a writ of error on the application of the state or a prosecuting officer. Section 5422 was amended in 1901, so that it now provides that in all criminal cases after final judgment, and within one year after the rendition of the judgment, proceedings to vacate, modify, or annul such judgment, may be begun in the Supreme Court by petition in error in the same manner as is provided for taking civil cases to that court. Laws 1901, p. 65, c. 63, § 1. That is the only provision or authority for a petition in error in criminal cases; and it is authorized only in a proceeding to vacate, modify, or annul the final judgment. The statute under which the present proceeding is brought expressly declares that the judgment shall not be reversed nor in any manner affected, but that the decision upon the questions presented in such a proceeding shall determine the law to govern in any similar case which may be pending at the time or may afterwards arise. No provision is made by this or any other statute for an appeal by the state, or any other proceeding on behalf of the state, to vacate, or modify the judgment rendered in a criminal case. The statute in question very clearly sets forth its purpose and defines the power and jurisdiction of the court in the premises. No doubt the petition in error was filed more out of abundant caution than from a belief in its necessity; but the title given to the cause in this court would seem to indicate some misconception of the character of the proceeding. In the petition in error, as well as the other papers, including the notice to the district judge of the purpose of the prosecuting attorney to apply for leave to file the bill of exceptions, the case is entitled as follows: "The State ex rel. Thomas H. Gibson, County and Prosecuting Attorney for Albany county, Wyoming, Plaintiff in Error, v. Bailey Cornwell, Defendant in Error." It was improper so to entitle the case in this court. In the case at bar the district court sustained a demurrer to the information, on the ground that the act charged was not a crime under the laws of this state, and the defendant was

therenpon discharged. It is clear that the case was settled so far as the defendant is concerned, and that no decision or order of this court in the proceeding could reinstate the case, so as to require the defendant to again answer to the same information, even if we should come to a different conclusion from that announced by the learned district judge. The necessity, therefore, of bringing the defendant into this court in this proceeding by a petition in error, or by any process ordinarily issued upon such a petition, is not perceived. The statute proceeds upon the theory that it is not necessary, and provides for the appointment of counsel at public expense to oppose the exceptions in this court. While the district judge may appoint as such counsel the attorney who represented the defendant in the district court, it is clear that he is not required to do so. We think it evident that in this court the case should bear the same title as that borne by the bill of exceptions, which of necessity will be the title by which the cause was known in the district court; and in previous cases under this statute that practice has been followed. *Terry v. Conley*, supra; *Terry v. Nelson*, supra; *State v. Boulter*, 5 Wyo. 236, 39 Pac. 883. Upon the ground, therefore, that it is not a necessary or proper paper in this proceeding, the petition in error will be stricken from the files. It follows from what has been said that the failure to have a summons in error issued does not constitute a defect in the proceedings. The issuance of such process is not required.

The principal objection urged to the bill of exceptions is that the bill is not sealed as required by section 5378, and we think the objection is well taken. The preceding section authorizing a defendant in a criminal case to make his exceptions matter of record by bill originally required such bill to be both signed and sealed by the court, but it was amended in 1890 in that respect so that since then a defendant's bill has been required to be only signed by the judge; the provision as to sealing being eliminated. Rev. St. 1887, § 3306; Rev. St. 1890, § 5377. No change in this particular, however, has been made in the provisions of the statute relating to a bill taken by the prosecuting attorney; and we possess no authority to make such change. It is unnecessary perhaps to suggest that without this, or a similar statute, there would exist no substantial reason for the taking of a bill of exceptions by a prosecuting officer, there being no other law allowing an appeal by the state in criminal cases. It is only upon a compliance with the provisions of the statute in question that this court obtains jurisdiction to review any ruling of the district court adverse to the state in criminal prosecutions. It is essential to our jurisdiction, therefore, in such a case, that the bill be taken and authenticated, substantially at least, in the manner required by the statute. The bill before us

is not sealed, and, for that reason, it is, in our opinion, ineffective to confer jurisdiction upon this court to consider and determine the questions presented by the alleged exceptions. We should be as certain of our jurisdiction in a case of this character as in any other, for, although the judgment in the particular case could not be affected, our decision upon the questions presented would, by express authority of the statute, govern in similar cases pending at the time thereof or afterwards arising. In this connection, the Attorney General suggests that, as the exception involved was taken to the ruling of the court sustaining a demurrer to the information, it was a matter of record without a bill. But it is obvious, we think, that the bill in a case like this not only serves to preserve in the record matters which otherwise would not be in the record, but it is the basis of the jurisdiction of this court. It is not perceived that we would have authority to decide any question arising upon exceptions of the prosecuting attorney in a criminal case, without a bill of exceptions containing the same, taken and filed as prescribed by the statute. In the concurring opinion in the case of *Territory v. Nelson*, supra, Mr. Justice Peck expressed a doubt whether exceptions not ordinarily appropriate to or presentable by a bill, could be reviewed at all by the Supreme Court under this statute. That learned judge was clearly of the opinion that the right of review depended upon a bill duly allowed and filed, and that without a bill there would be no jurisdiction. In view however of the double purpose of the bill, we are inclined to the opinion that though the exceptions would otherwise appear on the record, they may be embraced in a bill taken by the prosecuting attorney in criminal cases, as a basis for a decision by this court upon the questions thereby presented pursuant to the statutory provisions aforesaid. The bill must be stricken from the files. The result is that nothing is left for our consideration, and the cause must therefore be dismissed. It is unnecessary perhaps to consider the other grounds urged in support of the motion; but we deem it advisable and not improper to state our opinion respecting the contention made in support of the motion to dismiss that it is not the duty or right of the Attorney General to represent the state in this kind of proceeding. The point was urged in connection with the objection that the rules had not been complied with as to the filing of briefs on behalf of the plaintiff.

The office of Attorney General had not been created at the time of the enactment of the statute above quoted authorizing this proceeding, but it was then the duty of the county and prosecuting attorney to appear for the state in the Supreme Court in all criminal appeals. The later act which provided for the office of Attorney General requires that officer to represent the state in all

criminal cases in this court. Rev. St. 1899, § 99. A case brought here upon exceptions of the prosecuting attorney is unquestionably we think a criminal case within the meaning of the statute defining the duties of the Attorney General, and it is our opinion that it is not only the right, but the duty, of such officer to appear in this court in such a proceeding on behalf of the state. Though the judgment in the court below is not to be affected, the case, at least for the purposes set forth in the statute, continues, and the decision may not only affect many other pending cases, but must govern in future cases of like character; and it is evident that the state is not only a party to the case itself, but is directly interested in the result in this court. Because of the defect in the bill of exceptions above set out we are constrained to dismiss the cause.

BEARD and SCOTT, JJ., concur.

DAVIS et al. v. BIG HORN LUMBER CO.  
(Supreme Court of Wyoming. June 12, 1906.)

1. SALES—ACTIONS FOR PRICE—PETITION—SUFFICIENCY.

A petition in an action for the balance of the price of materials sold under a verbal contract, which alleges the date of the contract, and that certain materials were to be furnished for a specified purpose at a certain price, and the date when the contract was completed, and that the seller had performed its part of the contract, and that the buyer had not paid according to the contract, but had paid only a specified part thereof, sufficiently states that the balance was due and unpaid.

2. APPEAL—ERRONEOUS RULING ON DEMURRER—HARMLESS ERROR.

Where, in an action for the balance of the price of goods sold, defendant, on the overruling of a demurrer to the petition on the ground that it did not state when the amount claimed became due, or that anything was due, filed an answer admitting that the goods mentioned were furnished at the times stated in the petition and were to be paid for when they had been furnished, and averred a plea of payment, the error, if any, in overruling the demurrer, was harmless.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4098.]

3. MECHANICS' LIENS—STATEMENT OF LIEN—SUFFICIENCY—DESIGNATION OF OWNER.

The word "owner," in Rev. St. 1899, 2893, requiring the statement filed by a mechanic's lien claimant to state the name of "the owner or owners \* \* \* if known," when considered in connection with section 2889, giving a person performing work or furnishing materials by virtue of a contract with the owner a lien therefor, and section 2894 making it the duty of the county clerk to make an abstract of every lien account filed, containing the name of the person against whose property the lien is filed, etc., means the owner at the time the statement is made and filed.

Error to District Court, Sheridan County; C. H. Parmelee, Judge.

Action by the Big Horn Lumber Company against George Davis and another. There was a judgment for plaintiff, and defendants bring error. Modified.

M. B. Camplin, for plaintiffs in error. M. L. Blake and Stotts & Blume, for defendant in error.

BEARD, J. The defendant in error, the Big Horn Lumber Company, commenced this action in the district court of Sheridan county against the plaintiffs in error, George Davis and Margeret E. Peters, to recover judgment against Davis for a balance alleged to be due for lumber and building materials sold by the company to Davis on a verbal contract for the erection of a building on certain lots in the town of Sheridan, and to foreclose a mechanic's lien therefor on said building and lots. From a judgment against Davis for the amount claimed, and a decree establishing and foreclosing the lien, the defendants below bring error.

The petition contains two counts: The first alleging the making of a contract with Davis for the furnishing of certain materials for the building for the sum of \$398.10; that the same had been furnished between June 30 and September 15, 1904, according to the terms of the contract; and that Davis had not paid therefor according to said contract, nor any part thereof, except the sum of \$246. An itemized statement of the materials is attached to the petition. It is also alleged that Davis was the owner of the lots at the time the contract was entered into and until July 21, 1904. In the second count, after alleging the furnishing of the materials, etc., it is alleged that an affidavit and statement for a lien was filed in the office of the county clerk on January 9, 1905, and that Mrs. Peters claimed to own the property by virtue of a sale of the property to her by Davis. Davis filed a general demurrer to the first count of the petition, which was overruled, and that ruling is assigned as error. It is contended by counsel for Davis that the petition does not state when the amount claimed became due or that anything was due or to become due when the lien statement was filed. The petition is inartificially drawn, but a fair construction of it, we think, will not sustain this contention. It states the date of the contract, and that certain materials were to be furnished for a specified purpose at a certain price, the date when the contract was completed, that the company had kept and performed its part of the contract, and that Davis had not paid according to the contract, and had paid only \$246. This substantially states that the balance was due and unpaid. But, even if it be conceded that there was error in this ruling, it clearly appears from the record that Davis was not prejudiced thereby; for, after his demurrer was overruled, he filed his answer, in which he admitted that the materials mentioned were furnished to him at the times stated in the petition for the building of a house on the lots described in the petition, and were to be paid for when all of said materials had been furnished. His defense was a plea

of payment. The rule is well settled that a judgment in a civil action will not be reversed for an erroneous ruling, where it clearly appears from the whole record that no prejudice could possibly have resulted to the party from such ruling. The court found in favor of the company and against Davis for the amount claimed and rendered judgment therefor. The evidence on that issue, not being in the record, cannot be reviewed here. The personal judgment against Davis is affirmed.

The only other ruling complained of, which is discussed in the brief of counsel for plaintiffs in error, is alleged error in admitting in evidence, over objection, the lien statement filed with the county clerk. This statement was objected to "on the ground of the insufficiency of the affidavit thereto or verification thereof, and that the same is wholly insufficient in law; the name of the owner of the premises therein described and upon which a lien is claimed not given; and it not appearing therein or therefrom that the owner of said premises so described was at the time of filing said lien unknown to said claimant, the said plaintiff." It is stated in the claim filed and offered in evidence that Davis was the owner of the lots at the time the contract was made, and that the "materials were furnished on said contract although said Davis had sold said property before said house was fully completed." But it does not state who was the owner of the property at the time the lien statement was filed, neither does it appear either from the statement or the petition that the name of the owner of the property at the time of filing the statement was unknown to the party filing the same. The question presented is whether the lien statement should contain the name of the owner of the property at the time the contract was made and the materials (or a part thereof as in this case) were furnished, or the name of the owner at the time the statement is filed. Our statute (section 2893, Rev. St. 1899) requires the statement filed in the office of the county clerk to contain "a true description of all the property, or so near as to identify the same, upon which said lien is intended to apply, with the name of the owner or owners, contractor or contractors, or both, if known to the person filing the lien." The word "owner," as used in this section, is not qualified in any way, and naturally means the owner at the time the statement is made and filed. To entitle a contractor to a lien, he must, of course, have a contract with the owner or proprietor at the time of making the contract. Section 2889, Rev. St. 1899. That is a prerequisite to the lien, and the lien can only be created by a substantial compliance with the statute. *Wyman v. Quayle*, 9 Wyo. 326-331, 63 Pac. 988. When thus created it is against the interest of the owner of the property when created. One who had parted with the title before that

time would have no interest to be affected thereby. In *Corbett v. Chambers*, 109 Cal. 178, 41 Pac. 873, the court, in construing a statute similar to ours, said: "There is no limit upon the term 'owner,' as used in the above section of the Code, nor does it refer to the owner with whom the contract for the improvement was made, or the owner at any other time than at the date of filing the claim. The object of requiring the claim to be filed in order to perfect the lien is to give notice of the lien to those interested in the property upon which it is claimed, and as the owner at the time of filing the claim is the party to be affected thereby, rather than one who has parted with the property subsequent to the making of the original contract, it is reasonable to suppose that the Legislature intended the name of the owner at the time the claim was filed, rather than of the previous owner." It is also so held in *Sprague Inv. Co. v. Mouat L. & Inv. Co.*, 14 Colo. App. 107, 60 Pac. 179; *Willamette Lumber Co. v. McLeod*, 27 Or. 272, 40 Pac. 93; *Collins v. Snoko*, 9 Wash. 566, 38 Pac. 161; *Edwards v. Derrickson*, 28 N. J. Law, 39.

Again, it is made the duty of the county clerk, by section 2894, Rev. St. 1899, "to endorse upon every account so filed with him in his office the date of its filing, and make an abstract thereof in a book to be kept for that purpose and properly endorsed and indexed, containing the date of its filing, the name of the person or persons seeking to enforce said lien, the amount claimed, the name of the person or persons against whose property the lien is filed and a description of the property charged therewith." The person against whose property the lien is filed is the person who owns the property at that time and not one who has parted with and has no title. The abstract which the clerk is required to make must necessarily be made from the instrument filed. He is not required to make inquiry or to search the records for the name of the person against whose property the lien is filed, and it follows as a necessary conclusion that the instrument filed must contain the name of such person. *Edwards v. Derrickson*, supra; *Mis-soula Mer. Co. v. O'Donnell* (Mont.) 60 Pac. 549, 991; *Corbett v. Chambers*, supra. The statutes of some of the states are specific upon this point; but when, as in our statute, no date is mentioned, we are of the opinion, upon both principle and authority, that the name of the "owner" required to be stated by section 2893 is the name of the owner at the time the claim or lien statement is filed, and not the name of one who had parted with the property after the commencement of the improvement and before the lien is filed. The lien statement filed and admitted in evidence in this case, not containing the name of the "owner" as above construed, was insufficient to create a lien on the property; it not being stated either therein or in the petition that the name of the owner of the

property was unknown to the person filing the claim, if, indeed, such a statement in the petition alone would be sufficient which we do not decide.

The district court erred in admitting the lien statement in evidence, and the judgment, in so far as it decrees a mechanic's lien upon the property described in the petition, is reversed, and the judgment of the district court is modified accordingly. Plaintiff in error Margeret E. Peters will be allowed her costs in this court against defendant in error, and defendant in error will be allowed one half of its costs, to be taxed against the plaintiff in error George Davis.

Modified.

POTTER, C. J., and SCOTT, J., concur.

### KENNEDY v. DICKIE.

(Supreme Court of Montana. May 14, 1906.)

#### 1. PUBLIC LANDS—PROCEEDINGS IN LAND OFFICE—CONCLUSIVENESS OF DECISIONS—PREVENTING WITNESS FROM TESTIFYING.

A party is not bound to discover the existence of a witness adverse to him or to reveal to his adversary what the witness would testify to, and the invalidity of a finding of the land office in a contest for priority of claims cannot, in a collateral proceeding, be based on the fact that contestant brought a distant witness to testify for him, but on inquiry, finding the witness would not testify as was thought, paid his expenses and sent him back, telling him he did not want the contestee to get hold of him.

#### 2. SAME.

That a party and one of his witnesses in a land contest were intimate, and were both witnesses at the trial of the contest as well as at the trial of certain persons charged with crime, as a fact standing alone, furnishes no substantial ground for a finding that the two were engaged in a criminal conspiracy to procure a conviction in the criminal case, and thus prevent the contestee from using the evidence of the persons convicted.

#### 3. SAME.

The Land Department of the federal government is the tribunal specially designated by law to receive and consider the evidence and thereupon determine the rights growing out of settlements on public lands, with a purpose to secure them to those who have complied with the laws regulating the disposition of them; and if its officers err in the interpretation of the law applicable to the facts presented or a fraud is practiced by one rival claimant on the other by which the latter is deprived of his right if the officers themselves are chargeable with fraudulent practices which have resulted in their granting title to the wrong party, their action may be reviewed and annulled by a court of equity at the instance of the aggrieved claimant and the wrongful holder of the title may be compelled to surrender it, but for mere errors of judgment on the weight of the evidence produced before them in any case, the only remedy is by appeal. On such questions their rulings are final and conclusive on all courts whatsoever.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 301.]

#### 4. SAME.

A fraud, justifying a court of equity in interfering in a collateral proceeding with a finding of the Land Department of the federal gov-

ernment in a land contest, must have been extrinsic and collateral to the matter tried by the department and not in a matter tried on its merits and on which the decision was rendered, and the fact that false testimony was given at a contest as to the character of a claimant's entry on the land in controversy is not such as will justify the interference of the court.

#### 5. SAME.

Assuming that a judgment of the Land Department of the federal government might be overturned in a court of equity on the ground that false testimony was given at the contest, the allegations and proof must be something more than a mere rehearing on substantially the same case submitted at the hearing which resulted in the judgment of which complaint is made.

#### 6. SAME.

The individual citizen has no right to complain if the federal government is willing that a land claimant's heirs retain land which the claimant obtained without strict compliance with the law and rules of the department.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

Action by Catherine Kennedy, administratrix of the estate of Edward B. Kennedy, deceased, against William Dickie. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

Hathorn & Groves, for appellant. C. L. Harris, for respondent.

BRANTLY, C. J. Ejectment. The purpose of the action is to recover the possession of the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 35, and lot 5 of section 34, township 1 N., of range 26 E. of the principal meridian of Montana, situate in Yellowstone county. The complaint is in the ordinary form, alleging title and right of possession in plaintiff and ouster by the defendant. After the action was commenced the plaintiff, E. B. Kennedy, died. The present plaintiff, his widow, was thereupon substituted as plaintiff in his stead. The answer admits that the said Kennedy was prior to his death vested with the legal title to the land in controversy, but alleges that he became so vested with the title by a patent from the United States government, in fraud of defendant's rights, and that defendant is the lawful owner and entitled to the possession thereof. It denies the ouster. It then proceeds to allege two equitable counterclaims, which set forth in detail the history of a contest between E. B. Kennedy, the deceased, and the defendant before the Land Department of the United States, which resulted in a decision that the former was entitled to a patent by virtue of his priority of settlement upon the lands in controversy, with others, as his homestead. The first alleges, in substance, that this decision was obtained by fraud, in that, though defendant was the prior settler, Kennedy entered into a conspiracy with one Steele and others for the purpose of defeating defendant's claim, and succeeded in accomplishing his purpose by use of false and perjured testimony to the effect that he himself was the

prior settler, and by preventing the defendant from fully and fairly presenting his claim to the department, whereas in fact the defendant was the prior settler and, but for the wrongful conduct of plaintiff, would have been awarded patent. The second, referring to and adopting the allegations contained in the first and detailing the facts found by the officers of the Land Department, avers that these officers misconstrued the law applicable thereto, and awarded the patent to Kennedy, whereas upon a proper investigation and application of the law it should have been awarded to the defendant. It is demanded that the court decree plaintiff involuntary trustee of the legal title for defendant's benefit, and that she be compelled to execute to him a suitable conveyance. The trial was had upon the issues presented by plaintiff's reply to these counterclaims, denying all the material allegations therein, and resulted in findings and a judgment in favor of the defendant. Plaintiff has appealed from the judgment and an order denying her motion for a new trial.

The following facts are gathered from the record: Prior to 1892, the lands in controversy were included in the Crow Indian reservation. On December 8, 1890, under authority of an act of Congress approved September 25, 1890 (26 Stat. 468, c. 913), a treaty was negotiated with the Crow Indians, by the terms of which a portion of their reservation, including a part of the land in controversy, was ceded to the government. Among other exceptions provided for under the treaty, were allotments theretofore made to Indians in severalty, and selections made by any of them under prior treaties. The treaty was ratified by Congress by an act approved March 3, 1891 (26 Stat. 989, c. 543). By subsequent negotiations this treaty was modified under authority of an act of Congress approved July 13, 1892 (27 Stat. 121, c. 184). Thereupon the President by proclamation, on October 15, 1892 (27 Stat. 1034), declared that all lands ceded under the treaty were open to settlement, subject to the conditions, limitations, and reservations in section 34 of the Act of Congress approved March 3, 1891 (26 Stat. 1043, c. 543), and other laws applicable. The plat of the township survey was filed in the local land office at Bozeman on August 7, 1895, and notice was published that entries could be made by homestead settlers after September 8, 1895. Prior to this date and on July 1, 1895, Kennedy made application to the land office at Bozeman to enter as a homestead lot 5, section 34, the N.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of section 35, lot 7, and the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 28, township 1 N., range 26 E. This application was not received because the plat of the survey had not then been filed in the office. All the land described in his application, except the N.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of section 35, had theretofore been allotted to a Crow Indian

named High Nose. The application was accompanied by a relinquishment by High Nose, dated June 26, 1895, of his claim thereto. It had been approved by the local agent but not by the Interior Department. It was approved by the latter on October 12, 1895. Kennedy left his application in the office to be filed as soon as the plat should be received, paying the receiver the necessary fees. On September 9, 1895, Kennedy's entry was filed and allowed. On the following day the defendant made application covering the land in controversy. He found that he could not make the entry as to the conflicting portion, since this was covered by the entry of Kennedy. He thereupon filed contest as to this portion of Kennedy's entry, claiming priority of settlement.

Defendant contended at the hearing of the contest that he had settled on the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 35, by erecting a tent thereon on April 27, 1895, and building a fence inclosing a part of this subdivision and also of lot 5 in section 28. He further contended that he had removed his family thereon on May 27th and that thereafter he had made his home there, having erected a dwelling and necessary outhouses. Kennedy's contention was that his first act of settlement was the erection of a tent on the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 35, on May 24, 1895, and cleaning a portion of the surface, and that this was followed by the erection of a dwelling on the line between the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  and lot 5, into which he moved his family on May 20th and 30th where he had since resided. He further contended that his purchase of the relinquishment of the Indian, High Nose, gave him priority of right over the defendant. As to the alleged settlement of the defendant, E. B. Kennedy further contended that the defendant went upon the land not as a settler, or with the intention of acquiring title by homestead entry, but under an agreement with the Indian, High Nose, and another by the name of Rivers, who had allotments in other portions of section 28, under the terms of which he was to cultivate a portion of the land in both allotments and cut hay from other portions thereof, one-half of the product to be given to the Indians as consideration for his occupancy of their land. It was alleged that he built no new inclosure but merely repaired an old fence theretofore built by the Indians to protect their lands from the inroads of range stock, a portion of it having been put on the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 35, because the division lines were not known. On January 20, 1896, the local officers at Bozeman found that the defendant's first act of settlement was on May 27th. They sustained plaintiff's contention and dismissed the contest. The defendant then appealed to the Commissioner of the Land Office at Washington. That officer, in an opinion dated November 30, 1899, after a review of the evidence, affirm-

ed the decision of the local officers. On appeal to the Secretary of the Interior the decision was again affirmed. A subsequent application for a rehearing was denied. The Commissioner on his review of the case found that the plaintiff was the prior settler and that he had the equities in his favor by reason of his purchase of the allotment of High Nose. At the hearing before the Secretary of the Interior, besides going into the whole case on the facts, the defendant contended that E. B. Kennedy's entry was void as to lot 5, section 34, because it was not open to settlement until the relinquishment of High Nose had been approved by the Interior Department, and as to the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 35, because it had been made upon papers executed before any of the lands were subject to entry, and because the land included in the entry was in excess of 160 acres. The Secretary affirmed the finding of the inferior officers that E. B. Kennedy was the prior settler on the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 35, the portion not included in the High Nose allotment. Upon the questions of law presented by the contentions of the defendant, he held (1) that, as to the allotted land, though the entry was irregular, it was under the circumstances not void; (2) that, though irregular, it was not void because made upon papers executed prior to the time entry could have been made, but was amendable so as to make it good; and (3) that it was not void because it covered more than 160 acres.

These contentions, in the opinion of the Secretary, presented questions which the government only could raise and which could not be effectually urged by defendant whose rights under his alleged settlement were inferior to those of Kennedy. As to the portion of the land embraced within the allotment of High Nose the conclusion was that both Kennedy and defendant were trespassers, but that defendant stood in no position to question the validity of E. B. Kennedy's settlement because made prior to the time the relinquishment became operative. The evidence introduced at the trial in the district court consisted of a copy of the evidence submitted at the contest in the land office, supplemented by such other evidence of a cumulative and impeaching character as the parties could procure. Indeed, it was in the nature of a rehearing of the contest and differed in nowise from what it would have been had it taken place before the Land Department officers.

The district court found (1) that E. B. Kennedy prevented the defendant from producing one Shock as a witness and having his evidence heard at the contest in the land office; (2) that Kennedy caused one Warren Burton to be imprisoned during November, 1895, so that his evidence could not be obtained and used by the defendant; (3) that he likewise caused one John Miller to be

imprisoned with a like result; (4) that Kennedy conspired with one Steele, the reservation farmer, and other persons, to defraud defendant of the land in controversy; (5) that Kennedy gave false testimony at the contest, in that he swore that the Indian, High Nose, was dead so that he could not produce him to corroborate his (Kennedy's) statement as to defendant's arrangement with High Nose and Rivers under which he entered upon the land, and as to his repair of the fence thereon; (6) that there was in fact no fence on the land when defendant first occupied it; (7) that defendant did not enter upon the land or build any fence thereon or cultivate any portion thereof under agreement with High Nose and Rivers; (8) that defendant took up his residence on the land on May 27, 1895; (9) that E. B. Kennedy was not at that time residing on any part of the land and did not enter thereon at any time prior to May 29, 1895; (10) that patent was issued to Kennedy on March 17, 1903; (11) that defendant had resided continuously upon the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 35, and a portion of lot 5, section 34, and cultivated portions of both from year to year; (12) that George A. Miller, Clarence Kirk, Lionel I. Hammond, Henry Helse, and Joseph Ziminski, Jr., examined as witnesses at the contest, had given false testimony in behalf of E. B. Kennedy before the officers at Bozeman and (13) that this false testimony and other testimony found to be false at the trial in the district court, influenced and controlled the officers of the Land Department in making their decision.

As conclusions of law the court held: (1) That E. B. Kennedy's entry, made upon papers executed on July 1, 1895, was void; (2) that the purchase of the allotment of High Nose by E. B. Kennedy gave him no preferential right of settlement; (3) that as to lot 5 of section 34, both E. B. Kennedy and the defendant were trespassers up to October 14, 1895, the date at which the relinquishment of High Nose became operative, since the said relinquishment was ineffective until approved by the Secretary of the Interior; (4) that, since the defendant was the prior legal settler, the officers of the Land Department misconstrued and misapplied the law to the facts found by them; (5) that E. B. Kennedy, at the time of his death, was holding the title to lot 5, section 34, and the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 35, as involuntary trustee of the defendant, and that the plaintiff, his administratrix, was holding the same as his successor as such involuntary trustee; and (6) that the defendant was entitled to a judgment requiring the plaintiff as administratrix of E. B. Kennedy, deceased, to convey to the defendant by deed the legal title to the land so described, upon his payment into court for the use and benefit of the estate of E. B. Kennedy, the reasonable value of the improvements placed by Kennedy on

the lands, and upon his further payment for the same purpose of the sums of money paid by said Kennedy in making his entry and final proof for patent. These sums having been ascertained under a reference ordered for that purpose and paid into court, judgment was entered as heretofore stated in favor of defendant. Though requested to do so, the court refused to find that Kennedy procured any person or persons to give false testimony in his behalf at the hearing of the contest, or that Kennedy, or his agents in any manner prevented defendant from fully presenting his case at said hearing.

The questions submitted for decision are:

(1) Does the evidence justify findings 1, 2, 3, and 4; (2) can the judgment be sustained upon the other findings of fact made by the court; and (3) did the officers of the Land Department misconstrue and misapply the law to the facts found by them?

1. A careful examination of the record fails to reveal any substantial evidence to support the first four findings. The witness Shock was taken from Billings, Yellowstone county, near where the land in controversy lies, to Bozeman by Kennedy to testify in his behalf as to the fact of the existence of the Indian fence and its condition at the time of the defendant's alleged settlement. Upon inquiry of him, Kennedy found that he would not testify as it was thought. He thereupon paid him his expenses and sent him back to Billings, telling him that he did not want defendant to get hold of him. There is nothing to show that the defendant at that time knew anything of Shock, or what he would state, or that he could not have had his testimony had he so desired. Kennedy used no improper influence upon the witness. Unless it be the law that one party to a controversy is bound to discover witnesses to his adversary to his own detriment, then Kennedy did no wrong in paying this witness and discharging him. We hold that Kennedy was in no wise bound to discover the existence of Shock, or to reveal to the defendant what Shock would testify to. At such hearings witnesses appear, if at all, voluntarily at the request of the party who pays their expenses. Kennedy was not required to use his influence to detain this or any other witness, or to pay his expenses for the advantage of the defendant. After the contest arose, Burton and Miller were arrested by the federal authorities at the instance of Steele, the reservation farmer, for trespassing upon the reservation. They were committed for trial in the United States court at Helena. Both were indicted by a grand jury. Upon a trial Burton was convicted and fined, but Miller was acquitted. Both were in jail at Helena at the time of the hearing at Bozeman. Assuming that the evidence could not have been obtained by deposition, and that the defendant was not guilty of negligence in failing to procure it, there is nothing to show that Ken-

nedy instigated their arrest or that the motive actuating Steele in procuring it, was to aid Kennedy. Kennedy and Steele were intimate. Both were witnesses at the trial of Burton and Miller, as well as at the trial of the contest. But this fact, standing alone, furnishes no substantial ground for a finding that the two were engaged in a criminal conspiracy to procure a conviction of these witnesses and thus prevent the defendant from using their evidence. If it be a fact that they entered into and were partially successful in carrying out such a conspiracy, it was not established by anything in this record.

The same may be said of the fourth finding. Beyond the fact that Steele and Kennedy were friendly, and that Steele aided Kennedy in any way he could to establish his claim, there is no substantial proof that they expressly or impliedly agreed to defraud the defendant. While it does appear that Steele at the instance of Kennedy removed other persons from portions of the allotted land, he did not remove the defendant from his alleged claim even though defendant was himself from the time he made his settlement, according to his own admission, a trespasser upon lot 5 in section 34.

2. The remaining findings are, in our opinion, wholly immaterial. The court finds that Kennedy and the other witnesses named swore falsely at the trial of the contest, Kennedy as to the death of High Nose, and the other witnesses, as appears from an examination of their testimony, as to the arrangement between the defendant and the Indians High Nose and Rivers, and as to the ownership and character of the fence which defendant claims that he built as a part of his improvements. The Land Department of the federal government is the tribunal specially designated by law to receive and consider the evidence and thereupon determine the rights growing out of settlements upon public lands, with a purpose to secure them to those who have complied with the laws regulating the disposition of them. If its officers err in the interpretation of the law applicable to the facts presented, or a fraud is practiced by one rival claimant upon the other by which the latter is deprived of his right, or if the officers themselves are chargeable with fraudulent practices which have resulted in their granting title to the wrong party, their action may be reviewed and annulled by a court of equity at the instance of the aggrieved claimant, and the wrongful holder of the title may be compelled to surrender it. But for mere errors of judgment upon the weight of the evidence produced before them in any case, the only remedy is by appeal from one officer to another of the department. Upon such questions their rulings are final and conclusive upon all courts whatsoever. These fundamental rules have been settled by many decisions of the Supreme Court of the United States and have

frequently been recognized and applied by this court. *Bagnell v. Broderick*, 13 Pet. (U. S.) 436, 10 L. Ed. 235; *Johnson v. Towseley*, 80 U. S. 72, 20 L. Ed. 485; *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Shepley v. Cowan*, 91 U. S. 340, 23 L. Ed. 424; *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800; *Silver Bow M. & M. Co. v. Clark*, 5 Mont. 378, 5 Pac. 570; *Colburn v. Northern Pac. R. R. Co.*, 13 Mont. 476, 34 Pac. 1017; *Moore v. Northern Pac. R. R. Co.*, 18 Mont. 290, 45 Pac. 215; *Power v. Sla*, 24 Mont. 243, 61 Pac. 468; *Small v. Rakestraw*, 28 Mont. 413, 72 Pac. 746, 104 Am. St. Rep. 691.

It is also as well settled by the adjudicated cases and text-writers that the fraud in respect to which relief will be granted in any case must have been practiced upon the unsuccessful party, with the result that he has been prevented from fully and fairly presenting his case for consideration. In short, the situation in the case must have been such that there has never been a decision in a real contest over the matter in controversy. The fraud must have been extrinsic and collateral to the matter tried by the department, and not in a matter tried upon its merits and upon which the decision was rendered. *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Vance v. Burbank*, 101 U. S. 514, 25 L. Ed. 929; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; *Thornton v. Peery* (Okla.) 54 Pac. 649; *Cagle v. Dunham* (Wash.) 78 Pac. 561. *United States v. Throckmorton*, supra, was a suit brought to set aside and declare void a confirmation by the board of land commissioners of private land claims of California, of a claim of one Richardson under a Mexican grant. The ground of the action was that the decision of the board had been obtained by fraud. The specific fraud alleged was that Richardson had obtained from Micheltorena, the former political chief of California under the Mexican government, a grant to the lands in controversy falsely and fraudulently antedated so as to impose on the commissioners the belief that it had been made at a time when Micheltorena had power to make it. It was alleged that perjured depositions were procured and filed along with the fraudulent grant. The court, in deciding the case, adopted the view, and correctly, we think, that cases arising out of controversies over public lands and involving the validity of determinations of the officers of the land department, are governed by the principles applicable to ordinary suits in equity brought to set aside judgments obtained by fraud. It states the general rule thus: "If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, there is the same remedy by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceed-

ing, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So, in a suit in chancery, on proper showing, a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society, 'interest reipublice ut sit finis litium' is not violated. But there is an admitted exception to this general rule, in cases where, by reason of some thing done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, (by) a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. \* \* \* On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."

In *Vance v. Burbank*, supra, it is said in the same connection: "The appropriate officers of the Land Department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or quasi judicial tribunals are. It has also been settled that the fraud in respect to which relief will be granted in this class of cases, must be such as has been practiced on the unsuccessful party and prevented him from exhibiting his case fully to the department, so that it may properly be said that there has never been a decision in a real contest about the subject-matter of inquiry. False testimony or forged documents even are not enough. If the disputed matter has actually been presented to or considered by the appropriate tribunal." Again, in *Quinby v. Conlan*, supra, the court through Mr. Justice Field said: "For mere errors of judgment, as to the weight of evidence on these subjects, by any of the subordinate officers, the only remedy is by an appeal to his superior

of the department. The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers, or of their superior in the department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties. In this case the allegation that false and fraudulent representations, as to the settlement of the plaintiff, were made to the officers of the Land Department, is negatived by the finding of the court. It would lead to endless litigation and be fruitful of evil if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties' rights which, upon a correct construction, would have been conceded to them, or, where misrepresentations and fraud have been practiced, necessarily affecting their judgment that the courts can, in proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled. \* \* \* And we may also add in this connection, that the misconstruction of the law by the officers of the department, which will authorize the interference of the court, must be clearly manifest, and not alleged upon a possible finding of the facts from the evidence different from that reached by them."

The rule applicable is thus stated by Mr. Herman in his work on Estoppel and Res Judicata: "Sec. 395. In every litigated case where the interests involved are large there is generally conflicting evidence. Witnesses looking at the same transaction from different standpoints give different accounts of it. The statements of some are unconsciously affected by their wishes, hopes or prejudices. Some, from defective recollection, will blend what they themselves saw or heard with what they have received from the narration of others. Uncertainty as to the truth in a contested case will thus arise from the imperfection of human testimony. In addition to this source of uncertainty may be added the possibility of the perjury of witnesses and the fabrication of documents. The cupidity of some and the corruption of others may lead to the use of the culpable means of gaining a cause. But every litigant enters upon the trial of a cause knowing not merely the uncertainty of human testimony when honestly given, but that, if he has an unscrupulous antagonist, he may have to encounter fraud of this character. He takes the chances of establishing his case by opposing testimony, and by subjecting his opponent's witnesses to the scrutiny of a certain cross-examination. The case is not the less tried on its merits, and the judgment rendered is none the less conclusive, by

reason of the false testimony produced. Thus, if an action be brought upon a promissory note, and issue be joined on its execution, and judgment go for the plaintiff, and there is no appeal, or if an appeal be taken and the judgment be affirmed, the judgment is conclusive between the parties, although, in fact, the note may have been forged, and the witnesses who proved its execution may have committed perjury in their testimony. The rules of evidence, the cross-examination of witnesses, and the fear of criminal prosecution with the production of counter testimony, constitute the only security afforded by law to litigants in such cases. A court of equity could not afterward interfere upon an allegation of the forgery and false testimony, for that would be to reopen the case to a trial upon the execution of the note, which had already been sub judice and passed into judgment." The following cases illustrate application of the rule: *Kent v. Ricarda*, 3 Md. Ch. 392; *Wierich v. Dezoya*, 2 Gilman (Ill.) 385; *De Louis v. Meek*, 2 G. Greene (Iowa) 55, 50 Am. Dec. 491; *Pearce v. Olney*, 20 Conn. 544; *Smith v. Lowry*, 1 Johns. Ch. (N. Y.) 320; *Ross v. Wood*, 70 N. Y. 8; *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159. See, also, *Hukm. Chand. on Res Judicata*, § 480 et seq.

In the case at bar the fraud upon which the court permitted the defendant to recover is inferred from the fact that false testimony was given at the contest as to the character of the defendant's entry upon the land in controversy. As we have seen from an examination of the cases cited, this is not such fraud as will justify the interference of a court of equity. The possibility of the presence of perjury at any controversy in courts is always to be anticipated, and when a party is awarded a trial, he must be prepared to meet and expose it then and there. The very object of the trial is to ascertain the truth from conflicting evidence, and necessarily the result of the investigation is a determination of the truth or falsity of the story of every witness who has testified. The trial is the complaining party's opportunity to make the truth appear, and if he fails, being overborne by perjured testimony, he is unfortunate but nevertheless without remedy. *Pico v. Cohn*, supra. This seems to be a harsh rule, but any other would promote endless litigation and open the door to even greater fraud by encouraging litigants to attempt to set aside judgments after the evidence upon which they rest has been destroyed or lost by lapse of time. The cases of *Pico v. Cohn*, *Smith v. Lowry* and *Ross v. Wood*, supra, are directly in point and we think state the correct rule. Under the rule established by the authorities, although the finding that Kennedy and his witnesses swore falsely at the contest at Rozeman be ever so well established by the proof, nevertheless it is wholly

immaterial and does not warrant the judgment of the district court. Nor does the fact that the court found upon the evidence that the settlement of defendant was prior to that of Kennedy. But, conceding the rule to be that a judgment may be overturned on the ground alleged, the allegations and proofs offered must be something more than a mere rehearing upon substantially the same case submitted at the hearing which resulted in the judgment complained of. Here nothing is presented for determination other than the question decided by the Land Department, to wit: the truth of the statements of the witnesses who testified at the hearing. It is true that some additional witnesses testified in the district court, but their testimony was entirely cumulative and impeaching in character, and upon this feature of the case the findings and judgment of the district court are the result of a different conclusion reached upon practically the same facts submitted to the Land Department. Said Mr. Justice Field in *Lee v. Johnson*, supra: "A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which Congress has devolved exclusively upon the department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case, or the officers from fully considering it, that a court will look into the evidence."

3. Nor do we think that the officers of the Land Department misconstrued or misapplied the law to the facts found by them. The determinative fact found was the priority of Kennedy's settlement. So far as concerns his entry upon the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 35, it was lawful. The finding that he was there first was binding upon the district court, even though, if the matter had been submitted as an original question, that court might have found otherwise, as it did. This fact having been established, the decision of the department that the record entry made at the land office was not void but amendable, did not prejudice the defendant in any way, for it did not deprive him of any right. Under the circumstances he had no right of entry, and the condition of the

record was for this reason a question solely for the government, and if these officers wrongly decided it, this fact furnished no ground for complaint by defendant. The individual citizen has no right to complain if the government is willing that Kennedy's heirs retain the land which he obtained without strict compliance with the law and the rules of the department. Nor does it matter that the entry was not in fact amended by the local officers, as was suggested by the Secretary of the Interior in his opinion.

For the same reason the defendant cannot complain of the decision that the entry was not void for that Kennedy was a trespasser upon lot 5, section 34, or that he had superior equities by reason of his purchase of the High Nose allotment. Whether this latter conclusion was reached by ignoring the trespass or upon the theory that his occupancy of the allotment, originally wrongful, was made good from its inception by relation, by the approval and recognition of the relinquishment on October 14, 1895, it furnishes the defendant no ground to complain. In any event, if Kennedy's occupancy of lot 5, section 34, was wrongful, the defendant cannot be heard to say that his alleged occupancy was of any higher character. But however this may be, the disposition of this matter was for the government, and defendant has no ground to complain that an oversight on the part of the officers of the government deprived him of any right, when, as a matter of fact, he had no right. The district court, we think, was in error in deciding the case as it did. At the close of defendant's evidence the plaintiff requested the court to find in her favor. This it should have done, since the defendant did not make out a case upon which he was entitled to recover.

The judgment and order are, therefore, reversed, and the cause is remanded to be proceeded with in accordance with the suggestions herein.

Reversed and remanded.

HOLLOWAY, J., concurs. MILBURN, J., not having been present at the argument, takes no part in this decision.

STATE ex rel. YOUNG v. SUPERIOR  
COURT OF KING COUNTY et al.

(Supreme Court of Washington. July 7, 1906.)

CERTIORARI—TEMPORARY INJUNCTION—DIS-  
SOLUTION—REVIEW.

Under Ballinger's Ann. Codes & St. § 6500, subd. 3, allowing an appeal from an order vacating a temporary injunction in case the court shall have found on the hearing that the party against whom the injunction was sought was insolvent, an order dissolving a temporary injunction on motion, where the court made no finding as to defendant's insolvency, was not reviewable on certiorari.

Certiorari by the state, on relation of J. L. Young, against the superior court of King county and another, to review an order vacating a temporary injunction restraining the city of Columbia from grading one of its streets to the damage of relator's abutting property. Writ discharged.

Willett & Willett, for relator. Anthony M. Arntson, Arthur P. Redman, and F. A. Gilman, for respondents.

RUDKIN, J. The relator brought an action in the superior court of King county to restrain the city of Columbia from grading one of the city streets, upon the ground that such grade would damage the relator's abutting property, and such damage had not been ascertained or paid in the mode required by the Constitution. A hearing was had on a motion for a temporary injunction, after notice, and upon such hearing the application was denied. The relator thereupon applied to this court for a writ of review to review the order denying the motion for a temporary injunction. The writ was allowed, and the entire record is now before us.

The first question for consideration is: Should the writ of review issue in a case such as this? "Independent of legislation, and upon principle as well as authority, it is believed that the doctrine is that an order either granting or refusing a preliminary injunction, being merely an interlocutory order made during the progress of the case, does not partake of the nature of a final judgment or decree to such an extent as to warrant an appeal therefrom, or to justify a court of review in revising the action of the inferior court upon such question." 3 High on Injunctions, § 1693. "The issuance of a preliminary injunction, which will put restraints upon the defendant before the rights of the parties have been fully investigated and tried, rests solely in the discretion of the chancellor, and as a general rule his action in ordering or denying a preliminary injunction will not be reviewed on appeal or otherwise controlled." 10 Enc. of Pl. & Pr. p. 983. The Legislatures of many of the states have provided for appeals in such cases in one form or another. Ballinger's Ann. Codes & St. § 6500, subd. 3, allows an appeal "from any order granting or denying a motion for a temporary injunction, heard upon notice

to the adverse party, and from any order vacating or refusing to vacate a temporary injunction: Provided, that no appeals shall be allowed from any order denying a motion for a temporary injunction or vacating a temporary injunction, unless the judge of the superior court shall have found, upon the hearing, that the party against whom the injunction was sought was insolvent." There is no finding of insolvency in this case, and it is conceded that no appeal would lie. Colby v. Spokane, 12 Wash. 690, 42 Pac. 112; Anderson v. McGregor, 36 Wash. 124, 78 Pac. 776.

Why did the Legislature deny an appeal, except in cases of insolvency? It seems to us the reason is obvious. It was not because the Legislature had already provided another method for the review of such orders, nor because it contemplated a different method of review in the future, but because it deemed an appeal from the final judgment, or an action at law for damages, an adequate remedy in such cases. In other words, it is plain to us that the Legislature intended that such orders should not be subject to review in this court in any form, except on appeal from the final judgment. The power of this court to review interlocutory orders and the method of review are purely statutory, and, when it is apparent that the Legislature intended that a particular order should not be subject to review here, we are entirely without jurisdiction in the premises. The relator contends, however, that constitutional questions are involved in this case, and that a different rule applies. It is true the relator based his right of action in the court below upon the ground that the defendant was about to damage his property in violation of the Constitution of the state, but it is equally true that this claim has been denied by a court of competent jurisdiction. Unless the law otherwise provides, property rights which are safeguarded by the Constitution do not stand upon a different footing from property rights which are safeguarded by the common or statute law. All such rights are protected by the same courts and by the same procedure. In support of this contention, the relator cited *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; but we think that case is readily distinguished from the case at bar. The court there had under review an order of the superior court which permitted the defendant to damage the relator's property and substituted a bond for the damages which the Constitution declares must be paid in advance. The order was to all intents and purposes a final order, and the right of review in such cases is governed by entirely different principles. In *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 52 Pac. 317, 40 L. R. A. 317, 67 Am. St. Rep. 706, the writ was issued in aid of the appellate jurisdiction of this court, and the decision has no application. In *State ex rel. Cunn v.*

Moore, 23 Wash. 276, 62 Pac. 769, the writ was issued to review a final judgment. In *Swope v. Seattle*, 35 Wash. 69, 76 Pac. 517, this court reviewed the action of the superior court in requiring an additional bond to be filed as a condition precedent to the continuance of a temporary injunction. It must be confessed that the decision in that case tends to sustain the contention of the relator here. If we may review the action of the superior court in fixing the amount of the bond on an application for a temporary injunction, there would seem to be no good reason why we should not review any question of law or fact involved in the application in the same manner. The remedy by writ of review was not discussed in *Swope v. Seattle* further than to cite *State ex rel. Smith v. Superior Court*, supra, and, for the reasons we have stated, we do not think that the *Smith* case sustains the conclusion announced in the *Swope* case. But, however this may be, after further consideration, we are satisfied that the Legislature never intended that this court should review orders denying temporary injunctions in this manner, and the case cited will no longer be recognized as authority for such a proceeding.

We do not propose to discuss the merits of this application, but we think the case before us demonstrates the dangers that may arise from the indiscriminate exercise of the power to issue such writs. The decision sought to be reviewed is sustained by a clear preponderance of the testimony. There is not even a pretense that the court abused its discretion, and the application is wholly without merit. Notwithstanding this, the relator has tied the hands of one of the municipalities of the state for a considerable length of time, with what resulting damage we do not know. The municipality has no security for the damage sustained—not even for the costs in this court—and we must not lose sight of the fact that both parties to the controversy have rights which the courts must respect. This court has affirmed and reaffirmed the doctrine that a corporation cannot damage property without first making compensation, and that injunction is the proper remedy to protect the property rights of the citizen. Whether or not the property owner is entitled to an injunction presents solely a question of fact, and ordinarily the superior courts may be relied on to protect the constitutional rights of the citizen until the case reaches this court by appeal. It is true these courts may err and deprive a party of his constitutional rights, but, for that matter, so may this court. *Scott v. McNeal*, 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 853. This is one of the inherent defects in every judicial system. There is always the possibility of error and consequent wrong and injury, until the conclusive presumption of regularity and righteousness attaches to the final judgment of the court of last resort. But this affords no reason why appellate

courts should interpose or interfere until cases come properly before them. There is a growing tendency among attorneys to ask this court, by means of some extraordinary writ, to supervise and control every act of the trial judge, from the first step in the cause until the final judgment is entered. Such practice tends to retard rather than promote the administration of justice and is not to be commended.

For the reasons stated the writ was improvidently issued, and the same is accordingly dismissed.

MOUNT, C. J., and DUNBAR, ROOT, CROW, HADLEY, and FULLERTON, JJ., concur.

STATE ex rel. ROMANO v. YAKLEY, Judge.  
(Supreme Court of Washington. June 26, 1906.)

1. MANDAMUS—INTEREST OF RELATOR.

Under Ballinger's Ann. Codes & St. § 6695, permitting any person to make complaint that a crime has been committed, a person who has made such a complaint to a magistrate who has refused to act has a sufficient interest in the matter to entitle him to institute mandamus proceedings to compel the magistrate to act.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 55, 56.]

2. CRIMINAL LAW—PRELIMINARY COMPLAINT—DUTY OF COMMITTING MAGISTRATE.

Under Ballinger's Ann. Codes & St. § 6695, making it the duty of a magistrate, when complaint is made to him of the commission of a criminal offense, to examine the complainant on oath, reduce the complaint to writing, and issue a warrant, if it shall appear that any offense has been committed, it is the duty of the magistrate to determine for himself whether an offense has been committed, and if he finds this to be so he must issue a warrant, and he has no right to turn the matter of the issuance of a warrant over to the prosecuting attorney and refuse to act on the ground that that officer should determine whether a prosecution should be instituted.

3. MANDAMUS—FAILURE TO MAKE RETURN.

Where, on application for mandamus, no return is made to the writ, grounds of defense merely stated in respondent's brief cannot be considered.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 344-355.]

4. SAME—SCOPE OF REMEDY—COMPELLING OFFICIAL ACTION.

While the Supreme Court cannot by mandamus control the exercise of judicial discretion, it has power to compel a committing magistrate to take some action upon a complaint presented to him tending to show the commission of a crime.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 122.]

5. SAME—JUDGES AS COMMITTING MAGISTRATES—ACTING OUTSIDE OF COUNTY.

Const. art. 4, § 6, declares that superior courts "and their judges" shall have authority to issue certain writs, and section 23 provides that court commissioners shall have the same authority as "judges of superior courts at chambers." Laws 1891, p. 92, c. 54, § 5, provides that a judge may exercise out of court the powers expressly conferred upon a judge as contradistinguished from a court. Ballinger's

Ann. Codes & St. § 6500, allows appeals from certain determinations by the superior court "or a judge thereof." Section 6695 provides that any person may make a complaint to a justice of the peace or a judge of the superior court that a criminal offense has been committed, and that, if such is found to be the case, a warrant shall issue. Such an application was made to a visiting judge presiding outside the county for which he was elected, and was made to him in his capacity as committing magistrate. The judge refused to issue a warrant or consider the application therefor on its merits, and mandamus was instituted to compel him to do so. *Held* that, as under the statutory and constitutional provisions quoted, there is a distinction between a court and the judge thereof, and as the application for a warrant was made to the judge, as such, and not to the court, mandamus, if granted, would have to run against the judge personally, and would not issue to compel him to leave his own county and go to another for the sole purpose of hearing the application for a warrant.

Mandamus proceedings by the state of Washington, on the relation of Matteo Romano, against John B. Yakey, as judge. Writ denied.

William C. Keith (F. R. Conway, of counsel), for plaintiff. Kenneth MacKintosh, for defendant.

RUDKIN, J. This is an original application for a writ of mandamus. The following facts are alleged in support of the petition: That on the 26th day of October, 1904, the relator was tried in the superior court of King county for the crime of assault with intent to murder, was found guilty as charged, and sentenced to imprisonment in the penitentiary at hard labor for the term of 14 years, and that the judgment of conviction has been affirmed by this court; that the relator was convicted of said charge solely upon the testimony of Mrs. Sebastian Ucci and Conchetta Rosetta, who testified on the trial thereof that the relator had admitted and confessed to them that he shot and cut Sebastian Ucci, the prosecuting witness named in the information upon which said conviction was had; that after the affirmance by this court of the judgment against him the relator applied to the prosecuting attorney of King county for a criminal complaint, charging the said Mrs. Sebastian Ucci and Conchetta Rosetta with the crime of perjury, and produced before said prosecuting attorney witnesses, to the number of 15, who detailed to said officer the various conversations had with said Ucci and Rosetta relative to their testimony given on the trial of the relator on said charge, in which conversations said Ucci and Rosetta admitted that they had testified falsely in the matters herein set forth, and that said prosecuting attorney refused to issue said complaint, or to permit one to be issued; that thereafter the relator presented a written complaint, charging said Ucci and Rosetta with the crime of perjury, to P. V. Davis, one of the justices of the peace of said King county, and produced before said justice a large number of wit-

nesses who signified their willingness to testify that said Ucci and Rosetta had told them that they had testified falsely on the trial of the relator in the matters complained of, and that said justice of the peace refused to issue such warrant, stating that he would not interfere with the action of the prosecuting attorney in refusing the same; that thereafter the relator applied to various other justices of the peace of said county for such warrant of arrest, and that said several justices refused to issue the same for the same reason as did the said Justice Davis; that thereafter the relator applied to the superior court of King county for a writ of mandamus against the said Davis to compel him to issue said complaint and warrant, but a demurrer to his application was sustained by the court upon the ground that said justice had a right to refuse the same; that thereafter, and on the 4th day of March, 1906, the relator applied "to the Honorable John B. Yakey, sitting as one of the judges of the superior court of the state of Washington, for King county, and in his capacity as a committing magistrate," for a similar complaint and warrant, and by stipulation with the prosecuting attorney submitted a large number of affidavits of witnesses theretofore taken in relation to the admissions and confessions of the said Ucci and Rosetta; and that said judge refused to issue said warrant, giving as his reason therefor that he was at one time a prosecuting attorney himself, and that he believed it was the duty of the prosecuting attorney to make such investigations, and that he, sitting as a committing magistrate, would not interfere with the duties or doings of that officer. The relator further avers that he is innocent of the crime of which he stands convicted, that he is ready and willing to produce at the trial of said Ucci and Rosetta on the charge of perjury a large number of witnesses who will testify to the admissions and confessions above set forth, and that he has no plain, speedy, or adequate remedy at law. The application for the writ was made upon notice, and the prosecuting attorney of King county appeared in opposition thereto. A demurrer was interposed to the petition on the following grounds: (1) That the relator herein is not "beneficially interested"; (2) that the petition does not state facts sufficient to justify the court in granting the relief prayed for; and (3) that the court is without jurisdiction to grant the relief prayed for. The writ issued as prayed, but no further return has been made. The sufficiency of the petition is therefore the only question before us for consideration.

The first objection is that the relator is not a party beneficially interested. Of course, the fact that he was convicted on the testimony of these witnesses gives him no special interest in this proceeding. There is no doubt a conflict of authority as to whether

a private party can be the relator in an application for a writ of mandamus concerning a public right or duty. In discussing this question in *State v. Gracey*, 11 Nev. 223, the court said: "Upon this proposition there is an irreconcilable conflict in the decisions of the courts of the different states. In Maine, Massachusetts, Pennsylvania, Michigan, and California they fully support the position of respondents, and hold that to entitle a private citizen to move for and prosecute the writ he must show that he has some private or special interest to be subserved, or some particular right to be pursued or protected, independent of that which he holds in common with the public at large, and that 'it is for the public officers to apply when public rights alone are to be subserved.' *Sanger v. County Commissioners of Kennebec*, 25 Me. 291; *Heffner v. Commonwealth*, 28 Pa. 108; *Wellington's Petitioners*, 16 Pick. (Mass.) 87, 26 Am. Dec. 631; *People v. Regents of University*, 4 Mich. 98; *Conroy v. Duane*, 45 Cal. 607. But we think the better and more reasonable rule is established by the decisions of the courts of New York, Ohio, Indiana, Illinois, and Iowa, which hold the opposite doctrine, and maintain that when the question is one of public right, and the object of the mandamus to procure the enforcement of a public duty, the relator is not required to show that he has any legal or special interest in the result; it being sufficient if he shows that he is interested, as a citizen, in having the laws executed and the right enforced. *People v. Collins*, 19 Wend. (N. Y.) 56; *People v. Halsey*, 37 N. Y. 344; *State ex rel. Huston et al. v. Commissioners of Perry County*, 5 Ohio St. 497; *County of Pike v. People*, 11 Ill. 202, *City of Ottawa v. People*, 48 Ill. 233; *Hall ex rel. v. People*, 57 Ill. 307; *Hamilton v. State*, 3 Ind. 452; *State v. County Judge of Marshall County*, 7 Iowa, 186." Section 6695, Ballinger's Ann. Codes & St., permits any person to make complaint that a criminal offense has been committed, and, if the magistrate to whom the complaint is made wrongfully refuses to act in the matter, we think the party applying for the warrant has a sufficient interest in the performance of the public duty to compel action by mandamus. This is especially true where it is made to appear that the prosecuting attorney is resisting the application.

The second objection is that it does not appear from the petition that the respondent refused to hear or give proper consideration to the evidence presented. The duty of every magistrate to whom complaint is made is plain and specific. "He shall examine on oath the complainant, and any witness provided by him, and shall reduce the complaint to writing, and shall cause the same to be subscribed by the complainant; and if it shall appear that any offense has been committed of which the superior court has ex-

clusive jurisdiction, the magistrate shall issue a warrant reciting the substance of the accusation," etc. Ballinger's Ann. Codes & St. § 6695, supra. It is the duty of every magistrate to see that false charges are not preferred against the innocent, and that criminal process is not resorted to to subserve personal or private ends, but it is equally his duty to see that the guilty are brought to judgment. He may consult and advise with the prosecuting attorney, and it is proper that he should do so, especially where questions of law are involved, but in the end he must determine for himself whether an offense has been committed of which the superior court has exclusive jurisdiction, and, if he so finds, he must issue his warrant, whether the prosecuting attorney assents or dissents. The magistrates of the state are conservators of the peace in fact as well as in name, and in the discharge of their duties they are under the direction and supervision of no other officer. Their orders may be reviewed on habeas corpus (Ballinger's Ann. Codes & St. § 5827), or upon the statement filed by the prosecuting attorney containing his reasons in fact or in law for not filing an information (Id. § 6835), but not otherwise. In this state, where grand juries are the exception and not the rule, it is of the highest importance that every charge of violation of the criminal laws of the state should be carefully, conscientiously, and fearlessly investigated by the officers charged with that duty, and the theory that the prosecuting attorneys of the several counties must determine first and finally who shall be prosecuted, and who shall not, finds no support in the law. In the light of what we have said, did the magistrate to whom the application in question was made perform or attempt to perform the duties enjoined upon him by law? Manifestly he did not. He simply determined that it was the duty of the prosecuting attorney to make the investigation, and that he would not interfere with the duties or doings of that officer. The respondent's brief states that he took the matter under advisement and determined the application on its merits, and in disposing of the question said many things and gave many reasons which do not appear in the application before us. These facts, if true, should appear in the return to the writ, and not in the argument. This court must accept the record as it finds it, and all defenses to the application must be interposed at the same time.

The sixth objection is that this court cannot control the exercise of discretion through a writ of mandamus. This is no doubt true. Whether a warrant should issue or not is a question this court will not determine, nor can we control the judgment or discretion of the officer to whom the application was made: but we can and will compel official action in a proper case, and, if there were no other obstacle in the way, we would un-

hesitatingly issue the writ commanding the magistrate to hear and determine the application presented to him on the merits, instead of casting the burden on other shoulders.

The third, fourth, and fifth objections may be considered together. They are (3) that this court has no original jurisdiction to issue writs of mandamus to administrative officers, unless they are state officers; (4) that the respondent as a visiting judge had no authority to issue criminal complaints or warrants in King county; and (5) that, if he had such authority, having ceased to be a visiting judge, his authority has likewise ceased. In determining this question, we must first determine to whom the application for the warrant was made, as the petition avers that it was made to the respondent presiding in the superior court of King county, in his capacity as committing magistrate. The application might doubtless have been made direct to the superior court of King county, for every court of criminal jurisdiction is a conservator of the peace. As said by Chief Justice Marshall in *United States v. Burr*, Fed. Case No. 14,692b: "It is believed to be a correct position that the power to commit for offenses of which it has cognizance is exercised by every court of criminal jurisdiction, and that courts, as well as individual magistrates, are conservators of the peace. Were it otherwise, the consequence would only be that it would become the duty of the judge to descend from the bench, and, in his character as an individual magistrate, to do that which the court is asked to do. If the court possesses the power, it is certainly its duty to hear the motion which has been made on the part of the United States; for, in cases of the character of that under consideration, its duty and its power are coextensive with each other." See, also, *In re Smith*, 4 Colo. 532.

In jurisdictions where there are fixed terms of court, and where the courts are powerless to act out of term time, it is necessary to maintain the distinction between the powers of the court and the powers of the judge, but with us, where the superior courts are always in session, there seems to be no good reason for any such distinction. It would perhaps avoid confusion if every judicial act of a superior judge were declared to be the act of the court itself. But

however this may be, the distinction is clearly recognized in the Constitution and laws of this state, and this court is not at liberty to disregard it. Thus section 6 of article 4 of the Constitution declares that the superior courts and their judges shall have authority to issue certain writs, and section 23 of the same article provides that court commissioners shall have the same authority as judges of superior courts at chambers. Section 5 of the act of February 26, 1891 (Laws 1891, p. 92, c. 54), provides that a judge may exercise out of court all the powers expressly conferred upon a judge, as contradistinguished from a court, and not otherwise. Section 6500, Ballinger's Ann. Codes & St., allows appeals from certain determinations by the superior court or a judge thereof, and numerous other instances might be cited. Section 6695, *supra*, under which the application for the warrant in this case was made, provides that complaint may be made to a justice of the peace or judge of the superior court. Had this application been made to the superior court of King county, we would find no obstacle in the way of running a writ against that court, but we are constrained to hold that the relator elected to apply to the respondent as judge, and not to the court, and that, if a writ should issue, it must issue against the respondent as judge, and not against the superior court of King county. The power of a superior judge to act as a mere magistrate outside the county for which he is elected may be doubted, and there is a still graver doubt as to his duty to do so. The original jurisdiction of this court to issue a writ of mandamus against a magistrate, even though that magistrate should be a judge of the superior court, may also be questioned, but these questions we do not determine. We are satisfied that a writ which would require the respondent to leave his duties in Kitsap county and repair to another county, for the sole purpose of hearing an application for a warrant of arrest in that county, should not issue out of this court, as long as there are in the latter county numerous officers upon whom that duty is enjoined by law.

For this reason, the application is denied.

MOUNT, C. J., and FULLERTON, HADLEY, CROW, and ROOT, JJ., concur.

## STATE v. JEWETT.

(Supreme Court of Oregon. June 26, 1906.)

## 1. PERJURY — SUBORNATION — INDICTMENT — SUFFICIENCY.

B. & C. Comp. § 1321, declares that an indictment for subornation of perjury shall set out the substance of the controversy, in what court or before whom the false oath was taken, that the court or person before whom it was taken had authority to administer it, with proper allegations of falsity of the matter on which the perjury is assigned, without setting out the pleadings or proceedings, etc. *Held*, that it was sufficient when the indictment charged the substance of the matter in respect to which the crime was committed, before whom the oath was taken, that the person had authority to administer it, together with proper allegations of the falsity of the matter on which the perjury was assigned.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perjury, § 95.]

## 2. SAME—TAKING OF OATH.

An indictment for subornation of perjury alleging that the witness "was in due manner sworn" sufficiently alleged that she was "duly sworn."

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perjury, §§ 80, 95.]

## 3. SAME.

Where an indictment for subornation of perjury alleged to have been committed with reference to an application for the purchase of school lands charged that the applicant made her application to purchase the land described for her benefit and not for the purpose of speculation, that she had made no contract or agreement, express or implied, for the sale or disposal of the lands, and that the application, oath, and jurat were of the following tenor, which were then set out in full, such allegations were sufficient to show that the affidavit had reference to the application, that the applicant named in each was the same person, and that the lands described in the application were those referred to in the affidavit.

## 4. SAME.

The Oregon state land board, being a constitutional board consisting of the Governor, Secretary of State, and State Treasurer, as provided by Const. art. 8, § 5, it was not necessary that an indictment for subornation of perjury committed in an application for the purchase of state school lands, should allege that such board was duly constituted as required by law and had jurisdiction to consider or act on the application.

## 5. SAME.

An indictment for subornation of perjury in connection with an application to purchase school lands alleged that when the applicant was sworn she did not intend to purchase the lands for her own benefit as she affirmed, but for the purpose of speculation, and had prior thereto contracted to sell the land to defendant, which contract was then in full force, and that defendant knowingly and willfully incited her to testify falsely "in the manner aforesaid for the purposes herein specified." The indictment also charged that defendant procured her to take her oath to the effect that she then and there made application to purchase the lands, and that it was necessary for her to make such oath in order to procure such school lands from the state, and that she acquired the lands from the state by means thereof for the purposes specified. *Held*, that such allegations were sufficient to show the purpose for which defendant procured the applicant to make, and for which she made the false oath and affidavit, and for which such affidavit was used.

## 6. SAME.

Where an indictment for subornation of perjury in connection with an application to purchase school lands alleged that at the time the applicant made the affidavit she did not intend to purchase the lands for her own benefit, but for speculation, and then had a contract to sell the lands to defendant, and that she well knew that her application was made for the purposes specified, the indictment was not objectionable for failure to allege that the applicant "had made a contract" for the sale or disposal of the lands in case she was permitted to purchase.

## 7. SAME—TERMS OF CONTRACT.

Under B. & C. Comp. § 1321, declaring that an indictment for subornation of perjury need not set forth the pleadings, record, or proceedings with which the oath is connected, an indictment for subornation of perjury alleged to have been committed in connection with an application to purchase school lands in which it was charged the applicant falsely stated under oath that she had no contract to sell or dispose of the lands, was not objectionable for failure to set out the terms of the alleged contract or the facts showing such contract.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perjury, §§ 81-89, 95.]

## 8. SAME—KNOWLEDGE OF FALSITY.

Where an indictment for subornation of perjury in connection with an application to purchase certain school lands alleged that the applicant falsely, knowingly, and willingly swore that the proposed purchase was for her own benefit and not for speculation, and that she had made no contract for the sale of the lands, but that she at that time did not intend to purchase for her own benefit, and had a contract to sell to defendant, and knew that her application was made for such purpose, and that defendant knowingly procured her to testify falsely, and knew that she did not believe her testimony to be true, the indictment sufficiently alleged knowledge on the part of both parties.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perjury, §§ 67, 92, 95.]

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

F. W. Jewett was indicted for subornation of perjury. From an order sustaining a demurrer to the indictment, the state appeals. Reversed and remanded.

On April 28, 1905, the grand jury of Marion county, Or., returned the following indictment, omitting the formal parts, against the defendant:

"F. W. Jewett is accused by the grand jury in and for Marion county and state of Oregon, by this indictment, of the crime of subornation of perjury, committed as follows: The said F. W. Jewett, on the 6th day of August, 1902, in the county of Marion and state of Oregon, then and there being, did then and there feloniously, willfully, knowingly and corruptly suborn, incite, instigate and procure one, Emily A. Thatcher, to appear in person before A. O. Condit, a notary public for the state of Oregon, to take her corporal oath before said notary public and upon her oath so taken to testify, depose, and swear before said notary public in substance and effect that she, the said Emily A. Thatcher, then and there made application to purchase the following, described school

land, to wit: The northwest quarter of section 16, township 11 south, range 27 east of Willamette Meridian in Grant county, Oregon, containing one hundred and sixty acres; that the proposed purchase was made for the benefit of her, the said Emily Thatcher, and not for the purpose of speculation, and that she, the said Emily A. Thatcher, had made no contract or agreement, expressed or implied, for the sale or disposition of said aforescribed land, which said application, oath and jurat were then and are of the tenor following, to wit:

"Application to Purchase. To the State Land Board: I hereby apply to purchase the following described school lands situated in Grant county, Oregon, to wit: The northwest quarter of section 16, township 11 south, range 27 east of Willamette Meridian, all in township 11, range 27 E. containing 160 acres, and I agree to pay for the same according to law. Emily A. Thatcher. [Signature of applicant.] This 6th day of August, A. D. 1902.

"State of Oregon, County of Marion—ss.: I, Emily A. Thatcher, being first duly sworn, say that I am over eighteen years of age; that I am a native born citizen of the United States; that the proposed purchase is for my own benefit, and not for the purpose of speculation; that I have made no contract or agreement, expressed or implied, for the sale or disposition of the land applied for in case I am permitted to purchase the same, and that there is no valid adverse claim thereto. Emily A. Thatcher. [Signature of applicant.]

"Subscribed and sworn to before me this 6th day of August, 1902. A. O. Condit, Notary Public for Oregon. [Seal.]"

"And the said Emily A. Thatcher in consequence of and by means of said felonious, willful and corrupt subornation, incitement, procurement and instigation of the said defendant, F. W. Jewett, on said 6th day of August, 1902, in said county and state, did then and there appear in person before the said A. O. Condit, a notary public for the state of Oregon, and then and there was in due manner sworn by the said A. O. Condit as such notary public, and then and there testified and took her oath before the said A. O. Condit as such notary public to the effect that the matters and facts set forth in said application and certificate were true; the said A. O. Condit then and there being a duly appointed, acting and qualified notary public of and for the state of Oregon and as such notary public then and there being competent and authorized by law to administer the said oath to her, the said Emily A. Thatcher, and the matter in which, the said Emily A. Thatcher, was so sworn and took her oath as aforesaid before the said A. O. Condit as such notary public, as aforesaid, being then and there a matter in which a law of the state of Oregon then authorized an oath to be administered and then and

there, at and upon the taking of the said oath by the said Emily A. Thatcher before said A. O. Condit, notary public, became and was a material matter and question under the laws of Oregon whether she, the said Emily A. Thatcher, was over eighteen years of age; a citizen of the United States; that the proposed purchase was for her, the said Emily A. Thatcher's own benefit and not for the purpose of speculation; whether she, the said Emily A. Thatcher, had made a contract or agreement, expressed or implied, for the sale or disposition of said land in case she, the said Emily A. Thatcher, was permitted to purchase the same and whether there was any valid adverse claim thereto, the same being then and there material and necessary in order to enable her, the said Emily A. Thatcher, to procure and acquire by purchase from the state of Oregon said aforescribed school lands, said school lands then and there being the property of and owned by the state of Oregon and subject to sale in the manner provided by law, and the said Emily A. Thatcher being so sworn as aforesaid, then and there, upon her corporal oath so taken as aforesaid, did feloniously, falsely, knowingly, willfully and corruptly depose, swear and testify, amongst other things, before said A. O. Condit, notary public, as aforesaid, in substance and effect that she, the said Emily A. Thatcher, proposed to purchase said aforescribed school lands for her, the said Emily A. Thatcher's own benefit and not for the purpose of speculation, and that she, the said Emily A. Thatcher had made no contract or agreement, expressed or implied, for the sale or disposition of the aforescribed land so applied for in case she, the said Emily A. Thatcher, was permitted to purchase the same; whereas in truth and in fact the said Emily A. Thatcher, at said time when she was so sworn and took her oath before said A. O. Condit, notary public as aforesaid, did not intend to purchase said school lands from the said state of Oregon for her, the said Emily A. Thatcher's own benefit but for the purpose of speculation and had, prior thereto, made a contract for the sale and disposition of said land to said F. W. Jewett, said contract then and there being in full force and effect, and by reason of said false, fraudulent, felonious and corrupt oath so taken by the said Emily A. Thatcher before the said A. O. Condit, as such notary public, she, the said Emily A. Thatcher, was thereby enabled to and did file said application with the clerk of the State Land Board of the state of Oregon and acquired by means thereof said lands from the state of Oregon for the purposes herein specified; and whereas in truth and in fact the said Emily A. Thatcher, at the time of making said application and taking her corporal oath before the said A. O. Condit, notary public as aforesaid, well knew that said application was made for the purposes herein specified; and where-

as in truth and in fact the said F. W. Jewett then and there feloniously, knowingly, willfully and corruptly suborned, incited, instigated and procured the said Emily A. Thatcher to testify and depose falsely in the manner aforesaid for the purposes herein specified; and whereas in truth and in fact the said Emily A. Thatcher, at the time she was so sworn and took her oath and testified as aforesaid before the said A. O. Condit as such notary public, did not believe to be true the said matters so by her there testified, depose and sworn as hereinbefore specified and whereas in truth and in fact the said defendant, F. W. Jewett, at the time and place he so suborned, incited, instigated and procured the said Emily A. Thatcher to take her oath and to testify, depose and swear falsely as aforesaid, well knew that the said Emily Thatcher did not then and there believe to be true the said matters which he, the said defendant, F. W. Jewett, so then and there suborned, incited, instigated and procured her, the said Emily A. Thatcher, to testify, depose and swear before the said A. O. Condit, as aforesaid; and whereas in truth and in fact the said defendant, F. W. Jewett, did not then and there believe to be true the matters which he, the said defendant, F. W. Jewett, suborned, incited, instigated and procured the said Emily A. Thatcher to testify, depose and swear as hereinbefore specified, and the said defendant, F. W. Jewett, did in the manner and form aforesaid, feloniously, falsely, willfully and corruptly commit the crime of subornation of perjury, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon."

On January 4, 1906, the defendant demurred to this indictment, "for the reason that the facts stated therein do not constitute a crime," which demurrer was sustained by the lower court and the defendant discharged, and the state thereupon appealed to this court.

John H. & C. L. McNary, for the State.  
Wm. D. Fenton and Frederick V. Holman,  
for respondent.

HAILEY, J. (after stating the facts). The defendant was indicted for subornation of perjury in violation of section 1875, B. & C. Comp., which provides: "If any person authorized by any law of this state to take an oath or affirmation, or of whom an oath or affirmation shall be required by such law, shall willfully swear or affirm falsely in regard to any matter or thing concerning which such oath or affirmation is authorized or required, such person shall be deemed guilty of perjury, and if any person shall procure any other to commit the crime of perjury, such person shall be deemed guilty of subornation of perjury." Section 1321, B. & C. Comp., provides: "In an indictment for perjury or subornation of perjury, it is suffi-

cient to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court, or before whom, the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed." Under this last section it is sufficient if the indictment sets forth, first, the substance of the matter in respect to which the crime is committed; second, before whom the oath alleged to be false was taken; third, that the person before whom it was taken had authority to administer it; and, fourth, proper allegations of the falsity of the matter on which the perjury is assigned. The defendant raises six specific objections to the sufficiency of the indictment in this case, which will be discussed in their order.

1. It is contended that the indictment does not allege that Emily A. Thatcher was duly sworn, and that the allegation "was in due manner sworn" is not sufficient, and is not equivalent to the expression "duly sworn." This contention is not tenable, for it is sufficient to charge that the person was duly sworn without setting forth the form or manner in which it was done. *State v. Spencer*, 6 Or. 153; 2 McClain, *Crim. Law*, § 874; 16 *Ency. P. & P.* 331. The words "in due manner" have the same meaning as the word "duly." 3 *Words & Phrases*, 2259-2264; *Anderson's Dictionary of Law*, 385; 3 *Century Dict. & Encyc.* 1795.

2. It is next claimed that the indictment does not allege that the application set out therein was made to the state land board of the state of Oregon, or that the affidavit had reference to that application, or that the person who signed the application is the same person who signed the affidavit, or that the lands described in the application are those referred to in the affidavit. The application is addressed to the state land board and is for the purchase of lands in Grant county, Or., and a copy of it is set out in the indictment. There is only one state land board in this state, and no board outside of the state has control of any of the state school lands within this state, so the application speaks for itself. The indictment charges "that she, the said Emily A. Thatcher, then and there made application to purchase the following described school land, to wit," and then describes the lands set out in the application; that the proposed purchase was made for the benefit of her, the said Emily A. Thatcher, and not for the purpose of speculation, and that she, the said Emily A. Thatcher, had made no contract or agreement, express or implied, for

the sale or disposition of said aforescribed lands, which said application, oath and jurat were then and there and are of the tenor following, to wit, and then sets out the application and affidavit in full. These allegations are sufficient to show that the affidavit had reference to the application, and that the Emily A. Thatcher mentioned in each was one and the same person, and that the lands described in the application are those referred to in the affidavit.

3. It is claimed that it should have been alleged in the indictment that the Oregon state land board was duly constituted as required by law and had authority or jurisdiction to consider or act upon the application of Emily A. Thatcher, and to allow her to acquire the lands. Under section 5 of article 8 of the Constitution of Oregon, the Governor, Secretary of State, and State Treasurer constitute the board of commissioners for the sale of state lands, and are, therefore, a constitutional board, and we do not think it necessary, in a case of this kind, to allege that such board was duly constituted, or to specify its authority over state lands.

4. It is next contended that it is not alleged in the indictment that there was any agreement or understanding between Emily A. Thatcher and the defendant that the application, oath, testimony, or affidavit was made to be used to purchase or acquire the land described in the indictment or any other land; nor that said oath or affidavit was so used; nor that the defendant procured her to commit perjury for the purpose of enabling her to purchase said land or any other land. The indictment alleges that at the time Emily A. Thatcher was sworn before the notary she did not intend to purchase said lands for her own benefit, but "for the purpose of speculation, and had, prior thereto, made a contract for the sale and disposition of said land to said Jewett, said contract then and there being in full force and effect," and that the defendant knowingly and willfully incited her to testify falsely "in the manner aforesaid for the purposes herein specified." It also alleges that the defendant procured her to take her oath to the effect that she "then and there made application to purchase" the lands mentioned in the indictment, and that it was necessary for her to make the oath in order to enable her to procure and acquire from the state "the said aforescribed school lands," and that she "acquired by means thereof said lands from the state of Oregon for the purposes specified." This, we think, is a sufficient allegation of the facts showing the purpose for which defendant procured her to make and for which she made the false oath and affidavit, and for which it was used. These allegations clearly show that at the time she made the oath she did so by agreement with defendant and at his instigation and to be used for the purpose of purchasing the

lands from the state of Oregon, and that it was so used. In addition it is also alleged that the testimony alleged to be false was material, thus bringing the indictment within the two methods used for showing the materiality of the testimony alleged to be false in indictments for perjury, to wit: (1) To allege generally that the testimony in question was material, or (2) to allege in the indictment facts which render the materiality of the testimony clearly apparent. 16 Ency. P. & Pr. 343; 2 McClain, Crim. Law, §§ 878, 879.

5. Objection is made that there is no averment in the indictment that Emily A. Thatcher had made a contract for the sale or disposition of the lands in case she was permitted to purchase the same, and it is claimed that the indictment should set out the terms of any alleged contract or the facts showing such alleged contract. The first objection is fully answered by the allegations to the effect that at the time she made the affidavit she did not intend to purchase the lands for her own benefit but for the purpose of speculation, and then had a contract to sell them to defendant, and that she well knew that her application was made for the purpose specified. As to the second objection, the statute (section 1321, supra) says "the indictment need not set forth the pleadings, record, or proceedings with which the oath is connected," and we think it unnecessary, in a criminal action of this character, to allege the terms of the contract.

6. It is claimed that it is not alleged in the indictment that Emily A. Thatcher knew that any of the statements in her alleged oath were false, or that the respondent knew that any of the statements were false, or knew that she knew that they were false. The indictment alleges that she falsely, knowingly, and willfully swore that the proposed purchase was for her own benefit, and not for the purpose of speculation, and that she had made no contract for the sale of the lands, and that at the time she so swore she did not intend to purchase for her own benefit, and then had a contract to sell to defendant, and that she knew her application was made for such purposes, and that the defendant knowingly procured her to testify falsely in the manner aforesaid, and knew that she did not believe her testimony to be true. These facts, we think, sufficiently alleged knowledge on the part of both parties, if such allegation is necessary under our statute. *State v. Ah Lee*, 18 Or. 542, 23 Pac. 424.

If the necessary averments appear in any form or may by fair construction be found anywhere within the text of the indictment, it is sufficient. *U. S. v. Howard* (D. C.) 132 Fed. 334. While the indictment in this case is unnecessarily incumbered by what one author has been pleased to call "immense masses of surplusage," yet we think it contains sufficient allegations to constitute the

crime of subornation of perjury. It sets forth (1) the substance of the matter in respect to which the crime was committed; that is, the application to purchase school lands and the oath required therefor; (2) the name of the person before whom the oath was taken; (3) that he had authority to administer it; (4) proper allegations of the falsity of the testimony given before him and the materiality of the matter testified to; (5) proper charges of procurement on the part of the defendant, and these under section 1321, supra, and No. 18 of the Forms of Indictments, 1 B. & C. Comp. p. 752 are sufficient to enable a person of common understanding to know what is intended. B. & C. Comp. § 1314.

The judgment of the lower court will therefore be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

(47 Or. 592)

#### STATE v. BARNES.

(Supreme Court of Oregon. June 26, 1906.)

##### 1. HOMICIDE—CORPUS DELICTI—EVIDENCE.

In a prosecution for homicide, the evidence to establish the corpus delicti must show that the life of a human being has been taken, involving the subordinate inquiry as to the identity of the person charged to have been killed, and that the death was unlawfully caused solely by the party accused thereof.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 471-476.]

##### 2. SAME—REMAINS—IDENTIFICATION.

Where, in a prosecution for homicide, deceased's remains were largely destroyed by fire, it was not essential that the identity thereof should be established by direct and positive proof.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 472, 477.]

##### 3. CRIMINAL LAW—EVIDENCE—REMOteness.

Where, on the day defendant was arrested for homicide, a small roll of tin foil was found in his sack of potatoes, the identity of which was reasonably accounted for, and about six weeks thereafter the tin foil was unwrapped and found to contain deceased's diamond ring, the finding of said ring, and its connection with defendant, was not so remote as to preclude its admission in evidence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 848; vol. 26, Cent. Dig. Homicide, §§ 363, 364.]

##### 4. HOMICIDE—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

In a prosecution for homicide, circumstantial evidence held sufficient to establish the corpus delicti, and to exclude every reasonable inference other than defendant's guilt, and therefore sufficient to sustain a conviction.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 471, 472.]

Appeal from Circuit Court, Douglas County; L. T. Harris, Judge.

John C. Barnes was convicted of murder, and he appeals. Affirmed.

W. W. Cardwell and J. A. Buchanan, for appellant. Geo. M. Brown, Dist. Atty., for the State.

MOORE, J. The defendant, John C. Barnes, was indicted, tried, and convicted of the crime of murder in the first degree, alleged to have been committed in Douglas county, April 28, 1905, by killing one William Graham, in some way and manner, and by some means, instruments, and weapons, to the grand jury unknown. He appeals from the judgment of death which followed, and his counsel contend that the court erred in refusing to instruct the jury, as requested, to return a verdict of not guilty, on the ground that the evidence, which is wholly circumstantial, is insufficient to warrant a conviction.

The entire testimony given at the trial is sent up with the bill of exceptions, from which it appears that on Monday, May 1, 1905, at about 10 o'clock in the forenoon, a human skeleton was discovered in a burning log heap, a few feet east of the right of way fence near the railroad, about a mile and a quarter north of Glendale. Nearly all the flesh had been consumed, and there remained of the framework intact only the skull, the vertebrae, and parts of the shoulder and of the hip bones. The structure of the skeleton indicated the death of a small person, but it was impossible to distinguish the sex. A soft black hat, having two matches stuck in the band, was found at the same time hidden beneath the loose bark of a stump near the fire. There were also discovered in the ashes about where the hips of the skeleton lay, a three-bladed pocket knife, and near it some nails that had probably been driven in the soles and heels of the shoes worn by the deceased. In the immediate vicinity were seen some dark spots on the grass, earth, and stones, supposed to be blood stains, and the grass appeared to be lodged, as if some object had been dragged over it. After quite a number of persons had visited the place where the skeleton was found, a leather belt and a purse were discovered in the brush about 40 feet from where the fire had been. It further appeared that Graham, the man charged to have been killed, was about five feet four inches in height, weighed about 140 pounds, usually had matches in his hat band, and always carried a large Colt's revolver in a holster made from a boot top and suspended by a leather belt. Notwithstanding the fiber part of the handle of the knife had been burned, George Wood, as a witness for the state, claimed to recognize it as Graham's property, saying he had given it to him. The hat was claimed to be identified as Graham's by S. H. Duley, who testified that he had seen him wear it. Jesse Clements testified that the belt found in the brush was the one worn by Graham by which his revolver was carried and which the witness recognized by the clasp of the girdle being loose.

The testimony tending to connect the defendant with the commission of the crime shows that he and Graham were gold miners who were acquainted with, and had lived

near, each other on Dadd's creek, Douglas county, for several months until Thursday, April 27, 1905, when Graham moved across Cow creek to Tuller's creek, several miles westerly, and was last seen as he crossed the railroad going to his new residence. The defendant on the next day borrowed a Winchester rifle from a neighbor, telling him that he desired to shoot a wounded deer which he had seen. That evening, as he returned with the gun, he found two men at his cabin who had been hunting for stray cattle, to whom he stated that Graham claimed to be a "bad man," and referring to the latter he remarked: "If he makes a crooked move at me, I will kill him." He further stated to his visitors that they need not arise when he did the next morning for he was obliged to get up early so as to meet a man at a tunnel on the railroad. Barnes left his cabin Saturday morning about 4 o'clock, taking the rifle with him, and five hours thereafter he was in the town of Glendale, 10 miles southerly, where he paid a bill which he owed a merchant and received a sum of money in exchange for a piece of cast gold that had been molded by and belonged to Graham, the identity of which was unquestionably established. The defendant left that town soon thereafter, and was seen at several points as he walked northerly along the railroad to a section house near his home, where he secured his supper. He returned to Glendale that night and became intoxicated, leaving two packages in the saloon where he had been imbibing. The next day, Sunday, April 30th, he was seen on the railroad carrying a Winchester rifle, and, meeting a man who appeared as a witness at the trial herein, he told him he had been hunting, describing the route he claimed to have traveled. Barnes returned the rifle that day and paid the man from whom he borrowed it 10 cents for the cartridges he had used. About noon that day the defendant engaged one G. L. Hittaman to help him carry some provisions that had come by rail up a hill towards his cabin, and as they halted for a moment's rest Barnes, unwrapping a package, exhibited a revolver, whereupon his companion, referring to Graham, said, "You have got Bill's gun," and the defendant replied, "Oh! yes; I bought it from Bill." Sunday evening Barnes went south on the train towards Glendale. The next morning, May 1, 1905, which will be remembered as the day when the skeleton was found, he called at a saloon in that town about 5 o'clock and, waking the barkeeper, he secured a drink of whisky. At 1 o'clock that day he was about a mile and a quarter north of Glendale, where he met one W. H. Pruett, to whom he stated that Graham had gone to Mule creek, a tributary of the Umpqua river, prospecting, and that he had purchased from him some sluice boxes and was going to his cabin after them. Pruett told him the boxes referred to never belonged to Graham, but had been owned by

another person from whom the narrator purchased them. Barnes, upon receiving this information, remarked: "I am so damned tired and sore that I won't go any further. When you see Bill (meaning Graham), tell him that I got this far with you and turned around and went back." Whereupon he departed. The defendant on Tuesday night told a hotel keeper at Glendale that Graham, possessing a few dollars, had gone to California, and, referring to the nails discovered in the ashes, he further said if Graham was found he would have on old rubber boots. The sheriff of Douglas county, on Friday, May 5, 1905, visited Graham's cabin, which was locked; but, opening it, he found the bed in order, some wearing apparel, provisions, dough mixed for bread, water left in pails, and two pairs of rubber boots. The following Sunday Barnes was apprehended at his cabin, underneath which there was then found wrapped in a gunny sack a pistol that was identified as Graham's, and referring thereto the defendant, though claiming to have owned the gun several years, said to the sheriff and to the men accompanying him: "I put the revolver there, and I did not expect you fellows to find it." At the time the arrest was made, the defendant's cabin was searched, and in emptying a sack of potatoes a chunk of tinfoil rolled out and fell to the floor; but, without any examination, it was picked up and placed with the potatoes in the sack which had contained them. The sheriff, about May 31, 1905, took the defendant's goods and provisions from his cabin to the house of a neighbor, who, taking potatoes from a sack which had been so brought to him, saw a piece of tinfoil which he swept with the dust into a fireplace where it remained until the 17th of the next month when, concluding to make solder of the foil, he picked it up and unrolled it, discovering inwrapped therein a diamond ring that had belonged to, and been worn by, Graham. The defendant gave no testimony at his trial and called only two hardware dealers, who as witnesses severally testified that the knife, the parts of which were found in the ashes, and the revolver that was discovered beneath Barnes' cabin were generally kept and sold by merchants engaged in their trade. It also appeared that while the defendant was incarcerated in jail awaiting trial on the charge of which he was convicted, he attempted to escape.

It is argued by defendant's counsel that the evidence hereinbefore detailed, which we deem a fair statement of that given at the trial, is insufficient to establish either the death of William Graham, the person charged to have been killed, or the criminal agency of the defendant. In *State v. Williams* (Or.) 80 Pac. 655, it was held that circumstantial evidence alone was sufficient to prove the death of the person alleged to have been killed and also the criminal agency

of the party accused of the commission of the offense. In that case the person charged to have been killed was last seen in the presence of the defendant in that action, and there were found in what was supposed to have been a temporary grave gunny sacks that had been saturated with a liquid which by chemical analysis, was claimed to have been human blood, and also a lock of a woman's hair which was recognized as that of his alleged victim. The evidence necessary to establish the corpus delicti in cases of homicide must show (1) that the life of a human being has been taken, which question involves the subordinate inquiry as to the identity of the person charged to have been killed; and (2) that the death was unlawfully caused by the party accused thereof, and by no other person. In *Campbell v. People*, 159 Ill. 9, 42 N. E. 123, 50 Am. St. Rep. 134, it was held that the corpus delicti might be proved in a prosecution for murder by circumstantial evidence where that was the best proof obtainable; but that great caution should be observed in acting upon it.

Reviewing the evidence introduced in the case at bar, to prove the first element stated, Dr. W. H. Dale, a licensed practicing physician, and a graduate of a reputable medical college, who was a witness at the coroner's inquest, testified that he was positive the skeleton found in the burning log heap was the remains of a human being. As to the identity of the remains, it is not necessary that the evidence should be direct and positive, where such proof is impracticable. *Wills*, Cir. Ev. (6th Am. Ed.) 213; *Taylor v. State*, 35 Tex. 97. Thus in *Rex v. Clewes*, 4 Car. & P. 221, a carpenter's rule and the remains of a pair of shoes found near a skeleton were in part the means used to identify the relics of a man who had been buried 23 years. In *Commonwealth v. Webster*, 52 Am. Dec. 711, the metallic teeth of a person found in a furnace were held sufficient to prove the identity of a person charged to have been killed. In *State v. Williams*, 78 Am. Dec. 248, the charred remains of a missing woman were identified by the finding of certain hair pins with the bones and proof that the deceased was in the habit of wearing such pins two or three years prior thereto. In *Jackson v. State*, 29 Tex. App. 478, 16 S. W. 247, the identity of a child was proven by finding a number of small bones, locks of short curly black hair, and a small calico bonnet. So, too, in *State v. Martin* (S. C.) 25 S. E. 113, the identity of the charred remains of a person was established by finding in the ashes with the skeleton a piece of burned cloth like the woven fabric of which his trousers were made, and which he wore at the time of his disappearance, and by discovering in the same place a slate pencil with certain indentations thereon. In the case at bar the witness George Wood, referring to the knife found in the ashes, in answer to the direc-

tion: "Tell the jury why you know the knife," said: "I know the knife by the shape, the make and by the defects in it. The knife was always loose in the springs here and hard to open. That is the reason that I gave it to Graham."

It is argued by defendant's counsel that the fire having consumed a part of the handle of the knife, the heat was sufficiently intense to injure the springs and this being so, the witness could not recognize the instrument which was commonly sold by hardware dealers, and hence the skeleton was not identified as the remains of Graham. The testimony so given by Woods was competent and its adequacy was a question which the jury were called upon to determine. *Udderzook v. Commonwealth*, 76 Pa. 340. The hat which was found beneath the loose bark of an old stump near the fire, at the time the skeleton was taken from the ashes, was identified as the head covering worn by Graham, whose habit it was to carry matches stuck in his hat band. The finding of two matches so placed in the hat referred to affords corroborative evidence of the identity of the person who carried them in this peculiar manner. So, too, the finding of the belt in the brush, though not discovered until several days after the fire, was identified as Graham's girdle. The finding, near the remains of a human being of property that is recognized as having belonged to a missing person is a circumstance tending to identify the body of the deceased. It is possible, however, that such property may have been purposely placed by its owner where it was found to induce the belief that a living person is in fact dead, or that such personal chattels were intentionally put in the place indicated to create an inference of the identity of the deceased where doubt on that subject exists. The degree of proof resulting from such discovery necessarily depends upon the opportunity which time and interest afford a designing person to manufacture evidence. The finding of the belt, several days after the inquest was held, when there had been time and chance to create an inference of the identity of the deceased, weakens the evidence which the circumstance of the discovery would ordinarily produce, if seasonably made. Such evidence was admissible and it will be presumed, in the absence of any showing to the contrary, that the court correctly instructed the jury, as to the degree of proof which the circumstances adverted to furnished. It will be remembered that the parts of the skeleton found in the burning log heap, indicated the remains of a small person. This fact alone is not controlling on the question of identity, for the human framework discovered might have been that of any person corresponding in stature with Graham (*Commonwealth v. Webster*, 52 Am. Dec. 711), but when this circumstance is considered in connection with the other attending conditions, we think the

jury were authorized in concluding as the verdict implies, that the remains were those of the person charged to have been killed. The consumption of a human body by fire does not necessarily repel an inference of suicide or of an unintentional death, for the dissolution may have been caused by purposefully leaping or accidentally falling into a fire, or by being unable to escape from a burning building. So, too, a human body may be destroyed by that means after death had resulted from natural causes. The finding of the remains of a healthy person, like Graham, in a burning log heap, where escape was possible in case contact with the fire was accidental, and probably, where immediate intense pain resulting from the flame would cause an abandonment of an attempt at self-destruction, must necessarily repel every inference of death by means of such a fire. This conclusion is fortified by the testimony of a locomotive fireman who said that on Monday, May 1, 1905, at about 2:20 a. m., he saw, on the east of the railroad, about a mile and a quarter north of Glendale, a fire and a man standing by it. From this declaration under oath it would seem to appear that the fire which consumed Graham's body was not ignited by him. The evidence of what was supposed to have been blood stains in the vicinity of the ashes, and the appearance of the grass and weeds indicating that some object had been dragged towards the fire, thereby lodging the vegetation and staining the right of way fence with blood, warranted the jury in concluding that Graham's death did not result from natural causes or from suicide.

This brings us to a consideration of that branch of the question which involves the criminal agency. It will be remembered that on Saturday, April 29, 1905, at about 9 o'clock in the morning the defendant paid a bill which he owed a merchant in Glendale by giving a piece of gold that had belonged to Graham. The next day Barnes exhibited a revolver to the witness Hittsman, saying he had purchased it from Graham, which gun was found when the defendant was arrested hidden beneath his cabin. At the time the revolver was found there was also seen in a sack of potatoes in Barnes' cabin a piece of tinfoil. These potatoes were taken to a neighbor's house and emptied, there dropped from the sack a piece of tinfoil which being thereafter unrolled, a diamond ring was discovered that had belonged to Graham. In *Williams v. Commonwealth*, 29 Pa. 102, it was held that an instruction, directing the jury to infer the commission of the crime of murder from the possession of stolen articles, where the evidence was adequate to warrant a conviction of the latter crime, correctly stated the law applicable to the facts involved. In deciding that case, Mr. Justice Porter, comparing the instruction referred to with another that had been given, says: "In that portion of the charge which

treats of the possession of the coin, and the right of the jury to infer a higher crime from the possession of stolen articles, sufficient to convict the defendant of larceny, we see as little to condemn. If criminal offenses are to be punished, circumstances like these must be laid hold of to prove them." In *Poe v. State*, 10 Lea (Tenn.) 673, a similar instruction was given at the trial of the plaintiffs in error, who were charged with the commission of the crime of murder in the first degree, and it was held that no error was committed, the court saying: "In fact, the recent possession of stolen articles under these circumstances, would not merely be a strong circumstance, but raise a presumption of guilt, upon which the jury should convict." So, too, in *State v. Anderson*, 10 Or. 448, a pocket book containing money that had belonged to a person alleged to have been killed having been found in the possession of the defendant was considered as tending to establish his criminal agency.

An exception was taken by defendant's counsel to the admission of testimony as to the finding of Graham's diamond ring, on the ground that the circumstance was too remote, indefinite, and uncertain. In *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757, testimony of the finding in a well, of a watch, the property of the person charged to have been killed, several months after the alleged murder, was held admissible in connection with other evidence proving that on the day the defendant was arrested he had access to the well and could have thrown the watch into it. It will be remembered that on the day Barnes was arrested there was found in his sack of potatoes a small roll of tinfoil, the identity of which was reasonably accounted for, which being unwrapped revealed Graham's diamond ring. Evidence of this circumstance in connection with the others was, in our opinion, admissible. In the case of *State v. Anderson*, supra, the defendant's contradictory statements as to the whereabouts of the missing person were also regarded as tending to create an inference of his guilt. In the case at bar Barnes stated that Graham had gone to Mule creek prospecting and afterward that he had gone to California, saying that Graham had a few dollars, thereby implying that he was able to travel by rail. As Mule creek is situated west of Glendale and California south of that town, it was possible for a person going to the former place to continue his journey to the sister state; but as the travel by rail is so much easier and speedier than journeying over the mountains, the defendant's declarations should be considered as tending to incriminate him. *State v. Reed*, 60 Me. 550. The defendant having attempted to escape from the jail in which he was confined, awaiting trial on the charge of which he was convicted, is also a circumstance slightly tending to prove his guilt. Circumstantial evidence is legal and competent in the gravest kind of criminal cases; and

If it is of such a character as to exclude every reasonable hypothesis, other than that the party accused of the commission of the offense is guilty thereof, it is sufficient to authorize a conviction.

Believing that the attending circumstances adverted to are of the character indicated, and that other alleged errors that have been assigned are unimportant, the judgment is affirmed.

(30 Utah, 453)

**JOHN AINSFIELD CO. v. RASMUSSEN.**

(Supreme Court of Utah, July 14, 1906.)

**1. SALES—ACTION FOR PRICE—PLEADINGS—BURDEN OF PROOF.**

In an action for the price of goods, the defense that the seller failed to ship the same in time, and that the goods came too late to be of ready sale, is new matter, and the burden of proving it is on the buyer.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1044-1048.]

**2. TRIAL—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE—MISLEADING INSTRUCTIONS.**

Where, in an action for the price of goods, the buyer denied the allegation of the complaint and pleaded as an affirmative defense the failure of the seller to ship the goods in time, an instruction that, if the evidence was equally balanced, the verdict should be for defendant, was misleading because calculated to lead the jury to apply the instruction to the affirmative defense.\*

**3. EVIDENCE—BURDEN OF PROOF—FAILURE TO SUSTAIN.**

Where defendant denied the material allegations of the complaint, the burden of proving the allegations by a preponderance of the evidence was on plaintiff, and if he failed to do so, or if the evidence was equally balanced, he could not recover.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 122.]

**4. TRIAL—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE.**

Where, in an action for the price of goods, the buyer denied the allegations of the complaint, and pleaded an affirmative defense, and gave evidence rebutting the evidence of the seller, and the court charged that the burden of proving the sale was on the seller, and that the burden was on defendant to establish the affirmative defense by a preponderance of the evidence, and defined "preponderance of the evidence" as the greater weight of the evidence, the refusal to charge that the burden was on the seller to prove the material allegations of the complaint by a preponderance of the evidence, and that, if he failed to so prove the same, or if the evidence was equally balanced, the verdict should be for defendant, was erroneous.

Appeal from District Court, Weber County; J. A. Howell, Judge.

Action by the John Ainsfield Company against O. D. Rasmussen. From a judgment for plaintiff, defendant appeals. Reversed and new trial ordered.

Plaintiff brought this action to recover from defendant the sum of \$545.25, alleged to be due on an express contract for goods sold and delivered. The complaint contains two causes of action. In the first cause

of action it is alleged that between June 1, 1903, and November 1, 1903, at Ogden, Utah, plaintiff sold and delivered to the defendant, at his request, a certain stock of goods consisting of ladies' cloaks, skirts, and suits, and that the agreed price to be paid therefor was \$283. The allegations in the second cause of action are the same as those in the first, except that the goods, at the request of defendant, were shipped and delivered to him at Rock Springs, Wyo., and that defendant agreed to pay therefor the sum of \$262.25. The defendant answered denying each and every allegation of the complaint, and pleaded as an affirmative defense a breach of the contract under which plaintiff claims to have shipped the goods, in that the goods were not shipped until long after the time agreed upon and thereby were not received by defendant until the season for the selling of this class of goods had almost closed, and that they came too late to be of ready sale. It is further alleged that the goods were shipped to the defendant as samples from which to select a line of goods if he so desired; that he had permission to dispose of the goods, or such portion thereof as he might be able to sell in the usual course of trade; and that it was further agreed that defendant might, at any time, if he so desired, reship to plaintiff the unsold portion of said goods. There is a sharp conflict in the evidence on the issues raised by the pleadings, but it is not necessary to review in detail the facts in the case, because the errors assigned relate only to the instructions given by the court and the refusal of the court to give certain requests asked for by the defendant. From a verdict rendered by a jury and judgment entered thereon by the court, in favor of plaintiff, for the sum of \$390.62, defendant has appealed to this court.

Henderson & MacMillan, for appellant.  
N. J. Harris, for respondent.

McCARTY, J., after making the foregoing statement, delivered the opinion of the court:

Defendant assigns as error the refusal of the court to instruct the jury that, "if the evidence is equally balanced, your verdict must be for the defendant, no cause of action." One of the defenses set up by defendant in this case was the alleged failure of plaintiff to ship the goods mentioned as agreed upon at the time they were ordered, and that they arrived too late for the fall trade, and defendant was thereby unable to dispose of them. This was new matter. The burden of proving the issue raised by it was upon the defendant. As the foregoing request is not limited or confined to the issues made in the allegations of the complaint, the jury might have been misled thereby and applied it, had it been given, to the issues raised by the affirmative matter in the answer as well as to the issues of the complaint. Therefore the court did not

\*Hickey v. Rio Grande Western Ry. Co. (Utah) 82 Pac. 23.

err in refusing to grant it. *Hickey v. Rio Grande Western Ry. Co.* (Utah) 82 Pac. 29.

Defendant also requested the court to instruct the jury as follows: "The burden is upon the plaintiff to prove all of the material allegations of its complaint by a preponderance of the evidence, and if plaintiff fails to prove all of those material allegations by such preponderance, or if the evidence is equally balanced, then your verdict must be for the defendant, no cause of action." This request correctly states the law. The defendant having denied the material allegations of the complaint, the burden of proving such allegations by a preponderance of the evidence was on the plaintiff, and if it failed to do so, or if the evidence on those issues were equally balanced, the plaintiff could not recover, and the defendant was entitled to have the jury so instructed. It is urged, however, that the request was fully covered by the following instructions which were given in the case: "(6) I further charge that the burden of proof of the sale of said goods to the defendant, as set out in his complaint, is upon the plaintiff." The court in the same paragraph, after inviting attention to some of the affirmative matters set up as a defense in the answer, proceeded to further charge the jury as follows: "And he (defendant) having alleged such fact affirmatively, the burden is upon him to establish such an agreement between him and the plaintiff for the return of said goods by a preponderance of the evidence." The court in its next succeeding instruction defines what is meant by a "preponderance of the evidence," as follows: "By a preponderance of the evidence is meant the greater weight of the evidence; that which is more convincing of its truth." These instructions when read together do not correctly state the rule respecting the degree of proof necessary for a plaintiff to produce in support of the allegations of his complaint to entitle him to recover, when, as here, the defendant introduces evidence tending to rebut and overcome the evidence produced by the plaintiff. The jury was instructed that the burden was upon the plaintiff to prove the allegations of his complaint, and that the burden was upon the defendant to prove by a preponderance of the evidence the affirmative matter in his answer. The jury might well have understood from these instructions as given that, while the burden was upon the plaintiff to

prove the allegations of his complaint and to make out a prima facie case in chief, yet it was not indispensable to entitle him to recover that the evidence on these issues, when the case was finally submitted, should preponderate in his favor. Plaintiff cites and relies upon the case of *Hickey v. Railway Co.*, supra, in support of his contention that the request was properly refused. In that case the defendant requested the court to instruct the jury as follows: "You are further charged that the mere fact that the accident happened is not sufficient proof to charge the defendant with negligence. The burden of proving negligence rests on the party alleging it, and, when a person charges negligence on the part of another as a cause of action, he must prove the negligence by a preponderance of the evidence. And in this case, if the jury finds that the weight of the evidence is in favor of the defendant, or that it is equally balanced, then the plaintiff cannot recover, and you should find the issues for the defendant." It will be observed, as was pointed out in the opinion written by Mr. Justice Straup in that case, that the request in terms applied to the issues of the entire case, those raised by the allegations of contributory negligence in the answer as well as the issues upon the complaint; whereas in the case under consideration the request was limited to the allegations of the complaint. Moreover, in that case the court fully instructed the jury on all the issues raised by the pleadings in the case, and among other things charged the jury that: "The burden of proof is upon the plaintiff in this case, and it is necessary, before he is entitled to a verdict at your hands, that he should establish by a preponderance of the evidence the allegations of his complaint." It thus appears that the jury was instructed in clear and unequivocal terms that the burden was upon the plaintiff to prove the allegations of his complaint by a preponderance of the evidence, which was not done in this case. We are of the opinion that the defendant was entitled to have the request, or an instruction embodying the same principles, given to the jury, and that it was error for the court to refuse.

The judgment is reversed, and a new trial ordered, costs of this appeal to be taxed against respondent.

STRAUP, J., concurs. BARTCH, C. J., concurs in the result.

(80 Utah, 460)

**STONE v. OGDEN PACKING CO.**

(Supreme Court of Utah. July 12, 1906.)

**1. APPEAL AND ERROR—RECORD—BILL OF EXCEPTIONS—CERTIFICATE AS TO EVIDENCE.**

A judge's certificate to a bill of exceptions, reciting: "Inasmuch as the foregoing matters do not otherwise appear of record, I hereby certify that this bill of exceptions has been by me settled and allowed"—does not show that the bill contains all the evidence, so as to justify a consideration on appeal of the sufficiency of the evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2918-2927.]

**2. SAME—INCORPORATION OF EVIDENCE—NECESSITY.**

Where it is not made to appear that the bill of exceptions contains all the evidence as to certain points, objections to its insufficiency on such points cannot be considered on appeal.\*

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2916, 2917.]

Appeal from District Court, Weber County; J. A. Howell, Judge.

Action by Edward S. Stone against the Ogden Packing Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

James N. Kimball, for appellant. J. D. Skeen, for respondent.

MCCARTY, J. The pleadings in this case presented issues which involved both legal and equitable questions. It is unnecessary, viewing the case as we do, to reproduce here the issues and facts in the case. The questions of fact were tried by a jury who returned a general verdict in favor of plaintiff. Special Interrogatories, embodying the equitable issues in the case, were also submitted to the jury, upon which the jury returned a special verdict in favor of plaintiff. From the judgment entered upon the general and special findings of the jury, defendant has appealed.

The errors assigned and relied on by appellant for a reversal of the judgment relate to the alleged insufficiency of the evidence to justify the verdict. Respondent objects to a consideration of the errors assigned, on the ground that there is nothing in the bill of exceptions showing that it contains all the evidence introduced and submitted at the trial. The order of the judge before whom the case was tried, settling and allowing the bill of exceptions, is as follows: "Inasmuch as the foregoing matters do not otherwise appear of record, I hereby certify that this bill of exceptions has been by me settled and allowed." There is nothing in this certificate or order of the judge showing, nor is it otherwise made to appear, that the bill of exceptions contains all the evidence, or even the substance thereof, introduced at the trial. This court has repeatedly held that for it to consider an error based upon the insufficiency

of the evidence the record must affirmatively show that the bill of exceptions contains all the evidence bearing on the points wherein it is claimed the evidence is insufficient. Crooks v. Harmon, 29 Utah —, 81 Pac. 95; Mitchell v. Jensen, 29 Utah —, 81 Pac. 165; Hannan Bros. v. Waltenspiel, 29 Utah —, 82 Pac. 859.

We are of the opinion, and so hold, that respondent's objection is well founded, and that we are precluded from considering the alleged errors complained of.

The judgment is affirmed, with costs.

BARTCH, C. J., and STRAUP, J., concur.

(29 Nev. 149)

**STATE ex rel. BACHELDER v. MURPHY,**  
District Judge. (No. 1,690.)

(Supreme Court of Nevada. July 5, 1906.)

**1. INSANE PERSONS—ACTIONS—TRIAL PENDING INSANITY.**

Where relator's complaint for divorce against his wife alleged that the acts constituting the cause of action were committed by defendant before she became insane, her subsequent insanity constituted no ground for the trial court's refusal to try the cause which was at issue, during the continuance of such insanity.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Insane Persons, §§ 151-155; vol. 17, Cent. Dig. Divorce, §§ 237-242.]

**2. MANDAMUS—PETITION—ALLEGATIONS—ADMISSION.**

Where the trial judge did not deny or answer the allegation of a petition for mandamus, that he had refused ever to try petitioner's divorce case on account of the insanity of the defendant, such allegation would be regarded as admitted.

**3. JUDGES—DEFECTIVE PROCEEDINGS—DUTY OF JUDGE TO POINT OUT DEFECT.**

Where a trial judge was doubtful concerning his jurisdiction to try a cause because of defects in the service of the summons, it was his duty to call the attention of counsel to what he regarded as the defects in the proceedings, in order that they might be corrected by amendment, and not to arbitrarily refuse to try the cause by reason thereof.

Mandamus by the state, on relation of George Bachelder, against the First judicial district court; M. A. Murphy, district judge. Writ granted.

Mack & Farrington, for plaintiff. E. E. Roberts, for defendant.

FITZGERALD, C. J. This is a proceeding in mandamus to compel the respondent, as judge of the First judicial district court, to proceed to hear and determine the case of George Bachelder, Plaintiff, v. Rose Ann Bachelder, Defendant, alleged to be pending in said district court. In his petition relator, among other things, alleges: That he commenced his action for divorce on the 23d day of February, A. D. 1905; that on the 25th day of March, 1905, the defendant appeared in the action through her attorneys, Messrs. Curler & King, they filing an answer to the complaint; that on the 4th day of December,

\*Crooks v. Harmon, 29 Utah, 304, 81 Pac. 95; Mitchell v. Jensen, 29 Utah, 346, 81 Pac. 165; Hannan Bros. v. Waltenspiel, 29 Utah, 466, 82 Pac. 859.

1905, the respondent set the case for trial before a jury on the 21st day of December, 1905; that on the said 21st day of December, 1905, plaintiff's attorney in said case, C. E. Mack, Esq., appeared and requested the respondent to proceed with the trial of the case, that respondent refused to do so, giving and stating his reasons for so refusing as follows: "The said defendant is insane and confined in the Asylum for Mental Diseases at Reno, Nev."—and that this relator, through his attorney, the said C. E. Mack, thereupon made a demand upon the said respondent to proceed with the trial of said action, but that the said respondent then and there refused and does now refuse to proceed with the trial thereof, and will not proceed to the trial of said action without an order of this court compelling him so to do. The respondent's refusal to proceed with the trial of the case is based on the fact of the defendant's insanity. The complaint, however, alleged that the acts constituting the cause of action in plaintiff's favor against the defendant were committed by the defendant before the insanity occurred.

Under these circumstances, I think the fact of the insanity of the defendant was not sufficient to justify the respondent in his refusal to proceed with the trial of the case. In his return or answer to the alternative writ herein, the respondent sets up other matters in justification of his refusal to proceed with the trial, to wit, a doubt whether or not the summons in the action had been properly served, the absence of the defendant's attorneys, etc. As the case stands on the petition and answer, these matters cannot avail him under his admission that he would never try the case while defendant was insane. He did not deny or answer the allegation in the petition that on account of the insanity of the defendant he would not even in future try the case. The allegation stands admitted by the fact of its not being denied. The other matters alleged in the answer to the petition might perhaps have justified the respondent in his refusal to proceed with the trial at the time mentioned. But, if such were the case, he should have signified to counsel his willingness and intention to proceed with the trial at the proper time, and also have let them know wherein he deemed their proceedings irregular and insufficient, so that they could have amended and corrected them, and at some time gotten a trial of the case.

Therefore, without passing on the question of the sufficiency of the service of summons in the case, or any of the other matters stated in the answer of respondent, except the single one of the sufficiency of defendant's insanity as a bar to proceeding with the orderly hearing and determination of the case, it is ordered that the mandate of this court issue to the respondent that he proceed with the hearing and determination

of the case, of course, first satisfying himself upon all questions of service of summons, guardianship, and jurisdiction.

TALBOT and NORCROSS, JJ., concur.

(36 Colo. 492)

BOARD OF COM'RS OF TELLER COUNTY v. PINNACLE GOLD MINING CO.

LYSIGHT, County Assessor, et al. v. C., K. & N. MINING CO.

(Supreme Court of Colorado. May 7, 1906.)

TAXATION—ERRONEOUS ASSESSMENT—APPEAL TO DISTRICT COURT—APPEAL TO SUPREME COURT.

The statute authorizing one injured by an erroneous assessment of taxes to petition the county commissioners, and giving an appeal to the district court, does not authorize an appeal or writ of error from the judgment of the district court.

En Banc. Appeal from District Court, Teller County; Robert E. Lewis, Judge.

The Pinnacle Gold Mining Company and the C., K. & N. Mining Company petitioned for relief from an unjust assessment for taxation, one petition being addressed to the board of county commissioners of Teller county and the other to the district court, and in the case presented to the commissioners an appeal was taken to the district court. From the judgments of the district court reducing the assessments, the board of commissioners and another, as county assessor, appeal. Appeal dismissed.

C. S. Thomas and Scott Ashton, for appellants. McAllister & Gandy, for appellees.

BAILEY, J. The above cases are two of a series involving identical issues. One of the appellees filed a petition with the board of county commissioners of Teller county, praying for relief against what they deemed to be an unjust and excessive valuation placed by the assessor upon their nonproductive mining claims in Teller county. The commissioners refused to interfere with the assessment, and the case was taken to the district court of that county by appeal. The other appellee filed a like petition directly with the district court and by stipulation the cases were tried together. The district court reduced the assessment made by the assessor, and the board of commissioners and the assessor bring the actions here upon appeal.

This court has not jurisdiction to entertain this appeal. The statute concerning appeals to the district court from the assessor and from the board of county commissioners are similar to the previous law upon this subject, passed in 1889. There is no provision for an appeal from the district court. This question was before the Court of Appeals in the case of Pilgrim Consolidated Mining Co. v. Board of County Commissioners of Teller County, 20 Colo. App. —, 78 Pac. 617, and that court in a very carefully prepared opin-

ion, determined that neither appeal nor writ of error would lie from the judgment of the district court. We are inclined to follow the opinion of the Court of Appeals. There have been a number of similar cases brought to this court and to the Court of Appeals, either upon appeal or writ of error, in which the action of the district court has been reviewed. These cases afford no precedent by which we are to be controlled, the question of jurisdiction not having been raised or brought to the attention of the court.

For the reasons above set forth, these actions will be dismissed by the court upon its own motion, for lack of jurisdiction to entertain the appeal.

Dismissed.

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**BOARD OF COM'RS OF TELLER COUNTY v. BEN HUR GOLD MINING CO.**  
(Supreme Court of Colorado. May 7, 1906.)

En Banc. Appeal from District Court, Teller County; Robert E. Lewis, Judge.

Appeal by the board of county commissioners of Teller county from a judgment of the district court reducing an assessment of taxes against the Ben Hur Gold Mining Company. Appeal dismissed.

C. S. Thomas and Scott Ashton, for appellants.

BAILEY, J. The appeal in this action is dismissed for lack of jurisdiction, because of the reasons set forth in Board of County Commissioners of Teller County v. Pinnacle Gold Mining Company (Colo.) 85 Pac. 1005.

Dismissed.

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**LYSIGHT, County Assessor, et al. v. JENNIE SAMPLE CONSOL. GOLD MINING CO.**  
(Supreme Court of Colorado. May 7, 1906.)

En Banc. Appeal from District Court, Teller County; Robert E. Lewis, Judge.

Appeal by M. B. Lysight, as county assessor, and the board of county commissioners of Teller county, from a judgment of the district court reducing an assessment of taxes against the Jennie Sample Consolidated Gold Mining Company. Dismissed.

E. S. Thomas and Scott Ashton, for appellants.

BAILEY, J. The appeal in this action is dismissed for lack of jurisdiction, because of the reasons set forth in Board of County Commissioners of Teller County v. Pinnacle Gold Mining Company (Colo.) 85 Pac. 1005.

Dismissed.

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**LYSIGHT, County Assessor, et al. v. DES MOINES GOLD MINING CO.**  
(Supreme Court of Colorado. May 7, 1906.)

En Banc. Appeal from District Court, Teller County; Robert E. Lewis, Judge.

Appeal by M. B. Lysight, as county assessor, and the board of county commissioners of Teller county, from a judgment of the district court reducing an assessment of taxes against the Des Moines Gold Mining Company. Appeal dismissed.

C. S. Thomas and Scott Ashton, for appellants.

BAILEY, J. The appeal in this action is dismissed for lack of jurisdiction, because of the reasons set forth in Board of County Commissioners of Teller County v. Pinnacle Gold Mining Company (Colo.) 85 Pac. 1005.

Dismissed.

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**FIRST NAT. BANK OF MONTROSE, v. BOARD OF COM'RS OF MONTROSE COUNTY.**  
(Supreme Court of Colorado. May 7, 1906.)

Error to District Court, Montrose County; Theron Stevens, Judge.

Error by the First National Bank of Montrose to review a judgment of the district court of Montrose county refusing to reduce an assessment of taxes against plaintiff in error. Writ dismissed.

F. D. Catlin, for plaintiff in error. John Gray, for defendant in error.

BAILEY, J. The appeal in this action is dismissed for lack of jurisdiction, because of the reasons set forth in Board of County Commissioners of Teller County v. Pinnacle Gold Mining Company (Colo.) 85 Pac. 1005.

Dismissed.

GABBERT, C. J., and GODDARD, J., concur.

**SILLS v. COCHEMS.**

(Supreme Court of Colorado. May 7, 1906.)

**PHYSICIANS AND SURGEONS—COMPENSATION—ACTIONS—EVIDENCE—ADMISSIBILITY.**

In an action by a physician for the value of professional services rendered without any contract as to the price, evidence is admissible that plaintiff was busily engaged in the practice of his profession.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Physicians and Surgeons, § 57.]

Appeal from District Court, Gunnison County; Theron Stevens, Judge.

Action by F. N. Cochems against C. T. Silles. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Temple & Crump, for appellant. Dexter T. Sapp, for appellee.

**BAILEY, J.** But one question is presented for determination in this case: Is testimony tending to show that plaintiff was busily engaged in the practice of his profession admissible in an action brought by a physician to recover judgment for the value of professional services rendered, where the price to be charged for such services was not agreed upon?

It is said that "when an attorney sues upon a quantum meruit for professional services, his professional standing is a proper subject of inquiry as affecting the value of his services. And the amount of his professional business may be inquired into, as tending to show his professional standing." Weeks on Attorneys at Law, 681; Phelps v. Hunt, 40 Conn. 97. Counsel has called our attention to no case, and we know of none, wherein it is held that a different rule should obtain in determining the value of a physician's services. The same reasoning which prompts the doctrine as to attorneys seems to warrant its application to physicians. The value of professional services may depend very considerably upon the character and standing of him who performs them. In the first place, there are diversities of gifts. The period of time passed in the profession, the experience acquired, degree of skill, and the faculty of using professional knowledge make great differences in individuals. The services of some are worth more than the services of others, because they will command more. Should a question arise as to the value of services, in an action brought by a physician to recover fees, where the nature of the services performed makes the possession of certain qualifications to constitute an important element in the value of those services, as in this case where the plaintiff was called because of his peculiar skill as a diagnostician, evidence of professional standing is clearly admissible and is entitled to consideration.

The fact that plaintiff was extremely busy tends to show his professional standing, and tends to show, in connection with other testi-

mony concerning the length of time he had practiced medicine in that community, his experience, which gave him the requisite knowledge and ability to properly diagnose and prescribe the necessary medicines for diseased persons. If constant practice in the art of his profession renders a practitioner more capable than he otherwise would be, the extent of such a practice is a matter which may be properly inquired into for the purpose of determining the value of the services rendered.

The judgment of the district court will be affirmed.

Affirmed.

**GABBERT, C. J., and GODDARD, J.,** concur.

**HOTCHKISS v. FIRST NAT. BANK OF DENVER et al.**

(Supreme Court of Colorado. May 7, 1906.)

**1. JUDGMENT—JUDGES—POWERS IN CHAMBERS—JUDGMENT BY DEFAULT.**

Under Code Civ. Proc. § 168, providing that if, in a default case, proof of a fact be necessary, "the court may \* \* \* hear the proof or \* \* \* order a reference," the judge in chambers in one county cannot hear testimony and render judgment in a default case pending in another county.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 219.]

**2. EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF CLAIMS.**

In view of Mills' Ann. St. § 4793, providing that, on recovery of judgment in any court other than the county court against an administrator for a demand due from the intestate, no execution shall be issued, but a transcript shall be filed in the county court, "and the same shall be classed and paid as other demands," a district court is not authorized to decree that a judgment rendered by it against an administrator shall be allowed and paid as a claim of a certain class.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1887.]

Error to District Court, Montrose County; Theron Stevens, Judge.

Action by the First National Bank of Denver and another against Paul Gehr and others, in which V. L. Hotchkiss, administrator of Paul Gehr, deceased, was substituted. From a decree in favor of plaintiffs, defendant administrator brings error. Reversed.

Story & Story, for plaintiff in error. Tolles & Cobbe, S. S. Sherman, and John Gray, for defendants in error.

**BAILEY, J.** This action was brought by defendants in error in the district court of Montrose county against Paul Gehr and others. While the action was pending, Paul Gehr died, and steps were taken to substitute plaintiff in error in place of deceased. Plaintiff in error did not enter his appearance in the court below. On January 18, 1902, a decree was rendered against plaintiff in error

by the judge at chambers in Delta county. In this decree the taking of evidence is recited. Certain matters of fact are found and determined, and judgment rendered against plaintiff in error in the sum of \$2,396 and costs, and the decree provides: "That the said judgment is allowed as a fourth-class claim, and the administrator is ordered to pay the same pro rata, the same as all other claims of the fourth class."

This judgment cannot stand. In default cases, where testimony is taken, it must be by the court or referee. Section 163, Code Civ. Proc. The judge in chambers in Delta county cannot take testimony and render a judgment which should be done by the court in Montrose county.

The decree is also erroneous in providing that the judgment should be allowed as a fourth-class claim. This was a usurpation of the province of the county court. Section 4793, Mills' Ann. St.

We do not deem it necessary to pass upon the other errors assigned in this case. For the reasons above stated, the judgment will be reversed.

Reversed.

The CHIEF JUSTICE and GODDARD, J., concur.

WINTERS v. M. W. STODDARD & CO.  
(Court of Appeals of Colorado. March 13, 1905.)

APPEAL—INVITED ERROR.

One at whose instance an instrument was admitted in evidence, and subsequently stricken therefrom, may not complain of its admission.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3597-3600.]

Appeal from Arapahoe County Court.

Action by M. W. Stoddard & Co. against Michael Winters. Judgment for plaintiff. Defendant appeals. Affirmed.

W. W. Garwood, for appellant. George F. Dunklee and O. E. Jackson, for appellees.

GUNTER, J. Appellees sued to recover of appellant the value of certain plumbing supplies furnished, and work done in putting them in place. From a judgment in their favor the case is here. It is said that the evidence was insufficient to sustain the verdict.

1. There is no conflict in the evidence as to the services performed or the materials furnished, nor is there any conflict as to the value of such services or materials, nor is there any substantial conflict as to the fact that the services were performed and materials furnished at the request of appellant. There is some conflict as to what was the agreement between appellant and third parties as to liability for the work and supplies, but that conflict is not material to this controversy, as the appellees who performed the services were not parties to it. We think the court would have been justified at the conclusion of the entire evidence in instructing the jury to render a verdict for appellees for the amount they claimed.

2. It is said that error was committed in receiving in evidence a certain lease. As to this lease, it was admitted in evidence at the instance of appellant, and later, on his motion, was stricken therefrom. If any error was worked by its contents being made known to the jury, appellant is in no position to complain of it.

3. It is said that error was committed in the giving of instructions 7 and 8. When the instructions are taken as a whole, they clearly place upon appellees the burden of proving the contract sued on, which was the only question in issue.

The judgment below was right, and should be affirmed.

Affirmed.

THOMSON, P. J., not sitting.

**BARTON v. ROSE et ux.**

(Supreme Court of Oregon. July 17, 1906.)

**MECHANICS' LIENS—CLAIM OF LIEN—SUFFICIENCY.**

B. & C. Comp. § 5644, requires a claim of mechanic's lien to contain a statement of the name of the person to whom claimant furnished the materials or for whom he performed the labor. A claim recited that claimant had by virtue of a contract heretofore made with R. in the erection, material furnished and labor of a certain dwelling house, the ground upon which said house was built and erected being at the time the property of R., who caused the house to be erected, said house and land being described as follows. *Held*, that the claim was insufficient, as it did not state to whom claimant furnished material or labor, or that he furnished any material or labor used in the building sought to be impressed with a lien.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, §§ 234-236, 243-245.]

Appeal from Circuit Court, Malheur County; George E. Davis, Judge.

Action by T. A. Barton against W. W. Rose and wife, to foreclose a mechanic's lien. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Geo. W. Hayes, for appellant. J. A. Callahan, for respondents.

BEAN, C. J. This is a suit to foreclose a mechanic's lien. The portion of the claim of lien material on this appeal is as follows: "Know all men by these presents, that T. A. Barton, of Vale, in the county of Malheur, has by virtue of a contract heretofore made with W. W. Rose, of the county of Malheur, in the erection, material furnished and labor of a certain dwelling house, the ground upon which said dwelling house was built and erected being at the time the property of Mattie Rose, wife of W. W. Rose, who caused the said dwelling house to be erected and built, said dwelling house and land being known and particularly described as follows." This notice is insufficient within the rule announced in Rankin v. Malarkey, 23 Or. 593, 32 Pac. 620, 34 Pac. 816; and Dillon v. Hart, 25 Or. 49, 34 Pac. 817. It does not state, either directly or by necessary inference, to whom the plaintiff furnished the material or labor for which he seeks a lien, or, indeed, that he furnished any labor or material used in the building sought to be impressed with the lien. It is essential to the validity of a mechanic's lien under our statute (B. & C. Comp. § 5644) that the claim as filed contain a statement of the name of the person to whom the claimant furnished the materials or for whom he performed labor, and, however liberal the court may be in the construction of the mechanic's lien law, it cannot change the language used in the lien claim by eliminating or substituting words or supplying omissions therein.

The decree is affirmed.

**FRAME v. OREGON LIQUOR CO.**

(Supreme Court of Oregon. July 17, 1906.)

**1. EVIDENCE—PRIVATE LETTERS—ADMISSIBILITY.**

A letter, forming a part of a correspondence between the parties to an action concerning the question at issue, is admissible; it standing on the footing of a conversation between the parties.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1492-1499.]

**2. TROVER AND CONVERSION—EVIDENCE—ADMISSIBILITY.**

Where, in an action for conversion, it was shown that the goods had been bought by a third person, and placed in plaintiff's possession charged with the duty of forwarding them to the third person when ordered and that defendant, as a creditor of the third person, had attached them, evidence that the seller had demanded possession from plaintiff was admissible as showing that he had exercised the right of stoppage in transitu and that plaintiff had been compelled to settle for the goods.

**3. SALES—STOPPAGE IN TRANSITU—DURATION OF TRANSIT.**

A seller on credit may resume possession of the goods while they are in the hands of a carrier or middleman in transit to the buyer, on his becoming insolvent; and this right continues until the delivery of the goods to the buyer or his agent.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 827-830.]

**4. SAME.**

A seller consigned goods to the buyer. A third person, engaged in the warehouse and forwarding business at an intermediate point, had authority from the buyer to receive from the carrier all goods consigned to him and to forward the same to the point of destination when ordered to do so. The third person obtained possession of the goods pursuant to such authority. *Held*, that the third person was a mere forwarding agent, and the goods were in transit while in his possession, and subject to the right of the seller to take possession thereof on the buyer becoming insolvent.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 830, 841.]

**5. TROVER AND CONVERSION—EVIDENCE—ADMISSIBILITY.**

Where, in an action for conversion, the defense was that the goods were the property of a debtor of defendant and had been attached, it was competent for plaintiff to show that the goods which had been sold to the debtor had never been delivered to him, but were in transit at the time defendant obtained possession, and that subsequently the seller exercised the right to stop the goods in transit and annul the sale.

Appeal from Circuit Court, Baker County; Samuel White, Judge.

Action by R. W. Frame, doing business as the Frame Forwarding Company, against the Oregon Liquor Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for the conversion of personal property. The plaintiff is engaged in the warehouse and forwarding business at Huntington, a station on the Oregon Railroad & Navigation Company's railroad. Some time prior to December, 1903, one Olsen, a liquor and cigar dealer at Drewsey, a town about 60 miles from Huntington, ordered certain goods of

the defendants, who were doing business in Baker City, and also of Meyer, Mish & Co., of San Francisco, and Palm, Whitman & Co., of Medford, in this state. These goods were all sold on credit, and consigned by the respective sellers to Olsen at Drewsey by way of Huntington. When they reached Huntington they were received by plaintiff from the railroad company under authority from Olsen and stored in his warehouse to be transported to Drewsey by team when ordered by Olsen. While the goods were thus in the possession of the plaintiff, Olsen became insolvent, and defendants representing that they had an order from him for all such goods, directed plaintiff to ship them to Baker City, which was done accordingly. The goods reached the defendants on the 10th of December and on or about the 15th they commenced an action at law against Olsen to recover a balance due on account, and the goods purchased by him from Meyer, Mish & Co. and Palm, Whitman & Co. were attached. On December 24th the plaintiff received notice of Olsen's failure, and an order from him to return the goods to the original consignors. He, thereupon, demanded possession from the defendants of the Meyer, Mish & Co. and Palm, Whitman & Co. goods; but they refused to return the same to him, claiming that they had been attached as stated. The defendants subsequently recovered judgment against Olsen, and caused the goods to be sold under an execution issued thereon. The possession of the goods were afterward demanded of the plaintiff by Meyer, Mish & Co. and Palm, Whitman & Co., and being unable to deliver them he paid the value thereof, and subsequently commenced this action against the defendants for a wrongful conversion. The complaint sets up the facts substantially as stated. The answer pleads in substance that the goods had been delivered to and were the property of Olsen and sets up the attachment and sale under execution as a defense. The plaintiff had judgment, and defendant appeals, assigning error in the admission of evidence and in the giving and refusal of certain instructions.

J. N. Hart, for appellant. John L. Rand, for respondent.

BEAN, C. J. (after stating the facts). There are many assignments of error, but they may be grouped under substantially three heads: (1) The admission in evidence of a letter written by the plaintiff to the defendants on December 30, 1903, notifying them of the order from Olsen to return the goods to the consignors and asking for a copy of the order which they had represented they had from Olsen for the possession of the goods, and intimating that if they did not have such an order plaintiff would be constrained to commence legal proceedings to recover the goods or their value; (2) the admission of evidence tending to show that

Meyer, Mish & Co. and Palm, Whitman & Co. demanded of the plaintiff possession of the goods consigned by them to Olsen, and of plaintiff's subsequent settlement with such firms; (3) Instructions of the court concerning the right of a seller of goods to stop them in transitu.

1. The letter complained of was a part of the correspondence had between the plaintiff and the defendants concerning the goods in question, and was clearly competent testimony. It was a part of, and explanatory of, the transaction between the parties, and stood practically on the footing of a conversation between them. *Lee v. Cooley*, 13 Or. 433, 11 Pac. 70.

2. The evidence that Meyer, Mish & Co. and Palm, Whitman & Co. had demanded possession from plaintiff of the goods consigned by them to Olsen was competent as tending to show that they had exercised the right of stoppage in transitu, and that plaintiff had been compelled to settle with them for the goods of which the defendants had wrongfully obtained possession.

3. The objection to the instructions concerning the right of Meyer, Mish & Co. and Palm, Whitman & Co. to stop the goods ordered from them by Olsen in transit is two-fold. First that the right of stoppage in transitu ceased when the goods were delivered by the railroad company to the plaintiff, and second such instructions were outside of the issues made by the pleadings. In case of a sale of goods on credit the vendor may resume possession of the goods while they are in the hands of a carrier or middleman in transit to the vendee or consignee on his becoming insolvent. *Buckley v. Furniss*, 15 Wend. (N. Y.) 137; *Newmark, Sales*, § 413; *Hutch. Carriers* (2d Ed.) § 415. This right continues until the delivery of the goods to the consignee or his agent is completed (26 Am. & Eng. Enc. Law [2d Ed.] 1088; 2 *Mechem, Sales*, § 1537), and cannot be impaired or extinguished during its existence by seizure under legal process on behalf of the buyer's creditors (2 *Mechem, Sales*, § 1571; *Buckley v. Furniss*, supra; *Chicago, etc., R. Co. v. Painter*, 15 Neb. 394, 19 N. W. 488). Now, the goods in controversy were consigned by the sellers to Olsen at Drewsey, a point 60 miles from Huntington. The plaintiff is engaged in the warehouse and forwarding business at Huntington. He had authority from Olsen to receive from the railroad company all goods consigned to him, and forward them to their destination when ordered to do so. He could not change the destination of the goods, nor make any disposition of them except to forward them to Drewsey. He was, therefore, a mere forwarding agent, and the goods were in transit while in his possession, and subject to the right of the seller to take possession thereof on the consignee becoming insolvent. *Hutch. Carriers*, (2d Ed.) § 416; *Newmark, Sales*, § 414; 2 *Mechem, Sales*,

§ 1547. The transit of the goods had, therefore not terminated at the time the consignors demanded the return thereof and the instructions upon that question were pertinent.

Nor was it necessary for the plaintiff to aver that the goods had been stopped in transitu by the vendors to entitle him to prove that fact, and the court to instruct the jury in reference thereto. The defendants set up as a defense that the goods were the property of Olsen, and had been attached as such. To overcome this defense it was competent for the plaintiff to show that the goods had never been delivered to Olsen, but were still in transit at the time the defendants wrongfully obtained possession thereof, and that subsequently the sellers had exercised the right given by law to cancel and annul the sale and thereby terminate any rights secured by the defendants under their attachment.

It follows that the judgment of the court below must be affirmed, and it is so ordered.

(30 Utah, 462)

#### SCIUTTI v. UNION PAC. COAL CO.

(Supreme Court of Utah. July 13, 1906.)

##### 1. COSTS — RIGHT TO DEMAND SECURITY — WAIVER.

Under Rev. St. 1898, § 3354, providing that when plaintiff resides out of the state, or is a foreign corporation, security for costs may be required by defendant, the right to require security for costs may be waived by defendant.\*

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 532, 533.]

##### 2. SAME.

Under Rev. St. 1898, § 3354, providing that when plaintiff is a nonresident, defendant may require security for costs, the act of defendant in pleading to the merits and making no mention of security for costs until the case was called for trial was a waiver of its right to demand security.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 532, 533.]

Appeal from District Court, Salt Lake County; M. L. Richle, Judge.

Action by Antonio Sciutti against the Union Pacific Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought to recover damages for personal injuries which the plaintiff alleged he sustained through the negligence of the defendant. It appears from the pleadings and proof that on March 28, 1904, the day on which the accident resulting in the injuries complained of occurred, the defendant, a corporation existing by virtue of the laws of the state of Wyoming, was operating as owner a certain coal mine in that state, and that the plaintiff, who was a resident of Wyoming, was then in the employ of defendant in the capacity of a miner of coal. At the time of the accident, he was entering his place of work with a naked lamp, which

came in contact with inflammable and explosive gas and ignited it, whereupon an explosion ensued which caused the injuries of which complaint has been made. The plaintiff had received no notice of the presence of gas, although it was the duty of the defendant to cause the various places of work to be examined by means of safety lamps, and, if gas was found to exist in any one of them, to warn the employes, who were to work there, not to enter until the gas was displaced with pure air. The negligence complained of was predicated principally upon a failure of duty to the complainant, by the defendant, respecting the gas and notice of its presence. At the commencement of the trial, the defendant gave notice to the plaintiff that it required security for costs, but the court proceeded without enforcing the demand, and the jury returned a verdict in favor of the plaintiff. The question raised by such notice presents the decisive one on this appeal.

P. L. Williams, Geo. H. Smith, and John G. Willis, for appellant. King, Burton & King and Johnson & Fowler, for respondent.

BARTCH, C. J. (after stating the facts). The appellant does not claim that the court committed error in the admission of evidence, or in its charge to the jury, but insists that it erred in proceeding to a trial of the cause without requiring the plaintiff, who had been shown to be a nonresident, to give security for costs, after demand made therefor by the defendant. It is urged that the action of the court in the premises amounted to a denial of a right of the defendant secured to it by legislative mandate. We are of the opinion that, under the circumstances of this case, this contention is not sound. The statute, in section 3354, Rev. St. 1898, provides: "When the plaintiff in an action resides out of the state, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action must be stayed until an undertaking executed by two or more persons is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of three hundred dollars. A new or an additional undertaking may be ordered by the court, or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking is executed and filed." Doubtless this section confers a right upon a defendant, to demand that the plaintiff, where he is a nonresident, to give security for costs, but such right is one personal to the defendant and one in which the public, or the state, has no interest. It, therefore, is not of a jurisdictional character and may be waived, and, in case of waiver, the court may proceed with the trial

\*State v. Mortensen, 73 Pac. 562, 633, 26 Utah, 312.

without making any order respecting such right. *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, 633.

This statutory right, being thus a personal right, a mere personal privilege, may be waived by failure to make demand for security at all, or by failure to make such demand at a seasonable and within a reasonable time after it appears in the case, to the knowledge of the defendant, that the plaintiff is a non-resident. Where, then, the defendant, after the nonresidence has been shown, makes no effort, or no reasonable effort, to demand security until such time that the granting of his motion would cause a continuance of the trial, or delay the proceedings, or interfere with the business of the court, his laches may prevent him from asserting his right, for in either of such events the court may, doubtless, in its sound discretion, and as a matter of justice, refuse to grant an order requiring such security, and regard the right as waived. "A defendant, in case his adversary is nonresident, has an unquestionable right to security for costs, but inasmuch as it is a right which may be used to delay or obstruct justice, he should be required to insist upon it promptly, and to adhere to it persistently, or otherwise be held to have lost it." *Shuttleworth v. Dunlop*, 34 N. J. Eq. 488.

That a defendant waives his right to security for costs, under statutes like, or similar, to ours, if, without insisting on his right, he takes any step in a cause, after he has proper notice of the nonresidence of the plaintiff, we think is a well-settled rule of law. In 19 Ency. Pl. & Pr. 362, it is said: "A motion for security for costs should be made at the first opportunity the party has after knowledge of the facts that entitled him to an order requiring security to be given, for, if not made promptly, the motion is liable to be denied by reason of the laches shown by one who is otherwise entitled to security." And on page 363, *Id.*, it is said: "If a party takes any steps in a cause, after notice of the facts that entitle him to security, he waives his right to security for costs." In *Goodrich v. Pendleton*, 3 John. Ch. 520, it was said: "The rule is that, if the non-residence of the plaintiff appears on the bill the defendant waives his title to security for costs if he takes any step in the cause, or even prays time to answer." So, in *Brazell v. Cohn*, 32 Mont. 556, 81 Pac. 339, it was observed: "The record discloses that the court denied the stay upon the ground that the application for security was made too late. It was not necessary that the record show the reasons for the court's decision. As the application for security for costs was not made until the day set for the trial, and no previous notice of such demand appears to have been given, the court was justified in denying the motion, and justified for the reasons which it gave—that it came

too late; that is, that it was made immediately before the trial of the cause began, and without previous notice having been given." 11 Cyc. 176 et seq.; 12 Abb. New Cas. 108; *Swift v. Stine* (Wash. T.) 19 Pac. 63; *Stevenson v. N. Y., L. E. & W. R. Co.* (Sup.) 1 N. Y. Supp. 670; *Fagan v. Strong* (Sup.) 11 N. Y. Supp. 766; *Smith v. Kahn* (City Ct.) 42 N. Y. Supp. 478; *Voss v. Sensenig*, 14 Pa. Co. Ct. 631; *Muldon v. Place* (Ariz.) 6 Pac. 479; *Dunning v. Dunning*, 37 Ill. 306; *Prince v. Towns* (C. C.) 33 Fed. 161.

In this case the defendant filed an answer on the merits without making any demand for security, although it was specifically alleged in the complaint that the plaintiff was a nonresident—a resident of the state of Wyoming. Nor did the defendant serve and file any notice that it required security until the day when the case was called and when both parties were present in court and ready to proceed with the trial. Then, upon the attention of the court being called to the fact that demand was made for security for costs, one of the attorneys for the defense, addressing the court, among other things, said: "I do not want to work any hardship or interfere with the proceedings of the court," and made no motion to suspend proceedings. Nor did the defense object or refuse to proceed with the trial, or further insist upon the right; nor did it object to the impaneling of the jury, or except to the action of the court in proceeding with the trial. Under these circumstances the defendant must be held to have waived its statutory right. This case falls clearly within the principles hereinbefore referred to and stated, and the court did not err in its action in the premises. Nor, under the facts and circumstances revealed by the record, did the court err in overruling the motion for a new trial.

The judgment is affirmed, with costs.

MCCARTY, and STRAUP, JJ., concur.

SANFORD v. KUNKEL et al. (WALSH et al., Interveners).

(Supreme Court of Utah. July 19, 1906.)

On rehearing. Opinion modified and petition denied.

For former opinion, see 85 Pac. 363.

#### On Rehearing.

STRAUP, J. A petition for rehearing has been filed in this cause (reported in 85 Pac. 363). Upon further consideration of the case we have concluded that our directions modifying the judgment of the court below are too broadly stated. However, in order that a proper modification thereof may be made, we deem it unnecessary to reopen the case and to have it resubmitted.

The question of law presented to us at the hearing was whether a building on which a mechanic had performed labor or for which a materialman had furnished material, under contract with the owner of the ground, is discharged from the operation of a mechanic's lien by a removal of the building, when about completed, from the premises upon which it was constructed, without the consent of the owner and of the lien claimants. We held that it could not be so discharged, and we adhere to such holding. That was the only question presented on briefs or in oral argument. No point was made, nor any question raised as to any difference in the status of the several claimants, and the case was considered and determined by us without reference to any such difference. We assumed that all the claimants had either performed labor on or furnished material for the building afterwards removed by respondents, the Utah Lumber Company and Murphy, and our attention was not directed to anything to the contrary. Now it is pointed out that the claimant, Morrison Merrill & Co., whose claim had been assigned to Cain, furnished no material for nor performed labor on the building removed by the respondents from lot 8 and the north half of lot 9, but that, under contract, it had agreed to furnish, and that it did furnish material for the building constructed on lot 10 and the south half of lot 9. Its lien, therefore, attached only to the last-named lots and to the building thereon, and not to lot 8 and the north half of lot 9, from which the building was removed, and its rights were, therefore, not affected by the removal of the building. When we directed a sale of the removed building, on or for which Morrison Merrill & Co. performed no labor nor furnished material, in satisfaction of its claim, we committed error. Our directions to the trial court are therefore modified, and it is directed to sell lot 10 and the south half of lot 9, together with the building and other improvements thereon, the proceeds of which are to be applied in satisfaction of the claims for material furnished and labor performed on such building; to sell, first lot 8 and the north half of lot 9, the proceeds of which are to be applied in satisfaction of the claims for materials furnished and labor performed on the building removed therefrom, and, if any deficiency remain, that then the building removed therefrom and on lots 3 and 4 be sold and the proceeds of sale applied in satisfaction of such deficiency, and the purchaser at such sale be given the right to remove the building from lots 3 and 4. In view of there being no finding that a removal of the building from lots 3 and 4 will greatly or at all injure such freehold, it was unnecessary to direct, as we did in such event, also a sale of lots 3 and 4; and in such particular our directions are also modified.

With these modifications our original opin-

ion is adhered to, and the petition for a rehearing denied.

MCCARTY, J., concurs.

BARTCH, C. J. I am of the opinion that a rehearing ought to be granted in this case.

# STATE v. BROOKS.

(Supreme Court of Kansas. June 9, 1906.)

## 1. STATUTES—TITLE—SCOPE AND SUFFICIENCY.

The title, "An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes" is broad enough to cover a provision for the appointment of assistants to the Attorney General to prosecute offenses against the statute in case of the failure of the county attorney to do so.

## 2. CRIMINAL LAW—APPEAL—FAILURE OF DEFENDANT TO TESTIFY—CONSIDERATION BY JURY.

To justify a reviewing court in ordering a new trial in a criminal case because of the infraction of the statutory rule that the omission of the defendant to testify shall not be considered by the jury, it must conclusively appear that the jury or some member of it in arriving at a verdict gave weight to the fact that the defendant did not take the stand in his own behalf, as a circumstance tending to establish his guilt.

## 3. INTOXICATING LIQUORS—MAINTAINING LIQUOR NUISANCE—USE OF BUILDING—EVIDENCE.

In a prosecution against the owner of a building for knowingly permitting its use in maintaining a nuisance, the state, after introducing sufficient evidence to justify a finding that the building was so used, may then, as tending to bring knowledge of that fact home to the defendant, show that it had the general reputation in the community of being used for that purpose.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 289, 297.]

(Syllabus by the Court.)

Appeal from District Court, Wilson County; L. Stillwell, Judge.

M. A. Brooks was convicted of knowingly permitting a building to be used for the maintenance of a common nuisance, and appeals. Affirmed.

P. C. Young, for appellant. C. C. Coleman, Atty. Gen., and E. D. Mikesell (J. B. Wilson, of counsel), for the State.

MASON, J. M. A. Brooks appeals from a conviction under the statute (Gen. St. 1901, § 2489) making it an offense for the owner of a building knowingly to permit its use in maintaining what the prohibitory law denominates a common nuisance. Complaint is made that the information was defective. There is nothing, however, to take the case out of the ordinary rule that in charging a statutory crime, it is sufficient to follow the language of the statute, and that was substantially done in this instance. The prosecution was instituted and conducted by an

Assistant Attorney General appointed under the statute (Gen. St. 1901, § 2476), authorizing such appointments whenever the county attorney fails to prosecute violations of the law referred to. The contention is made that this part of the statute is void because not covered by the title under which it was enacted. It first appeared as a part of section 11 of chapter 149, p. 243, of the Laws of 1885, the title of which read "An act amendatory of and supplemental to \* \* \* an act entitled 'An act to prohibit the manufacture and sale of intoxicating liquors, except for medicinal, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes.'"

"A title fairly expressing the general subject covers provisions for all proper means and instrumentalities which will or may facilitate the accomplishment or enforcement of the purpose expressed, such, for instance, as a provision prohibiting violations of the act, or prescribing a penalty or other punishment for such violations." 26 A. & E. Encycl. of L. (2d Ed.) 588. A provision intended to insure the prosecution of offenses against an act is as plainly adapted to the enforcement of its purpose as is one prescribing a penalty. The provision under consideration is of that character, and is fairly within the scope of the title quoted. The ownership of the building and its use for the prohibited purpose were expressly or substantially admitted. The vital question upon which the trial turned was whether the owner knew of the fact; the state relying upon circumstantial evidence to show such knowledge. The defendant did not testify. A motion for a new trial was filed upon the ground that his omission to do so was considered by the jury, and the overruling of this motion is assigned as error. Upon the hearing of the motion each juror testified orally. The defendant claims that the evidence of misconduct of the jurors in this regard was as strong as that presented in *State v. Rambo*, 60 Kan. 777, 77 Pac. 563, and that under that authority the decision of the trial court must be reversed. There it was held that the evidence compelled the conclusion that at least one juror had been influenced in his judgment by the fact that the defendant had not taken the stand in his own behalf. In the present case there was testimony that one member of the jury in the course of its deliberations used the fact as an argument in favor of conviction. This juror himself, while he did not in set terms deny having used the language attributed to him, swore that he had no recollection of having done so. This was a sufficient challenge of the truth of the testimony referred to so that an issue of fact was raised. For anything that appears in the record the trial court may have believed that the objectionable argument was not in fact made. This belief would amount to a finding of fact, which cannot be reviewed

here, for it depended upon the credence and weight to be given to oral testimony, and derived some support from the probability that the juror charged with the misconduct would have remembered it if it had taken place. But even had the evidence in support of the motion not been contradicted either directly or inferentially, no reason is apparent why the trial court was compelled to accept it as true—to determine its truth was one of the functions of the tribunal to which it was presented.

Assuming, however, as an established fact that a juror did at one time in the course of discussion offer as a reason for believing the evidence against the defendant that he had not denied it—other considerations prevent this fact from necessitating a new trial. The court gave an instruction that the omission of the defendant to testify raised no presumption against him and could not be considered by the jury. The evidence upon the motion for a new trial was to the effect that at several times during the deliberations of the jury the failure of the defendant to testify was mentioned in such a way as to suggest an inference against him; but it further appeared that upon each of such occasions attention was called to the instruction referred to, and that thereupon the statement was made and acquiesced in by all that the matter was one to which no force could be attached. Whether this shows a violation of the law depends upon the precise meaning to be given to the word "considered" as used in the statute (Gen. St. 1901, § 5657), which reads: "The neglect or refusal of the person on trial to testify \* \* \* shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the court or jury before whom the trial takes place." The prohibition cannot reasonably be construed as absolutely forbidding the court and jury to take any thought whatever regarding such omission of the defendant—to deny it entrance to the mind in any aspect. Such a requirement would be impracticable. The very reference to the matter in the instructions of the court would be a violation of the law under such a construction. The statute provides that the prosecuting attorney must not refer to the circumstance that the defendant has not testified, but the language with regard to the court and jury is different; they must not consider it; that is, give weight to it in arriving at a decision, attach to it the force of evidence, or draw any inference from it. Whether in this case the prohibition was disregarded, whether the jury or any member of it did consider the defendant's failure to take the stand in his own behalf, did permit that circumstance to weigh against him, was a question of fact requiring to be determined by the trial court upon oral evidence which was not wholly harmonious and from which

different inferences might reasonably have been drawn. Under such circumstances we cannot say that a wrong conclusion was reached or that a new trial should have been granted.

After abundant evidence had been introduced to prove that the defendant's building had been used as a place where intoxicating liquors were sold in violation of law, the state was permitted over the defendant's objection to show that such illegal use was a matter of general reputation in the community, and this ruling is complained of as error. Of course the state could not have been permitted to show that the place in question was commonly reputed to be a liquor nuisance for the purpose of establishing that it was such in fact; but when sufficient proof had otherwise been made of its real character evidence that such character was a matter of public notoriety was competent, as bearing upon the probability of notice thereof having reached the defendant, who was engaged in business in a neighboring building. For illustrations of this method of proof see Wigmore on Evidence, p. 2314, § 1789; also sections 245, 254, 255, and especially 257, where it is said: "Where a statute forbids the selling of liquor to a person of known intemperate habits, the reputation of the vendee for intemperance is relevant to show probable knowledge by the seller." In support of this statement the author quotes from *Ward v. Herndon*, 5 Port. (Ala.) 382: "No man is presumed to be so much of a recluse as not to know what is generally known and talked of in his neighborhood."

Various other assignments of error have been made. All have been examined and are held to be not well taken but only those already mentioned are thought to require discussion.

The judgment is affirmed. All the Justices concurring.

#### CITY OF LA HARPE v. GREER.

(Supreme Court of Kansas. June 9, 1906.)

#### MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—ACTION FOR DAMAGES.

In an action against a city for damages resulting from a defective sidewalk, a demurrer to the petition should be sustained, when it fails to state that the city had notice of the alleged defect prior to the injuries of which the plaintiff complains.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1714.]

(Syllabus by the Court.)

Error from District Court, Allen County; Oscar Foust, Judge.

Action by Joseph J. Greer against the city of La Harpe. Judgment for plaintiff, and defendant brings error. Reversed.

W. D. Cope and Campbell & Goshorn, for plaintiff in error. J. B. Goshorn and Travis Morse, for defendant in error.

GRAVES, J. This action was commenced in the district court of Allen county, to recover damages for injuries resulting from a defective sidewalk in the city of La Harpe. The city demurred to the plaintiff's petition on the ground that it did not contain facts sufficient to constitute a cause of action. The demurrer was overruled, and this ruling is assigned as error. It is claimed by the plaintiff in error, that the petition does not aver that the city had notice of the alleged defect in the sidewalk prior to the injury of which the plaintiff complains. The defendant in error claims that this allegation is contained in the paragraph of the petition which reads: "It was the duty of said city to keep the said sidewalks, streets, alleys, and crossings in said city in good repair and in a safe condition for persons passing along and over said street, sidewalk and crossings without injury, yet the said defendant, the city of La Harpe disregarding its duty in that respect, by its servants and agents, did, on or about the 17th day of July, 1904, so negligently and carelessly keep and manage its public sidewalks and crossings in said city that the same became dangerous to life and safety of persons passing thereon. That on the evening of the 17th day of July, 1904, plaintiff was lawfully walking upon the public sidewalk on McKinley avenue in said city on his way home in the northeast part of said city, and not knowing said sidewalk was defective, and without fault or negligence upon his part, and when so walking upon said sidewalk, plaintiff was tripped by a loose board upon said sidewalk and was thrown with his entire weight and great violence upon the heel of his left hand and wrist joint, thereby bruising, breaking and lacerating the tissues of the wrist joint of his left arm."

We are unable to find such an allegation in the petition. There does not appear to be any statement of fact which was intended by the pleader to cover this point. It was apparently overlooked. No motion to make the petition more definite and certain was filed, and therefore the statements of the petition should be liberally construed in favor of the pleader. *Bowersox v. Hall* (Kan.) 84 Pac. 558; *Insurance Co. v. Duffey*, 2 Kan. 347; *Stewart v. Balderston*, 10 Kan. 147; *Crowther v. Elliott*, 7 Kan. 235; *Park v. Tinkham*, 9 Kan. 615. But as no attempt was made to allege that the city had notice of the defect in the sidewalk before the injury occurred, there is nothing to construe. "To make a city liable for injuries resulting from a defect in a sidewalk it must appear either that the city had notice of the defect or that it was a patent defect and had continued so long that notice might reasonably be inferred, or that the defect was one which with reasonable and proper care should have been ascertained and remedied." *Jansen v. City of Atchison*, 16 Kan. 353; *Riggs v. City of Florence*,

27 Kan. 194; *City of Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. 893. The mere existence of a defect in a sidewalk does not constitute culpable negligence on the part of a city. Such negligence arises only when the city fails to repair the defect within a reasonable time after having notice thereof. The existence of such notice is therefore an important element in a cause of action against a city for damages resulting from a defective sidewalk, and must be alleged in the petition. For want of such averment the petition in this case is fatally defective.

The judgment of the district court is reversed, with instructions to sustain the demurrer to the petition, and proceed with the case in accordance with the views herein expressed. All the Justices concurring.

#### HUTCHINSON LUMBER & PLANING MILL CO. v. BAKER.

(Supreme Court of Kansas, June 9, 1906.)

APPEAL—REVIEW—VARIANCE—HARMLESS ERROR.

The rule that the negligence proven and found by the jury must correspond with the averments of the petition is not to be construed in a narrow, technical sense, but with a view of giving effect to section 133 of the Code (Gen. St. 1905, § 5015); and a verdict will not be set aside because some of the language used is inappropriate, where there is sufficient to apprise defendant of the nature of the negligence complained of, and where it manifestly appears that defendant was not misled or prejudiced in maintaining its defense on the merits.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4086.]

(Syllabus by the Court.)

Error from District Court, Reno County; P. J. Galle, Judge.

Action by Sylvester Baker against the Hutchinson Lumber & Planing Mill Company. Judgment for plaintiff, and defendants bring error. Affirmed.

Plaintiff in error was engaged in the contracting business and had a number of men at work repairing a large coal shed belonging to the Hutchinson Water, Light & Gas Company. The coal shed having been overloaded with coal, the walls had spread and left the foundation at the sides, and the roof sagged down. Defendant in error was in the employ of Henry Shears who had a separate contract for the brick piers of the foundation. In order to get the walls back upon the foundation it was necessary to raise the roof. Plaintiff in error was engaged in doing this by means of jackscrews placed inside the walls at intervals of about 16 feet. Each screw supported an upright timber about 16 feet long. One of these uprights fell and struck defendant in error on the head while he was at work laying brick at one of the piers. The jury found for defendant in error and allowed him \$800 damages. The trial court denied a motion for a new trial, and from the judgment plaintiff in error appeals.

Prigg & Williams, for plaintiff in error.  
Geo. A. Vandever and F. L. Martin, for defendant in error.

PORTER, J. (after stating the facts). The principal contention is that the petition of defendant in error set up a specific act of negligence, and the recovery was had upon another and entirely different act of negligence. The petition alleges that Wagner, foreman of plaintiff in error, "negligently and carelessly, with jacks and braces, pushed the north wall of said building in at the bottom, thus slightly raising the roof or plates on which the roof rested and which were resting on the upright timbers as aforesaid, thus loosening the tension and letting one of said timbers fall, which said timber in falling struck the plaintiff across the head." It has frequently been declared by this court that the negligence proven and found by the jury must correspond with the averments of the petition. *Telle v. Rapid Transit Rly. Co.* 50 Kan. 455, 31 Pac. 1076; *S. K. Rly. Co. v. Griffith*, 54 Kan. 428, 38 Pac. 478; *Brown v. Railway Company*, 59 Kan. 70, 52 Pac. 65; *St. John v. Berry*, 63 Kan. 775, 66 Pac. 1031.

It is claimed, as a matter of fact, that plaintiff in error on the next day following the accident took the same jackscrews from under the uprights where they had been supporting the roof, and placed them in a horizontal position against the railway track, and by the use of pressure applied laterally pushed the north wall a sufficient distance south to make it perpendicular. It is insisted that plaintiff in error "went into trial knowing that Wagner was not pushing the building over with jacks or braces until the next day after the accident occurred and had the right to rely on this fact as a complete defense." It is provided in section 133 of the Code that "no variance between the allegations in a pleading, and the proof, is to be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." Gen. St. 1905, § 5015. It may be conceded that the petition in this case is not drawn with the certainty and precision as to the negligent act of plaintiff in error with which it should have been to strictly conform to the facts proven; but it requires some stretch of imagination to discern in what way plaintiff in error could have been misled. The upright timber did, as plaintiff in error well knew, fall and strike Baker on the head fracturing his skull. It is inconceivable that every one present, including the employees of plaintiff in error, did not know all about it immediately. They did know and were present at the trial and gave their testimony. There was no dispute with reference to the exact time the accident happened and practically none with respect to how it happened. No one actually went into the trial believing that defendant in error expected to prove that his injuries were received the day after

they were received, simply because plaintiff in error happened on the next day to be pushing the coal shed over in the manner described in the petition. It may be true that as a matter of strict pleading, plaintiff in error had the right to believe this, but certainly with the knowledge it had of what actually occurred it had no business to believe it. The contention turns upon too narrow a construction of the pleading. The gravamen of the charge of negligence was not so much the pushing of the side of the building "in" or "over" nor even the slight raising of the roof, but the "loosening" of the tension of the weight on the upright, permitting it to fall and strike plaintiff across the head. As the learned foreman of the jury, in answer to a special question, phonetically expressed it: "(6) Then state what caused said timber to fall. Ans. Because the Jack was not kept tight." Most of the complaint in reference to the instructions is based upon this same contention that there was a fatal variance between the averments of the petition and the proof, and that the court should have instructed the jury definitely as to the specific negligence charged, and practically that unless the injury occurred by reason of the north wall being pushed in as averred in the petition, defendant in error was not entitled to recover. The instructions though quite general were fair upon the pleadings and the evidence, and, in our opinion, give plaintiff in error no ground for the claim that its substantial rights were prejudiced.

Error is urged because the court refused to require the jury to make their answer to question No. 3 more definite. The question and answer are as follows: "(3) When did the said M. H. Wagner and his men push the north wall of said building in with reference to the time the plaintiff was injured? Ans. Finished 28th May, 1904." Plaintiff in error all through the trial contended that the building was in fact pushed "over" onto its foundation on the 28th and there was no controversy but that the accident in which defendant in error received his injuries occurred on the day previous, May 27th. The answer was rendered somewhat indefinite by the word "finished," but it could not affect the liability of plaintiff in error no matter how it was answered or whether answered at all. The question had sole reference to an occurrence after the accident in which plaintiff was injured, and therefore it was immaterial when the building was pushed "in" or "over" so long as the question had no reference to the time of the injury. No answer the jury could have returned under the evidence would have availed anything to plaintiff in error. It is urged that the jury allowed damages for permanent injuries after finding that defendant in error sustained no permanent injury. This contention is based upon the special findings, as follows: "(10) Are the injuries to plaintiff such that he will be permanently disabled from per-

forming manual labor? Ans. Don't know. \* \* \* (13) How much do you allow plaintiff for permanent injury? Ans. \$500.00." The physician who treated plaintiff did not know whether it would or would not permanently interfere with his ability to perform manual labor, but the evidence of the same physician as to the probability of the injury being to some extent permanent in its character warranted the jury in allowing the sum they did for permanent injury. A man might have his ear torn off and permanent injury sustained which at the same time might not render him in any sense less able to perform manual labor.

We have examined the other errors complained of, but find none which in our opinion affect the substantial rights of plaintiff in error or which require specific mention here.

The judgment will be affirmed. All the Justices concurring.

#### UPHAM v. HEAD.

(Supreme Court of Kansas. June 9, 1906.)

##### 1. PLEADING—DEMURRER—CONSTRUCTION.

Where a demurrer is filed to a petition on the ground that it does not state facts sufficient to constitute a cause of action, without first presenting a motion to have the allegations of the petition made more definite and certain, the statements of such petition will be liberally construed in favor of the pleader.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 66, 400, 485, 1173.]

##### 2. LANDLORD AND TENANT — REPAIRS BY LANDLORD.

A landlord who at the request of his tenant undertakes to repair defects existing upon the leased property and employs and directs a mechanic to do the work, is chargeable with knowledge of the manner in which the work is done.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 638.]

##### 3. SAME—NEGLIGENCE IN MAKING—INJURIES TO TENANT—LIABILITY OF LANDLORD.

Where a landlord causes repairs to be made as above stated and the work is negligently done, and the tenant, without fault on his part is injured on account of such negligence, the landlord will be liable in damages therefor.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 632.]

(Syllabus by the Court.)

Error from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Action by Elizabeth Head against W. S. Upham. There was judgment for plaintiff, and defendant brings error. Affirmed.

J. H. Keith, for plaintiff in error. Geo. R. Snelling, Ayres & Welch, and Ziegler & Dana, for defendant in error.

GRAVES, J. The plaintiff in error, W. S. Upham, owned a residence in the city of Coffeyville, which he rented to the defendant in error, Elizabeth Head. Soon after taking

possession of the property Mrs. Head requested Upham to repair the covering or platform of the cistern. In compliance with this request Mr. Bledsoe was sent by Mr. Upham to the premises with instructions to "see what was needed and to fix it up good." Bledsoe made the repairs desired. Soon afterwards Mrs. Head fell through the covering into the cistern and thereby sustained serious injuries. Afterwards she commenced this action to recover damages for the injuries so received. She recovered a judgment for \$1,690, and the defendant being dissatisfied has brought the case here for review.

The first error assigned is the overruling of the defendant's demurrer to the plaintiff's petition. The petition alleges that the plaintiff was in possession of the premises as tenant of the defendant, under a written lease for a term of six months, beginning February 5, 1903. Then follows the paragraph objected to which reads: "This plaintiff further alleges that on or about the 20th day of July, 1903, and while attending to her ordinary household duties, and while being and standing upon the platform or covering of the cistern on said above-described premises, she was, by the negligence of the said defendant, his agents, and servants, and employes, injured by being precipitated into the said cistern; that the covering on the said cistern had been so negligently constructed by the agents and servants of the said defendant that as this plaintiff stepped upon a board which formed a part of the covering of the said cistern, one end of which board had been nailed to pieces of wood or stringers across the said cistern while the other end of the said board was not nailed or fastened to anything so that as the plaintiff stepped upon the said board, the said board gave way by reason of its not being nailed or fastened to the stringers or crosspieces, and this plaintiff was thereupon and with great force thrown through the said hole in the covering of the said cistern, and through no fault or negligence on her part was violently thrown into the said cistern, and plaintiff was greatly injured thereby as follows, to wit:" It is claimed that a landlord is not liable to a tenant for defects existing in the leased premises, unless the defect is known to and concealed by him. That the statement in the petition that the covering on the cistern was negligently constructed, refers to the original building of the cistern, which antedates the lease, and therefore an additional allegation of defendant's knowledge of the defect was essential, and for want of this averment the petition is said to be subject to demurrer. There was no motion filed to make the petition more definite and certain, and therefore its statements must be construed liberally in favor of the pleader. *Bowersox v. Hall* (Kan. Sup.) 84 Pac. 538; *Insurance Co. v. Duffey*, 2 Kan. 347; *Stewart v. Balderston*, 10 Kan.

147; *Crowther v. Elliott*, 7 Kan. 235; *Park v. Tinkham*, 9 Kan. 615; *La Harpe v. Greer* (just decided), 85 Pac. 1015. If the words "negligently constructed" refer to the original building of the cistern as claimed by the defendant, then if such building was done negligently by the "agents and servants" of the defendant as alleged, he would probably be held to have knowledge thereof, when the injuries were sustained by the plaintiff, as every person is supposed to know as much about his own business as his agents and servants do. With this view of the petition, the demurrer was properly overruled.

This question, however, does not necessarily arise in this case, for under the liberal rule of construction above mentioned, the court was justified in holding that the evidence offered was admissible even though the work done on the cistern was in a sense repairs, rather than original construction. It appears from the evidence that the work on the covering to the cistern occurred while plaintiff was in possession of the premises as a tenant of the defendant, and that the work was done under the direction of the defendant. It also appears that the covering was practically torn up, rebuilt, and reconstructed, so that the difference between the meaning of the words "constructed and repaired" as applied to the work done is too slight to be seriously considered. Such a variance is not sufficient to constitute error. *Code Civ. Proc. § 133* (Gen. St. 1905, § 5015); *Hutchinson Lumber & Planing Mill Co. v. Baker* (just decided), 85 Pac. 1016. The defendant undertook to place the cistern in a sound and safe condition. He selected a person of his own choice to do the work. When the work was completed this workman informed the plaintiff that the cover was all right and safe. In fact it was not safe, but dangerous. The boards of the cover were nailed at one end only, and when plaintiff stepped on the other end the board tipped up and let her into the cistern. The defendant was liable for the negligence of his employe. He was bound to take notice of what his employe did or omitted to do. The knowledge of the employe in such matters is the knowledge of the employer. 1 *Thompson Com. on Neg. § 1142*; *Real Estate Ass'n v. Hatcher* (Tex. Civ. App.) 28 S. W. 404; *Lynch v. Ortlieb* (Tex. Civ. App.) 28 S. W. 1017; affirmed in *Sup. Court*, 30 S. W. 545; *H. & G. R. R. v. Meador*, 50 Tex. 77; *Bernaer v. Steele Co.*, 33 Ill. App. 491; *Peerless Mfg. Co. v. Bagley*, 126 Mich. 225, 85 N. W. 568, 53 L. R. A. 285, 86 Am. St. Rep. 537; *Werthelmer v. Saunders*, 95 Wis. 573, 70 N. W. 824, 37 L. R. A. 146; *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Gregor v. Cady*, 82 Me. 131, 19 Atl. 108, 17 Am. St. Rep. 466; *Hamilton v. Ferry*, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rep. 485. Contributory negligence is argued by the plaintiff in error, but the only averment upon this subject is that stock was permitted to run loose on the premises, and the cistern cover

was broken thereby; no proof was given of this fact.

It appears from the evidence that the plaintiff was present when the work was done by Bledsoe, and it is claimed that she must have known whether it was negligently done or not. But she appears to have relied upon the workman to do the work properly, and his failure to sufficiently nail the boards to the stringers was not an omission open to her casual observation. Bledsoe was not her servant, and she had no control over him. The question of contributory negligence, therefore, need not be considered.

No error appearing, the judgment is affirmed. All the Justices concurring.

### HAMPE v. HIGGINS.

(Supreme Court of Kansas. July 6, 1906.)

#### VENDOR AND PURCHASER—CONTRACT—PERFORMANCE.

A written contract for the sale of real estate is superseded and extinguished by a subsequent deed of conveyance between the same parties, which covers in its provisions all of the stipulations contained in the contract.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Deeds, § 266.]

(Syllabus by the Court.)

Error from District Court, Shawnee County; A. W. Dana, Judge.

Action by George Hampe against Anna M. Higgins. Judgment for defendant, and plaintiff brings error. Affirmed.

W. R. Hazen, for plaintiff in error. Ferry & Doran, for defendant in error.

GRAVES, J. This is an action to recover damages for a breach of a contract for the sale of real estate. The defendant claims that the contract is merged in a subsequent conveyance of the land. Whether the contract of sale is still an independent and subsisting instrument or not is the only question presented. The contract sued on reads: "March 12th, 1903. This is to certify that Hiram Higgins and Annie M. Higgins, his wife, has sold to Geo. Hampe for the consideration of five thousand eight hundred dollars all that part of southeast quarter section eleven (11) township twelve (12) south of range fifteen (15) east of the 6th p. m., lying south of Shunganunga creek to the center of said creek containing ninety acres (90) more or less for which they have received (50) fifty dollars in cash on purchase price, fifty seven hundred and fifty to be paid April 1st, 1903, or as soon as title and deed are made if this lacks ninety acres the above-named people agree to make it to ninety (90) acres. Anna M. Higgins. Hiram Higgins. Geo. Hampe." The course of the creek which formed the northern boundary of the land was so meandering as to make it quite difficult to determine the exact number of acres in the tract. Before April 1, 1903,

when the deal was to be closed, a defect in the title was discovered and the grantors were unable to make a clear conveyance. The plaintiff in error went into possession of the land and the grantors proceeded with the lawsuit in which their title was involved, which terminated against them. By the judgment in this suit it was determined that other parties had an interest in the land. Afterwards plaintiff in error tendered the whole amount of the unpaid purchase price, and demanded a warranty deed, which the grantor offered to give. It was refused, however, on account of the imperfect condition of the title. Afterwards the plaintiff commenced an action for specific performance which was pending when the deed was executed. Finally the defendant in error bought in the outstanding interests, and on August 29, 1903, after considerable controversy and consultation with attorneys, the matters were adjusted by the execution on the part of the grantor of a deed of special warranty and by the payment of the full amount of unpaid purchase money by the purchaser. The clause in the deed involved in this controversy reads: "Witnesseth, that said party of the first part, in consideration of the sum of fifty eight hundred dollars, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the party of the second part, her heirs and assigns, forever, all of her right, title and interest in and to the following described real estate lying and situated in the county of Shawnee and state of Kansas, to wit: All that part of the southeast quarter of section numbered eleven (11), township numbered twelve (12) south, of range number (15) east of the sixth principal meridian, lying south of the Shunganunga creek, to the center of said creek, containing ninety (90) acres more or less." After the delivery of the deed, the plaintiff in error had the land surveyed, and ascertained thereby that there was only 81.51 acres in the tract, instead of 90, as had been supposed. He then brought this suit to recover the value of the difference.

On the trial, the district court instructed the jury as follows: "You are instructed the plaintiff cannot recover in this action for any alleged deficiency of the land under the contract of March 12, 1903, as the same merged in the deed of August 29, 1903, and plaintiff must recover, if at all, upon the provisions of said deed concerning the quantity of land conveyed and paid for by the plaintiff, and as said deed described said land as containing 90 acres, more or less, plaintiff cannot recover at all in this action for any alleged deficiency in the quantity of land conveyed." This instruction was equivalent to a direction to find for the defendants, and it is assigned as error. The general rule that written contracts are presumed to take the place of all prior agreements, covering the same subject, is conceded by the plaintiff

in error, but he insists that this case is an exception to that rule, for the reason that it relates to the consideration of the conveyance, which is always open to inquiry, and also because it is a collateral agreement in no way inconsistent with the terms of the deed. The defendant in error urges, that the circumstances under which the deed was executed show that the parties intended it to be the end of all controversy, and to extinguish all prior agreements. In our view the evidence furnished by the face of the two instruments, and also by the extrinsic circumstances shown, indicate that the parties intended the deed as a complete settlement of all further controversy concerning the sale and conveyance of the land. The transaction was initiated by the contract of sale, and closed with the deed. It is apparent from the contract that the parties intended when it was executed, that all preliminary questions should be adjusted, by April 1, 1903, and then the conveyance would be consummated with a deed. They were unable to adjust these preliminary questions by April 1st as anticipated, and did not do so until August 29, 1903, when the deed was executed and delivered, and all of the remaining purchase money paid. It will be seen from an inspection of the two instruments that the amount of land to be conveyed and the purchase price thereof, so carefully guarded in the contract of sale, was not overlooked in the deed, but is fully covered by its terms, clearly indicating that nothing was left for future consideration. The extrinsic circumstances show that, when it was discovered that the grantors did not own the complete title to the land, the grantee, plaintiff in error, became alarmed, demanded a deed at once, tendered the whole amount of the purchase price, and was apparently willing to pay that sum for a good conveyance to the land described in the contract; and he began an action to compel specific performance of the contract of sale. Conditions arose, not contemplated by the parties when the contract of sale was executed—conditions which furnished ample reasons for new and different stipulations. The fact that lawyers were consulted who managed the negotiations which led up to the deed; that a special, instead of a general, warranty deed was finally accepted; that no mention was made in the deed or other written instrument, concerning the subsequent ascertainment of the exact number of acres conveyed, and the adjustment of the purchase price accordingly; and that this matter was stated in the deed, thereby indicating that the purchaser took the land as it was, more or less, and paid the full consideration when the deed was delivered—shows that the parties then understood that the transaction was closed.

We are unable to see, in any view of the case, how this defunct contract can be infused with new life, and made to do service

as a cause of action. The stipulations of the contract sued upon involve more than a mere inquiry into the consideration of the deed, for the purpose of showing its true character, which is generally permissible. On the contrary, their legal import is to modify and vary the material language of the deed as an instrument of conveyance. The language, "in consideration of the sum of \$5,800, receipt whereof is hereby acknowledged, \* \* \* do grant, bargain, sell and convey \* \* \* all the land, \* \* \* containing 90 acres more or less," is to be changed by adding thereto, in substance, the following: "If, upon a survey, the tract is found to contain more than 90 acres, the grantee will pay for the excess at the rate of \$82.22 per acre; and if it contains less than 90 acres the grantor will pay back to the grantee the value of the deficiency, at the same rate per acre." We do not think this can be done. To do so would violate a long-recognized rule of law, which is stated in the case of *Van Syckel v. Dalrymple*, 32 N. J. Eq. 233, as follows: "What was said during the negotiation of the contract or at the time of its execution must be excluded, on the ground that the parties have made the writing the only repository and memorial of the truth, and whatever is not found in the writing must be understood to have been waived and abandoned."

The judgment of the district court is affirmed. All the Justices concurring.

#### STATE v. SMITH.

(Supreme Court of Kansas. July 6, 1906.)

#### JURY—OPINION OF JUROR—CHALLENGE FOR CAUSE.

Where the examination of a juror in a criminal trial upon his voir dire discloses that he has formed an opinion as to the existence of a fact material to be proven on the trial, and upon his belief of such fact has formed an opinion as to the defendant's guilt, such juror should be excused from service upon a challenge for cause.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 438-448.]

(Syllabus by the Court.)

Appeal from District Court, Comanche County; E. H. Madison, Judge.

W. L. Smith was convicted of crime, and appeals. Reversed.

Dale & Amidon and John W. Davis, for appellant C. C. Coleman, Atty. Gen. (R. A. Strain and F. O. Price, of counsel), for the state.

SMITH, J. The appellant was convicted of the crime of statutory rape in the district court of Comanche county, and appeals to this court. The evidence was of the most extraordinary character, and, aside from the circumstance that the defendant departed from the state and was arrested elsewhere, which fact seems to have been given great promi-

nence, consisted almost entirely of the statements of the injured party. While there is evidence sufficient to sustain the finding of the jury, the statements of the injured party, long persisted in out of court, were contradictory of her sworn testimony, and this, with the extraordinary character of the crime as related by her, suggests that at another trial new facts may be developed, and another jury may come to a different conclusion.

The principal error assigned upon the trial is as to the qualification of the juror O. E. Fish. Referring to the departure of the defendant from the state, the following is a portion of the evidence given by this juror upon his voir dire: "Q. You mean by that that you heard no contradiction of it, and you did believe it? A. I believe that he had gone; yes. Q. (by the court). How is that? A. I believed that he went away; yes. Q. You believed that he went away contrary to law? A. Yes, sir. Q. And was brought back by the sheriff? A. Yes, sir; that is the way I heard it. Q. And you feel that you are called to believe that at this time? A. Yes, sir. \* \* \* Q. Well, now, it would take some evidence at this time submitted by the defendant in his behalf to remove the various partial opinions that you have formed? A. I rather think it would. Q. And they relate to the question of his guilt or innocence? A. Yes, sir. Q. And on that you have partially made up your mind? A. Why, I assumed that he would be guilty or he would not have went away. I would have no opinion, only he went away. \* \* \* Q. Has anything occurred to change that belief in your mind? A. I don't think there has. Q. (by the court). Well, if this case was submitted to you, if this case was submitted to you now, you would require some evidence on the part of the defendant to remove the impression just testified to that you previously formed, would you not? A. Yes, sir. Q. What is that impression based on? A. On the ground that he was arrested on that charge. Q. And brought back from New Mexico? A. Yes, sir. Q. And it is also based on what you have heard about the case? A. No, sir; I never heard anything in particular about the case, only just that they had made the arrest. Q. Then, if testimony should be offered to that feature of this case, then it would have some influence on your verdict? A. It probably would. Q. Regardless of anything the defendant might testify to on that issue? A. I do not know what he would testify to; but, of course, I would go according to the evidence as near as I could. Q. At this time you would require the defendant to testify to something to remove that opinion from your mind? A. Yes, sir."

While the juror modified these statements somewhat under suggestive questions by the court, and testified that he thought he could set aside the opinion he had formed, and determine the case according to the evidence, yet it is apparent that he started into the

trial, the defendant's challenge to his competency having been overruled, with an opinion that the defendant had fled from the state and that by reason of that fact he believed the defendant guilty, and that to remove such opinion the defendant himself would have to testify, and would have to satisfy the juror from such testimony that he went for some other reason, and not for the reason that he was accused of the crime. The fact that the defendant had left the state, and was rearrested in New Mexico and brought back, was conceded by all on the trial. Hence this juror was in the position of having formed an opinion before the trial that the defendant was guilty upon a fact which was not in controversy at the trial. He should have been excused upon the defendant's challenge. The tendency is to relax the old rules disqualifying jurors to sit on a criminal trial by reason of opinions or impressions formed prior to the hearing of the evidence. In view, however, of the extraordinary evidence in this case, and the prominence that was given to the circumstance of the defendant leaving the state on the introduction of the evidence and in the instructions of the court, we feel that the defendant may have been prejudiced by the opinion of this juror formed prior to the hearing of the evidence.

Complaint is also made of instruction No. 15, given by the court which, so far as its correctness is questioned, reads: "If you are convinced by the evidence that any witness has willfully and corruptly testified falsely to any matter or thing material in the issue of this case, you are at liberty to disregard all the testimony of such witness, but whether or not you will do so is a matter resting entirely with you. You are not obliged to reject all the testimony of such witness, but may, and should, consider such portions of it that you find to be worthy of credit and give it such weight as you believe it entitled to considering all the facts and circumstances of the case." The language used in the first sentence of this instruction has been inferentially approved by decisions of this court. The writer of this, however, is inclined to believe that the word "corruptly" should be omitted therefrom or that it should be preceded by the word "or" instead of the word "and." As used in this instruction, the impression seems to be conveyed that it is not sufficient to justify a jury in disregarding the testimony of a witness that it may be convinced by the evidence that such a witness has willfully testified falsely but it must also believe that he has corruptly testified falsely. And 'corruptly,' so far as it carries any meaning in addition to willfully, suggests the idea of having been suborned to testify falsely. If this criticism is well taken the better language would be "willfully or corruptly" or, as the writer thinks, still better "willfully, knowingly or corruptly." As a substitute for the last clause of the first sentence the writer

suggests, "but whether or not you should do so is a matter resting entirely in your judgment." The writer also suggests the insertion of the words "if any" after the clause in the second sentence, "but may and should consider such portions of it." The reversal of this case, however, is not based upon this instruction.

Numerous other errors are assigned, which need not be discussed, nor determined as the same questions are not likely to recur.

The judgment of the district court is reversed, and a new trial is awarded. All the Justices concurring.

#### STATE v. DISTRICT COURT OF SECOND JUDICIAL DIST. et al.

(Supreme Court of Montana. May 14, 1906.)

##### 1. WILLS—PROBATE—CONTEST—PERSONS ENTITLED—PUBLIC ADMINISTRATOR.

The public administrator has no interest in the estate of a deceased person which entitles him to appear and object to the probate of the will under Code Civ. Proc. 1895, § 2320, providing that any person interested may contest such proceedings.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 534.]

##### 2. SAME—MINORS—APPEARANCE—GUARDIAN AD LITEM—STATUTES.

Code Civ. Proc. 1895, § 574, relating to the subject of parties to civil actions, provides how and when a guardian ad litem may be appointed for an infant party and section 2025, relating to "special proceedings of a civil nature," declares that at or before the hearing of petitions and contests of the probate of wills, etc., the court may, in its discretion, appoint some competent attorney to represent minor heirs, etc., having no general guardian in the county. *Held*, that the application of section 2025 to probate proceedings was exclusive so that there was no authority for the appearance of a minor by a guardian ad litem in opposition to the probate of a will.

##### 3. EXECUTORS AND ADMINISTRATORS—SPECIAL ADMINISTRATOR—APPOINTMENT—PERSONS ENTITLED.

On an application for the appointment of a special administrator pending contest of a will, the appointment of the public administrator over the protest of testatrix's widow, who was testatrix's legatee, devisee, and executrix, was a violation of Code Civ. Proc. 1895, § 2502, declaring that in case of the appointment of a special administrator, the court shall give preference to the person entitled to letters testamentary or of administration.

##### 4. COURTS—JURISDICTION—SPECIAL ADMINISTRATOR—APPOINTMENT—WAIVER OF OBJECTIONS.

Where a court had no jurisdiction to appoint any one to the office of special administrator of a testator's estate, the fact that testator's widow asked that she be appointed did not estop her to object to the appointment of another.

Application by the state, on the relation of Mary A. Eakins, against the Second judicial district court, department 3, and Michael Donlon, judge thereof, to review an order. Order annulled.

W. A. Pennington and J. H. Duffy, for relatrix. Jas. E. Healy and M. F. Canning, for respondents.

**HOLLOWAY, J.** On January 31, 1906, John Eakins died in Silver Bow county, leaving an estate therein and leaving a will by the terms of which Mary A. Eakins, this relatrix, is named, as wife of decedent, as legatee and devisee in the will and as executrix of the will. The other legatees and devisees are two minor sons and two adult sons of the deceased. On February 14th, the relatrix presented to the district court a petition asking for the probate of the will and her appointment as executrix. Notice of the hearing of the petition was given for February 26th, on which last-named day the public administrator of Silver Bow county, John B. O'Reilly, filed written objections to the probate of the will and asked that he be appointed administrator of the estate. Thereupon the court continued the hearing of the petition and the objections thereto by the public administrator to March 3d, on which last-named day the court again continued such hearing to March 10th, and on its own motion appointed John B. O'Reilly special administrator of the estate; but upon application to this court the last order was annulled. On March 10th the hearing of the petition and objections was again continued to March 31st. On April 9th the court, sitting as a court of probate, appointed M. C. Whitney guardian ad litem of the minor heirs, and on the same day such guardian ad litem filed written objections to the probate of the will, and prayed that a special administrator be appointed pending the hearing of the petition and objections thereto. On the same day the court made an order again appointing John B. O'Reilly special administrator of the estate. Thereupon application was made to this court to review the order appointing O'Reilly special administrator.

The only authority which a district court has for appointing a special administrator is found in section 2500 of the Code of Civil Procedure of 1895, which reads as follows: "When there is delay in granting letters testamentary or of administration, from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an executor or administrator dies, or is suspended or removed, the court or judge must appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate." Of course, the phrase "from any cause" means from any legal cause. The only cause for any delay whatever in this instance was the filing of the objections by the guardian ad litem and the court's consideration of such objections. The court appears properly to have refused to consider the objections of the public administrator after this court annulled the order appointing him special admin-

istrator. The public administrator has not any interest in an estate, which entitles him to object to the probate of a will. Section 2329, Code Civ. Proc. 1895; In re Sanborn's Estate, 98 Cal. 103, 32 Pac. 805. Confessedly, if the court had refused to consider the objections made by the guardian ad litem, there was not anything to prevent immediate consideration of the petition for the probate of the will.

Did the filing of the objections by the guardian ad litem furnish legal cause, or any cause, for delay? The provisions of law relating to the appointment of a guardian ad litem are found in section 574 of the Code of Civil Procedure. Those provisions and the provisions of section 575 are a part of title 3, part 2, of the same Code. Part 2 is entitled "Civil Actions," and title 3 thereof is entitled "Parties to Civil Actions." Probate proceedings comprise title 12 of part 3, same Code, and part 3 is entitled "Special Proceedings of a Civil Nature." Section 2925 is one section of title 12, pt. 3, above, and is as follows: "At or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate, and confirmation thereof; settlements, partitions and distributions of estate, setting apart homesteads, and all other proceedings where all the parties interested in the estate are required to be notified thereof; the court or judge may, in its or his discretion, appoint some competent attorney at law to represent in all such proceedings the devisees, legatees or heirs, or creditors of the decedent, who are minors and have no general guardian in the county, or who are nonresidents of the state; and those interested who, though they are neither such minors or nonresidents, are unrepresented. \* \* \* These provisions of this last section are special, are applicable only to probate proceedings as distinguished from civil actions or other special proceedings of a civil nature, and must be held to be exclusive. This is the conclusion reached by the Supreme Court of California and the Supreme Court of the United States. Sections 372 and 1718, of the California Code of Civil Procedure, contain the same provisions as our sections 574 and 2925 above, respectively, and, construing them, the Supreme Court of California in *Carpenter v. Superior Court*, 75 Cal. 596, 19 Pac. 174, said: "The last ground is the one upon which the counsel for respondents rely. The position is based upon the proposition that the provisions in relation to guardians ad litem in the chapter on 'parties to civil actions' apply to probate proceedings. But, in the first place, we do not think that the provisions referred to apply to probate proceedings. It has been held that for some purposes probate proceedings are not 'civil actions.' *Estate of Scott*, 15 Cal. 220; *Ex parte Smith*, 53 Cal. 204. And we do not think they are to be considered civil actions or

proceedings within the meaning of said provisions. If these general provisions were intended to apply to probate proceedings, what was the use of making special provisions in reference to the appointment of attorneys for minors in such proceedings? Is it not to be inferred that the special provisions were put in because the general ones were not intended to apply? This inference is strengthened when the provisions are considered together. The thing of which a guardian ad litem is appointed to do is to 'represent' the infant in the action or proceeding. (Code Civ. Proc. § 372), by which we understand that he is to conduct and control the proceedings on behalf of the infant. Now, the attorney for minors in probate proceedings is to 'represent' the minor (Id. § 1718), and, so far as he is concerned, to conduct and control the proceedings; so that, if the general provisions apply, it would be possible to have two representatives of the minor in the same contest, neither of whom would be subordinate to the other. We do not think such a result could have been intended."

This decision is referred to and approved by the Supreme Court of the United States in *Robinson v. Fair*, 128 U. S. 53, 9 Sup. Ct. 30, 32 L. Ed. 415, wherein it is held that section 372, of the California Code of Civil Procedure, or our own section 574 above, refers to civil actions as distinguished from probate proceedings, and that section 1718, California Code of Civil Procedure, or our own section 2925 above, controls in probate matters. We think the conclusion reached in these cases correct, and that the minors could not appear by guardian ad litem in opposition to the probate of the will.

Under this view of the matter, then, it was the duty of the district court to strike from the files the objections made by the public administrator and the so-called guardian ad litem, and proceed to hear and determine the petition for the probate of the will. If these objections had been stricken from the files or wholly disregarded, as they should have been, there was not then any legal cause, nor any causes, for delay. And if there had been any legal cause for appointing a special administrator, the court directly violated the provisions of section 2502 of the Code of Civil Procedure of 1895, in appointing the person whom it did appoint, in preference to others first entitled to such appointment. But so far as this record shows, there was not any cause whatever for the appointment of a special administrator, and, in the absence of legal cause, the district court did not have jurisdiction to make the appointment of which complaint is made. In *re Ming*, 15 Mont. 79, 38 Pac. 228. But it is said that, as this relatrix asked that she be appointed special administratrix pending the hearing of the petition for probate of the will, she cannot complain that the court appointed O'Reilly. But, if the court did not have jurisdiction

to appoint any one to such office, then nothing that this relatrix did could confer such jurisdiction. In point of law, there was not anything before the district court, except the petition for the probate of the will, and in appointing O'Reilly special administrator the district court acted without any legal cause appearing why such appointment should be made, and, therefore, exceeded its jurisdiction.

The order of the district court made April 14, 1906, appointing John B. O'Reilly special administrator of the estate of John Eakins, deceased, is annulled. Remittitur forthwith.

Order annulled.

BRANTLY, C. J., concurs.

MILBURN, J. I concur. A grand jury, commenting on probate matters in this state about 15 years ago, in its report to the court said: "Administration of estates is spoliation of estates." As it is always the property of the widow or children, or both, of the deceased person which pays the lawyers, executors, administrators, appraisers, et al., and the size of the fees in most cases is fixed by the court, frequently with extra allowances for "extraordinary services," the courts should be anxious and very careful to limit the number of lawyers and other officers to the fewest possible in number, and should not appear to insist on appointing self-seeking persons to lucrative positions. In this case there seems to me to be undue persistency on the part of citizen O'Reilly in demanding that he be allowed to serve (not merely as public administrator, even if in his public capacity he could properly appear, which, as shown in Mr. Justice HOLLO-WAY'S opinion, he may not properly do). I think that our former determination of this matter ought to have been conclusive.

The district judge, sitting in probate proceedings, is the representative of the dead person, his creditors, if any, and of the orphan, rich or poor, and of the law made for the protection of the sometimes helpless, and should, in the exercise of his solemn duty, and of his own motion, oppose all efforts of strangers to profit by the death of the head of the family or of any one else. The district court should be earnest, active, anxious, and solicitous in all matters connected with the estates of deceased persons, and in dealing with the helpless children, with the intent to save as much as possible of the assets for those to whom they belong. He should not be complacent in dealing with people who are desirous of increasing the number of aids, assistants, counsel, administrators, et al., the employment of many of whom often almost, or entirely, swamps the estate. The court also should see to it that estates are settled as soon as possible, thus avoiding expense running over too long a time.

## STATE v. TRUEMAN.

(Supreme Court of Montana. May 14, 1906.)

### 1. CRIMINAL LAW—THREATS—HEARSAY.

Where, in a prosecution for homicide, a witness testified to a threat uttered by defendant, but also stated that the reason he knew that deceased was included in the threat was because witness' neighbors had previously told him so, the evidence was incompetent as hearsay, though witness also stated that he knew defendant referred to deceased, witness and another.

### 2. WITNESSES—CROSS-EXAMINATION.

Where a witness testified that he and deceased were together on the day of the homicide, and told generally of their movements, and, on cross-examination said that he and deceased voted before they had anything to drink, it was proper cross-examination to ask him whether or not he and deceased had anything to drink that day.

### 3. SAME.

Where, in a prosecution for homicide, a witness for the state testified at length concerning the circumstances preceding and attending the homicide, and stated that deceased came up to where witness and defendant were standing and struck defendant over the shoulder with an axe handle, it was proper cross-examination to ask him whether or not he saw deceased carrying the axe handle around during the day for the purpose of showing that deceased sought the encounter and had prepared himself for it.

### 4. CRIMINAL LAW—TRIAL—CURING ERROR.

The fact that the evidence sought to be elicited by such question was in a sense cumulative did not cure the error in refusing to allow the same.

### 5. SAME—EVIDENCE—INTOXICATION—EFFECT.

Where a witness for accused testified that he saw deceased on the day of the homicide, and that the latter appeared to have been drinking, he should have been allowed to answer whether he noticed that the drinking affected deceased's conduct.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 761, 1046.]

### 6. SAME—PRIVATE COUNSEL FOR STATE—MISCONDUCT.

In a prosecution for homicide, the court compelled the state to call a hostile witness, who was examined by a private prosecutor. The witness was exasperating in his conduct toward the attorney, and was extremely impertinent in his replies, whereupon the prosecutor asked him if he was non compos mentis, and whether he knew anything at all. He also stated that the state would not vouch for his truthfulness, that the witness had unqualifiedly lied, and was a "self-deluded fool that knew nothing." The attorney also sought to get before the jury the fact that deceased had left surviving a widow and small child and after the court had stricken such evidence, immediately called the widow and again disclosed such fact and on motion to strike out consented that the answer should be stricken. *Held*, that the attorney was guilty of misconduct which constituted prejudicial error.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1061.]

### 7. SAME—FORMER JEOPARDY—EVIDENCE.

Evidence that defendant had been once tried on a plea of not guilty, that the jury failed to agree, were discharged, and that the cause was continued to the succeeding term of court was insufficient to sustain a plea of former jeopardy.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 344.]

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

Edward B. Trueman was convicted of manslaughter, and he appeals. Reversed and remanded.

Noffsinger & Folsom, McIntire & Kendall, W. G. Downing, and Jesse B. Roote, for appellant. Albert J. Galen, Atty. Gen., and E. M. Hall, Asst. Atty. Gen., for the State.

HOLLOWAY, J. Edward B. Trueman was convicted of the crime of manslaughter and appeals from the judgment, and from an order denying him a new trial. The defendant killed James McCabe on election day, November 4, 1904, near a polling place at Sedan, Flathead county. He was tried at the February term of court, 1905, but the jury failed to agree upon a verdict, was discharged and the cause continued until the May term of the same year, when it was tried a second time. Upon the second trial the defendant entered a plea of once in jeopardy in addition to his plea of not guilty, which had been interposed before the first trial. There had been a long-standing difficulty between deceased and defendant, other personal encounters between them had occurred, and each had made threats against the other.

1. A witness, Yeiser, testified to a threat made by the defendant in 1900. He testified that he was near the defendant's place; that defendant came up, with a rifle leveled at the witness, to within about 20 feet from where the witness was standing, and said: "I will get you sons-of-bitches yet." When asked how he knew that McCabe was meant, he answered: "Because my neighbors had told me previously." This was objected to upon the ground that it was hearsay, and a motion to strike it out was made. The objection was in effect overruled and the motion to strike out was denied. The testimony, so far as it related to McCabe, was clearly hearsay and inadmissible. The witness did not pretend that McCabe's name was mentioned at all by the defendant, and there is nothing in the record whatever to show that McCabe was intended to be included in the class referred to by the defendant. The mere fact that the witness said: "I know he meant James McCabe and myself and Frank Addeman," does not alter the situation, for he had testified that the reason he knew that McCabe was intended to be included was because his neighbors had told him so. The rule of law with reference to the reception of testimony of previous threats by the defendant is stated in 21 Ency. of Law (2d Ed.) 220, as follows: "The rule as generally laid down is that threats to be admissible must indicate a purpose to do some particular person an injury, or must be expressions of ill will or hate against a class of which the deceased is one, and must be capable of such construction as to show reference to the deceased."

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2. Fred. Strodtbeck, a witness for the state, testified that he and McCabe went to Sedan together on the day of the homicide, and told generally of their movements. On cross-examination he stated that he and McCabe went to Sedan and voted before they had anything to drink (meaning intoxicating liquors). On cross-examination he was asked to state whether or not they had anything to drink that day, but, on objection by counsel for the state, he was not permitted to answer. This rule was erroneous. It was proper cross-examination, for the purpose of showing whether the witness was in such a condition of sobriety as to be likely to remember what occurred, and as tending to shed light upon McCabe's action. The contention of the defendant was that McCabe was the aggressor, and was killed by Trueman in self-defense.

3. The witness Roddy, for the state, testified at great length with reference to circumstances preceding and attending the homicide; that McCabe came up to where witness and Trueman were standing, came up behind Trueman and struck him over the shoulder with an axe handle. On cross-examination he was asked to state whether or not he saw McCabe carrying that axe handle around during that day. This was objected to by counsel for the state as not proper cross-examination, and the objection was sustained. This was also error. It was not only proper cross-examination, but tended directly to sustain the defendant's contention that McCabe sought the encounter and had prepared himself for it. There is no dispute in the evidence that McCabe not only had the axe handle, but had a loaded revolver in his coat pocket, at the time he was killed. The testimony also tends to show that he had purchased this axe handle during the forenoon, some considerable time before the homicide. The mere fact that the evidence sought to be elicited by the question was in a sense cumulative does not cure the error. The jury might not have believed the other witnesses and might have believed the witness Roddy.

4. A witness, Alexander, testified for the defendant that he was a clerk of election at Sedan on the day of the homicide; that he saw McCabe, and that McCabe appeared to have been drinking. He was then asked to state whether he noticed that the drinking affected McCabe's conduct. This was objected to on the ground that it called for the conclusion of the witness. The objection was sustained, and error is predicated upon this ruling. The ruling was erroneous. In *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 442, it is said: "But without reference to any recognized rule or principle, all concede the admissibility of the opinions of nonprofessional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. These are questions

of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention." The correctness of this rule is settled beyond controversy. *People v. Sehorn*, 116 Cal. 503, 48 Pac. 495; *State v. Dolan*, 17 Wash. 499, 50 Pac. 472; 3 Wigmore on Evidence, § 1977; 17 Cyc. 91.

5. Thomas D. Long, an attorney, was employed by Mrs. McCabe, relict of James McCabe, the deceased, to assist in the prosecution, and from the record it appears that he assumed the role of leading counsel for the state and did most of the work of interrogating witnesses at the trial. During the course of the trial Mr. Long's conduct became the subject of many protests from counsel for the defendant, and it is urged that the district court abused its discretion in permitting him to continue in the case, and that his conduct was such as to prevent the defendant from having a fair trial. There may be some question as to whether these matters are properly presented in the record. This we do not determine. The matters are discussed as though properly before us, except that the attorney general contends that the objection to privately employed counsel appearing for the state should have been made before or at the time the trial commenced. The court compelled the state to call as one of its witnesses, Frank Roddy, as the only living eye-witness to the homicide except the defendant. Roddy appeared to be hostile to the state and friendly to the defendant. His testimony was very strongly in the defendant's favor. Almost as soon as he was called to the witness stand, there apparently developed a very bitter feeling of hostility between the witness and Mr. Long, who was interrogating him on behalf of the state. The witness was exasperating in his conduct towards the attorney, was extremely impertinent in his replies, and merited severe punishment by the court; but, instead of controlling the conduct of the case and requiring that the trial should be conducted in an orderly and decorous manner, the court seemingly permitted counsel and witness to violate almost every propriety of the court room with very mild rebukes, when any were administered. The court should have controlled the witness or should have punished him for contempt. But while the conduct of the witness was exasperating in the extreme, it did not furnish any provocation for the conduct of Mr. Long.

As illustrative of that conduct, it appears that soon after the witness was called to the witness stand he was asked a question to

which counsel for the defendant made an objection. Mr. Long said: "You compelled us to put this witness on." Mr. Downing, for the defendant, said: "The court compelled you." Mr. Long replied: "We don't vouch for this witness. He is yours. We don't think he can tell the truth." Later, the witness was asked a question to which he answered that he could not tell, and Mr. Long then propounded to him this question: "Q. Are you non compos mentis? Do you know anything at all?" It became a question as to which of two buildings the witness Roddy was near when the homicide was committed. He was asked a number of questions respecting this matter, and why he gave a different answer at the first trial from that given at the second. In explaining his answer he said to Mr. Long: "You told me you was positive it [referring to a particular building] was the building;" to which Mr. Long replied: "I wish to say that the witness unqualifiedly lied." In answer to one of Mr. Long's questions the witness said that at the former trial counsel had abused him, and called him a "self-deluded fool that knew nothing," to which Mr. Long replied: "And I think that." Again the witness was interrogated with reference to the two buildings mentioned before, and he repeated to Mr. Long that Mr. Long had told him that he was positive one building was the particular one near which Roddy was standing, to which Mr. Long replied: "I told you once this morning what I thought of you, and tell you now that you unqualifiedly lie."

On behalf of the state Mr. Long sought to get before the jury the fact that the deceased had left surviving him a wife and a small child. He proved this fact, over the objection of the defendant, by a witness, Eugene McCabe; but afterwards, on motion of counsel for the defendant, the court struck out all testimony relating to the family of the deceased. Thereupon Mr. Long immediately called Mrs. James McCabe as a witness, asked her a few questions relating to wholly immaterial matters, and, by questions evidently asked for that purpose, again got before the jury the fact that the deceased had left surviving him a wife and a baby. Upon objection by counsel for the defendant and on motion, this testimony was stricken out; Mr. Long consenting that the answer to the last question he had asked should be stricken out. Misconduct of a prosecuting officer of the character shown above has quite uniformly been held sufficient to require a reversal of a judgment of conviction in the comparatively few instances where such misconduct has been manifested. It is the duty of the prosecuting officer to see that the defendant has a fair trial, and that he is convicted, if at all, only upon competent evidence, and to this end it is peculiarly incumbent upon the prosecuting officer to be fair and impartial. 12 Cyc. 571. It is highly improper for him to ask questions which he knows, or has

reason to believe, the court will not permit to be answered; and when the court has indicated its decision by a ruling, counsel should respect it. In *State v. Rogers*, 31 Mont. 1, 77 Pac. 293, this court reversed a judgment of conviction, because the county attorney asked a witness for the defendant certain improper questions which tended to degrade and discredit the witness. If the prosecuting officer did not wish the witness' statements to go unchallenged, he might have become a witness, and in a proper manner have denied them; but his abuse of the witness while acting as prosecuting officer was so extreme that it cannot be justified, and, when properly presented, such misconduct will always work a reversal of a judgment of conviction. 12 Cyc. 576, and cases cited. "It is the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue." Code Civ. Proc. § 3402. While these acts of misconduct did not pass wholly unnoticed by the court, they were not treated as they should have been, and the very leniency of the court might have been misunderstood by the jury to defendant's prejudice.

Error is predicated upon the refusal or failure of the court to require the jury to return a verdict upon the defendant's plea of former jeopardy. But we do not think this was error of which the defendant can complain. Had the court submitted the question to the jury for a verdict, it would have been compelled to instruct the jury to return such verdict in favor of the state upon that issue under the decision of this court in *State v. Keerl*, 85 Pac. 802, decided February 19 of this year, and opinion on motion for rehearing, filed April 30, 1906.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and MILBURN, J., concur.

#### BARTELS v. DAVIS et al.

(Supreme Court of Montana. June 22, 1906.)

##### 1. CONTRACTS—SEPARATE INSTRUMENTS—CONSTRUCTION.

Where a note, deed, and defeasance were all executed at the same time, had reference to the same subject-matter, and were a part of the same transaction, the deed being intended as a mortgage to secure the note, the three instruments should be construed as one instrument, as provided by Civ. Code, § 2207.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 746-748; vol. 35, Cent. Dig. Mortgages, §§ 214, 215.]

##### 2. MORTGAGES—DEFEASANCE AGREEMENT—OBLIGATION OF MORTGAGEE.

Defendants executed a note, binding themselves to pay plaintiff \$300, with interest, on

or before November 14, 1903. Defendants also executed a deed to plaintiff to secure the note, and plaintiff executed a defeasance agreement reciting that, one of the defendants desiring to sell from time to time "during the life of this agreement" certain portions of the property conveyed, plaintiff would convey to any purchaser so obtained on receipt of \$50 per lot, to be applied on the note. *Held*, that the phrase "during the life of this agreement" was limited to the time prior to the mortgagors' default in paying the note secured by the deed at maturity, and that plaintiff was not bound after such default either to accept less than the full amount due on the note or to convey a portion of the mortgaged property.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

Action by E. J. Bartels against Vernie A. Davis and another. From a judgment for plaintiff, defendants appeal. Affirmed.

McBride & McBride, for appellants. Peter Breen and Jeremiah J. Lynch, for respondent.

HOLLOWAY, J. On May 14, 1903, Vernie A. Davis and Sewell W. Davis executed and delivered to E. J. Bartels their promissory note for \$300, due six months after date, with interest at 2 per cent. per month, and to secure the payment of said principal and interest at the same time executed and delivered to Bartels a deed, absolute on its face, conveying to him a large number of city lots located in the city of Butte. Contemporaneously with the execution of the note and deed there was executed by Bartels and Vernie A. Davis a defeasance agreement which refers to the note and deed, declares that the deed was intended only as security for the payment of the \$300 and interest represented by the note, and then contains these recitals: "Whereas, the said Vernie A. Davis desires the right to sell from time to time during the life of this agreement, such portions of said property as she may be able to find a purchaser for, it is agreed, by and between the parties hereto, that upon the said Vernie A. Davis finding a purchaser for any one or more of the said lots hereinabove described, that the said first party will make, execute and deliver to the purchaser thereof, a proper conveyance, transferring said lot to said purchaser, upon the said Vernie A. Davis paying to the said E. J. Bartels, for each lot so sold the sum of fifty (\$50.00) dollars, the said amount paid to apply upon the note hereinabove referred to. It is further expressly understood and agreed, that in the event of the said Vernie A. Davis paying or causing to be paid to the said E. J. Bartels, the amount of the said note, principal and interest, that thereupon the said E. J. Bartels will reconvey to the said Vernie A. Davis, or to the party named in writing by her, all of the real property hereinabove described, which shall not at said time have been sold under the terms of this contract hereinabove contained." On November 25, 1903, Bartels commenced this action to foreclose the mortgage, alleging

that the deed was intended to be and was in fact a mortgage, and that no part of the principal or interest represented by the note had been paid. The complaint is in the usual form. The defendants answered admitting the due execution and delivery of the note and deed; that the deed was understood to be a mortgage, and that no part of the principal or interest represented by the note and secured by the mortgage had been paid. The answer contains a denial that there is anything due to the plaintiff from the defendants or either of them, and a general denial of all the allegations of the complaint not specifically admitted or denied. The answer then sets forth as an affirmative defense the facts that the defeasance agreement was executed as herein set forth; that on November 15, 1903, a purchaser was procured for two of the lots described in the deed; that thereupon \$100 was tendered to Bartels and demand was made upon him that he execute to such purchaser a deed for said lots; that Bartels refused to do so and claimed that he (Bartels) was the owner of the lots; and that by reason of Bartels' refusal to accept such tender and convey said lots and otherwise comply with the terms of such defeasance agreement, the defendant Vernie A. Davis suffered damages in the sum of \$1,000. The prayer of the answer is that Vernie A. Davis be decreed to be the owner of the lots described in the deed and entitled to a conveyance thereof from Bartels, that she recover judgment against him for \$1,000, and that he be adjudged not entitled to recover any sum of money whatever from either of the defendants. Plaintiff thereupon moved for judgment on the pleadings, upon the ground that the answer is frivolous, that it does not contain any denial of any material allegation of the complaint; and that it does not state facts sufficient to constitute a defense or counterclaim. This motion was sustained and judgment entered on the pleadings in accordance with the prayer of the complaint. From that judgment the defendants appealed.

In that portion of the defeasance quoted above, appears this language: "Whereas, the said Vernie A. Davis desires the right to sell from time to time during the life of this agreement," etc. The only question propounded for our solution is: What does the phrase "during the life of this agreement" mean? Appellants earnestly contend that the life of the agreement extended over a period of eight years—the period fixed by the statute of limitations for the enforcement of the contract by plaintiff—or until the agreement was extinguished by payment of the debt or was merged in a judgment. The note, deed, and defeasance all relate to the same matter and are to be taken and construed together. Civ. Code, § 2207. It is not contended that the defeasance agreement had the effect of extending the time

for the maturity of the note. It is conceded that the note matured on November 14, 1903. The note, deed, and defeasance all refer to the same subject-matter, and, in contemplation of law, constitute one agreement. *Cornish v. Woolverton et al.*, 32 Mont. 456, 81 Pac. 4; 7 Cyc. 582, and cases cited. This is likewise conceded by appellants in their brief. This being so, the appellants, by their contention, place themselves in this somewhat awkward situation. In effect they say to Bartels: "We confess that we violated the terms of this agreement by our failure to pay the note on or before its maturity, but, notwithstanding our breach, we insist that you shall scrupulously keep or perform the agreement in all things by you to be kept or performed." It is elementary that upon the maturity of the note, Bartels had an absolute right to demand payment of the debt in full, and it would be altogether absurd to say at the same time, that he could be legally compelled to accept a part only. The one thing which the appellants bound themselves to do by this contract was to pay Bartels \$300 with interest on or before November 14, 1903, and with respect to this they wholly failed to keep their agreement. The term or duration of the contract, so far as the Davises were concerned at least, was fixed at six months, or to and including November 14th. In view of these considerations, and in the absence of anything to indicate a contrary purpose, we hold that when the phrase "during the life of this agreement" was used, it was intended to designate the duration of the agreement, that is, the period of time during which the appellants, without having breached the contract themselves, might rightfully demand performance of its terms by the other party to it. Bartels was not bound to accept a partial payment of the debt after the maturity of the note, and the duty imposed upon him to execute the deed for the lots being conditioned upon the payment to him of \$50 for each lot so sold, there was, therefore, no obligation whatever resting upon him to execute the deed for the two lots on November 15, 1903, after the debt had matured and the time had arrived when he could rightfully demand payment in full. It goes without saying that the provision for payment to Bartels of \$50 for each lot sold as a condition precedent to his making a deed, means payment at such time and under such circumstances that he was legally bound to accept it. As he was not under obligation to accept a partial payment after the maturity of the note, he did not violate any legal right of the appellants in refusing acceptance and refusing to execute the deed, and therefore his refusal could not give rise to any claim for damages.

What is here said is to be understood only in view of the matters disclosed by this record. Whether the tender made before suit was brought, if kept good, would have operated to stop the interest on the \$100,

need not be considered. The answer does not allege that the tender was kept good. The denial that there was anything due to the plaintiff at the time of the commencement of this action is the denial of a mere conclusion of law, and does not raise any issue. Neither was the general denial in the answer of any effect, for the answer admits all the material allegations of the complaint.

We are of the opinion that the answer did not state any defense or counterclaim, and that the court properly rendered judgment on the pleadings. The judgment is affirmed.

Affirmed.

BRANTLY, C. J., concurs.

MILBURN, J., not having heard the argument, takes no part in the foregoing opinion.

#### DONOVAN-McCORMICK CO. v. SPARR.

(Supreme Court of Montana. May 14, 1906.)

##### 1. MONEY PAID — INSTRUCTION — REQUEST BY DEFENDANT.

An instruction that, if plaintiff purchased shares of stock for defendant and others and held it in trust for them, defendant is bound to pay his proportion of the price, is erroneous, since a request by him is essential to his liability.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Money Paid, § 10.]

##### 2. APPEAL — REVIEW — PRESUMPTIONS — INSTRUCTIONS.

Where the evidence does not appear in the record on appeal, instructions, to be ground for reversal, must have been erroneous under any possible state of facts appearing at the trial.

##### 3. MONEY PAID—ISSUES—APPLICABILITY TO PLEADING.

Where the complaint alleges that a corporation purchased stock for defendant at his instance and request, and that he agreed to pay for it, to which the defendant entered a general denial, the submission of the question whether it was purchased for the corporation does not present a new issue, since the defendant might have presented evidence to show that the corporation purchased the stock for its own use.

##### 4. TRIAL—INSTRUCTIONS—BURDEN OF PROOF.

Where the complaint alleges that plaintiff purchased stock for defendant, an instruction placing on plaintiff the burden of proving that it did not purchase the stock for its own use, though requiring proof of a negative, was not prejudicial to plaintiff.

##### 5. APPEAL — HARMLESS ERROR — CONFLICTING INSTRUCTIONS.

Conflicting instructions are not ground for reversal, where the incorrect instruction is favorable to the appellant.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

Action by the Donovan-McCormick Company against Charles W. Sparr. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Walsh & Newman and Wm. M. Johnston, for appellant. O. F. Goddard and T. J. Walsh, for respondent.

HOLLOWAY, J. The Donovan-McCormick Company brought this action to recover from the defendant Sparr the sum of \$5,049.31, alleged to have been expended by the company for the use and benefit of Sparr and at his special instance and request. The complaint alleges that T. C. Power, Paul McCormick, A. C. Johnson, and defendant Sparr purchased 200 shares of the capital stock of the plaintiff company from W. H. Donovan for \$20,197.23; that such stock was transferred to Paul McCormick, trustee, to be held for the parties named, in the following proportions: Power, 56¼ shares; McCormick, 56¼ shares; Johnson, 37½ shares; and Sparr, 50 shares; that this stock was paid for by the plaintiff company at the special instance and request of the above-named parties; that defendant Sparr's proportion of the purchase price was \$5,049.31, which he agreed to repay to the plaintiff, but failed and refused to do so. The answer admits that the plaintiff company paid for the stock mentioned the sum of \$20,197.23, but denies every other material allegation of the complaint. The trial of the case resulted in a verdict and judgment in favor of the defendant, from which judgment the plaintiff appeals.

The record consists of the judgment roll, without any bill of exceptions, and, of course, does not present any of the evidence. The errors assigned are the refusal of the court to give plaintiff's requested instruction No. 7, and the giving of instructions Nos. 6, 7, 8, 9, 10, and 11. Plaintiff's requested instruction No. 7, which was refused, is as follows: "You are further instructed that if you believe from the evidence that the said 200 shares of stock were purchased for the said A. C. Johnson, T. C. Power, Paul McCormick, and the defendant, C. W. Sparr, and held in trust by the said McCormick for the said parties, that the defendant is bound to pay his proportion of the said sum of \$20,197.23, which he admits that the plaintiff paid for said stock." If we assume that the particular 50 shares of stock were purchased for Sparr and that McCormick holds them in trust for him, still the showing of these facts alone would be wholly insufficient to charge Sparr with their purchase price. They may have been purchased for him without his knowledge or consent. He may never have requested that they be purchased for him, and he may never have agreed to pay for them. Any controversy over this subject, however, is set at rest by the recent decision of this court in *Smith v. Perham*, 33 Mont. —, 83 Pac. 492. In that case the court instructed the jury that, if the plaintiff delivered the goods to defendant and defendant received them, he must pay for them. The giving of this instruction caused a reversal of the judgment. Among other things, this court said: "It is elementary that before a plaintiff can prevail he must put the defendant in the wrong. \* \* \* In order to charge the defendant, the complaint must set forth an express con-

tract, or a request, expressed or implied, on the part of the defendant for the goods, or the delivery of the goods by the plaintiff and a promise, expressed or implied, on the part of the defendant to pay therefor.

\* \* \* The mere delivery of goods by one person to another is not of itself sufficient to create a liability for their value. The delivery to and an acceptance by the intended purchaser must have occurred under such circumstances that the law will imply a promise to pay for them. One may not make himself the creditor of another by officiously delivering to such other person goods of whatever character." In 2 Greenleaf on Evidence (16th Ed.) § 107, it is said: "In actions upon the common counts for goods sold, work and materials furnished, money lent, and money paid, a request by the defendant is material to be proved; for ordinarily no man can make himself the creditor of another by any act of his own, unsolicited and purely officious." In *Boyer v. Richardson*, 52 Neb. 156, 71 N. W. 981, the same rule is announced as follows: "It is elementary law that in order to recover money paid to the use of another, where the party paying was under no obligation so to do, the payment must have been moved by a previous request from the party to whose use the money was paid. In some cases a previous request will be implied, as where the money was obtained by duress either of a person or property, or by deceit, or where there has been a subsequent express promise to repay the money, as was the case in *Stult v. Sweesy*, 48 Neb. 767, 67 N. W. 748. But where the payment is entirely voluntary—where there is no subsequent promise to repay—a previous request must be proved." In considering this same question, though presented by the pleadings, the Supreme Court of California, in *Curtis v. Parks*, 55 Cal. 106, said: "The complaint failing to show any agreement or understanding by which the plaintiffs were authorized to pay the defendant's part, or any promise by the latter to repay, it fails to show any right in plaintiffs to recover what must be regarded, as the case is presented by the complaint, as a voluntary payment. No man can be a debtor for money paid, unless it was paid at his request." The court properly refused this requested instruction.

2. While errors are predicated upon the giving of instructions 6, 7, 8, 10, and 11, these instructions are all considered together, and Nos. 6 and 7 fully present all questions argued. They are as follows:

"(6) The question for your determination in this case is as to whether the plaintiff company, at the time of the transfer of the 200 shares of its capital stock from W. H. Donovan to Paul McCormick, trustee, paid what it did pay for the same because it had purchased said stock to be held as its own or like treasury stock, and to be disposed of as its board of directors should order, or whether the stock was purchased by the de-

fendant, Sparr, and the other stockholders in the proportion of their then holdings; each being entitled to dispose of his own share as he saw fit, the plaintiff corporation paying for the same at the request of the purchasers and for their accommodation.

"(7) The burden of proof is on the plaintiff to show that it did not buy or own the Donovan stock, and that when it paid for the same it was not paying its own obligation or indebtedness, but advanced the money as an accommodation to the defendants Power, McCormick, and Johnson, who were purchasers of the same; and the plaintiff must satisfy you by a preponderance of the evidence that it did not buy said stock, but simply advanced to the persons last named, at their request, the money to buy the same; and if you believe the weight of the evidence is against the contention of the plaintiff in that regard, or if you believe the evidence in respect to the matter to be evenly balanced, or if you are unable to say from the evidence what the truth of the matter is, your verdict should be for the defendant."

In *State v. Mason*, 24 Mont. 340, 61 Pac. 861, this court, speaking through Mr. Justice Word, quoted with approval, and specifically adopted, the rule announced in *People v. Levison*, 16 Cal. 98, 76 Am. Dec. 505, as follows: "It is true, there is no statement in this case. But, when the instructions are erroneous under any and every state of facts, then this court will review them. For it follows as necessarily in such a case that the court erred to the prejudice of the defendant, when there is no statement, as when one exists. If, however, the instructions may be correct under any supposed state of facts, as the appellant must show affirmative error, we presume in favor of the judgment below, and will not reverse the judgment when no statement appears." In 1 *Blashfield on Instructions to Juries*, § 375, it is said: "So, where the instructions would be correct under a possible state of facts, and the evidence is not all before the court, it will be presumed that the evidence was such as to justify the giving of the instructions. This presumption is rebutted, however, where the record purports to contain all the evidence, or where it is apparent that the instructions would be improper under any possible state of the evidence under the pleadings." In order, then, to reverse this judgment, we are required to say that these instructions given would have been erroneous under any possible state of facts appearing at the trial of the case. The argument of counsel for appellant is that these instructions introduced into the case an issue not raised by the pleadings, imposed upon the plaintiff the burden of proving such issue, and required the plaintiff to prove a negative. To what extent, if any, instructions may properly be given with respect to matters not strictly within the issues made by the pleadings, need not be considered.

We do not think any new issue was introduced by these instructions. Every reasonable presumption will be indulged in favor of the action of the trial court, and, in the absence of the evidence, it will be presumed that the instructions were warranted by the interpretation of the pleadings acted upon by the parties, and by the evidence in the case, unless the contrary appears. The complaint alleges that these 50 shares of stock were purchased for Sparr at his special instance and request, and that he agreed to pay for them. The question whether the shares were purchased for the plaintiff did not present a new issue, for, under his general denial, Sparr might have presented evidence to show that the plaintiff had purchased the shares of stock for its own use and benefit and not for him. In *Wiedeman v. Hedges*, 63 Neb. 103, 88 N. W. 170, it is said: "If suit is brought against A. for goods alleged to have been sold him, it would seem that the facts necessary to be established under the petition, before a recovery could be had, could hardly be more directly controverted than by evidence establishing the fact that the contract was made with, and the goods sold to, B., and all such testimony is admissible under a general denial." So, likewise, in actions in replevin and conversion, it has been held by this court that, where the plaintiff alleges ownership in himself, the defendant under a general denial may show that he is the owner of the property, or that it belongs to a third person. *Staubach v. Rexford*, 2 Mont. 565; *Gallick v. Bordeaux*, 22 Mont. 470, 56 Pac. 961; *Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884. If, then, when A. alleges ownership in himself, and, under a general denial, B. may show that he is the owner of the property, the converse of this would certainly be equally true, namely, if A. alleges that B. is the owner, as in the case under consideration, then, under the general denial, B. may show that in fact A. is such owner. *Pomeroy's Code Remedies*, § 558. These instructions would seem to indicate that the trial court understood that the theory of the defendant was that the shares of stock had been purchased by the plaintiff for its own use and benefit, and not for Sparr's account. And, if that was the position assumed by the defendant, the trial court might properly have said to the jury: "The plaintiff contends that the shares of stock were purchased for the defendant at his instance and request; the defendant contends that they were purchased for the use and benefit of the plaintiff, and not for him. It is for you to determine from the evidence which, if either, of these contentions is correct"—and this is just what the court did do, in effect, by instruction No. 6. If the theory of the defendant was that the shares of stock were purchased by the plaintiff for its own use, then instructions Nos. 8, 10, and 11 were proper, for the court has no right to ignore the theory of either

party in its instructions. 11 Ency. Pleading & Practice, 190, note and cases cited.

It is also argued that instruction No. 7 imposes upon the plaintiff the burden of proving a negative; that is, that the plaintiff did not purchase the shares of stock for its own use and benefit. While this manner of presenting a question in controversy to the jury is not to be commended, we cannot say, in the absence of the evidence, that the instruction is erroneous. Confessedly, the burden was upon the plaintiff to show that the shares of stock were purchased for Sparr, and that Sparr either requested that they be purchased for him, or, knowing that they had been purchased for his use, agreed to pay for them. *Smith v. Perham*, above. If instruction No. 7 does not impose upon the plaintiff any additional burden, it cannot complain. The contention of plaintiff was that the shares had been purchased for Sparr at his special instance and request, and that, when plaintiff paid for the shares, it was merely advancing the money for Sparr's accommodation, and that Sparr agreed to repay the amount advanced on his account. The instruction told the jury that, if they believed the weight of the evidence was against the contention of the plaintiff, or if the evidence in respect of the matter was evenly balanced, or if they were unable to say from the evidence what the truth of the matter was, their verdict should be for the defendant—and that portion of it is certainly correct. Furthermore, it must be presumed that the evidence showed one of two things, that the shares were purchased for Sparr or for the plaintiff, and plaintiff could prove its contention by showing that they were purchased for Sparr, or by showing that they were not purchased for itself; for, if there were but two alternatives presented, then proof of either disproved the other, and, if proving that the stock was purchased for the defendant was sufficient to show that it was not purchased for the plaintiff, then there is nothing in this record to indicate that the burden imposed upon the plaintiff by the first portion of instruction No. 7 was any greater than that which would have been imposed had the instruction told the jury that the burden was upon the plaintiff to show by a preponderance of the evidence that the stock was actually purchased for Sparr. This instruction may be clearly erroneous under section 3145 of the Code of Civil Procedure, but, in the absence of the evidence, we must presume that it was warranted by the facts appearing at the trial.

It is said that instructions 9 and 14, given, are conflicting, and they appear to be so. No. 9 told the jury that the plaintiff must prove that the shares were purchased for Sparr at his request. No. 14 announces the rule that, where one person pays money for the use of another, the law raises an implied promise, on the part of the person for whom the money was paid, to repay the same.

Instruction No. 9 correctly states the law as determined in *Smith v. Perham*, above, while No. 14 is erroneous, but in plaintiff's favor, as it only imposed upon the plaintiff the burden of showing that it had paid for the stock for Sparr's use and benefit, and relieved it of the burden of showing any request on Sparr's part in the first instance, or promise to pay in the second. But the fact that these instructions are conflicting does not require a reversal of the judgment. In *State v. Jones*, 32 Mont. 442, 80 Pac. 1095, this court said: "It is not every case of conflicting instructions which warrants a reversal. If one instruction states the law, and another one in conflict with it is given, which is erroneous, but in the defendant's favor, he cannot complain of the erroneous instruction, or of the conflict between the two"—and numerous authorities are cited in support of the rule. And there is reason for the rule. If the jury in this case followed the directions of instruction No. 9, the plaintiff cannot complain, because that instruction correctly states the law. If, on the other hand, the jury followed instruction No. 14, the plaintiff cannot complain, for, if the jury could have been misled by that instruction, it could only have been misled in the plaintiff's favor.

The judgment is affirmed.  
Affirmed.

BRANTLY, C. J., concurs. MILBURN, J., not having heard the argument, takes no part in the foregoing decision.

(34 Mont. 268.)

**PALATINE INS. CO., LIMITED, OF MANCHESTER, ENGLAND, v. NORTHERN PAC. RY. CO.**

(Supreme Court of Montana. June 4, 1906.)

**1. STATUTES—PASSAGE OF BILLS—ENTRY OF AYES AND NAYS.**

Under the direct provisions of Const. art. 5, § 24, Act March 11, 1901 (Laws 1901, p. 157), did not become a law; "the names of those voting" not having been "entered on the journal," as required by such section.

**2. SAME—EVIDENCE.**

The courts may look into the journals of either house to determine whether a bill, valid on its face, properly signed by the presiding officers and the Governor, and deposited with the Secretary of State, was in fact passed in accordance with Const. art. 5, § 24, providing that no bill shall become a law except by a majority vote of the members present, nor unless the vote be taken by ayes and nays, and the names of those voting be entered on the journal.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 384, 385.]

**3. SAME—AMENDMENT—EFFECT.**

Const. art. 5, § 23, provides that no bill shall be amended by reference to its title only. Pol. Code, 1895, § 5186, declares certain acts of the Legislature of 1893, referring to them by title, to be in full force and effect. *Held*, that such acts were not amendments to the Code, falling within the constitutional provision, but the law of the land, recognized by the Legislature as such when the Code was adopted, and

hence Act March 9, 1893 (Code Civ. Proc. 1895, § 524), relating to limitations for injuries to chattels, and included in section 5186, is not invalid as not passed in accordance with the requirements of the Constitution.

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

Action by the Palatine Insurance Company, Limited, of Manchester, England, against the Northern Pacific Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

R. R. Purcell and W. T. Pigott, for appellant. Wm. Wallace and Chas. Donnelly, for respondent.

MILBURN, J. This is an action arising out of a tort alleged to have been committed by the defendant, a foreign corporation, on January 21, 1901, at the county of Jefferson. Certain buildings, of the value of \$500, owned by one Scharf, on which he held a policy of insurance issued by the plaintiff company for that sum, were burned by the defendant. Plaintiff paid the amount of the insurance to Scharf and took an assignment of his right of action against the defendant. Defendant refused to pay, and plaintiff sued for the \$500. Among other things, the defendant railway company pleads the statute of limitations: First, in that the action was not commenced within the time limited by section 524 of the Code of Civil Procedure and was therefore barred; secondly, that House Bill No. 75, being entitled "An act entitled an act," etc., was never constitutionally enacted, and therefore never became a law of the state of Montana, for that the same was never in fact passed by a majority vote of all the members of the Senate or by a vote of any members of the Senate, and that an aye and nay vote was never taken in the Senate, and that there was not any name of any member of the Senate, voting for or alleged to have voted on the final passage of said bill, ever entered on the journal of the Senate, and that the journal of the Senate affirmatively shows that said bill was never voted on at all before final passage; and, thirdly, that the action was not commenced within a reasonable time after March 9, 1903, the date of approval of the act of the Eighth legislative assembly, entitled "an act to amend sections 513, 514 and 524 of the Code of Civil Procedure, and to repeal an act approved March 11, 1901 (being House Bill No. 75), relating to limitations of actions," and that said cause of action is barred by the provisions of section 524 of the Code of Civil Procedure as amended by said act approved March 9, 1903 (Laws 1903, p. 292), and particularly by the provisions of subdivisions 3 of section 524 as amended by the last-named act. As stated in the brief of appellant, the questions involved are: (1) May the journals of the Assembly ever be resorted to for the purpose of showing that an enrolled bill, signed by the presiding officers, perfect on its face,

approved by the Governor, and duly deposited with the Secretary of State, was not legally enacted? (2) If the journals may be so examined, then was the bill never a law because of the omission in the journal of an entry showing that a vote was had, and the names of the members voting upon the bill? And (3) if such an enrolled bill be such conclusive evidence of its regular enactment, the act of March 11, 1901 (Laws 1901, p. 157), was valid, and the next question is, was the remedy barred by the provisions of subdivision 3 of section 524 of the Code of Civil Procedure, or of subdivision 3 of the section as amended by the act of March 9, 1903?

The first question we shall consider is, is the act of 1901 void? Section 24, art. 5 of our Constitution reads as follows: "No bill shall become a law except by a vote of a majority of all the members present in each house, nor unless, on its final passage, the vote be taken by ayes and nays, and the names of those voting be entered on the journal." Exhibit A, attached to the answer, is a copy of the journal minutes of the Senate pertaining to the matter of the bill of 1901. It affirmatively appears from an examination of the minutes, which it is admitted are a correct transcript, that there is not any record in the minutes of "the names of those voting." They were never entered. It does not appear from these minutes that the bill was ever passed by the Senate at all. On the contrary, it appears that it was not. The Constitution is the supreme law of this state, if not in contravention of the Constitution of the United States or of valid federal laws or treaties. It is supreme in this case and must be followed and adhered to by this court. The Constitution says: "No bill shall become a law," unless, among other things, "the names of those voting be entered on the journal." It follows logically that the bill did not become a law. There is no escape that we can see from this conclusion. The courts of the Union are hopelessly divided upon the question as to whether or not the minutes—that is, the journal—of either house of a Legislature may be looked into to determine whether or not a bill, valid on its face, signed by each presiding officer, approved by the Governor and signed by him and deposited with the Secretary of State in his office, and therefore *prima facie* valid, shall be recognized as a law by the courts, although the journals may show that no such bill was in fact ever passed by the Legislature or either house thereof. The provision of the Constitution to which we refer, in our opinion would be absurd and useless if evidence may not be taken to determine whether or not the will of the people, as expressed in the Constitution, has been obeyed by their servants, the legislators. The journal imports verity. The journal of the Senate here shows that the bill was indefinitely postponed. It also affirmatively shows that the command of the Con-

stitution, to wit, that the names of those voting should be entered, was not obeyed. We must look to the journal, which in this case is admitted to be correct, and we declare that this bill of 1901 never became a law, for that the names of those voting were not entered on the journal of the Senate. *Durfee v. Harper*, 22 Mont. 354, 56 Pac. 582. For the authorities pro and con on the question whether or not the journal may be considered, see *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, and cases cited in the briefs there set out at length by the reporter, and footnotes referring to each state in the Union. So far as anything in the opinion in *State v. Long*, 21 Mont. 26, 52 Pac. 645, conflicts with the views herein expressed, what is held in that case is now reversed.

It is not necessary now to consider the act of 1903 referred to, for the reason that the act of 1901, which the act of 1903 attempted to repeal, and the amendment (by the act of 1903), of section 524, subsec. 3, not altering the provision of subsection 3 of the act of 1893 in any wise, the limitation stood as in 1893; the amendment of 1903 (subsection 3) being merely cumulative, if of any effect at all. This brings us to a consideration of section 42 of the Code of Civil Procedure of 1887 (Comp. St. 1887, div. 1, p. 69), as amended by Sess. Laws 1893, p. 50, being now section 524 of the Code of Civil Procedure of 1895. This section 524 is the act of March 9, 1893, "brought forward" (*Penwell v. County Commissioners*, 23 Mont. 357, 59 Pac. 167), or "continued in operation" (*Chowen v. Phelps et al.*, 26 Mont. 531, 69 Pac. 54), or "continued in force" (*City of Helena v. Rogan et al.*, 27 Mont. 137, 69 Pac. 709), or "retained by section 5186, Political Code" (*In re O'Brien*, 29 Mont. 540, 75 Pac. 196). Subsection 3 is the same in section 42, Comp. St. 1887, in the act of 1893, and in section 524 of the Code of 1895, and the same language is used in it in fixing the limitation as two years in "an action for taking, detaining, or injuring any goods or chattels. \* \* \* There is not any point made in this case that possibly the property destroyed by the fire was real estate. It is considered personal property in the pleadings and in the briefs.

The point is made by appellant that section 524 of the Code of Civil Procedure of 1895 is, if anything, an amendment of the act of 1893, and is void and of no effect, for that it was not enacted in accordance with section 25 of article 5 of the Constitution, which provides: "No law shall be revised or amended, or the provisions thereof extended by reference to its title only, but so much thereof as is revised, amended or extended shall be re-enacted and published at length." Our opinion is that the laws passed by the Third legislative assembly—that is, of 1893—and referred to in section 5186 of the Political Code, are not amendments to the Code, but the laws of the land at the time of the passage of the Codes, recognized by the Legislature

to be such, and simply referred to as such as continuing in force, or brought forward from the Session Laws into the Codes, as suggested in the opinions from which the several phrases, such as "brought forward," "continued in operation," etc., are quoted above herein. This court has always treated them as such, and not as amendments. *Campana v. Calderhead*, 17 Mont. 549, 44 Pac. 83, 36 L. R. A. 277; *Steele v. Gilpatrick*, 18 Mont. 454, 45 Pac. 1089; *Jobb v. County of Meagher*, 20 Mont. 424, 51 Pac. 1034; *Home, etc., Ass'n v. Nolan*, 21 Mont. 208, 53 Pac. 738; *Penwell v. County Commissioners*, 23 Mont. 357, 59 Pac. 167; *King v. Pony Gold Min. Co.*, 24 Mont. 478, 62 Pac. 783; *State v. Dickinson*, 26 Mont. 393, 68 Pac. 468; *Chowen v. Phelps*, 26 Mont. 531, 69 Pac. 554; *City of Helena v. Rogan*, 27 Mont. 137, 69 Pac. 709; *In re O'Brien*, 29 Mont. 540, 75 Pac. 196.

A reply was filed admitting the allegations of the answer, except as to its conclusions of law, except, also, that it denied that the action was not brought within a reasonable time after the passage of the act of 1903. Motion for judgment on the pleadings was made by defendant, which motion was granted. Of course, the court must have held below that the act of 1901 was invalid, and that the amendment of 1903, so far as subsection 3, under consideration, is concerned, did not change the period of limitation, and that section 524 of the Code of Civil Procedure, being the act of 1893 amending section 42 of the Code of Civil Procedure of 1887, was in full force and effect, and that the period of limitation, to wit, two years, mentioned in said section 524, had run before the commencement of the action.

In this we think the court was correct. The judgment is affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

DOLAN et al. v. PASSMORE et al.

(Supreme Court of Montana. June 11, 1906.)

MINES AND MINERALS—LOCATION OF CLAIM—DECLARATORY STATEMENT.

Under Pol. Code, § 3611, providing that, within 90 days after the posting of a notice of location of a mining claim, the locator must sink a shaft on the claim to the depth of 10 feet from the lowest part of the rim of the shaft at the surface, or deeper, if necessary to show a well-defined crevice or valuable deposit, or must do the equivalent thereof, which is defined to be a cut, cross-cut, or a tunnel, which cuts a lode at the depth of 10 feet below the surface, or an open cut of at least 10 feet in length along the lode from the point where the lode may be in any manner discovered, and section 3612, requiring the filing within such 90 days of a declaratory statement, containing the dimensions and location of the discovery shaft, or its equivalent, no right is acquired by a location where the declaratory statement merely states that the locator within such 90 days dug "a tunnel at the point of discovery of the follow-

ing dimensions: About 12 feet long, 6 x 4½ cut 3 feet deep, 6 feet wide, wherein is disclosed a well-defined crevice and valuable deposit of ore"—it not showing that a vein or lode was cut at the depth of 10 feet below the surface.

Appeal from District Court, Silver Bow County; Geo M. Bourquin, Judge.

Action by John C. Dolan and another against Charles S. Passmore and another. Judgment for plaintiffs. Defendants appeal. Reversed and directed.

McBride & McBride and Jas. E. Murray, for appellants.

BRANTLY, C. J. This action was brought to recover a judgment for damages for trespass alleged to have been committed by defendants by mining and removing ores from certain mining ground situated in Silver Bow county, to which plaintiffs allege title by location as the Boston Lode Mining Claim, and by the destruction of certain buildings thereon. The defendants deny all the allegations of the complaint and allege that they are in possession and entitled to the possession as the owners of the ground, under a location made by them as the Iron Cliff Lode Mining Claim. Upon a trial by jury plaintiffs had verdict, and judgment was thereupon entered in their favor. The defendants have appealed from the judgment and an order denying them a new trial. Plaintiffs' discovery was made on January 1, 1900, and the record of it made on March 31, 1900. Defendant's location was made later in the same year.

Of a number of contentions argued in appellants' brief, only one requires notice, since it must be sustained and is conclusive of the case. Their contention presents the question: Did the court err in admitting in evidence a copy of plaintiffs' declaratory statement of location? The ground of the objection to the declaratory statement was that it does not show that within 90 days after their discovery was made the plaintiffs sunk a discovery shaft upon the vein to a depth of at least 10 feet from the lowest part of the rim of said shaft at the surface, or that they did an equivalent amount of work by means of a cut, cross-cut, or tunnel to expose the vein at the depth of 10 feet below the surface, or that they ran an open cut at least 10 feet in length along the vein from the point where it was discovered, as provided by section 3612 of the Political Code. Section 3611 of this Code provides that the locator or locators must sink a shaft on the lode or claim to the depth of at least 10 feet from the lowest part of the rim of the shaft at the surface, or deeper, if necessary to show a well-defined crevice or valuable deposit. As an equivalent, a cut or cross-cut, or tunnel cutting the lode at the depth of 10 feet below the surface, or an open cut for at least 10 feet along the lode from the point of discovery, is deemed sufficient. Under section 3612 the declaratory statement

must show the dimensions and location of the discovery shaft, or its equivalent. The evident purpose of this latter provision is that it may appear of record that the requirements of section 3611 have been complied with, and hence that the locator or locators may appear to one examining the statement to be vested with the inchoate title. It has been repeatedly held by this court, not only that the provisions of these statutes are valid, but that they are mandatory and must be substantially followed, in order that the locator may acquire any right under his location. *Purdum v. Laddin*, 23 Mont. 387, 59 Pac. 153; *Hahn v. James*, 29 Mont. 1, 73 Pac. 965; *Wilson v. Freeman*, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833; *Mares v. Dillon*, 30 Mont. 117, 75 Pac. 963; *Baker v. Butte City Water Co.*, 28 Mont. 222, 72 Pac. 617, 104 Am. St. Rep. 683. On writ of error to the Supreme Court of the United States in the last case, the validity of this statute was upheld. *Butte City Water Co. v. Baker*, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409. In *Purdum v. Laddin* it was held that the declaratory statement must contain "the location and description of each corner with the markings thereon." In *Hahn v. James* it was said: "While all the other steps prior to the record of the notice may have been taken, yet, without the record in substantial compliance with the statute, the location is of no value." So in *Wilson v. Freeman* it was held that, if the location under which title is claimed be a relocation of an abandoned claim, the requirements of section 3615 of the Political Code, both as to the acts done and the contents of the record, must be substantially observed.

As to the preliminary work done on this location, the statement contains the following: "For the purpose of perfecting the location of said claim as required by law, the undersigned have heretofore, and within ninety days after posting said notice of location, dug a tunnel at the point of discovery of the following dimensions: about 12 feet long, 6x4½ cut 3 feet deep, 6 feet wide, wherein is disclosed a well-defined crevice and valuable deposit of ore." This statement does not meet the requirements of section 3612, supra, in that it does not appear that a vein or lode was cut at the depth of 10 feet below the surface; for if, instead of sinking a shaft to the depth of 10 feet in the clear upon the vein, the equivalent work is done, it must be either by cut, cross-cut, or tunnel cutting the vein at a depth of at least 10 feet, or by an open cut at least 10 feet in length along the vein, and it must appear from the record that this has been done. A failure to observe these requirements is fatal to the location, for the record cannot be supplemented by proof of what was actually done. *Hahn v. James*, supra.

The court was in error in overruling defendants' objection, because the statement, not being in compliance with the law, was

wholly immaterial to establish plaintiffs' title, and the judgment must for that reason be reversed. Since the exclusion of this evidence would have been conclusive of plaintiffs' case, and since it cannot be aided by proof, it is not necessary to order a new trial. The result of a new trial would necessarily be a judgment in favor of defendants.

It is therefore ordered that the judgment be reversed, and that the cause be remanded, with directions to the district court to enter judgment for defendants.

Reversed and remanded.

MILBURN and HOLLOWAY, JJ., concur.

(34 Mont. 392)

BLANKENSHIP et al. v. DECKER et al.  
(Supreme Court of Montana. June 22, 1906.)

# 1. PLEADING—CAUSES OF ACTION—STATEMENT—COUNTS.

The court may in its discretion permit the same cause of action to be stated in different counts in order to meet the exigencies of the case, as provided by Code Civ. Proc. § 672.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 114.]

# 2. BROKERS—COMMISSIONS—QUANTUM MERUIT.

Though a contract for broker's services is required by Civ. Code, § 2185, to be in writing, subscribed by the party to be charged or his agent, in order to be valid, a recovery may nevertheless be had, on complete performance, on a quantum meruit.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 44, 99.]

# 3. APPEAL—RIGHT TO ALLEGE ERROR—PREJUDICE.

Where, in an action for broker's services, at the opening of the trial plaintiffs abandoned a count in their complaint based on a quantum meruit, introduced no proof in support thereof, and the instructions submitted the case on the issues raised on the count based on the written contract, defendants were not entitled to a reversal for alleged error in the overruling of a special demurrer to the count based on quantum meruit, as provided by Code Civ. Proc. § 778.

# 4. CONTRACTS—CONSTRUCTION—AMBIGUITY.

Civ. Code, § 2214, provides that, if the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it. Held that, where the actual facts and circumstances are resorted to as an aid in the construction of a written contract, the promisor is only bound to show by a preponderance of the evidence that the promisee understood the contract as he (the promisor) believed he understood it, and is not bound to show what the promisee in fact understood.

# 5. SAME.

While, in the absence of proof, it will be presumed that the promisor caused any ambiguity or uncertainty in the terms of a written contract as provided by Civ. Code, § 2219, when it is proved that the promisee wrote the agreement and himself selected the terms employed to express the understanding of the parties, the presumption is that he caused the uncertainty, and the burden is on him to remove the same.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 736.]

# 6. EVIDENCE—PRESUMPTIONS.

Civ. Code, § 2219, declaring that, in the absence of proof, it will be presumed that the

promisor caused any ambiguity or uncertainty in the terms of a written contract, is merely declaratory of the common law.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

Action by E. V. Blankenship and others against Minnie F. Decker and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed and remanded.

Walrath & Patten, for appellants. Hartman & Hartman, for respondents.

BRANTLY, C. J. This action was brought to recover the sum of \$480, alleged to be due plaintiffs as commissions on the sale of 240 acres of agricultural land and appurtenances, situate in Gallatin county, with interest from the date of sale, under an agreement in writing dated September 28, 1903, the terms of which are in substance the following: The plaintiffs were given sole power of sale. They were to pay all expenses of examination by proposed customers and of all advertising, and to have as compensation all the selling price over the fixed minimum of \$38 per acre; the purchase money to be paid part in cash and part in deferred payments, with interest. Certain incumbrances were to be assumed by the purchaser, and in case the defendants revealed the terms of the agreement, so that a sale was defeated or delayed, or if they sold the land themselves at a lower price or on more advantageous terms than those specified, the plaintiffs were to have 5 per cent. commission. One clause of the agreement is the following: "Authority to sell said land is continued for 12 months and until specially withdrawn in writing." The complaint contains two counts. The first declares upon the written agreement, alleging that on September 28, 1903, the plaintiffs negotiated a sale at the price of \$40 per acre, whereby there became due and payable to them the sum claimed, but that the defendants wrongfully and in violation of their agreement refused to pay the same, or any portion thereof. The second declares upon a quantum meruit, alleging that the amount claimed is due as the reasonable value of the services rendered by plaintiffs in effecting the sale. A special demurrer was interposed to the complaint, the ground thereof being that two causes of action, the first upon an express agreement conferring authority to sell real estate, and the second upon a quantum meruit, were improperly united, since the services alleged in both causes of action were the same. This having been overruled, the defendants answered, admitting the execution of the agreement, but denying all other allegations of the complaint. It was then alleged affirmatively that on October 7, 1903, and while the agreement was still in force, it was by mutual agreement of the parties abandoned and a substitute modification of it made in writing, indorsed thereon, as follows: "Boze-

man, Montana, Oct. 7, 1903. This is to state that we will take \$35.00 per acre, net to us, for our farm, described above, if sold within the next 30 days, the purchaser to pay the \$300.00 interest on mtg. now on hand. If not sold in 30 days, we will not sell. We would like all cash if possible. [Signed] Minnie F. Decker." As an additional defense the defendants pleaded and relied upon subdivision 6 of section 2185 of the Civil Code, which declares that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission is invalid, unless it be in writing, subscribed by the party to be charged or his agent. The reply admits that the parties made the agreement embodied in the answer at the date named, but alleges that it was understood by the parties at the time to modify the original agreement, so as to permit a sale at a reduced price for 30 days only, and that thereafter the original agreement should revive and continue in force according to its terms for 12 months and until the authority granted should be revoked by notice in writing. The case is before us on appeal from the judgment in favor of plaintiffs and an order denying defendants' motion for a new trial.

The theory of the parties and of the court was that the language of the memorandum dated October 7th, particularly in the expression, "if not sold in 30 days, we will not sell," is ambiguous, and should be interpreted by the aid of proof of the circumstances under which it was executed and the behavior of the parties with reference to it; no question being made as to the binding character of it, though signed by Mrs. Decker alone. The questions presented for review are whether the court erred to the prejudice of the defendants in overruling the demurrer and in instructing the jury. That the court may, in its discretion, under Code Civ. Proc. § 672, permit the same cause of action to be stated in different counts in order to meet the exigencies of the case as presented by the evidence (*Manders v. Craft*, 3 Colo. App. 236, 32 Pac. 836; *Rucker v. Hall*, 105 Cal. 425, 38 Pac. 962; *Cowan v. Abbott*, 92 Cal. 100, 28 Pac. 213), counsel for defendants concede, but argue that since the cause of action herein arose out of a contract of employment to sell real estate, which must be evidenced by a writing, no recovery may be had upon a quantum meruit for the services rendered thereunder, and hence that it was error to permit the second count to stand, since it unnecessarily complicated the case and probably confused the jury upon the trial. In so far as the court held that a recovery may be had upon a quantum meruit in this character of a case, we think there was no error. The rule is well settled that though a contract, to be valid under the statute (Civ. Code, § 2185, supra), must be evidenced by a writing and subscribed by the party to be charged or his agent, the fact that it is in writing is a mat-

ter of proof and not of allegation in pleading (*Sweetland v. Barrett*, 4 Mont. 217, 1 Pac. 745; *Mayger v. Cruse*, 5 Mont. 485, 6 Pac. 833; *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201); and upon a complete performance of an express contract for services at a stipulated compensation, there seems to be no sound reason why a recovery may not be had upon a quantum meruit (*Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025; *Shepard v. Mills*, 173 Ill. 223, 50 N. E. 709; *Fells v. Vestraill*, \*41 N. Y. 152). In such case the effect of proof of the express contract is to make the stipulated compensation the quantum meruit in the case; and, the fact that must be evidenced by a writing being a matter of proof and not of pleading, the form of the pleading does not affect the merits. But, conceding that the demurrer should have been sustained, we do not think the appellants can now complain of the court's action in the premises. At the opening of the trial the plaintiffs abandoned the second count entirely and introduced no proof in support of it. The trial was had upon the issues presented by the answer to the first count only, and the instructions submitted to the jury were formulated accordingly. It is apparent, therefore, that the error, if it was error, was one for which this court may not reverse the judgment. Code Civ. Proc. § 778. Evidently the jury could not have been misled, since plaintiffs failed to introduce proof in support of this count, and the court's instructions impliedly excluded it from their consideration.

Among the instructions submitted are the following: "You are instructed that whether or not the indorsement made upon said contract on the 7th day of October, 1903, was a withdrawal of the authority of the plaintiffs to sell the land, depends upon whether the plaintiffs so understood it at the time. The defendants would not have any right to withdraw the authority given by said written contract from the plaintiffs until after 12 months from the 28th day of September, 1903, except for some cause which is not claimed here; and unless it was understood and acquiesced in by the plaintiffs that said indorsement of October 7, 1903, was a complete withdrawal of their authority to further attempt to sell the land under the contract after 30 days therefrom, such indorsement cannot have that effect. The mere desire of the defendants to withdraw the authority of the plaintiffs, granted by said contract, held or expressed at that time or any subsequent time, could not have the effect to so withdraw it, and unless there was complete acquiescence by the plaintiffs in such expressed desire on the part of the defendants (if the desire was so expressed) the contract was not affected by the indorsement." (Instruction No. 13.) "The court instructs that there is only one writing in evidence that can be considered by you as a possible

withdrawal of the authority granted the plaintiffs by the written contract to sell the land, and that is the writing indorsed thereon on October 7, 1903; and whether or not said writing had the effect to withdraw the authority of plaintiffs after 30 days depends entirely upon whether or not the plaintiffs so understood its effect. The defendants had no right to withdraw it without the consent of the plaintiffs, and it devolves upon the defendants to satisfy your minds by a fair preponderance of the proof and that plaintiffs so understood it." (Instruction No. 16.)

The complaint made of these instructions is that they advised the jury that plaintiffs' right of recovery depended upon whether they understood the indorsement of October 7, 1903, was a withdrawal of their authority, whereas the rule applicable is that laid down in section 2214 of the Civil Code, as follows: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." This criticism is just. The plaintiffs were the promisees. In the absence of proof of the attendant facts and circumstances admitted in aid of the construction of an agreement, any ambiguity or uncertainty therein must be construed most strongly against the party who caused the ambiguity or uncertainty, and the presumption is indulged that the promisor caused it. Civ. Code, § 2219. In such case the presumption is against the promisor, and the contract should be construed most strongly against him. But, when the attendant facts and circumstances are resorted to as an aid to an understanding of the agreement of the parties, no greater burden rests upon the promisor than to show by a preponderance of the evidence that the promisee understood it as he (the promisor) believed he understood it. He is not required to show by a preponderance of the evidence what the promisee in fact understood. Clearly, then, the theory of these instructions, particularly of the latter, is wrong, in that it distinctly cast upon the defendants—the promisors—the burden of showing by a preponderance of the evidence that the plaintiffs understood the agreement to mean what the defendants accepted as its true meaning. The point at issue was, not what the promisees understood, but what the promisors believed they understood—a different question from the one submitted in the instructions. The instructions refer wholly to the mental condition of the promisees, while the correct rule involves the inquiry: What did the promisors, at the time the agreement was executed, believe the promisee understood this to mean.

The defendants requested the court to submit the following instruction: "You are instructed that, when one of the parties to a contract in writing draws the contract, any ambiguity in its terms is to be construed

more strongly against the party so drawing the instrument." It is said that the refusal of this instruction was prejudicial error. While, under section 2219, *supra*, in the absence of proof, the presumption must be indulged that the promisor caused any ambiguity or uncertainty in the terms of the agreement, when the evidence permits the inference—as it does in this case—that the promisee wrote the agreement, selecting himself the terms employed therein to express the understanding of the parties, this presumption gives way to the contrary presumption, that the promisee caused the uncertainty, and the burden is upon him to remove it. If he do not, the uncertainty must be resolved against him. The instruction requested embodies the familiar principle recognized by the courts generally, of which the statute is but declaratory. *Bickford v. Kerwin*, 30 Mont. 1, 75 Pac. 518; *Gillet v. Bank of America*, 100 N. Y. 549, 55 N. E. 292; *Wilson v. Cooper* (C. C.) 95 Fed. 625; *Allen-West Com. Co. v. People's Bank* (Ark.) 84 S. W. 1041; *Hill v. John P. King Mfg. Co.* (Ga.) 3 S. E. 445; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; *Noonan v. Bradley*, 9 Wall. (U. S.) 394, 19 L. Ed. 757; *Webster v. Dwelling House Ins. Co.*, 53 Ohio St. 553, 42 N. E. 546, 30 L. R. A. 719, 53 Am. St. Rep. 658; 9 Cyc. 509. The evidence shows that at the time the memorandum was written Mrs. Decker went to the office of plaintiffs and told Davies of the change she desired made. He thereupon wrote the memorandum to express the change. He says: "I sat down and wrote this second contract, and asked Mrs. Decker to sign it. I don't think I wrote it, using her language, but to follow her wishes. I think I composed it myself, and asked her if it was all right—following her wishes. When I used the language, 'we will not sell' and 'we would like all cash if possible,' I think I was following the language, or approximately so, that she had given me." These facts, which were not disputed, warranted the submission of an instruction embodying the rule stated in the one requested, in the same connection also leaving it to the jury to determine whether, in the use of the expressions, "we will not sell" and "we would like all cash if possible," Davies used terms dictated by Mrs. Decker; for the evidence might justify the conclusion that he did. If such were the case, plaintiffs were not responsible for any uncertainty in these expressions, and were entitled to be relieved of the presumption to be otherwise indulged against them upon the theory that Davies selected these expressions.

Generally throughout the instructions the court, in referring to the memorandum of October 7th, used the term "withdrawn." While a substituted agreement would in effect have been the same as a withdrawal of the authority granted under the original agreement, the use of this term was not entirely

appropriate. The real inquiry was whether the parties intended the memorandum as a substitute for the original agreement, or as a modification of it for temporary purposes only. It was in no event an attempt to withdraw authority entirely.

We have considered this case upon the theory upon which it was tried in the district court. The question whether the terms of the agreement are in fact uncertain or ambiguous was not submitted to us, and we express no opinion thereon. For the reasons stated, the judgment and order appealed from are reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

HOLLOWAY, J., concurs. MILBURN, J., not having heard the argument, takes no part in the foregoing opinion.

(13 N. M. 459)

DYE et al. v. CRARY et al.

(Supreme Court of New Mexico. March 2, 1906.)

# 1. APPEAL—SECOND APPEAL—LAW OF CASE.

Matters of law determined upon a former appeal become the settled law of the case, are binding upon the court and the litigants, and cannot be reviewed on second appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4358-4363.]

# 2. ESTOPPEL—EVIDENCE TO ESTABLISH.

In order to establish an equitable estoppel against one asserting his title to real property, the party attempting to raise it must show either an actual fraudulent representation or concealment of such negligence as would amount to a fraud in law, and that the party setting up such estoppel was actually misled thereby to injury.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, §§ 124-153.]

# 3. MINES AND MINERALS—ASSESSMENT WORK — FAILURE TO PERFORM — REDEMPTION BY CREDITOR.

One who buys an interest in an unpatented mining claim at a void judicial sale and pays the portion of the assessment work due from the judgment debtor before the time to redeem has fully expired, taking a receipt therefor only, is not subrogated to the rights of the party seeking the forfeiture, and his payment and its acceptance prevents the forfeiture as against the judgment debtor.

Mills, C. J., and McFie, J., dissenting in part. (Syllabus by the Court.)

Appeal from District Court, Socorro County; before Justice Frank W. Parker.

Action by Benjamin H. Dye and others against H. C. Crary and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

On the 21st day of April, 1897, Benjamin H. Dye, John D. Cockrell, and Theo. W. Heman located the Compromise lode claim in the White Oaks mining district, in Lincoln county, N. M., the property in dispute in this action. Thereafter the plaintiff B. H. Dye, one of the original locators of said claim, acquired interests by deed and otherwise until he was the owner of five-sixths of said claim; the other one-sixth being the property

of the Apex Gold Mining Company, a corporation. On the 8th day of March, 1898, Jones Taliaferro commenced a suit against Dye to recover the amount due on two promissory notes for \$80 and \$32.47, and interest, respectively, in the district court of Lincoln county, by attachment, Dye being then absent from the territory, and the writ of attachment was levied on certain lots in the town of White Oaks, N. M., and a tract of land near said town, and notice was given by publication. Later an alias writ was issued, and the mining claim in controversy levied upon and sold under the alias writ on February 18, 1899, to Jones Taliaferro. At the time of the sale Dye had not paid his share of the assessment work for 1898, which had been done by his co-tenant, the Apex Gold Mining Company, and at the time Taliaferro received the sheriff's deed and entered into possession of Dye's interest in the mining claim the Apex Company, by T. C. Johns, had advertised for forfeiture, which time would have expired on July 5, 1899, the period in which Dye might redeem, on June 15, 1899, Taliaferro paid this money to Johns, and took his receipt therefor. Dye returned to the territory in the latter part of April, 1899, and upon his return learned that the mining claim had been sold by attachment, and that Jones Taliaferro was in possession of it as purchaser at such sale. Taliaferro leased to Crary and Heinman with an option to buy the property, on June 5, 1900. In August, 1900, Crary and Heinman made the discovery of rich ore and bought the property under their option contract, the deed bearing date October 1, 1900, though the price was not paid or the deed delivered until late in November, 1900. Dye in the meantime had taken no steps to ascertain the condition of the attachment proceedings; in fact, he told several parties that he had lost his interest in the Compromise, that it went to pay a debt and that he considered it well sold. During the time the option contract was in operation between Taliaferro and Crary and Heinman he visited the property several times and told both Crary and Heinman that he had lost his interest in the claim; after the rich discovery was made he told Crary in answer to the direct question that he had no interest in the claim and "wished him well," as Crary expressed it. In the meantime Crary and Heinman had expended several thousand dollars upon the claim. After making the rich discovery they obtained an abstract of title and employed an attorney to look the title up, including the attachment proceedings and the sheriff's sale thereunder to Taliaferro. After being assured by their attorney that the attachment proceedings were regular and the title good, they paid Taliaferro the \$1,500 under the option contract and received a quit-claim deed to the claim. About November 20th Dye wrote Mr. Childers, an attorney at law at Albuquerque, and had him look up the attachment suit, and upon being informed

by Childers that the sheriff's sale under the attachment proceedings, and the judgment in that case were void, he and Childers, to whom he had deeded an interest, commenced this suit in ejectment for the possession of the mining claim. After suit was commenced, both Crary and Heinman, the original defendants, sold all their interest in the property and conveyed the same by deed to Jones Taliaferro, Charles Spence, and Joseph E. Spence, and afterwards Mr Harvey B. Fergusson acquired an interest in the property, and one Van Schoick also acquired an interest later, all of the defendants who are now interested having become so since this suit was instituted, and with knowledge of its pendency.

H. B. Fergusson and Elfago Baca, for appellants. W. B. Childers, for appellees.

MANN, J. (after stating the facts). 1. At the January, 1904, term of this court this case was heard on appeal from the district court of Socorro county, from a judgment in favor of the defendants and reversed and remanded to that court for further proceedings in conformity with the opinion in the case. *Dye et al. v. Crary et al.*, 78 Pac. 533. It was held in that opinion that there was no authority for an alias writ of attachment at the time the alias writ was issued in *Taliaferro v. Dye*, in the district court of Lincoln county, and that property levied upon under such writ gives the court no jurisdiction, and that consequently the judgment against Dye in that court, and the sale of the property in controversy, was absolutely void. The court having so held, whether right or wrong, it thereupon became the law of this case, and is controlling upon this court, so that the question of the validity of the alias writ and the proceedings of the court thereunder cannot be reviewed here, the evidence being substantially the same. This court, speaking through Mr. Justice McFie, in *Crary v. Field*, 10 N. M. 257, 61 Pac. 118, quoted with approval the following language from *Phelan v. San Francisco*, 20 Cal. 45. "A previous ruling by the appellate court upon a point distinctly made may be only authority in other cases, to be followed and affirmed, or to be modified or overruled, according to its intrinsic merits, but in the case in which it is made it is more than authority. It is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves." In *Flournoy et al. v. Bullock et al.* (N. M.) 66 Pac. 547, 55 L. R. A. 745, Mr. Chief Justice Mills, in the opinion of the court, says: "According to well-settled principles of law and the decision of this court, in the case of *Crary v. Field* (N. M.) 61 Pac. 118, the former decision of this court when this case was here before on appeal (*Rice v. Schofield*, 9 N. M. 314, 51 Pac. 673) so far as it states

the law, is the law of the case, and will not be reviewed by this court on this hearing. This seems to be the universal rule. *Balch v. Hass*, 73 Fed. 975, 20 C. C. A. 151; *Wayne County v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *Ex parte Sibbald*, 12 Pet. (U. S.) 487, 9 L. Ed. 1167; *Slizer v. Many*, 16 How. (U. S.) 98, 14 L. Ed. 861; *Corning et al. v. Troy Iron & Nail Factory*, 15 How. (U. S.) 451, 466, 14 L. Ed. 768; *Roberts v. Cooper*, 20 How. (U. S.) 467, 15 L. Ed. 969; *Durant v. Essex County*, 101 U. S. 555, 25 L. Ed. 961; *Stewart v. Salamon*, 97 U. S. 361, 24 L. Ed. 1044. The facts presented with reference to the attachment proceedings are identical with those presented on the former appeal, and cannot now be reviewed. The law expressed in the former opinion, so long as it stands unreversed, is the settled law of this case.

2. The next question arising is whether or not defendant Dye is estopped by his actions and conduct from asserting title to the Compromise mining claim, the property in dispute, or, in other words, whether his acts have raised against him an equitable estoppel. Whether certain acts, misrepresentations or silence on the part of a person will raise an equitable estoppel against him from claiming title to real property depends largely upon the circumstances in each individual case, and such a plea is addressed to the conscience of the trial court, whether in equity and good conscience he should be allowed under the circumstances to set up and establish such a claim. True, such an estoppel may be raised in courts of law, but the principle is one of equity. Equitable estoppel is defined as: "A right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." *Bigelow on Estoppel* (4th Ed.) 445. "An estoppel (which) presupposes error upon one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage." *Anderson, L. Dict.* "This estoppel arises where one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." 16 Cyc. 722. *Bouvier* defines it as an estoppel "such as arises from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself." 1 *Bouvier (Rawle's Revision)* 694. There are, however, certain well-defined and essential elements which must enter into the acts, conduct, or representations of the party against whom the estoppel is sought to be raised, in order to constitute an equitable estoppel. "The fol-

lowing elements must be present in order to constitute an estoppel by conduct: (1) There must have been a representation or concealment of material facts. (2) The representation must have been made with knowledge of the facts. (3) The party to whom it was made must have been ignorant of the matter. (4) It must have been made with the intention that the other party would act upon it. (5) The other party must have been induced to act upon it." 1 *Bouvier (Rawle's Revision)* 695; *Bigelow on Estoppel*, 484. "In order to constitute an equitable estoppel there must exist a false representation, or concealment of material facts; it must have been made with knowledge, actual, or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied or acted upon it to his prejudice." 16 Cyc. 726.

Bearing in mind these definitions and elementary principles of the doctrine of equitable estoppel, is Dye estopped by his acts and conduct from now asserting his title to the mining claim in controversy? His acts which are set up as raising an equitable estoppel against him are: (1) Failure to attack the judgment and proceedings in the attachment case, directly, within the time prescribed by law; (2) that he had told strangers to this action (*McIver*, *Robertson*, and others), that he had lost his interest in the property; and (3) that he told the original defendants, *Crary* and *Heiniman*, before they purchased under the option from *Tallaferro*, "that there could be no other claimant unless it was himself (Dye), and he had allowed his time to lapse and made no further claims to the property." This in answer to the direct question of *Heiniman* as to whether the title to this property, the Compromise mine, was all right. In treating of this question it must be borne in mind that the sale under the attachment proceedings was absolutely void and that therefore the grantor to *Heiniman* and *Crary* had absolutely no title to convey; that such proceedings were matters of record and equally available to *Dye*, *Crary*, and *Heiniman*; that all these conversations with *Dye* took place after *Crary* and *Heiniman* took the option from *Tallaferro* and after the big strike and most of the expenditure upon the claim; that it is undisputed that *Dye* had no actual knowledge of the invalidity of the attachment proceedings until after the actual sale from *Tallaferro* to *Crary* and *Heiniman*. The judgment and sale in the attachment case being absolutely void and subject to collateral attack (*Dye v. Crary* [N. M.] 78 Pac. 533), it necessarily follows that *Dye* was under no obligation to attack it directly, and his failure to do so was not an abandonment of his rights. It would be folly to say that a judgment was void and subject

to collateral attack and then add that because one did so attack it he thereby lost his rights. The conversation between Dye and the witnesses Robertson, McIvers, Despain, Fuston, Thomas, Alexander and perhaps others, in which Dye stated that he had lost his interest in the Compromise by lapse of time, or by the attachment proceedings, clearly do not constitute an equitable estoppel, for the reason that neither of these witnesses are, nor ever have been interested in the property in controversy, nor does it appear that the parties claiming the land were told of these conversations, or in any manner acted upon them, or that they came to their knowledge until after this suit was brought, or at most, after Heiniman and Crary purchased from Taliaferro. *Moore v. Boyd*, 74 Cal. 167, 15 Pac. 670; *Harvey v. West*, 87 Ga. 553, 13 S. E. 693; *Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157. Dye was not informed that his statements to these witnesses might affect his rights or would be relied upon by anyone. *Hackett v. Callender*, 32 Vt. 97; *Scharman v. Scharman*, 38 Neb. 39, 56 N. W. 704; *Allen v. Shaw*, 61 N. H. 95. As to the direct statement from Dye to Heiniman and Crary there is little or no controversy. Mr. Crary says: "Mr. Dye was there (at the mine), and Mr. Heiniman asked him, I can hardly remember the exact words, but in substance whether the title to this property, the Compromise mine, was all right, Mr. Dye replied that there was some drawn ground between it and the Scranton on the side that would belong to the Scranton. It was an overlap; and that there could be no other claimant, unless it was him, and he had allowed his time to lapse and made no further claims to the property. He also added, 'I hope you will do well with the property, and make lots of money out of it.'" Mr. Heiniman says: "Mr. Dye visited the mine and while there in presence of Mr. Alexander, and Mr. Crary, I told him that I was about to make the payment for the property in full, and I asked him if he knew of any conflicting claim, or any other claims on the Compromise. He immediately answered there was. The Scranton claim took off about 100 feet, and he said as to other claims there would be nobody but himself. And he says I have allowed all my time to lapse and I have no claim whatever. With that he wished me success and hoped it would prove a good mine." Mr. Dye says: "I have no doubt it is true that I have told Mr. Heiniman in various conversations that we have had on all manner of subjects that I had at one time owned five-sixths of the Compromise mine. I have no doubt that I have told him, as I have told anybody else who made it their business to inquire of me, that fact. Q. What fact? A. That I had been the owner of five-sixths of the Compromise mine, and that it was sold out under attachment in my absence from the territory."

Granting that the conversation took place as testified by Mr. Heiniman, the most favorable to the defendants, it does not contain many of the essential elements of an equitable estoppel. Dye did not know of his rights; at least, he had no actual knowledge, as shown by the very language attributed to him, "I have allowed all my time to lapse and have no claim whatever" was a mere statement of his supposed legal rights, and not of a matter of fact. At that time (October 23d) he had not been advised of his rights by Mr. Childers, and if he made the statement, did so under the impression and belief that the attachment proceedings were regular and valid. "An admission, in order to constitute an estoppel, must relate to an admission of fact, and a person will not be estopped by an admission as to the law." 16 Cyc. 756, citing *English v. Dycus*, 8 Ky. Law Rep. 331; *Brewster v. Striker*, 2 N. Y. 19; *Crawford v. Lockwood*, 9 How. Prac. (N. Y.) 547; *Daub v. Northern Pac. Ry. Co.* (C. C.) 18 Fed. 625. In *Huffman v. Nixon* (Mo.) 75 Am. St. Rep. 454, 53 S. W. 1078, Mr. Justice Robinson, in delivering the opinion of the court at page 459-466, 15 Am. St. Rep., page 1080 of 53 S. W., says: "As to the two remaining contentions of defendant (and which judging from the briefs filed herein must have been the controlling question, in the mind of the trial court, in the making of its judgment, first, that the sheriff sold and plaintiff bought only the equity of redemption of J. B. Kelsey in the land in controversy, and second, that he should now be estopped to assail the deed of trust conveying the land, on account of his declaration and conduct, and the answer filed by him in the Knoop Case recognizing its validity notwithstanding the court may think and find the deed of trust in fact to have been fraudulent in its inception, we have this to say: The proof shows that the sale was made in the ordinary way and that the sheriff sold all the right, title, and interest of the execution defendant in the land. The sheriff simply acted under and in conformity to the statute, and in virtue of the judgment of the court, and the law under which he acted conveyed all the interest and estate of the execution defendant in the land sold. If the land in fact was subject to a prior value deed of trust (regardless of the manner of the sale), the purchaser would have only bought the equity of redemption of the original grantor, and execution defendant, while, on the other hand, if the sale had been made subject to the so-called deed of trust in express terms, and the same should afterwards be discovered fraudulent, and without regard to what the execution purchaser thought of it, at the time of the sale, or what he afterward said or offered to do, by the answer in the suit of Koop against the Kellys, Nixon, and himself in 1892, when Koop attempted to have the sale set aside, it could and did not affect the interest pur-

chased by him, and he cannot now be estopped by what was done or said from setting up the fraudulent origin and character of the deed of trust by those who have lost nothing by his belief, declaration or answer filed." If Dye had no knowledge of the actual character of the proceedings against him and that they were void for want of jurisdiction, then there could have been no fraudulent representation or concealment on his part, when he had the conversation with Crary and Heiniman.

In *Brant v. Virginia Coal & Iron Co. et al.*, 93 U. S. 326, at page 335, 23 L. Ed. 927, Mr. Justice Field says: "It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. And therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud.' 1 Story's Eq. 391. To the same purpose is the language of the adjudged cases." And on page 337: "It is also essential for its application with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. *Crest v. Jack*, 3 Watts (Pa.) 240, 27 Am. Dec. 353; *Knouff v. Thompson*, 16 Pa. 361." In *Henshaw v. Bissell*, 18 Wall. (U. S.) 255, 271, 21 L. Ed. 835, the same judge says: "An estoppel in pais is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights have no such ingredient, and seldom work any such result. There are cases, it is true, where declarations may be made under such circumstances that the party will be estopped from denying any knowledge of his rights; but they are exceptional and do not affect the

correctness of the general rule as stated." *Smith v. Sprague*, 119 Mich. 148, 77 N. W. 689, 75 Am. St. Rep. 384. Nor can it be said that Dye was guilty of such negligence as would amount to a fraud in law. As soon as he discovered the invalidity of the judgment and sale of his property, he immediately brought this suit. It may be said that Dye had constructive notice of the invalidity of the proceedings, but that contention acts as a two-edged sword and if he is charged with notice, how much more so were the defendants, Crary and Heiniman, the proposed purchasers from Taliaferro? It seems also to be a well-settled rule of law that where all parties have an equal opportunity to determine the true facts there is no estoppel. 16 Cyc. 741; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; *Brant v. Virginia Coal Co.*, 93 U. S. 326, 23 L. Ed. 927.

Another essential element of equitable estoppel in this case is lacking, in that Crary and Heiniman did not rely upon the statements of Dye as to the condition of the title to the Compromise mine. The evidence shows that they procured an abstract of the title and employed an attorney to examine these very proceedings and relied at least in part, upon his report. I quote from pages 205, 206, of the record, Mr. Heiniman being on the stand. "Q. What report did your attorney make for you about that? A. He told me that he examined the record carefully, and paid the clerk \$4.00 to assist him in going through the records, and he reported to me that all proceedings of this sheriff's sale was regular and that everything was of record and that so far as that was concerned, I would be perfectly safe to handle the property. Q. Now, when you came to handling the property and making this payment, did you rely upon Dye's statement to you, or the opinion of your attorney and this abstract? A. I relied upon all these." "It is an essential element of equitable estoppel that the person invoking it has been influenced by and relied on the representations or conduct of the person sought to be estopped; but in all cases the representation or conduct must of itself have been sufficient to warrant the action of the party setting up the estoppel, and if notwithstanding such representation or conduct he was still obliged to inquire for the existence of other facts and to rely upon them also to sustain the course of action adopted, he cannot claim that the conduct of the other party was the cause of his action, and no estoppel will arise." 16 Cyc. 736, citing *McMaster v. Insurance Co. of N. Am.*, 55 N. Y. 222, 14 Am. Rep. 239; *Deer Lodge Bk. v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458; *First National Bank v. Peltz*, 186 Pa. 204, 40 Atl. 470; 11 Am. & Eng. Ency. of Law, 439.

3. Defendants contend that Dye had forfeited his rights to his co-owner Johns, and that Taliaferro, the purchaser at the sheriff's

sale under the attachment proceedings, by paying to Johns the amount due from Dye for the assessment work of 1898, succeeded thereby to Johns' rights and became the owner by reason of the forfeiture. They contend that section 3126, Comp. Laws, subrogates them upon the payment to Johns, to his rights. But that section contemplates a valid judicial sale, and this sale being void would give them no such rights, even if their contention as to that be correct. But we cannot concur in defendants' view, either, that there was a forfeiture, or that if such was the case that Tallafarro by his payment to Johns succeeded to his rights or to Dye's. Clearly Tallafarro, when he made the payment, did so to protect the interest he acquired, if any, by the sale under the attachment; indeed, such is the contention of counsel. This being true, Tallafarro was not attempting to create or buy an outstanding title, but to protect the title obtained through Dye. The alleged forfeiture was never completed because the money was paid to the co-owners before the 90 days after the conclusion of the advertisement, under section 2324, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1426] and Tallafarro having acquired no rights under the void sale, was a mere volunteer and was not subrogated to the rights of any one.

But there is another, and it seems to us, a conclusive reason why there was no forfeiture. The record discloses that the title to the one-sixth interest was in the Apex Gold Mining Company, a corporation, while the notice was given by T. C. Johns. Johns was a stranger to the title and while there is evidence that he was the manager of the Apex Gold Mining Company, yet he could not have given the notice in his own name. Statutes of forfeiture are strictly construed and must be strictly complied with. A notice to Dye that Johns had performed the labor as co-owner with him and that the title would be forfeited to him, was no notice that the Apex Gold Mining Company, his real co-owner, was attempting to advertise him out. *Turner v. Swayer*, 150 U. S. 578, 14 Sup. Ct. 192, 37 L. Ed. 1189. The testimony of Walsh shows that he did the work for the Apex Company. The testimony of Tallafarro shows that the one-sixth interest was not in Johns, but in the Apex Company. Just why we should assume that Johns was the owner of the one-sixth interest in his own right, in the face of this testimony of defendants' witnesses, does not appear. "The burden of proof rests with the party asserting the forfeiture." 2 Lindley on Mines, § 646.

The judgment of the court below was right, and is therefore affirmed.

POPE and ABBOTT, JJ., concur. MILLS, C. J., and McFIE, J., dissent from the con-

clusions of the majority of the court. PARKER, J., having heard the case below, did not sit.

## HENRY v. LINCOLN LUCKY & LEE MINING CO. et al.

(Supreme Court of New Mexico, March 2, 1906.)

1. NEW TRIAL—MOTION—TIME FOR MAKING. A motion for a new trial must be filed during the term at which the verdict is rendered and within five days after verdict, or it may be stricken from the files.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 238-249.]

2. APPEAL—REVIEW—NEW TRIAL—NECESSITY OF MOTION.

Unless a motion for a new trial is made in a jury case, no question properly to be presented to the lower court thereby can be reviewed on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1650-1661.]

3. COURTS—ADJOURNMENT—CONSTRUCTION OF ORDER.

Inasmuch as Code, § 103, provides that courts are to be always in session, except for jury trials, an order of adjournment reading "It is ordered that the court do now adjourn until court in course," is not to be construed as an adjournment of the term.

Error to District Court, Santa Fé County; before Justice John R. McFie.

Action by Alexander M. Henry against the Lincoln Lucky & Lee Mining Company and others. From a judgment in favor of defendants, plaintiff brings error. Motion to strike a motion for a new trial and the bill of exceptions from the record. Motion denied.

W. B. Childers and N. B. Laughlin, for plaintiff in error. E. A. Fiske, for defendants in error.

PER CURIAM. There can be no doubt that a motion for a new trial must be filed during the term at which the verdict is rendered and within five days after verdict, that unless so filed it may be stricken from the files as a nullity, and that, unless a motion for a new trial is filed in a case tried by a jury, no question, properly to be presented to the lower court thereby, can be reviewed here. But in this case, although it seems probable that it was the intention of the judge to adjourn the term of court, that intention, perhaps by inadvertence, was not, we think, embodied in the record. The language of the adjournment is: "It is ordered that the court do now adjourn until court in course." That order was in the form in ordinary use in some of the districts of the territory when the courts were in session only during the terms established by statute; But, since the law was so changed by section 103 of the Code that the courts are to be always in session except for jury trials, it would seem to be necessary that the "term," which it still recog-

nized as existing for many purposes, should be particularly mentioned, or, at least, definitely indicated, in the adjournment order, and that, in the absence of such mention or specific reference, it must be held that the court and not the term was adjourned. As we have said, it is highly probable that it was the intention of the court to adjourn the term, but we cannot read into the record what it does not contain, and it, we think, does not show that the term had ended when the motion for a new trial was made, and, as it was filed within five days after verdict, it was in time. The subsequent termination of the term by operation of law without action thereon by the court resulted, under the statute, in its being overruled.

For the reasons stated, the motion to strike the motion for a new trial and the bill of exceptions from the record is denied.

### TERRITORY v. NEATHERLIN.

(Supreme Court of New Mexico. March 2, 1906.)

#### 1. CRIMINAL LAW—APPEAL—REVIEW.

A judgment based on a finding of fact by a jury will not ordinarily be reversed by this court on the ground that there was no evidence to support it, if there was any substantial evidence to sustain the finding.

#### 2. RECEIVING STOLEN GOODS—VERDICT.

A verdict of guilty "as charged" on an indictment for receiving and aiding in the concealment of stolen property, which contains an allegation of the value of the property, is a sufficient finding of value.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receiving Stolen Goods, § 21.]

#### 3. INDICTMENT—ISSUES—PROOF—ALTERNATIVE ALLEGATIONS.

An indictment which charges the commission of several things forbidden, in the alternative, through the use of the word "or," by a statute, is established by proof of any one of them, although they are charged in a single count and the word "and" is used, instead of "or."

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 534.]

#### 4. CRIMINAL LAW—EVIDENCE—ACTS OF CONSPIRATORS.

Acts and declarations of one of several persons, in pursuance of a common design to commit a crime, are the act and declarations of all, and are admissible in evidence against the others engaged in the common enterprise, although conspiracy is not specifically charged, provided that its existence shall be established as a fact.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 989, 1012.]

#### 5. SAME—ARGUMENT OF COUNSEL.

A suggestion made to the jury by the prosecuting attorney in his argument, in reply to one similarly made by the attorney for the defendant, to the effect that, in case the defendant should be convicted, they could unite with him and secure a pardon for a certain purpose, was improper, and was on that ground withdrawn from the consideration of the jury by the court; but it was not, under those circumstances, so clearly harmful to the defendant

as to warrant a reversal of judgment by this court.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3127.]

(Syllabus by the Court.)

Appeal from District Court, Roosevelt County; before Justice Pope.

Jake Neatherlin was convicted of larceny, and appeals. Affirmed.

Freeman & Cameron and Louis O. Fullen, for appellant. George W. Prichard, Atty. Gen., for the Territory.

ABBOTT, J. The essential facts are stated in the opinion. The defendant was found guilty by a jury, in December, 1904, in the district court for Roosevelt county, on the second count of an indictment, charging that he "unlawfully, feloniously, and knowingly did buy, receive, and aid in the concealment of two horses, of the value of \$20 each, of the goods and chattels and property of one Oscar Anderson, \* \* \* the said Jake Neatherlin then and there well knowing the same to have been stolen." The first count of the indictment charged the defendant with the larceny of the same horses, and of that he was found not guilty.

The first error assigned by the appellant is that there is no evidence of the value of the property named in the indictment and therefore no legal finding of value. His contention is that section 1117 of the Compiled Laws of 1897, is repealed as to the penalty provided for by section 1187, and that, as by the latter section the penalty is made to depend on the value of the property involved, its value must be found by the jury from the evidence. Whether the latter section repeals any part of the former, need not now be determined, since the second count of the indictment charges at least one act, which is forbidden by section 1117, and is not referred to in section 1187; namely, that of aiding in the concealment of stolen money, goods, or property, knowing the same to have been stolen; and it is that offense which the evidence in this case tends most strongly to establish. Fayette Beard, a cattle inspector, at Roswell, testified that he saw the defendant, with others, in charge of the lot of horses, which included the two named in the indictment, in the vicinity of Roswell; that he knew the defendant and said to him, "Where are you coming from with your horses?" To which he replied, "From Arizona." Such a statement, which was on all the evidence false, was unquestionably calculated to aid in the concealment of the horses, as well as to show the intention of the defendant, and, if believed by the jury, was sufficient to warrant a finding that he did aid in the concealment, which this, with other evidence, tended to prove.

The appellant claims, it is true, in his second assignment of error, that although sec-

tion 1117 uses the word "or," and so is in the alternative, as regards the buying, receiving, and concealing of stolen property, which it makes criminal, yet, as the indictment uses the word "and," each of the three must be proved as an element of one crime. We do not so understand the law on that point. In Bishop's New Criminal Procedure (4th Ed.) vol. 1, § 436, the rule is thus stated: "Therefore the indictment on such a statute may allege in a single count as many of the forbidden things as the pleader chooses, employing the conjunction 'and' where the statute has 'or,' and it will be established by proof of any one of them." "On the other hand," says the learned author, in section 586, "the indictment may equally well charge what comes within a single one or more clauses, less than all of the statute, and still it embraces the complete proportions of the forbidden wrong." There can be no doubt that there was evidence sufficient to sustain a verdict of guilty, if the charge had been that of concealing stolen property, knowing it to have been stolen, alone; and, on the authority cited, the addition of other things forbidden by the statute did not put the territory to the proof of them. It may, therefore, well be considered that no allegation, proof, or finding of value was necessary. But, even if the contrary be assumed, the value of the horses in question is alleged in the indictment to have been \$20 each, and the jury found the defendant guilty "as charged." Such a verdict is generally, although not universally, held to be a sufficient finding of value. Bishop's New Crim. Proc. vol. 2, § 764. There was to support the verdict, the testimony of the witness West, that he agreed to pay "\$15 around" for the lot of horses, including those in question. He had seen the horses, and the evidence indicates, although it does not expressly show, that he was prepared to accept them as horses of the kind he had contracted for. There was considerable evidence bearing on the value of horses in this lot, as compared with that of horses in another lot described by the witnesses, and on the size and qualities of the two horses named in the indictment, as favorably distinguishing them from the other horses in the lot for which \$15 around was to be paid. *Gatling v. Newell*, 9 Ind. 572; *Faust v. Hosford*, 119 Iowa. 98-104, 93 N. W. 58; *Harrison et al. v. Glover et al.*, 72 N. Y. 451; *Saddler v. State*, 20 Tex. App. 195; *Commonwealth v. McKenney*, 9 Gray (Mass.) 114. There was substantial evidence to support the verdict, and this court will not therefore disturb it. *Torlina v. Trorlicht*, 5 N. M. 148, 2 Pac. 68, and cases cited; *Candelaria v. Miera* (decided at the present term of this court) 84 Pac. 1020.

The third, fourth, and sixth assignments of error relate to evidence admitted and instructions given, which left the jury at liberty to find that a criminal conspiracy existed between the defendant and others in

relation to the subject-matter of the indictment. It is claimed, first, that unless the conspiracy is charged in the indictment, evidence of the acts and declarations of co-conspirators is inadmissible against a defendant. The weight of authority is to the effect that when a sufficient foundation is laid by the evidence to establish the existence of a conspiracy, the acts and declarations of co-conspirators in pursuance of the common purpose, are admissible, whether conspiracy is directly charged or not. *Wigmore on Evidence*, §§ 1079, 1797; 16 Cyc. p. 1025, and cases cited. In the case at bar there was abundant evidence that the defendant was engaged with others in the common enterprise of collecting from ranges about 80 miles away, and taking to Roswell, for sale to the witness West, a lot of horses, and that they in fact got together and put first in one and then in another pasture, three or four miles from Roswell, 47 horses to be delivered to West. The jury must have found that some, at least, of those horses were stolen, and that the defendant, and presumably his associates, knew it, even if they were not themselves guilty of the larceny. The question whether a conspiracy had been established was left to the jury under proper instructions by the court, and they were told that, unless they found from the evidence that there was such a conspiracy between the defendant and others, they should disregard the evidence to which these assignments of error relate.

It is urged in behalf of the appellant that, even if such evidence was admissible, no acts or declarations of a time subsequent to the completion of that for which the alleged conspiracy existed, which, it is assumed, was the larceny of the horses, were competent evidence. That is, doubtless, the law of the matter; but the object of the conspiracy was not accomplished with the larceny of the horses, nor, indeed, was it ever fully, or in the feature most essential to the alleged conspiracy, carried out, since they did not succeed in delivering the horses and getting the money for them. The receiving and concealing with which the defendant was charged continued up to the time when the horses were taken from the possession of himself and his associates by the owner or the officers of the law.

Another error claimed is that the district attorney in his argument to the jury was permitted to discuss the possibility of a pardon for the defendant, in case of his conviction. It appears that the attorney for the defendant sought to persuade the jury to acquit his client, by assuring them that if he should be convicted, his testimony could not be used to convict the witness, West, who was under indictment in connection with the same matter. To that the district attorney replied that his testimony could be secured, if desired, through a pardon, and that the jury and himself could unite in obtaining one. Neither suggestion was a proper

one for the consideration of the jury, although reference to the well-known fact that there existed the power to pardon is not uncommon in trials, and it is difficult to perceive how the mention of anything so commonly known could be prejudicial, especially as part of what was said by the prosecuting attorney on the subject to which the defendant's attorneys especially objected at the time, was withdrawn by the court from consideration by the jury.

Judgment affirmed.

MILLS, C. J., and McFIE and PARKER, JJ., concur. MANN, J., concurs in the result. POPE, J., having heard the case below, did not participate in this decision.

### HUBBELL v. ARMIJO.

(Supreme Court of New Mexico. March 2, 1906.)

#### 1. OFFICERS — COMMISSION—COLLATERAL ATTACK.

The commission of the Governor of the territory, issued on an appointment to any public office, which he is by law empowered to fill in case a vacancy exists, and reciting such vacancy, is prima facie evidence thereof, and courts will not go behind its recitals in a collateral proceeding involving the title to such office.

#### 2. INJUNCTION—TITLE TO OFFICE.

Where one is prima facie entitled to a public office by virtue of a commission by the Governor of the territory appointing him to such office, his right thereto can only be questioned by an action in the nature of quo warranto to test his title, and one not having the prima facie right to such office cannot maintain a suit to enjoin the appointee from exercising the duties of the office or from obtaining the paraphernalia, books, papers, etc.

Appeal from District Court, Bernalillo County; before Justice Ira A. Abbott.

Action by Frank A. Hubbell against Justo R. Armijo. Judgment for defendant, and plaintiff appeals. Affirmed.

William B. Childers, A. B. McMillen, and E. W. Dobson, for appellant. Neill B. Field and F. W. Clancy, for appellee.

PER CURIAM. This is a suit in equity brought by the appellant, Frank A. Hubbell, against the defendant, Justo R. Armijo. The complaint setting out in substance that the complainant is a citizen of the United States, residing in the county of Bernalillo and territory of New Mexico; that at the general election held in and for the said county of Bernalillo on the Tuesday next after the first Monday in November, 1904, he was a candidate for the office of treasurer and ex officio collector of said county; that he was duly elected to said office and received a certificate of election thereto, and that he duly qualified and had been acting and was still acting as such treasurer; that by virtue of said election and qualification he was entitled to serve as such treasurer

and collector for the term of two years commencing on the 1st day of January, 1905, and ending on the 1st day of January, 1907; that he is, and has been, in possession of all the paraphernalia of said office, including the tax rolls, etc., and was and is entitled to collect and receive the public taxes and all other moneys legally collectable by the treasurer of said county and to exercise the duties of his said office and receive the fees and emoluments therefor until the expiration of his term on the 1st day of January, 1905, as aforesaid; that he has never resigned said office as treasurer and ex officio collector of said county, that he is not dead and has never abandoned said office, and that no vacancy in said office has occurred or been created in any manner since he qualified and entered upon his duties as aforesaid. Complainant further sets out that certain charges of official misconduct were filed against him with the Governor of New Mexico, which charges he sets out in detail, and that the Governor of New Mexico, after notifying the complainant of a hearing to be had on said charges, proceeded to hear said charges and on the 31st day of August, 1905, that the said Governor made an order pretending and claiming to remove the plaintiff from said office of treasurer and collector of said county; that said Governor issued and signed a pretended commission under the great seal of the territory of New Mexico, pretending to appoint and commission the defendant, Justo R. Armijo, as treasurer and ex officio collector of said county of Bernalillo to fill the pretended vacancy claimed to have been caused by the attempted removal of the plaintiff from said office and a copy of said commission so issued by the Governor as aforesaid plaintiff files as an exhibit with his said complaint. Continuing, the plaintiff alleges that the Governor of New Mexico had no lawful power or authority to hear or determine the charges filed against him and had no power or authority to remove said plaintiff from office and that the action of the Governor in so doing did not create any vacancy in said office. He further alleges that the defendant, Armijo, by virtue of said pretended appointment and commission, has assumed and qualified for said office of treasurer and ex officio collector of said county of Bernalillo by taking the oath and giving the bond required by law and is attempting to usurp plaintiff's rights to said office of treasurer and ex officio collector, and has demanded possession of said office and the property belonging thereto, which said demand was refused by the plaintiff. Complainant further alleges that the said defendant threatens to take possession of the said office and that unless restrained by an order of the court will take forcible possession of the room occupied by plaintiff as the treasurer's office of said county, and the books, tax rolls and other paraphernalia of said office. He further alleges that al-

though he, plaintiff, is in the possession of the office and in the active discharge of his duty, that the defendant has brought no suit by quo warranto or otherwise, to test the title of said office and that the rights of said plaintiff and defendant have never been judicially determined; but defendant threatens to seize the said office, books, papers, etc., by force. There are many other allegations in the complaint with reference to the power of the Governor to remove plaintiff, and the insolvency of the defendant, etc., which, in our view of this case, it is not material to set out here.

To this complaint the defendant answered, setting up his commission issued to him by the Governor of New Mexico, under the great seal of the Territory, which commission is in words and figures following, to wit: "Plaintiff's Exhibit D: In the Name and by Authority of the United States of America. Miguel A. Otero, Governor of the Territory of New Mexico, to All to Whom These Presents shall Come—Greeting: Whereas, a vacancy exists in the office of treasurer and ex officio collector of Bernalillo county, New Mexico: Know ye, that, reposing special trust and confidence in the prudence, integrity and ability of Justo R. Armijo, I do hereby appoint and commission him as treasurer and ex officio collector for Bernalillo county, New Mexico, for the territory of New Mexico. The said Justo R. Armijo is therefore carefully and diligently to discharge the duties of said office by doing and performing all manner of things thereunto belonging in compliance with law; this commission to continue in force during the term prescribed by law. In testimony whereof, I have hereunto set my hand and caused to be affixed the great seal of the territory of New Mexico. Done at Santa Fé, this thirty-first day of August, in the year of our Lord one thousand nine hundred and five, and of the territory fifty-fifth, and of the independence of the United States the one hundred and thirtieth. Miguel A. Otero. [Seal.] By the Governor: J. W. Reynolds, Secretary of the Territory of New Mexico." Indorsed: "Filed in my office this September 27, 1905. W. E. Dame, Clerk"—and also setting up this qualification to said office as required by law. The answer set up numerous other matters which are immaterial here for the reason that the plaintiff filed a demurrer to said answer, which demurrer was overruled by the court as to the answer, but upon the theory that a demurrer searches the entire record the court carried the same back to the complaint and sustained the demurrer to the complaint upon the ground that the complaint does not state facts sufficient to constitute a cause of action. And the plaintiff electing to stand on the complaint, the court rendered a final judgment dismissing the cause with costs, to which judgment plaintiff excepts and appeals to this court.

The question before us, then, is whether or not the complaint as filed by the plaintiff, appellant herein, states facts sufficient to constitute a cause of action against the defendant. The complaint sets out a commission issued by the Governor of New Mexico, under the great seal of the territory, which upon its face recited that a vacancy existed in the office of treasurer and collector of Bernalillo county, and appointing thereto the defendant Justo R. Armijo. In the case of *Eldodt v. Territory*, 10 N. M. 141, 61 Pac. 105, this court said, speaking through Crumpacker, Judge: "Where one has received an appointment to a public office from the authority invested with power to make such an appointment, and has duly qualified in accordance with statutory requirements, the law will presume, in the first instance, that the appointment was legal, and that the appointee is the rightful incumbent of the office designated in the appointment"—citing *Conklin v. Cunningham*, 7 N. M. 445, 38 Pac. 170. It will be seen that the complaint in this case sets out the appointment and commission of the defendant and his qualifications thereunder. This, in our view, brings the case squarely within the rule laid down by this court in the case of *Territory v. Eldodt*, and *Conklin v. Cunningham*, supra. If the commission of the Governor is *prima facie* title to any office which the Governor is by law empowered to fill, in case a vacancy exists, then it must appear that the appellant, Hubbell, under the allegations of his complaint, was not entitled to the relief sought, for the commission so reciting its *prima facie* evidence of such vacancy, and the court will not go behind its recitals in a collateral proceeding. If Armijo was the *prima facie* treasurer and collector of Bernalillo county, and his right thereto can only be questioned by an action in the nature of quo warranto to test his title, and such is undoubtedly the doctrine announced in the two cases cited, then it is inconceivable that one who has not the *prima facie* right to such office could maintain a suit in equity to enjoin him from exercising the duties of said office or from obtaining the paraphernalia, books, papers, etc., belonging to said office. Whatever we may think of the authority upon which the cases of *Territory v. Eldodt* and *Conklin v. Cunningham*, are grounded, it is nevertheless true that the principles of those cases have become the settled law of this territory under the decisions of this court, and we are loath to disturb them. While those cases may not be upheld by the weight of authority elsewhere, we believe that the doctrine of these decisions should be applied, and that greater harm would be done to the interests of the public in this territory by overruling them than by adhering to them.

Upon the authority announced in those two cases, the judgment of the lower court is affirmed, with costs; and it is so ordered.

**VIGIL v. STROUP.**

(Supreme Court of New Mexico. March 2, 1906.)

Appeal from District Court, Bernalillo County; before Justice Ira A. Abbott.

Bill by Eslavio Vigil against Andrew B. Stroup. Judgment for defendant, and plaintiff appeals. Affirmed.

W. B. Childers, A. H. McMille, and E. W. Dobson, for appellant. Neill B. Field, for appellee.

**PER CURIAM.** For the reason stated in Frank A. Hubbell v. Justo Armijo (decided at this term) 85 Pac. 1046, the judgment of the lower court will be affirmed; and it is so ordered.

**BIG HORN LUMBER CO. v. DAVIS et al.**  
(Supreme Court of Wyoming. June 12, 1906.)

**1. MECHANICS' LIENS—PROCEEDINGS TO ENFORCE—PLEADING—ESTOPPEL.**

In a suit to foreclose a mechanic's lien, an answer alleging that defendant demanded of plaintiff a statement of the amount due for materials, and was furnished a partial statement, but not alleging that defendant was thereby misled to her injury, did not present any issue as to whether plaintiff was estopped to claim the full amount due him.

**2. SAME—FINDINGS—SUFFICIENCY OF NOTICE OF CLAIM OF LIEN.**

A finding that a notice claimed a lien "against the said frame house and the land upon which the said house stood" implied that the house and land were properly identified in the notice.

**3. WRIT OF ERROR—DISPOSITION OF CAUSE—REVERSAL—RENDERING JUDGMENT.**

Where, on petition in error in proceedings to enforce a mechanic's lien, the errors assigned are that the findings of fact and law are insufficient to support the conclusions of law and judgment, and that the facts found entitle the plaintiff in error to judgment, on reversal, the findings covering all the issues, the appellate court will render judgment, and not remand the cause for a new trial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4581.]

On petition for rehearing. Denied.

For former opinion, see 84 Pac. 900.

Burgess & Kutcher, for plaintiff in error. W. E. Mullen and S. P. Cadle (W. S. Metz of counsel), for defendants in error.

**On Rehearing.**

**POTTER, C. J.** In the former opinion in this case (84 Pac. 900), we stated that it was not contended that the inclusion of the November items of plaintiff's account in a partial statement rendered to the defendant Sanders and which was paid by her as set forth in the opinion estopped the plaintiff from claiming a lien for the amount actually due upon the account against the contractor, Davis. And it was further stated that it was not contended that an estoppel resulted from the delivery to Mrs. Sanders by the contract-

or of his receipted bill which had been obtained in exchange for his check which had no value and was never paid, but payment of which upon its prompt presentation had been refused by the bank upon whom it was drawn. It is now insisted on a petition for rehearing by counsel for Mrs. Sanders that the question of estoppel was in the case, and that counsel did not intend to waive it. But the argument upon that subject is based almost entirely upon counsel's understanding of the evidence. They say that on the trial both parties introduced evidence, without objection, bearing directly upon the question of estoppel, apparently forgetting that no part of the evidence is in the record before this court. We have only the pleadings, findings and judgment as the basis for our consideration of the case, and, as pointed out in the former opinion, the pleadings and findings do not establish an estoppel against the plaintiff. The answer of Mrs. Sanders alleged that on January 19, 1905, she demanded of plaintiff a statement of the balance due on account of materials used in her house, and was thereupon furnished with a statement of the November items (which had not been included in the receipted bill to Davis) and one other item, which she then paid. But it does not appear either by allegation of the answer, or in the findings, that she was misled in consequence of such partial statement to her injury, or that she was misled at all as to the actual facts and condition of the account. On the contrary, it appears from the findings that six days prior thereto Mrs. Sanders had been notified that there was \$368.40 due the plaintiff from the contractor Davis for materials used in her house, for which the plaintiff claimed a lien on her property; and it is alleged in plaintiff's reply that promptly on the dishonor of the Davis check, the plaintiff informed Mrs. Sanders of such dishonor, and that they would look to her property for payment of the Davis account. It will hardly be contended that the circumstances of the check and receipted bill amounted to a payment of the account in fact; and as there is neither allegation nor finding that Mrs. Sanders was misled by reason of the receipted bill, as well as no allegation or finding that she paid anything to the contractor in consequence thereof, or at all, and absolutely nothing in this record to show or even indicate that she lost any remedy, or suffered any injury, by reason of any of the facts set out in the answer, or embraced in the findings, in connection with either receipted bill, there is no ground upon which to hold the plaintiff estopped from claiming or enforcing its lien. The answer did not, in our opinion, state sufficient facts to constitute an estoppel; and if it be conceded that it was unnecessary to plead it, and that the facts might have been shown which would amount to an estoppel under the issues as framed by the pleadings, the record fails to disclose any such showing; and in the absence of the evi-

dence, or of any finding of facts sufficient to constitute an estoppel on account of the circumstances above mentioned, we are not at liberty to assume that estoppel was proven, or that the court failed to pass upon the evidence in that respect. We cannot agree with counsel for defendant in error that the lien notice as shown by the findings was insufficient to support the lien. The findings in that respect are quoted in the former opinion, and, in our opinion, show a sufficient notice. The court found that the notice claimed a lien "against the said frame house and the land upon which the said house stood," which finding implies that the house and land were properly identified in the notice.

We perceive no reason for receding from our view that the findings clearly show that the November items were charged to the contractor upon his running account for materials furnished for the Sanders house, and that they were sold and delivered to the contractor for that purpose. There is nothing in the pleadings properly construed admitting a different state of facts, nor do we think that the findings insufficiently cover the issues tendered by the pleadings. We conceive it to be unnecessary to attempt to draw an inference from the pleadings as to the reason for Mrs. Sanders' payment of the November items and one other included in the statement furnished her January 19, 1905. We do not intend to attribute any improper motive to her in that respect, nor do we understand that there is any ground for so doing. It is left unexplained on the record here. It may be possible that at the time she believed it competent for her to rely upon the receipted bill for all the other items, and that she might be obliged to pay the items not included therein; or she might have understood that she alone was responsible for the unincluded items, but the court, however, found differently as to that matter.

It is suggested that instead of directing a judgment upon the findings of fact in accordance with our views of the law, the case should be remanded for new trial. If the record authorized such a course we would be willing enough to adopt the suggestion. But it does not. Counsel are mistaken in the assumption that plaintiff in error has asked merely for the reversal of the order overruling its motion for new trial. The petition in error prays for a reversal and vacation of the judgment as between the plaintiff and the defendant Sanders, and for judgment in its favor against Mrs. Sanders. The overruling of a motion for new trial is not assigned as error, nor is such a motion mentioned in the petition in error. The errors assigned are that the findings of fact are wholly insufficient to support the judgment in favor of defendant Sanders; that they do not support or warrant the conclusions of law numbered 1 and 2; that said conclusions of law are erroneous as based upon the facts found; that the judgment in favor of defendant San-

ders is not supported by the conclusions of law; that such judgment is contrary to law, as based upon the findings of fact; and that the facts found entitle the plaintiff to judgment against said defendant. We are not permitted upon the record to question the findings of fact; they seem to us to cover the issues presented by the pleadings, and no ground therefore is perceived for remanding the cause for a new trial.

Rehearing will be denied.

BEARD and SCOTT, JJ., concur.

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#### LEWIS v. ENGLAND.

(Supreme Court of Wyoming. June 12, 1906.)  
COSTS—WRIT OF ERROR—TRANSCRIPT OF EVIDENCE.

Under Rev. St. 1899, § 4266, providing that when a judgment is reversed the plaintiff in error shall recover his costs, and that there shall be taxed as part of the costs the cost of making the transcript of evidence in the case, where the evidence in an action was taken before a special master commissioner, and he transcribed all the evidence, and costs were taxed therefor in the court below, and no further transcript was made, the plaintiff in error is not entitled to costs for the making of the transcript.

On motion to retax costs. Denied.

For former opinion, see 82 Pac. 869.

POTTER, C. J. The judgment of the district court in this cause was reversed on error, and remanded for new trial. 82 Pac. 869. Counsel for plaintiff in error has filed a motion for the retaxation of costs in this court, by which it is sought to have taxed as costs, in favor of the plaintiff in error, the cost of making a transcript of the evidence in the case, pursuant to the provisions of section 4266, Revised Statutes of 1899. That section provides that when a judgment or final order is reversed the plaintiff in error shall recover his costs, and that there shall be taxed as a part of such costs the cost of making the transcript of the evidence in the case, which is to be computed at the rate allowed by law for making such transcript.

Our attention is called to the fact, which was disclosed by the record, that the evidence in the case had been taken before a special master commissioner, to whom the cause had been referred for that purpose, and it is shown by the affidavit of counsel for defendant in error, which is not controverted, that the commissioner took and transcribed all the evidence, and that the cost thereof was paid to such commissioner by the parties by order of the court below, and the same was taxed as costs in the case in that court. And it does not seem to be disputed that such evidence was transcribed and returned to the court below before hearing and judgment, and that at the time of judgment the transcription of the evidence was among the papers filed in the case as a part of the commissioner's report. The cause was heard and determined

in the district court upon the report of the commissioner in connection with such evidence. It does not appear that any subsequent or other transcription of the evidence was made for incorporation in the bill of exceptions, but it is claimed on the contrary that all the costs of the transcript appearing in the bill were included in the commissioner's charges, and, there being no different showing, we think it is fairly deducible from the record that the transcript of the evidence contained in the bill of exceptions is that which was made and filed with the district court by the commissioner.

The object of the provision contained in section 4266, as to the cost of making a transcript of the evidence, is, in our opinion, the securing to a plaintiff in error in case of reversal his costs incurred, in the respect stated, in making up a record for a review in this court of the judgment or final order complained of. The cost of transcribing the evidence will usually be incurred in the preparation of the bill of exceptions, as the statute now provides that the original papers, necessarily inclusive of the bill if there be such a paper in the case, shall be sent to this court, instead of a transcript thereof; and before the enactment of the existing statute, it was permissible to bring the original bill here as part of the record if so desired. And it may be said generally that, where the fact is made to appear that the transcript of the evidence was procured by the plaintiff in error for the purpose of incorporating it in the bill of exceptions, without which the points raised would not be entitled to consideration, and the bill containing such transcript is properly brought into the record in this court, the cost of making the transcript will be taxable as part of the costs, under section 4266, in the case of a reversal of the judgment, except as to such part, if any, of the cost thereof which may clearly appear to have been unnecessary. In this case, however, the plaintiff in error was not put to the expense of obtaining a transcript of the evidence in order to prepare her bill of exceptions. It had been transcribed and filed as a necessary part of the commissioner's report, and the expense thereof was taxed as costs in the court below; and it is claimed by counsel for defendant in error, that the latter has already paid one-half of that expense. The cost of the transcript in this case, therefore, does not come within the provisions of section 4266, as we understand its object and meaning. It is within the power and province of the district court to make the proper order adjusting the ultimate liability of the parties for the expense of the transcript, as such expense was included in the commissioner's charges, and properly so, and is entered as part of the costs in that court.

Upon the grounds stated, the motion to re-tax costs will be denied.

BEARD and SCOTT, JJ., concur.

## POINTER v. JONES.

(Supreme Court of Wyoming. June 12, 1906.)

### 1. JURY—RIGHT TO TRIAL BY JURY—TRIAL BEFORE JUSTICE OF THE PEACE—STATUTORY PROVISIONS.

Rev. St. 1899, § 4375, provides that, after issue being joined in an action before a justice of the peace, either party may demand a trial by a jury of six persons on first paying to the justice the jury fees in advance. Section 4376 provides that, whenever the justice shall be satisfied that a jury, after being out a reasonable time, cannot agree on their verdict, he may discharge them and issue a new venire, unless the parties consent that the justice may render judgment. Sections 4381, 4382, provide that, if the jury be unable to agree, proceedings shall be in all respects as upon the return of a summons. Section 4383 provides that when the jury shall be unable to agree on the verdict the same compensation shall be paid them by the party calling the jury as upon rendering a verdict. *Held*, that where the jury at a first trial failed to agree, or the jurors were paid from a sum deposited by the defendant, who had demanded the jury, and the defendant failed to appear at the date to which the trial was adjourned, the justice properly tried the cause without impaneling a new jury.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 184.]

### 2. JUSTICES OF THE PEACE—DOCKET—SUFFICIENCY OF ENTRY—DISAGREEMENT BY JURY.

An entry in the docket of a justice of the peace stating that the jury returned a verdict of disagreement was sufficient to show that the justice was satisfied that the jury could not agree on their verdict after having been out a reasonable time.

### 3. SAME—REVIEW OF PROCEEDINGS—WRIT OF ERROR—BILL OF EXCEPTIONS.

Any error in discharging a jury in a trial before a justice of the peace for a disagreement could not be considered on writ of error, in the absence of a bill of exceptions showing an exception to the order.

### 4. SAME—DOCKET—NATURE OF PLAINTIFF'S DEMAND.

An entry in the docket of a justice of the peace, referring to the written petition of the plaintiff on file in the cause, is a sufficient compliance with Rev. St. 1899, § 4330, requiring him to enter in his docket a brief statement of the nature of plaintiff's demand and the amount claimed.

### 5. SAME—PROCESS.

An entry in a docket of a justice of the peace stating that summons was issued directing defendant to appear and answer at a certain time, stated in the entry, sufficiently showed the particular nature of the process issued.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 454.]

### 6. SAME—APPEARANCE.

The objection that the docket of a justice of the peace does not sufficiently state the particular nature of the process issued in an action is not available to the defendant, where he appears and files an answer without objecting to the summons issued.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 268.]

### 7. SAME—REFERENCE TO ANSWER.

The failure of a justice of the peace to make reference in his docket to the written answer filed by defendant, as required by Rev. St. 1899, § 4341, is not jurisdictional error; the answer having been in fact filed.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 455.]

**8. SAME—APPEARANCE OF PARTIES.**

An entry in the docket of a justice of the peace, reciting that the case was called at an hour named, and, after waiting one full hour, defendant came not, but made default, and plaintiff appeared in person and by attorney, was sufficient to show that the plaintiff appeared within the hour, as required by Rev. St. 1899, § 4374.

**9. SAME—WRIT OF ERROR—DISPOSITION OF CAUSE.**

The failure of the district court, on affirmance of a judgment of a justice of the peace, to order the clerk to certify the decision to the justice or to award execution out of the district court, as required by Rev. St. 1899, § 4271, does not vitiate the judgment of affirmance.

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Action by R. D. Jones against Charles W. Pointer. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

M. B. Camplin, for plaintiff in error. Burgess & Kutcher, for defendant in error.

POTTER, C. J. This action was originally brought before a justice of the peace in Sheridan county by R. D. Jones against Chas. W. Pointer, and a judgment was rendered in favor of the plaintiff. For the purpose of obtaining a review of the judgment the defendant filed a petition in error in the district court sitting within and for said county, and that court, upon a hearing, affirmed the judgment. From that judgment of affirmance, the cause is brought to this court on error.

A final judgment of a justice of the peace may be taken to the district court of the county either by appeal or by proceedings in error. Rev. St. 1899, § 4397. And in all cases tried by or without a jury before a justice of the peace either party may except to the opinion of the justice upon any question of law arising during the trial of the cause; and when either party shall allege such exception, the justice is required to sign and seal a bill containing such exceptions, if truly alleged, with the point decided so that the same may be made part of the record in the cause. Rev. St. 1899, § 4384. There is no bill of exceptions in the record, nor does it appear that any exception was taken to any ruling of the justice of the peace. Hence, the petition in error filed in the district court did not present for consideration any ruling or decision of the justice to which, as a condition precedent to its review on error, an exception duly preserved by bill would be required. But the plaintiff in error challenged by his petition in error the judgment rendered by the justice upon the ground, among others, that it was rendered without jurisdiction, as shown upon the face of the record. And we are not prepared to hold that such an objection apparent upon the record may not be presented by petition in error without a bill of exceptions, or that error, if any, manifest upon the face of the judgment of a justice of the peace, is not reviewable on petition in error without a bill

or even in the absence of an exception to the judgment. Without specifically deciding that question, it may be conceded for the purposes of this case that an error of the character mentioned is reviewable in the district court on error without a bill; for we are convinced that the record discloses no error, jurisdictional or otherwise.

The docket of the justice discloses the following particulars. October 3, 1904, the plaintiff, by his attorney, filed a petition setting forth his cause of action against the defendant, and summons was issued forthwith and placed in the hands of the sheriff for service, directing the defendant to appear and answer October 7, 1904, at 2 o'clock p. m. October 4, 1904, summons was returned by the sheriff, properly indorsed, and filed, showing due service upon the defendant on October 3, 1904, at 4:40 p. m. October 7, 1904, at 2 o'clock p. m., the cause was called, all parties being present, and the cause was continued to October 8, 1904, at 9:30 a. m., on motion of the defendant, with the consent of the plaintiff. October 8, 1904, at 9:30 a. m., the cause was called, all parties being present, and defendant made application for jury and deposited \$6 cash for same. The docket then recites the drawing, impaneling, and swearing of the jury, and that at 3 o'clock p. m. of the same day the case was called for trial, all parties being present and represented by attorneys; that witnesses were examined, the cause argued to the jury by the attorneys for the respective parties at the close of the testimony, and submitted to the jury for a verdict, whereupon a bailiff was sworn to take charge of the jury; and that, "after being out about three hours the jury returned a verdict of disagreement, which was accepted by the court, and the jurors given \$1 each and discharged. This case is now set for trial by agreement on October 31, 1904, at 10 o'clock in the forenoon at this office." An entry appears in the docket as follows: "Oct. 31, 1904, 10 o'clock a. m. Case called. After waiting one full hour, defendant came not, but made default. Plaintiff appeared in person and attorney, Chas. A. Kutcher. R. D. Jones duly sworn to tell the truth, the whole truth, and nothing but the truth, and testified in his own behalf. From the evidence the court finds that the plaintiff, R. D. Jones, has sustained damages at the hands of Chas. W. Pointer, defendant, equal to the sum of \$195. It is now therefore ordered and adjudged by this court that the plaintiff, R. D. Jones, have and recover from defendant, Chas. W. Pointer, the sum of \$195, together with the costs of this action, herein taxed at \$25.85." Among the papers in the case returned by the justice to the district court appears a verified petition of the plaintiff in writing, filed in the office of the justice October 3, 1904, a written and verified answer filed by the defendant with the justice October 8, 1904, and plaintiff's reply in writing filed with the justice on the same day. The

petition shows that the action was brought to recover damages in the sum of \$195 for personal injuries inflicted upon the plaintiff by the defendant. The answer contains a general denial, and a separate defense alleging that as to the matters charged against the defendant in the petition he acted in self-defense, and was justified in the acts charged. The reply denies generally the allegations of the special defense set up in the answer.

Upon the facts appearing by the record as aforesaid, it is contended that, as a jury had been demanded by the defendant and the jury fee deposited, the justice was without jurisdiction to try the cause without a jury, notwithstanding that a jury had once been called to try the cause and had been discharged upon their disagreement, to whom the deposited jury fee had been paid, and notwithstanding the defendant's failure to appear at the time set by agreement for another trial. In the first place, in respect to this contention, we are not clear that the failure or refusal of a justice in any case to call a jury upon a demand therefor would be jurisdictional error, or that the point could be raised on error without first presenting the objection in some form to the justice and preserving an exception to his ruling thereon. In this case it seems that the question was attempted to be raised by a motion to vacate the judgment, which was filed with the justice more than five months after the judgment was rendered, and after the filing of the petition in error in the district court; but it does not appear that the motion was ever acted on by the justice, or even presented to him for consideration, otherwise than by its mere filing. Waiving the question thus suggested, we are satisfied that the circumstances disclosed by the record did not entitle the defendant to a trial by jury on the day when the case was finally tried, and the judgment complained of rendered.

It is provided by section 4376, Rev. St. 1899, that whenever the justice shall be satisfied that a jury sworn in any cause before him, after having been out a reasonable time, cannot agree on their verdict, he may discharge them and issue a new venire, unless the parties consent that the justice may render judgment. Counsel for plaintiff in error relies upon that provision, and contends that after a jury has been demanded, and the jury fees deposited, the justice is deprived of power to render judgment without the verdict of a jury, unless the parties consent thereto, and that in such case, where a jury to whom the case has been submitted are discharged upon their disagreement, the only authority of the justice in the premises, unless the parties consent otherwise, is to issue a venire for another jury, without a renewed demand for a jury or the further deposit of jury fees. The section relied on must, however, be read and construed in connection with succeeding sections of the same chapter.

In sections 4381 and 4382 provision is made for granting a new trial upon certain grounds after the verdict of a jury; and the last clause of section 4382 reads as follows: "If the new trial shall be granted, or the jury be unable to agree, the proceedings shall be in all respects as upon the return of the summons." Section 4383 is as follows: "Upon the verdict being delivered to the justice, and before judgment being rendered thereon, each juror shall be entitled to receive \$1 which shall be taxed in the cost bill against the losing party. When the jury shall be unable to agree upon a verdict, the same compensation shall be paid them by the party calling the jury, and the same shall be taxed in the cost bill against the losing party." Section 4375 which authorizes a jury trial provides that, after issue be joined, either party may demand that the action be tried by a jury of six persons, on first paying to the justice the jury fees in advance. Construing these several provisions together, we think it is not difficult to arrive at a clear understanding of their meaning and effect. It should be remembered that jurors in civil cases before justices of the peace are not paid by the county, as are jurors in district courts, and the only provisions for the payment of their fees are those above mentioned. It is clear that the jury fees required to be paid in advance to perfect the demand for a jury in the justice's court are the fees for a single jury, viz., \$6. When the jury shall be unable to agree, it is the duty of the party calling them to pay their compensation, and he may no doubt do so without resort to the fees deposited, allowing the latter to remain with the justice for another jury; and in such case the justice might and probably should summon another jury, unless the parties consent that he may render judgment. Where, however, the party calling the jury fails to pay them upon their disagreement, but allows the justice to use the deposit for that purpose, which would clearly be his duty in such case, another deposit would be necessary to require the calling of another jury. The provision of section 4382, that if the jury be unable to agree the proceedings shall be in all respects as upon the return of the summons, seems to contemplate the necessity of a demand of another jury if one be desired; though doubtless such a demand should be understood as made where the party himself pays the disagreeing jury, leaving the advance deposit intact in the hands of the justice. In the case at bar it does not appear that the defendant paid the fees of the jury otherwise than by permitting the justice to pay them with the money deposited, nor is it contended that he did pay them except in that manner; and it became the duty of the justice to pay their fees, as we understand from the record he did, by using the advance deposit for that purpose. A new demand, or at least a new deposit of

jury fees, was necessary to entitle the defendant to another jury trial. No such demand or deposit having been made, the justice was authorized to hear and determine the cause without a jury.

It is next objected that the docket entries are insufficient to show a disagreement of the jury. The entry is, of course, inaccurate in stating that the jury returned a verdict of disagreement instead of reciting their inability to agree upon a verdict; but we think the meaning is evident, and that the entry is sufficient to show that the justice was satisfied that the jury could not agree upon their verdict after having been out a reasonable time, and is sufficient to authorize the jury's discharge. Further than that any error in discharging the jury could not be considered in the absence of a bill of exceptions showing an exception to the order at the time.

It is further contended that the judgment is void upon its face for the reason that the justice failed to enter in his docket "a brief statement of the nature of the plaintiff's demand, and the amount claimed," as required by section 4330, Rev. St. 1889; and it is insisted that in consequence of such failure the jurisdiction of the justice over the subject-matter of the action is not shown. While it is true that there is no specific statement in the docket of the nature and amount of plaintiff's claim, there is an entry in the following words on the date of the commencement of the suit: "Comes now plaintiff by his attorney, Chas. A. Kutcher, and for a cause of action against defendant complains and alleges as is set forth by plaintiff's petition already filed in the case." Conceding that the record of the justice should show jurisdiction, and that a failure in that respect would authorize a reversal of the judgment, it is clearly sufficient on error if the jurisdiction appears from the entire record. And where, as in this case, plaintiff files a written petition at the commencement of the case, stating a cause of action, and claiming an amount within the jurisdiction of the justice, and such petition is referred to by an entry in the docket as setting forth the plaintiff's cause of action or demand, the absence of a more definite statement by docket entry of the nature and amount of plaintiff's claim is not in our opinion ground for reversal. *Straley v. Payne*, 43 W. Va. 185, 27 S. E. 359; *Missemmer v. Trout*, 17 Pa. Co. Ct. R. 317; *Coffee v. Chippewa Falls*, 36 Wis. 121; *Baizer v. Lasch*, 28 Wis. 268; *Campbell v. Babbitts*, 53 Wis. 276, 10 N. W. 400; *Jones v. Hunt*, 90 Wis. 199, 63 N. W. 81; *Plank Road Co. v. Parker*, 22 Barb. (N. Y.) 323; 12 Ency. Pl. & Pr. 753, 754. The petition is a part of the record of the case, and it is not perceived why it may not be consulted to ascertain whether the case is one within the jurisdiction of the justice, where

the judgment is assailed on error for want of jurisdiction.

The objection that the justice did not enter in his docket the particular nature of the process issued is not warranted by the facts. An entry in the docket states that summons was issued directing defendant to appear and answer at a certain time stated in the entry, and a summons is a writ specially provided for by the statute. But that objection would not in any event be available to the plaintiff in error, since he appeared in the action and filed an answer, without objecting to the summons. The failure of the justice to make reference in his docket to the written answer filed by the defendant as required by section 4341, Revised Statutes, is not, in our opinion, jurisdictional error. The answer was, in fact, filed, and returned as one of the papers in the cause.

It is earnestly contended that the judgment of the justice is void on the ground that the docket of such officer does not show affirmatively that the plaintiff appeared at the time the cause was set for the second trial, or within one hour thereafter. The statute provides that "if either party shall fail to appear within one hour after the time specified for the return of the process, or after the hour of adjournment, the justice shall dismiss the suit, or proceed to hear the proof of the party present, and render judgment thereon accordingly, as the case may require." Rev. St. 1899, § 4374. As shown above, in the docket entry of October 31, 1904, when the cause was heard and judgment rendered, it is stated as follows: "Oct. 31, 1904, 10 o'clock a. m. Case called. After waiting one full hour, defendant came not, but made default. Plaintiff appeared in person and attorney." It is argued that this entry does not show plaintiff's appearance or presence when the case was called, or at any time within the hour thereafter, and that, from all that is stated in the entry, the plaintiff may not have appeared until after the expiration of the hour. We do not think that the entry is to be so construed. Docket entries of a justice of the peace are entitled to receive a fair and reasonable construction; and, while the entry in question is perhaps somewhat obscure, it is, in our opinion, sufficient to show plaintiff's presence at the time appointed for the trial, or at least within the required period thereafter. Had the entry as to plaintiff's appearance immediately followed the statement that the case was called, it seems to be admitted that it would have been sufficient. We think that the purport and effect of the entry as it stands is the same. The statement that plaintiff appeared, though following the entry of defendant's nonappearance, is to be understood as referring to the preceding entry that the case was called at 10 o'clock a. m., rather than to the expression "after waiting one full hour" in the clause stating defendant's failure to

appear. It is evident that the justice had in mind the provision of the statute above quoted, and his duty to hear the proof of the party present at the hour fixed for trial, or within the time allowed by the statute, and, in connection with the statement of the date and hour when the case was called, the intention is reasonably clear to record plaintiff's appearance at the appointed time. We cannot agree with counsel for plaintiff in error that the entry shows that plaintiff appeared after the justice had waited one full hour. Construing the docket entry fairly and reasonably, we think the statement that plaintiff appeared is related to the entry showing the calling of the case. Had the plaintiff as well as the defendant failed to appear after the justice had waited the full hour, it is reasonable to assume that it would have been so stated, instead of merely entering the fact of his appearance. The statement in the entry that the defendant made default is inaccurate except as applied to his nonappearance on the date set for trial. The defendant had appeared to the action, and filed an answer which remained on file. He was not therefore in default. But having failed to appear on the adjourned day a trial was authorized in his absence by bearing the proof of the plaintiff who was present.

An objection is urged to the judgment of affirmance, entered by the district court, on the ground that it fails either to order the clerk to certify the decision to the justice, or to award execution out of the district court, as required by section 4271, Rev. St. 1890. That section provides that, upon the affirmance on error in the district court of a judgment of a justice of the peace, the district court shall render judgment against the plaintiff in error for costs of the suit, and award execution therefor, and thereupon order its clerk to certify its decision to the justice, so that the judgment affirmed may be enforced as if such proceedings in error had not been taken, or that such court may award execution to carry into effect the judgment of the justice as if the judgment had been rendered in the district court. In the case at bar the district court affirmed the judgment of the justice and rendered judgment against the plaintiff in error for costs. It does not appear that an order was made awarding execution out of the district court for the collection of the judgment rendered against plaintiff in error by the justice, or that the clerk was ordered to certify the decision to the justice. But it is not perceived that the failure of the district court to provide for the lawful enforcement of the judgment affirmed can be regarded as either vitiating the judgment of affirmance, or as prejudicial to the rights of the plaintiff in error in the present proceeding, which is a mere proceeding in error for the review of the judgment.

For the reasons above stated, the judg-

ment of the district court affirming the judgment of the justice of the peace must be affirmed. Counsel for defendant in error ask that a reasonable attorney fee be taxed as part of the costs against the plaintiff in error as provided in section 4250, Rev. St. 1899; but we think the case should be held within the exception contained in that section, and, as therein provided, our judgment will certify that there was reasonable cause for the proceeding in error.

Judgment affirmed.

BEARD and SCOTT, JJ., concur.

FREEBURGH v. LAMOUREUX et al.  
(Supreme Court of Wyoming. June 12, 1906.)

1. SPECIFIC PERFORMANCE—DECREE.

Defendant, who was the owner of a certain half lot, agreed to convey the same to plaintiff in consideration of money and a lot to be selected by defendant from the lands of plaintiff. Defendant subsequently conveyed the half lot to a third person, and in a suit by plaintiff for specific performance it was decreed that the deed to the third person be canceled and that defendant convey to plaintiff. *Held*, that the decree was erroneous, in that defendant should have been required to make the selection within a time to be fixed, and upon the selection being made the decree should have required plaintiff to convey the lot and to pay the money consideration provided for in the contract.

2. NAME—CONTRACTS ENFORCEABLE—CERTAINTY—DESCRIPTION OF SUBJECT-MATTER.

A contract whereby defendant agreed to convey certain land to plaintiff in consideration of one lot of land in a certain town, to be selected by defendant from the lands belonging to plaintiff in such town, was too uncertain and indefinite, as concerned the description of the land to be selected, to sustain a decree for specific performance.

3. APPEAL — PRESUMPTIONS — FACTS NOT SHOWN BY RECORD.

Where, on appeal in a suit for specific performance of a contract to convey land, the evidence is not in the record, it will be assumed that the proof was no more specific as to the description of the land in the contract than the description contained in the petition.

Error to District Court, Fremont County; Charles W. Bramel, Judge.

Action by Jules Lamoureux against Louis Poire and another. Decree in favor of plaintiff, and defendant Freeburgh brings error. Reversed.

See 81 Pac. 97.

E. H. Fourn and N. E. Corthe'l, for plaintiff in error. Gibson Clark, for defendant in error Jules Lamoureux.

BEARD, J. This action was commenced in the district court of Fremont county by Jules Lamoureux, one of the defendants in error, against Louis Poire and the plaintiff in error, Philomine Freeburgh, to set aside a deed from Poire to Freeburgh of the west one-half of lot 7 in block 22 of the original town site of Lander in the town of Lander, Fremont county, Wyo.; and to enforce the

specific performance of an alleged contract for the conveyance of said property to Lamoureux by Poire. The petition alleges: That Poire, being the owner of the premises above described, did, on the 1st day of September, 1885, make an agreement with Lamoureux whereby Lamoureux "promised in consideration of the sum of five dollars and other valuable consideration, to wit, one lot of land in said town of Lander, to be selected by defendant Poire from the lands of plaintiff in said town and to be conveyed to him the said Louis Poire by plaintiff, to convey said real estate and property to plaintiff Jules Lamoureux by good and sufficient warranty deed." That Lamoureux went into possession of the half lot under the contract, has ever since been in possession and has made valuable improvements thereon with the knowledge and consent of Poire, and has paid the taxes thereon. That he has demanded a deed from Poire for the property which he has neglected and refused to execute, and that he has, at all times, been ready and willing to perform his part of said contract. The petition then alleges that "Poire fraudulently pretends that he has sold and conveyed said premises to the defendant, Philomine Freeburgh, on a valuable consideration of \$50; but plaintiff avers that said defendant Philomine Freeburgh well knew of all of the rights of plaintiff in and to said premises before and at the time she received said conveyance, and so fraudulently paid her money thereon, if any was paid by her." The prayer of the petition is that the deed from Poire to Freeburgh be decreed to be void and be canceled of record and that Poire be required to convey the half lot to Lamoureux. A general demurrer to the petition was overruled, and the defendants filed separate answers. Poire denying the contract and alleging that Lamoureux was in possession under a verbal contract that he might erect a building on the lot and use it for a period not to exceed five years. Freeburgh pleaded that she was an innocent purchaser. The cause was tried to the court, and a decree entered canceling the deed from Poire to Freeburgh, and requiring Poire to convey to Lamoureux. After the decree was entered Poire died, and the action was revived against the administrator of his estate. The bill of exceptions having been stricken from the record (12 Wyo. 41, 73 Pac. 545) the case stands upon the question of the sufficiency of the petition to support the decree. A number of objections to the sufficiency of the petition have been presented by counsel, but it will not be necessary to consider all of them.

It is contended that the decree is unwarranted and inequitable in that it does not enforce the whole contract, and does not require Lamoureux to perform his part of the contract. If the contract is such a one as a court of equity should require to be

specifically performed at all, the decree should have provided for its performance in its entirety, as nothing is shown to render its enforcement inequitable or impossible. "The decree, it has been held, must bind all the parties, for a decree of specific performance against the defendant is erroneous unless it requires of the plaintiff the performance of his share of the obligations." 26 Enc. Law, 65, and 20 Enc. P. & P. 496, and cases cited in notes. The fact that Poire had neglected to select the lot was not a good reason why the obligations to be performed by plaintiff should not have been required. Poire should have been required to make the selection within a time to be fixed by the court, that being a condition precedent to the duty of Lamoureux to convey, and upon the selection being made the decree should have required Lamoureux to convey the lot so selected to him; and it should also have required Lamoureux to pay the portion of the consideration which he alleges in his petition he was to pay in money. These were at least concurrent conditions to be complied with by Lamoureux upon a conveyance of the half lot to him by Poire. For this reason alone the decree as entered by the district court is inequitable and erroneous.

So far we have treated the contract as one that could be required to be specifically performed. Counsel for the plaintiff in error contends that this cannot be done because the lot of land to be conveyed to Poire is not described with sufficient certainty to be capable of identification. We have quoted the description as contained in the petition in the first part of this opinion, and it contains nothing from which the quantity of land to be selected by Poire or the dimensions of the lot can be determined. It is argued, however, that the description as given is sufficient because Poire had the right under the contract to select the lot and that, by such selection, it would become certain; and that the rule that "that is certain that can be made certain" applies. But the difficulty here is not in applying a description which is sufficiently definite to the lands of Lamoureux, but it is in the description itself. If the dimensions of the lot or the quantity of land to be selected had been stated in the contract, and all that remained to be done to identify the lot was to apply the description to such part of the lands of Lamoureux as Poire should select, that could be done and the land to be conveyed definitely determined. But in this contract, as it is stated in the petition, the dimensions of the lot are not mentioned, nor is reference made therein to any other fact from which they can be ascertained. To warrant a court of equity in requiring the specific performance of a contract, the contract "must be so certain that the court can require to be done the specific thing agreed to be done." *Godschalk v. Fulmer*, 176 Ill. 64, 51 N. E. 852. And

where the contract is for the conveyance of land the description "must be sufficient to fix and comprehend the property which is the subject of the transaction, so that, with the assistance of external evidence, the description, without being contradicted or added to, can be connected with and applied to the very property intended and to the exclusion of all other property." *Ryan v. U. S.*, 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447. But external evidence is inadmissible for the double purpose of describing the land and then applying the description. *Halsell v. Renfrow*, 14 Okl. 674, 78 Pac. 118, and cases there cited. Tested by these rules the description contained in this contract is too uncertain and indefinite to sustain a decree for specific performance. Whether the contract as shown by the evidence introduced at the trial was more definite in any particular than the statement of it contained in the petition we cannot determine as the bill of exceptions has been stricken from the record. We must assume that the proof was no more specific than the statements of the petition, and cannot, therefore, modify the decree as herein indicated.

The judgment of the district court is reversed and the case remanded for such proceedings as may be deemed proper upon the record. The plaintiff in error will recover her costs in this court with the exception of those connected with the bill of exceptions and the proceedings herein in the striking of the bill from the record. The costs growing out of the motion to strike the bill from the record will be taxed to the plaintiff in error.

Reversed.

POTTER, C. J., and SCOTT, J., concur.

**HECHT v. SHAFFER (CAREY, Intervener.)**  
(Supreme Court of Wyoming. June 26, 1906.)

**1. WITNESSES — COMPETENCY — TRANSACTION WITH DECEASED PERSON.**

One seeking to establish a parol gift causa mortis is not competent to prove the gift as against the executor of the deceased donor; *Rev. St. 1899, § 3683*, prohibiting a party from testifying when the adverse party is an executor.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 651.]

**2. GIFTS—CAUSA MORTIS—REQUISITES.**

To constitute a gift causa mortis there must be a manifest intention of the owner to give, a subject capable of passing by delivery, and an actual delivery at the time, in contemplation of death.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gifts, § 104.]

**3. SAME—EVIDENCE—ADMISSIBILITY.**

Where, in a suit to establish a parol gift causa mortis, a witness testified that the deceased donor had not said anything to the witness in regard to the alleged gift, it was not error to exclude evidence of a conversation with the donor with relation to her intention to give other things to the donee especially in view of

a will of the donor making a bequest to the donee.

**4. SAME—POSSESSION BY DONEE—EFFECT.**

Mere possession of an alleged gift by a donee is not sufficient to establish a gift causa mortis, especially where the donee had the opportunity to obtain possession of the property both before and after the donor's death.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gifts, §§ 154, 155.]

**5. SAME—PROOF OF DELIVERY—EFFECT.**

To constitute a gift causa mortis it must appear that the delivery of the gift by the donor to the donee was accompanied by an act or declaration indicating that a gift causa mortis was intended.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gifts, § 109.]

Error to District Court, Laramie County; Richard H. Scott, Judge.

Action by Fredricke Hecht against Annie M. Shaffer, in which John F. Carey, as executor of Julia F. Schweickert, deceased, intervened. There was a judgment in favor of defendant and intervener, and plaintiff brings error. Affirmed.

Walter R. Stoll, for plaintiff in error.  
Gibson Clark, for defendant in error Carey.

**BEARD, J.** The plaintiff in error, Fredricke Hecht, brought suit in the district court of Laramie county against one of the defendants in error, Annie M. Shaffer, on a promissory note payable to the order of one Julia F. Schweickert. She alleged in her petition that Mrs. Schweickert, the payee of the note, had transferred and delivered the note to her as a gift, and that she thereby became the owner thereof. The defendant Shaffer answered denying that the plaintiff was the owner of the note and alleging that it was the property of the estate of Julia F. Schweickert, deceased, and tendered and paid into court the amount then due on the same. The defendant in error John F. Carey, executor of the will of Mrs. Schweickert, deceased, by leave of court intervened in the action and answered, denying the plaintiff's ownership of the note and alleging that it was the property of said estate. The claim of the plaintiff is that Mrs. Schweickert, a short time before her death, made a gift causa mortis of the note to plaintiff. The cause was tried to the court without a jury, and the court found that the note was the property of Mrs. Schweickert at the time of her death, which was prior to the time of the commencement of the action, and that it still belonged to her estate, and that plaintiff had no interest or right of ownership therein, and gave judgment accordingly. From this judgment, plaintiff brings error.

The note was not indorsed, and the only evidence of its delivery to plaintiff by Mrs. Schweickert was the fact that it was in the possession of plaintiff. Upon the trial the plaintiff was sworn as a witness in her own behalf, and her counsel offered to prove by her that a short time before the death of

Mrs. Schweickert and while she was ill, which illness resulted in her death, she called for a little receptacle which she had, and in which she had some jewels, some money, and the note in question, and opened it and delivered the contents of the same together with the receptacle to plaintiff as a gift, saying at the time, in substance, "These I give to you, you understand. But in case I get well again, then, of course, the things are mine;" that plaintiff took charge of the receptacle and the articles, and from that time had the possession of the same. Counsel for the executor objected to this testimony and to the plaintiff testifying to anything that took place prior to the death of Mrs. Schweickert. The objection was sustained, and that ruling is the chief ground relied upon by plaintiff in error for a reversal of the judgment. The objection to this testimony is based upon the following provisions of our statutes (section 3683, Rev. St. 1899): "A party shall not testify when the adverse party is the guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee of a deceased person, except." Then follows certain exceptions, within the letter of which it is conceded this testimony does not come. The section then closes with the following sentence: "Nothing in this section contained shall apply to actions for causing death, or actions or proceedings involving the validity of a deed, will or codicil; and when a case is plainly within the reason and spirit of the last three sections, though not within the strict letter, their principles shall be applied."

It is urged that, because the law permits a party to testify in an action involving the validity of a deed or will, the same reasons exist for admitting his testimony in an action involving the validity of a gift causa mortis, and that this case comes within the reason and spirit of the exception. But we think there is a marked distinction between the two. Deeds and wills are required to be formally executed in the presence of witnesses and, when their validity is attached, the instrument itself, in a manner, speaks for the deceased grantor, or the testator. The rule is that a party shall not testify to transactions which occurred between such party and a person since deceased as against the personal representative of such deceased person. The reasons for the rule are well understood. The lips of the one being sealed by death, justice requires that those of the other should be closed by the law, as to such transactions. To permit a party to testify is the exception, and the exceptions are statutory and in a measure arbitrary. We have been cited to no case, nor have we found any, where a party, within the letter of the law excluding his testimony, has been permitted to testify because within the spirit

of the exception. In *Hudson v. Houser*, Administrator, 123 Ind. 309, 24 N. E. 243, it is said: "We have no recollection of any case where this court has held that a party incompetent because within the letter of the statute was competent within the spirit of the statute; but we have a number of cases where the reverse of this has been ruled. The reason for this is well stated in *Malady v. McEnary*, 30 Ind. 273." *Paddock v. Adams and Holly*, Ex'rs, 56 Ohio St. 242, 46 N. E. 1068. There is perhaps no class of cases where the reason for applying this rule is stronger than in cases of parol gifts causa mortis. No class of cases affords better opportunities or greater inducements to acquire property wrongfully than under such circumstances as are claimed in this case. The parties are alone, no witness is present, and none is called to witness the transaction. To admit the party to testify to the making of the gift under such circumstances would be to open wide the door for the perpetration of fraud, and would amount, practically, to the abrogation of the rule.

To constitute a valid gift causa mortis three things must concur. There must be a clear and manifest intention of the owner to give, a subject capable of passing by delivery, and an actual delivery at the time, in contemplation of death. *Cutting v. Gilman*, 41 N. H. 147; *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429. In the case at bar the only evidence, aside from the offered testimony of the plaintiff, of the intention of Mrs. Schweickert to give the note in question to plaintiff is contained in the offered testimony of Anna Ralston, a daughter of plaintiff. She was asked if she had any conversation with Mrs. Schweickert at any time with relation to what she intended to do when she died, with any of her property; to which she answered: "Yes." She was then asked to state what she said. This was objected to, and the court ruled that she should answer if it related to this matter. She answered: "In regard to this matter, she did not say anything." Plaintiff then offered to prove by this witness the conversation with Mrs. Schweickert with relation to her intention to give things to plaintiff upon her death. This testimony was excluded, and we think rightly. The witness had already stated that there was nothing said about the matter in controversy, and what may have been said about other property was irrelevant to the issue. In addition to this, the will of Mrs. Schweickert, bearing date less than six weeks before the time this gift is alleged to have been made, was introduced in evidence, from which it appears that she made bequests of certain specific items of personal property to plaintiff. The date of the conversation is not given by the witness, but from other statements in her testimony it is more than probable that it was before the will was executed.

It is also argued that the possession of the note by plaintiff imports a delivery to her by Mrs. Schweickert. But we think it is quite well settled that the mere possession of the subject-matter of the gift by the claiming donee is not sufficient of itself to establish a gift causa mortis; especially where, as in this case, the claimant had the opportunity to obtain possession of the property both before and after the death of the donor. Nor is delivery alone sufficient. It must appear that the delivery was accompanied by some act or declaration clearly indicating that a gift causa mortis was intended. *Buecker v. Carr*, 60 N. J. Eq. 300, 47 Atl. 34; *Podmore v. Dime Savings Bank* (Sup.) 60 N. Y. Supp. 533; 14 Enc. Law (2d Ed.) 1050; 20 Cyc. 1231.

We find no error in the ruling of the district court in excluding the offered testimony of the plaintiff, or of the witness Ralston. The plaintiff having failed to sustain the alleged gift, by sufficient evidence, the judgment of the district court is affirmed. Affirmed.

POTTER, C. J., and CRAIG, District Judge, concur. SCOTT, J., having announced his disqualification to sit in this case, Hon. DAVID H. CRAIG, Judge of the Third District, was called in to sit in his stead.

#### HUGHES v. TERRITORY.

(Supreme Court of Arizona. March 30, 1906.)

##### 1. CONTEMPT—CRIMINAL PROSECUTION—STATUTORY PROVISIONS.

Pen. Code, § 3, providing that after the passage of the Code no act shall be criminal except as described in the Code, and section 162, providing that contempt of court of certain kinds named is a misdemeanor, but not naming publication concerning a pending cause, when construed in connection with section 11, providing that the Code does not affect any power conferred by law on any officer to inflict punishment for contempt, section 621, providing that a criminal act is not less punishable as a crime because it is also declared to be punishable as a contempt, and Rev. St. 1901, pars. 1223, 1237, giving district courts original and appellate jurisdiction, and power in addition to that conferred by statute to proceed according to common law, do not attempt to abridge the power of the district court to punish for criminal contempt.

##### 2. SAME—TITLE OF PROCEEDINGS.

In a prosecution for criminal contempt, that the proceedings prior to the order of attachment against the defendant were not in the name of the territory does not affect the jurisdiction of the court to punish for the contempt.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, §§ 137, 139.]

##### 3. SAME—PETITION—ALLEGATIONS ON INFORMATION AND BELIEF.

In proceedings for the punishment of a criminal contempt, allegations on information and belief that the accused was the proprietor and editor of a paper and published articles relating to pending causes were sufficient to put the accused to his denial.

##### 4. SAME—DEFENSES—TRUTH OF PUBLICATION.

In a prosecution for contempt in publishing articles relating to pending causes, the truth or falsity of the statements made is immaterial.

Appeal from District Court, Pima County; before Justice John H. Campbell.

L. C. Hughes was convicted of criminal contempt. From a judgment imposing a fine, and from an order denying a new trial, he appeals. Affirmed.

Worsley & Van Dyke and John T. Hughes, for appellant. E. S. Clark, Atty. Gen., Eugene S. Ives, and Benton Dick, for the Territory.

KENT, C. J. The record shows that it was brought to the attention of the court below by the verified petition of one Albert Steinfeld, that in connection with certain proceedings in that court in Tucson, both criminal and civil, relating to one Harcourt and one Bartlett, the appellant had published in a newspaper in Tucson belonging to him four editorial articles which it was claimed were in contempt of court, in that they tended to influence the proceedings in said cases, and to obstruct justice. Upon this petition an order to show cause was issued against the appellant, who appeared and made answer admitting the publication of the articles, but denying that they were published with intent to obstruct justice. The court below heard evidence in the case, and adjudged the appellant guilty of criminal contempt, and imposed a fine.

It is claimed by the appellant that the district court was without jurisdiction in the matter, and that its judgment should therefore be set aside. The appellant contends that, even though the rule be that the Legislature may not abridge the power of a court created by the Constitution to punish for contempt, the rule is otherwise where the court is the creature of the Legislature. He contends that the district court of the territory is a creature of the Legislature of this territory, and that, therefore, the Legislature of the territory has the right to abridge its power to punish for contempt, civil or criminal. He further contends that by section 3 of the Penal Code the Legislature has exercised such power, and that by virtue of the provisions of that section all common-law offenses have been abolished, and with them the inherent power of the court to punish for contempt, except as prescribed in the Civil and Criminal Code, and that, as this offense is a criminal contempt, it can only be punished as provided in section 162 of the Penal Code. These provisions of the Penal Code are as follows:

"Sec. 3. This Code shall take effect at 12 o'clock, noon, on the first day of September, 1901. No act or omission commenced after 12 o'clock, noon, of the day on which this Code takes effect as a law, is criminal or punishable, except as prescribed or author-

ized by this Code, or by some of the statutes which it specifies as continuing in force and as not affected by its provisions, or by some ordinance, municipal, county, or town regulation, passed or adopted under such statutes and in force when this Code takes effect. Any act or omission occurring prior to that time may be enquired of, prosecuted and punished in the same manner as if this Code had not been passed."

"Sec. 162. Every person guilty of any contempt of court in either of the following kinds is guilty of a misdemeanor: [Then follow eight subdivisions of the section, specifying different offenses, none of which include the particular offense in question.]"

We do not need to determine to what extent, if at all, the Legislature may limit the power of a district court of this territory in respect to its common-law and equity jurisdiction, under the powers conferred upon it by our organic act; or whether in any event the Legislature could take away from such court the power inherent in it to protect itself by summary procedure from acts constituting a criminal contempt, for we do not agree with the appellant, that the Legislature has attempted to abridge the power of the court to punish for contempt. The correctness of his other premises need not, therefore, be considered. Section 11 of the Penal Code provides: "This Code does not affect any power conferred by law upon any court martial, or other military authority or officer, to impose or inflict punishment upon offenders; nor any power conferred by law upon any public body, tribunal or officer, to impose or inflict punishment for a contempt." Section 621 of the Penal Code provides: "A criminal act is not the less punishable as a crime because it is also declared to be punishable as a contempt." Our organic act provides that the district courts "shall possess chancery, as well as common-law, jurisdiction." Our Legislature has provided, with respect to the district courts in our Civil Code, that:

"In addition to the jurisdiction of the district courts, as conferred by the Constitution and laws of the United States, their jurisdiction shall be of two kinds. First, original; second, appellate."

"The said district courts in addition to the powers conferred by statutes, shall have power to proceed according to the course of the common law."

Rev. St. Ariz. 1901, pars. 1223, 1237.

We think it is clear, construing all the provisions of our law together, irrespective of whether it had the power so to do, that the Legislature did not, by section three of the Penal Code, abridge the power of the court to punish for a criminal contempt; and that it had no intention so to do. The provision of section 162 of the Penal Code cannot be construed as in any manner limiting the power of the court to punish for a

contempt. It merely provides that certain contempts are misdemeanors and may be punished as such. In passing upon such a contention upon a similar statute, the Supreme Court of Oklahoma said, in language which meets our approval: "This contention is untenable for two reasons. In the first place, the language of the statute itself shows a clear intention on the part of the Legislature not to make contempts of court exclusively punishable by prosecutions by indictment. The act evinces no intention on the part of the Legislature to take away from the court a power which it already had to punish contempts of court in the summary manner of such proceedings. The Legislature simply provided that contempts of court were also misdemeanors. It declared that an offense against the court, of a certain prescribed kind, was also an offense against the public. This was proper legislation, and in no way affected the court's power to punish, by the ordinary proceedings, such contempts. The Legislature undoubtedly intended that the judge of the court whose office was transgressed, whose dignity was offended, and whose integrity was impeached, should not be the only person to determine whether such acts should be prosecuted. Such conduct is often overlooked by the courts when the acts are a serious injury to the public. The diffidence of courts to take up for investigation and punishment matters which are aimed, not only at the court in its public capacity, but also in its individuality, often permits such transgressions, as contempt of court, to be overlooked and allowed to go unnoticed, by the judges of the courts; and the public welfare, the morals, the good behavior and the proper consideration of a community for governmental functions are thereby often greatly injured. The Legislature intended that the public itself might also have a right to prosecute these offenses; not to take away a power which the court already had to punish the offender, but to prescribe a means in addition to that already possessed for such punishment." *Burke v. Territory*, 2 Okl. 499, 37 Pac. 829.

It is urged by the appellant that the court below was without jurisdiction, because the proceedings as instituted were not in the name of the territory, but were entitled, "In the matter of the petition of Albert Steinfeld for an order declaring L. C. Hughes guilty of criminal contempt." The record shows that the proceedings were commenced by a petition so entitled, and were carried on under such title, through the proceedings until the order of attachment was issued, which order and the subsequent judgment were entitled, "The territory of Arizona against L. C. Hughes." In the absence of statute or rule of court, there seems to be no uniform practice in the matter in the various jurisdictions. Generally the proceedings, at least after the

attachment or order to show cause has issued, seem to be entitled in the name of the people. We incline to the belief that the better form is to entitle the proceedings, "In the Matter of the Proceedings against ———, for Contempt of Court," rather than to entitle them in the name of the territory; but the matter of the title of the petition or of the proceedings is unimportant, and not one that affects the jurisdiction of the court. The court might have instituted the proceedings of its own motion, had it had knowledge of them, without any preliminary petition or other application. "In the present cases it was not necessary that a formal complaint should first have been made to the court. The contempt, if there was one, was not, strictly speaking, committed in the presence of the court, but it related to a trial then proceeding before the court. In each case a summons to the plaintiffs in error was issued by the court, of its own motion, and without complaint made, to show cause why the corporations should not be adjudged in contempt for publishing an article dealing with a matter on trial before the court. When it comes in any manner to the knowledge of the presiding justice of a court that articles are published in a newspaper circulated in the place where the court is held which are calculated to prevent a fair trial of a cause then on trial before the court, the court of its own motion, can institute proceedings for contempt. Such a power in the court is necessary for its own protection against an improper interference with the due administration of justice, and it is not dependent upon the complaint of any of the parties litigant. If the publication amounts to a contempt of court, because it interferes with the due administration of justice in a cause before the court, the contempt is analogous to a contempt committed in the presence of the court." *Telegram Co. v. Commonwealth*, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280. The minute entries in the case show that upon the filing of the petition an order to show cause why an attachment should not issue was served on the appellant. To this the appellant filed an answer. A hearing was had, evidence taken, and judgment rendered. The appellant's rights were fully protected, and the defect in the form and title of the proceeding, if it existed, since it in nowise affected the substantial rights of the appellant, is to be disregarded.

It is further urged that the petition was insufficient, since it alleged certain matters on information and belief, such as that the appellant was the proprietor and editor of the paper and published the articles in question. These matters were not denied by the appellant, and such an allegation was sufficient to put the defendant to his denial. *Rapalje on Contempt*, § 94.

It is further claimed that the court erred in not allowing the appellant to prove the

truth of the statements made in the articles published by him. The trial court was clearly right in refusing to hear evidence as to the truth of the statements made as to Harcourt and Bartlett. The gravamen of the charge was not the alleged false character of the publications, or that the statements made as to these persons were false, but was the publication of articles tending to prejudice the public and the members of the jury, and thereby to influence the result of the pending trials. The truth or the falsity of the statements contained in the articles was immaterial. Whether true or false, the court found their tendency was to prejudice and influence the public and the jury, and the result of the trial, and thus obstruct justice. The publication was, therefore, a contempt of court, irrespective of the truth or falsity of the statements contained in the articles. It would seem almost superfluous to point out why, in the furtherance of justice, newspapers must refrain from the publication of articles intended or calculated to influence a court or jury in the determination of a cause pending before them. It is not a question of abridging the freedom of the press, but one of restraining and controlling a license, happily but seldom indulged in, which carries such newspapers beyond the bounds of propriety, in an endeavor improperly to use their great power to influence judicial action. The reason why restraint must be put upon them to prevent such abuse of power is apparent, and is well stated by the Supreme Court of Colorado: "Parties have a constitutional right to have their causes tried fairly in court, by an impartial tribunal, uninfluenced by newspaper dictation or popular clamor. What would become of this right if the press may use language in reference to a pending cause calculated to intimidate or unduly influence and control judicial action? Days and sometimes weeks, are spent in the endeavor to secure an impartial jury for the trial of a case; and, when selected, it is incumbent upon the court to exercise the utmost care in excluding evidence of matters foreign to the issues involved, so that the minds of the jurors may not perchance be unduly biased or prejudiced in reference either to the litigants or to the matters upon trial. But if an editor, a litigant, or those in sympathy with him, should be permitted, through the medium of the press, by promises or threats, invective, sarcasm, or denunciation, to influence the result of the trial, all the care taken in the selection of the jury, as well as the precaution used to confine their attention at the trial solely to the issues involved, will have been expended in vain." *Cooper v. People* (Colo.) 22 Pac. 790, 6 L. R. A. 430.

The court below found as a fact that the appellant was guilty of criminal contempt of court in knowingly having published the articles in question, and that such publica-

tion was an interference with, and an obstruction of, justice. We are not at liberty to review on this appeal, the facts so found, or the decision of the lower court upon that issue. Upon the questions of law presented, we are of the opinion that the court, having jurisdiction of the person of the appellant and of the subject-matter of the proceeding, had jurisdiction to determine the matter, and to enter the judgment; and that the record presents no reversible error. We think it proper to point out that, inasmuch as the question of the right of the appellant to review by appeal a determination of the district court in proceedings for contempt has not been raised, we have not passed upon such question, but have considered the matters presented as if such method of review were available to the appellant.

The judgment of the district court is affirmed.

SLOAN, DOAN, and NAVE, JJ., concur.

(10 Ariz. 94)

THORPE v. CLANTON et al.

(Supreme Court of Arizona. March 30, 1906.)

1. DEDICATION — SALE WITH REFERENCE TO PLAT—ESTOPPEL.

Where the owner of land sells lots or blocks according to a description given in a plat, he is estopped from revoking the dedication of the streets and alleys shown on the plat.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 34-47.]

2. HIGHWAYS—OBSTRUCTION—INJUNCTION.

Purchasers of lots sold with reference to a plat showing certain streets are not entitled to enjoin the closing of streets by the owner of the land, in the absence of a showing that they would be specially injured by such action.

3. SAME—FINDINGS.

In an action by persons who purchased lots with reference to a plat showing certain streets to enjoin the owner from obstructing the streets, a finding that the plaintiffs have a mutual interest in the common use of the streets of the town site, and as inhabitants of the town site are interested in keeping them open, is not sufficient to authorize a judgment enjoining the owner from obstructing the street, since it does not show that the plaintiffs would suffer any special injury.

Appeal from District Court, Maricopa County; before Chief Justice Kent.

Action by T. N. Clanton and others against James R. Thorpe. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

C. F. Ainsworth, for appellant. Street & Alexander, for appellees.

SLOAN, J. T. N. Clanton and five other persons, owners of lots in a town site known as Sidney, situated in Maricopa county, brought suit in the district court of said county against James R. Thorpe, the owner of certain lots in said town site, to obtain a permanent injunction restraining Thorpe from fencing in his said lots so as to close

up certain streets and alleys shown on the map of said town site, which streets and alleys are alleged by them in their complaint to have been dedicated to public use. Thorpe, in his answer, admitted that he had fenced in and closed said streets and alleys, but pleaded that said streets and alleys had never been dedicated to public use; that the board of supervisors of Maricopa county, by resolution entered upon the minutes of said board, had duly vacated and annulled an attempted dedication to public use of that portion of said town site which includes the streets and alleys so fenced by him; that after said action of said board he purchased the lots owned by him including the land abutting on and running through and around them designated on said maps as said streets and alleys; that after his said purchase he had cleared, fenced, and cultivated as one tract said lots; including said designated streets and alleys, as a farm. From the evidence adduced at the trial the court found that the grantors of Thorpe, then the owners and in possession of the S. W.  $\frac{1}{4}$  of section 5, town 1, range 3 W., Maricopa county, laid the same out into a town site, and subdivided the same into blocks and lots, and mapped and platted the same into blocks and lots, streets and alleys, numbering said blocks and lots, and naming the streets, and staked the said lots and blocks, streets, and alleys, so as to mark the same upon the ground, and gave to said town site the name of Sidney; that on the 3d day of September, 1888, said grantors of Thorpe filed said map and plat in the recorder's office of Maricopa county; that thereafter Thorpe and his grantors offered said lots and blocks for sale, and that the plaintiffs purchased certain lots in said town site, and settled upon and improved the same, and built houses for themselves thereon; that said purchases were made with reference to said map and plat, and with reference to said streets and alleys in said town site so mapped, platted, staked, and marked upon the ground; that Thorpe is the owner of certain blocks known as blocks 19, 20, 21, 28, 29, 30, 31, 32, and 33; that the board of supervisors passed the resolution set forth in the defendant's answer and that thereafter Thorpe fenced up the streets and alleys running through and around the blocks above numbered, and has subjected the same to his exclusive control and possession. Upon these findings the court gave judgment for the plaintiffs, and entered its decree granting the injunction prayed for. From the judgment and ruling of the court denying his motion for a new trial, Thorpe has appealed.

The question presented by the record is of great interest, and is not free from difficulty. At the time of the filing of the town site of "Sidney" by the grantors of Thorpe there was no statute in force in the territory relating to the dedication of streets and al-

leys by the owners of property. Such dedication as was made, therefore, by the platting of the land and filing of the map, and the sale of the lots according to the description as given in the map by the grantors of Thorpe, was a common-law dedication. In so far as the rights of purchasers are concerned the distinction between a statutory and common-law dedication is unimportant, as such distinction relates wholly to the nature of the title, which is granted, and not to the right of the public or to the rights of purchasers of lots to the free and unobstructed use of streets and alleys included within the dedication. *Barney v. Keokuk*, 94 U. S. 340, 24 L. Ed. 224. Where a dedication has been made, whether under a statute or at common law, and accepted by the public it becomes irrevocable. Where there has been no acceptance by the public, but where the owner has sold lots or blocks according to the description given in a map or plat, such owner is universally held, upon the doctrine of estoppel in pais, to be precluded from revoking the dedication. *Morgan v. Railroad Co.*, 96 U. S. 716, 24 L. Ed. 743. The important and essential questions involved in this case are, as asserted by counsel for plaintiff in error in his brief, as to the nature and extent of the rights of the defendants in error, under the facts as found by the court, to the use of the streets and alleys inclosed by Thorpe, and as to the nature of the relief to which they may be entitled. Elliott in his work on *Roads and Streets* has declared the general doctrine relating to the rights of purchasers of lots in a platted town site to be as follows: "It is not only those who buy land or lots abutting on a street or road laid out on a map or plat that have a right to insist upon the opening of the street or road, but where streets and roads are marked on a plat and lots are bought and sold with reference to the plat or map, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right in all the public ways designated thereon and may enforce the dedication. That plan or scheme indicated on the map or plat is regarded as a unity and it is presumed, as it well may be, that the public ways add value to all the lots embraced in the general scheme or plan. Certainly, as every one knows, lots with convenient cross streets are of more value than those without, and it is fair to presume that the original owner would not have donated land for public ways unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value and the donor ought not, therefore, to be permitted to take it from them by revoking part of his dedication."

The broad rule thus stated, that a purchaser of a lot in such town site has a right, as such owner, to have all the streets and alleys, designated upon the map, kept open

and unobstructed, and to enforce that right, has been affirmed by a few of the appellate courts of this country, and denied by others. The Supreme Court of North Carolina, following the doctrine as laid down by Elliott, has held, in a number of decisions, that, where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into subdivisions of lots, streets, and alleys, such purchaser of a lot or lots acquires the right to have all of said streets kept open, and if they be obstructed such obstruction amounts to a public nuisance, and each purchaser can, by injunction, or other proper proceeding, have such obstruction removed. That in such case there is an irrebuttable presumption that the complainant suffers some special injury to his property rights. *Hughes v. Clark* (N. C.) 46 S. E. 956; *Conrad v. Land Co.* (N. C.) 36 S. E. 282. The Supreme Court of Pennsylvania, in *Re Opening of Pearl Street*, 5 Atl. 430, has held, that one who purchases lots according to a plan as shown on a map, has a right to assert that not only are the streets abutting on said lots of the character of public streets, but that all other streets in the general plan are irrevocably dedicated as such streets. On the contrary, the Supreme Court of Tennessee in the case of *State v. Hamilton*, 70 S. W. 619, approves the rule as laid down in *Jones on Easements*, § 347, as follows: "When land is sold by reference to the plan upon which several streets and avenues are laid out the grantee does not necessarily acquire an easement in all said streets or ways. He acquires an easement in the street or way upon which his lot is situate, and in such other streets or ways as are necessary or convenient to enable him to reach a highway. He acquires no easement in the street or way which his land does not touch and which does not lead to the highway; and he is not entitled to an injunction or other remedy by reason of an obstruction to such street or way." In the case of *Chapin v. Brown*, 10 Atl. 639, the Supreme Court of Rhode Island held that a complainant, who bought a lot with reference to a plat, one side of which was bounded by an avenue, who sought to have a fence, obstructing said avenue and also other streets, removed, might have a technical right to have the obstruction from such other streets removed, but as such removal would be of no real benefit to him, and he would oblige the defendant to incur additional trouble and expense to protect his property, would not be granted relief in equity. The Supreme Court of Michigan, speaking by Judge Cooley, in the case of *Bell v. Todd*, 51 Mich. 21, 16 N. W. 304, held that the rule that those who purchase by reference to a plat are entitled to the use of the streets on which the purchased premises appear to abut and of all connecting streets, not to apply in the case where the plat was not acknowl-

edged nor the dedication accepted by the public, nor the streets laid out on it, used or capable of use, and where the streets were neither ways of necessity nor of convenience, and no equities were shown against closing them which the plaintiffs could assert. These cases illustrate the conflict in the decisions.

Upon principle we think the extreme view taken by the North Carolina court cannot be sustained. It may be that all the streets and alleys which appear upon a map or plat and according to which the owner has sold and conveyed lots are thereby irrevocably dedicated to the public; yet only such persons as may be injured in an especial manner by the obstruction or closing of such streets have a right in equity to enforce the dedication. Equity will not enforce mere technical rights nor attempt to redress unsubstantial wrongs. It lies at the base of the right of an individual to proceed in a court of equity to restrain an interference with the enjoyment of some common right, that he suffer, by such interference, some special or particular damage not suffered by the public generally. The North Carolina cases recognize the principle that special damage must exist as a basis for equitable relief, but rest upon the theory, that a purchaser in a platted town site buys with reference to the general plan, and pays an added price for his property by reason thereof, and that the free and unobstructed use of all the streets shown on such plan is necessary for the convenient use of every lot, and the obstruction of any one of such streets detracts from the value of such lot, are irrebuttable presumptions of fact. To apply these presumptions to town sites in a new country like this, where many abortive attempts are made to establish towns and villages, is to do violence to our sense of right, founded upon common observation and experience. In the present case the record shows that, although many years have elapsed since the platting of the town site of Sidney, it has less than half a hundred people and these live in less than a dozen houses. The town site may never be more populous. It seems to us that the question of the effect of the closing of the streets by Thorpe upon the property rights of the defendants in error is one which ought not to be determined by general presumptions of fact, but by the facts as they may appear from the proof. It may be that little proof is necessary to show special damage in such a case, but it does seem to us that some proof should be adduced showing that the complainants are injured in a way not suffered by the public in order that they may make out a case within the equitable jurisdiction of the court.

Turning to the record, we find that the finding of the court as to the injury which results to the appellees from the closing of

the streets and alleys by the appellant reads as follows: "That these plaintiffs as said purchasers of said lots from defendant and his grantors and predecessors in interest and as the owners and holders of the same have a joint and mutual interest in the common use of the streets and alleys of the said town site of Sidney; and as inhabitants of the said town site are interested in keeping open and maintaining the streets and lots of said town site as mapped and platted and laid out and staked on the ground for their joint and several and mutual common convenience and benefit." The effect of this finding is a declaration of law, rather than a determination of an issue of fact. The plaintiffs may have been interested in keeping open the streets, and these streets may have been laid out "for their joint, several, mutual and common convenience and benefit," yet no injury may actually result to them from their closing; and as we hold that injury to every purchaser of a lot within such a town site will not be presumed to result from the closing of any street or alley therein, which may have been designated on the plat of such town site, it follows that the finding is insufficient as showing special injury to have been done to the property rights of defendants in error by the acts of Thorpe, which differ in kind from those possessed by the general public. Upon the trial it appears that evidence was introduced, on the part of defendants in error, tending to show such injury, and evidence tending to show the contrary was introduced on behalf of plaintiff in error. As a basis for the relief granted by the court we hold that there should have been a determination of this question, not as a matter of law but as a matter of fact, and that without such finding no ground for equitable relief appears.

We hold, therefore, that the decree awarding the injunction prayed for is not sustained by the findings, and the judgment and decree must therefore be reversed.

DOAN, CAMPBELL, and NAVE, JJ., concur.

THOMAS et al. v. TERRITORY.

(Supreme Court of Arizona. March 30, 1906.)

1. RAIL—ACTION—COMPLAINT—SUFFICIENCY.

Rev. St. 1901, par. 1282, provides that in pleading a judgment or other determination of a court of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but that the judgment or determination may be stated to have been duly given or made. *Held*, that a complaint in an action on a bail bond was not insufficient because it did not state facts showing the jurisdiction of the justice who made the order holding to answer, or because there was no allegation that the order was duly made, as the act of the justice as a committing magistrate was an act done by him as an officer having general jurisdiction.

## 2. SAME — VALIDITY OF BOND — ABSENCE OF PRINCIPAL'S SIGNATURE.

Inasmuch as Code Cr. Proc. §§ 1074, 1076, 1077, 1084, provide that when a defendant gives bail for his appearance before the magistrate upon the examination of the charge, and when he gives bail after indictment that the bail bond shall be signed by the defendant, but there is no similar provision for the form of the bail bond when it is given for the defendant to appear in the court above upon being held to answer after examination, it is not necessary where a defendant has been held to answer after examination, that a bail bond for his appearance to answer be signed by the principal, but it is sufficient if executed by the bondsmen.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Bail, § 217.]

## 3. SAME—ACTION ON BOND—JUDGMENT.

A judgment on a bail bond should have provided that plaintiff recover judgment against the sureties in the amount of the bond, and that of such sum plaintiff have and recover of each individual defendant the amount for which he was obligated in the bond, and a judgment that plaintiff recover of each defendant the amount for which he was obligated, which total was in excess of the amount of the bond, was improper.

## 4. APPEAL—BOND—SUFFICIENCY.

An appeal bond was not defective under the statute requiring that the bond shall be given in a sum double the probable amount of the costs of the suit to be fixed by the clerk, merely because the clerk made no order fixing the amount of costs, it having been sufficient for the clerk to fix the amount of the bond.

## 5. SAME—CORRECTION OF RECORD.

By Rule 6 of the Supreme Court (71 Pac. viii), for the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing, and upon good cause shown, obtain an order that the proper clerk certify to the Supreme Court the whole or any part of the record required. *Held*, that where the transcript on appeal did not contain a copy of the order of the adjournment of the term so that it could be determined whether the appeal bond was filed within the proper time after adjournment, a certificate of the clerk showing the date of adjournment, cured the defect.

Appeal from District Court, Santa Cruz County; before Justice Doan.

Action by the territory against Colby N. Thomas and others. From a judgment in favor of plaintiff, defendants appeal. Remanded, with directions to modify judgment, and, as so modified, affirmed.

Frank J. Duffy and A. Orfila (George R. Davis and J. H. Langston, of counsel), for appellants. E. S. Clark, Atty. Gen., for the Territory.

KENT, C. J. This was an action brought by the territory against one L. F. Swain and certain other defendants who are appellants in this court. The complaint alleged "that on the 31st day of January, 1904, the defendant L. F. Swain having been committed by S. Ashley, justice of the peace of precinct No. 1, Santa Cruz county, Ariz., to await the action of the grand jury of said county and territory, upon two charges of felony, to wit, embezzlement, and being then under arrest and confined in the county jail at Nogales, Santa Cruz county, Ariz., in the

custody of Thomas J. Turner, sheriff of said county," the defendant Swain, to secure his release from jail on said charges, gave his bail bond in the sum of \$9,000, with the appellants as sureties, conditioned that he would appear and answer the charges; that thereafter Swain was indicted by the grand jury, and, being called for arraignment in the district court, failed to appear, and that an order declaring the said bail bond forfeited was duly entered; and alleged that thereby the bond became forfeited, and prayed judgment for the amount thereof. Separate general demurrers were introduced on behalf of the defendant Swain, and on behalf of the appellants herein. The demurrer was sustained as to the defendant Swain, but the demurrers of the appellants were overruled, and the answers of the appellants not being under oath, judgment was entered against the appellants in the court below. From the order overruling the demurrers, and from the judgment and the denial of a motion for a new trial the appellants have appealed.

It is urged that the complaint does not state a cause of action against these defendants, in that facts showing the jurisdiction of the justice to make the order holding the defendant Swain to answer are not pleaded, nor is there any allegation that the order so made was duly made. It is claimed that the court of a justice of the peace is one of inferior or special jurisdiction, and that no presumption arises as to the jurisdiction or the regularity of its proceedings, and that facts to show such jurisdiction must be pleaded, unless the pleader pleads the conclusion that the judgment or order was duly made as authorized by paragraph 1282 of the Revised Statutes of 1902, which reads as follows: "In pleading a judgment or other determination of a court or officer of special jurisdiction it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish in the trial the facts conferring jurisdiction." We do not need to determine whether when a judgment or other determination of a court of a justice of the peace is one which the general statutes show he has jurisdiction to make, as a matter of public policy, the jurisdiction of such court and the regularity of the proceedings before it should not be assumed, in the absence of proof of defects therein; or, in other words, whether there should properly be any distinction shown between a court of a justice of the peace, under such circumstances, and a higher court, as to the presumption that attaches as to its jurisdiction. That question does not arise here. The act of the justice of the peace was not a judgment or determination of the justice's court sitting as a trial court, but the act of the justice sit-

ting as a committing magistrate, whereby, as such magistrate, he held the defendant to answer to the grand jury. As such, he has the same powers as a justice of the Supreme Court or a district judge, who are likewise magistrates under our Code, and as such he acts as an officer having general and not special jurisdiction; and the presumption of law attaches that he had the jurisdiction to act in such capacity, and that his action as such was regular. The complaint was therefore sufficient. *Boynton v. State*, 77 Ala. 29; 1 Blsh. New Crim. Proc. §§ 228-239.

It appears that the bond, a copy of which is set forth in the complaint, was not executed by Swain, the principal, but only by the appellants; and it is claimed that the trial court erred in not sustaining the demurrer of the appellants and dismissing the action, for the reason that in the absence of such execution by the principal, the sureties are relieved of any liability under the bond, and the complaint did not, therefore, state facts sufficient to constitute a cause of action as against them. It is provided in chapter 1, tit. 12, of the Code of Criminal Procedure, § 1074, that if the offense be bailable the defendant may be admitted to bail before conviction: (1) For his appearance before the magistrate on the examination of the charge, before being held to answer, or on the trial upon a charge of misdemeanor; (2) to appear at the court to which the magistrate is required to return the depositions and statement, upon the defendant being held to answer after examination; (3) after indictment, etc. Chapter 2 of the same title, which is entitled, "Ball before examination or trial, and upon being held to answer before indictment," provides, in section 1076, that when the defendant has been held to answer upon an examination for a public offense, the admission to bail may be by the magistrate by whom he is so held. Section 1077 provides that bail for the appearance of the defendant before the magistrate upon the examination of the charge, or on the trial of a charge of misdemeanor, shall be put in by a written undertaking, executed by the defendant, and not less than two sufficient sureties, and acknowledged before the magistrate in substantially the form set forth in such section. Chapter 3 of the same title, providing for the giving of "ball upon indictment before conviction," provides, in section 1084, that the bail must be put in by a written undertaking executed by two sufficient sureties (with the defendant), and acknowledged before the court or magistrate, in substantially the form set forth in the section. It will be perceived that the Code is specific in its requirements with respect to the form of the undertaking admitting the defendant to bail in two of the three instances when the defendant may be admitted to such ball before conviction, to wit,

when he gives ball for his appearance before the magistrate upon the examination of the charge, and when he gives ball after indictment. In each of these cases, the Code requires that the ball bond must be signed and executed by the defendant. There is no such similar provision, however, for the form of the ball bond when it is given for the defendant to appear in the court above, upon being held to answer after examination, and no requirement that a bond so given shall be executed by the defendant. Section 1070 of the Code provides: "The taking of ball consists in the acceptance by a competent court or magistrate, of the undertaking of sufficient ball for the appearance of the defendant according to the terms of the undertaking, or that the bail will pay to the territory of Arizona, a specified sum."

We think where a defendant has been held to answer after examination, a bond conditioned that he will appear and answer the charge, under our practice, may be given by the bondsmen, without such defendant as principal joining therein. The bond in this case was as follows: "In the Justice Court in and for Precinct Number One, County of Santa Cruz, Territory of Arizona. An order having been made on the 31st day of January, A. D., 1904, by S. Ashley, justice of the peace of Santa Cruz county, that L. F. Swain be held to answer on a charge of embezzlement, upon which he has been admitted to bail in the sum of nine thousand dollars, we, Colby N. Thomas by occupation mining engineer in the amount of \$7,000.00, and C. R. Brown by occupation mine manager in the amount of \$7,000.00, and N. K. Noon by occupation physician in the amount of \$2,000.00, and Henry Levin by occupation broker in the amount of \$2,000.00, householders within the territory of Arizona, hereby undertake that the above-named L. F. Swain will appear and answer to the charge above mentioned in whatever court he may be prosecuted, and will at all times hold himself amenable to the orders and processes of the court; and, if convicted, will appear for judgment, and render himself in execution thereof, or, if he fail to perform either of these conditions, that we will pay to the territory of Arizona the sum of nine thousand dollars as herein specified. Witness our hands and seals this 24th day of June, A. D. 1904. Colby N. Thomas, [Seal.] C. R. Brown, [Seal.] N. K. Noon, M. D. [Seal.] Henry Levin, [Seal.]" The obligors duly justified, and the bond was approved by the justice of the peace and duly filed. It will be observed that by the terms of the bond, Swain did not purport to be a party thereto, and we think as the justice had jurisdiction to hold the defendant to answer, that the obligors on the bond were liable upon a breach of the condition.

It is further contended by the appellants that the judgment entered was erroneous, in

that it is in double the amount for which the obligors became liable. The judgment provides as follows: "Wherefore it is ordered, adjudged, and decreed that the plaintiff, territory of Arizona, do have and recover judgment against the defendant Colby N. Thomas for the sum of seven thousand dollars (\$7,000.00); against the defendant C. R. Brown for the sum of seven thousand dollars (\$7,000.000); against the defendant N. K. Noon, M. D. for the sum of two thousand dollars (\$2,000.00), and against the defendant Henry Levin for the sum of two thousand dollars (\$2,000.00), and against all of said defendants for the sum of forty-one  $\frac{18}{100}$  dollars (\$41.15) plaintiff's costs and disbursements herein expended, and for all of which sums let execution issue." We think such judgment is improper in form. It should have provided that the plaintiff have and recover judgment against the defendants in the amount specified in the bond, to wit, the sum of \$9,000, and that of such sum the plaintiff have and recover of each individual defendant the amount for which he is obligated in the bond; and that the plaintiff have and recover of the defendants the amount of its costs; payment of said sum of \$9,000 and costs, by any or all of the defendants, to operate as a satisfaction of the judgment. Counsel for the appellee contends that upon the incomplete record presented to us in this case, we may not consider the question urged by the appellants. The record presented to us is defective, and fails to comply in many respects with the statutory provisions or the rules of court. The objections, however, to the sufficiency of the complaint, and the action of the trial court in overruling the demurrers of the defendants, and as to the form of the judgment, appear on the face of the record, and we may properly consider them.

It is further urged that the appeal bond is so defective as not to confer jurisdiction upon this court. It is claimed that inasmuch as the statute requires that the bond shall be given "in a sum at least double the probable amount of the costs of the suit of both the appellate court and the court below, to be fixed by the clerk," the clerk should make an order fixing the amount of such costs; and that, as no such order has been made, the bond is invalid. This objection is not well taken. It is not the duty of the clerk to make or enter an order in the premises. It is his duty to fix the amount of the bond. When, as in this instance, it appears that the clerk has duly approved the bond, by his indorsement thereon to that effect, such approval covers the form of the bond, the amount thereof, and the sufficiency of the sureties. To approve the amount of the bond, is to fix the amount, within the meaning of the statute.

It is further objected that the record does not show that an appeal bond was filed

within 20 days after the date of the adjournment of the trial court for the term, as required by law. The transcript should contain a copy of the order of the adjournment of the term, in order that it may appear whether the appeal bond was filed in time to perfect the appeal. The record is silent in this respect. Rule 6 of the rules adopted by us (71 Pac. viii) provides: "For the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing, and upon good cause shown, obtain an order that the proper clerk certify to this court the whole or any part of the record required, or he may produce the same duly certified, without such order." Taking advantage of the permission accorded by this rule, the appellants have provided a certificate of the clerk, showing the date of the adjournment of the term, and that the bond in question was filed within the time allowed. The defect having been thus cured, we may disregard it.

We find no error in the record which requires a reversal of the judgment. As we have pointed out, the form of the judgment, however, is improper, and it should be modified in accordance with the views we have expressed. The cause is remanded to the district court, with instructions to modify the judgment in accordance with this opinion; and as so modified, the judgment is affirmed.

SLOAN, CAMPBELL, and NAVE, JJ., concur.

#### SMITH v. MANLOVE.

(Supreme Court of Arizona. March 30, 1906.)

APPEAL—RECORD—QUESTIONS CONSIDERED—HARMLESS ERROR.

Where, on appeal in an action involving the validity of a tax title, the record shows that the trial judge was of the opinion that the law of 1903 controlled, but does not show that his decision would have been different if the law of 1901 controlled, the correctness of his ruling in that regard will not be reviewed.

Appeal from District Court, Pima County; before Justice John H. Campbell.

Action by Grace H. Manlove against Manuel Smith. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Charles Blenman and William M. Lovell, for appellant. Frank H. Hereford, for appellee.

KENT, C. J. This was an action brought by the appellee to quiet her title to certain property as against the appellant, who claimed the same under a tax deed. The trial court, upon the documentary and oral evidence presented to it, found the tax deed to be illegal and void, and rendered judgment for the appellee; and from this judgment, and an order denying a motion for a new trial, an appeal has been taken.

The motion for a new trial is as follows: "Now comes the above-named defendant, Manuel Smith, and moves this honorable court for a new trial in this cause, and for grounds for said motion alleges: (1) That the evidence does not sustain the judgment. (2) That the judgment is contrary to the evidence. (3) That the judgment is contrary to law. The appellant has assigned as error: (1) That the court erred in overruling defendant's motion for a new trial. (2) The evidence does not sustain the findings or judgment. (3) The findings of fact do not support the conclusions of law. (4) The conclusions of law and the judgment are contrary to law and the evidence." The abstract of record contains only the pleadings, the findings, the judgment, the minute entries, and the motion for a new trial. The evidence taken is not presented, either in the abstract or otherwise preserved, and is not before us, nor is there any bill of exceptions or statement of facts.

The appellant has discussed in his brief but one question, and that is whether the act of 1901, relating to the collection of delinquent taxes, or the act of 1903, in relation thereto, was in force at the time of the tax sale, his contention being that it appears from the conclusion drawn by the court from its findings, that the court was of the opinion that the act of 1903 was in force, and was therefore in error in rendering judgment for the plaintiff. If upon the insufficient assignment of error in that regard we should, nevertheless, consider the question, it would be of no avail in coming to a determination as to whether the court was right in the judgment rendered. If we should hold with the appellant that the act of 1903 had not gone into effect at the time of the sale, and the sale was therefore properly to be made under the provisions of the act of 1901, we would still have nothing before us to determine whether or not the trial court was right in the conclusions it arrived at, or in the judgment it rendered. The appellant says in his brief: "From the findings of fact it is submitted on behalf of the appellant that judgment must and would have been rendered in his favor had not the court below taken the view that the sale for delinquent taxes of the property, which was the subject of the action, should have been made and carried out under the new law of 1903."

We have nothing before us to show that judgment would have been rendered in favor of the appellant, except for the fact, as claimed, that the court thought the act of 1903 applied. We think it probable from the language of one of the subdivisions of the conclusions drawn by the court, that the court was of the opinion that the act of 1901 was not in force, but it by no means follows that the conclusions of the court that the tax deed was void, and that the appellant had no title, were not based upon a failure of proof as to the regularity of the proceedings and up-

on the illegality of the deed in other respects; and even under the law of 1901 it is urged by the appellee that the findings show the illegality of the deed in several particulars, to which the appellant has made no reply, and the appellant fails to point out why the conclusions arrived at by the court, and the judgment rendered may not have been entirely proper upon the findings as made, even if the act of 1901 were in force at the time. Upon the record before us, we are not able to say that, from the findings as made, the court was not justified in its conclusions for reasons other than that the sale was made under a statute not in force. As a determination in his favor of the question presented by the appellant in his brief would not, upon the record before us, aid us in a determination as to whether the judgment of the trial court should be reversed, we deem it unnecessary to express any opinion as to the correctness of the appellant's position in that regard.

Upon the record before us, the judgment of the district court is affirmed.

SLOAN, DOAN, and NAVE, JJ., concur.

#### MEYER-CLARKE-ROWE MINES CO. v. STEINFELD.

(Supreme Court of Arizona. March 31, 1906.)

MINES AND MINERALS—MINING CLAIMS—CONFLICT—BOUNDARIES—EVIDENCE—FINDINGS.

In a suit to determine an alleged conflict in the boundaries of two mining claims, a finding that a point 300 feet N. 9° W. from the east-end center of one of the claims, where the old northeast corner monument stood, was at the point now marking the southeast corner of the conflicting claim according to the survey for the patent thereof, held unsupported by any evidence, inconsistent, self-contradictory, and mathematically impossible.

On rehearing. Reversed.

For former opinion, see 80 Pac. 400.

Thomas H. Mitchell and William M. Lovell, for appellant. Selim M. Franklin, for appellee.

DOAN, J. The appellant is the owner of a patented mining claim known as the "Paterson." The appellee is the owner of a mining claim known as the "Iron Mountain" adjoining the "Paterson" on the north. A survey of the "Iron Mountain" in support of the application for patent includes a strip 34½ feet wide along the northern side of the "Paterson" for the full 1,500 feet, which is claimed by the appellants to be within the external boundaries of the "Paterson" according to the patent issued therefor in 1884. The appeal in this case was presented at the last term of this court, and the judgment of the lower court was reversed in accordance with the opinion written by Mr. Justice Sloan, 80 Pac. 400. A rehearing was grant-

ed on application of the appellee, and the case again presented at this term of court.

We held in the original opinion in this case that the decree of the court excluding the ground in controversy from the "Paterson" and including it within the boundaries of the "Iron Mountain" claim was not sustained by the findings, and for that reason the judgment was reversed. A further presentation of the case and an examination of the evidence convinces us that the decree of the court is not sustained by the findings as formerly stated, that the seventh and eighth findings are unsupported by any evidence, and the latter part of the sixth finding is inconsistent and self-contradictory.

The evidence contains the testimony of three deputy mineral surveyors who have recently made surveys of this property—Mr. Santee, who for the plaintiff made a survey in 1899, and again in 1902 or 1903; Mr. Chilson, who made a survey for the defendant shortly after Santee's survey in the year 1899; and Phillip Contzen, who made the survey in support of the application for patent of the "Iron Mountain" in 1902. The surveys all purport to start from the west end center of the "Paterson" mining claim. The three surveyors practically agree in their testimony as to the courses and distances between the different points on the several lines of the two claims, and the contention in regard to the disputed strip  $34\frac{1}{2}$  feet wide lying either above or below the boundary line between the "Paterson" and the "Iron Mountain" arises from the dispute as to the proper location of the west end center as the initial point. The plaintiff claims that the true west end center of the "Paterson" is at the point where the initial monument designating it now stands, while the defendant claims that its true location, as called for in the field notes of the survey for patent, is 36 feet S.  $9^{\circ}$  E. from that monument. Starting from a point 36 feet south of the initial monument as the correct end center, the two surveys for the defendant run N.  $9^{\circ}$  W. 300 feet, and there fix the northwest corner of the "Paterson" and the southwest corner of the "Iron Mountain." They run thence 1,500 feet N.  $81^{\circ}$  E., and fix the northeast corner of the "Paterson" and the southeast corner of the "Iron Mountain" at a point where they say the northeast corner of the "Paterson" was originally located by the survey for the patent. They run thence S.  $9^{\circ}$  E. 300 feet, to an old pile of stones, at a point which they claim represents the true east end center of the "Paterson"; thence from these old stones S.  $9^{\circ}$  E. 300 feet, to a point which they claim is the correct location for the southeast corner of the "Paterson," as designated by the patent and the calls of the survey, and which is  $35\frac{1}{2}$  feet from the plaintiff's monument marking said corner. They run thence S.  $81^{\circ}$  W. 1,500 feet, to a point which they claim to be the proper location for the southwest corner of the "Pat-

erson," at which no monument is found, but which Contzen locates 43 feet, and Chilson 37 feet, south of the monument claimed by the plaintiff and found by the court to mark the true southwest corner. They run thence 297 feet to the point of starting, which they claim is the true west end center of the "Paterson," but which they say is 36 feet S.  $9^{\circ}$  E. from the monument now marking said west end center, and which is claimed by the plaintiff and found by the court to be the one erected on the survey for the patent. They testify that the point fixed by them for the northwest corner of the "Paterson," and the southwest corner of the "Iron Mountain," while 301 feet distant from the true west end center as claimed by them, is 36 feet south of the corner monument erected by the plaintiff, and is only 265 feet distant from the monument designating the west end center, and they likewise testify that the point fixed by them for the northeast corner of the "Paterson" and the southeast corner of the "Iron Mountain" is 37 feet S.  $9^{\circ}$  E. from the monument erected by the plaintiff to designate the same common corner. They testify that running 300 feet from the corner established by them as the northeast of the "Paterson" and the southeast of the "Iron Mountain" takes them to a point where some old stones were found  $35\frac{1}{2}$  feet S.  $9^{\circ}$  E. from the monument claimed by the plaintiff to represent the east end center of the "Paterson," and that 300 feet from the point marked by these old stones ( $35\frac{1}{2}$  feet south of the point claimed by the plaintiff to represent the east end center) they fixed the southeast corner of the "Paterson," at a point  $35\frac{1}{2}$  feet south of the monument claimed by the plaintiff to represent the said southeast corner. The testimony of Santee, who surveyed the claim for the plaintiff in 1899 and again in 1902, agrees in all these material points with their testimony. Santee, however, claims that the monument designated as the west end center of the "Paterson" claim stands now in the identical place in which it was built by the surveyor who made the official survey for the patent, and that the corner established by him 300 feet north from that initial monument, and 36 feet north of the point designated by the other surveyors, is the true northwest corner of the "Paterson," and the southwest corner of the "Iron Mountain"; that, running thence N.  $81^{\circ}$  E. 1,500 feet, the monument in place 37 feet N.  $9^{\circ}$  W. of the point found by Chilson and Contzen as the corner common to the northeast of the "Paterson" and southeast of the "Iron Mountain" designates the true corner of those claims, and that, 300 feet S.  $9^{\circ}$  E. from that corner, the true east end center of the "Paterson" is designated by the monument there standing as claimed by plaintiff, and that the monument 300 feet S.  $9^{\circ}$  E. from the said east end center monument designates the true southeast corner of the "Paterson" at a point  $35\frac{1}{2}$  feet N.  $9^{\circ}$  W.

from the point claimed as such corner by Chilson and Contzen; and that running thence 1,500 feet in a course S. 81° W. he strikes the true theoretical southwest corner of the "Paterson" at a point 11 feet south of the southwest corner monument, as erected by the official surveyors for the patent and now standing on the ground, which is conceded to be 289 feet S. 9° E. from the initial monument which the plaintiff alleges marks the true west end center of the claim.

The court found as a fact that "the west end center monument of said 'Paterson' mine, as described and called for in the said patent of said 'Paterson' mine aforesaid, is situate on the ground at the point originally established by the deputy mineral surveyor who made the survey of said mine for patent." The court found that "the monument erected on the ground by the said deputy mineral surveyor as marking the southwest corner of said 'Paterson' mine, and as called for and described in said patent is also situated upon the ground at the point where the same was first erected; that said monument is situated S. 9° E. 289 feet from the said west end center monument; that the monument erected upon the ground by the said deputy mineral surveyor, who made the survey for patent of the said 'Paterson' mine, as marking the southeast corner of said 'Paterson' mine as called for and described in the said patent, and also in the field notes of survey of said 'Paterson' mine, is also situated upon the ground at the point where the same was first erected by said deputy mineral surveyor, and being the monument called for and described in said patent and field notes aforesaid, said monument being, approximately, N. 81° E. 1,500 feet from the said southwest corner monument of said 'Paterson' mine; that the monument erected upon the ground by the deputy mineral surveyor who made the survey for patent of said 'Paterson' mine as marking the east end center of said 'Paterson' mine, as called for and described in the said patent, and also in the field notes of survey of said 'Paterson' mine, is also situate upon the ground at the point where the same was first erected by said mineral surveyor, and being the monument called for and described in said patent and field notes aforesaid, said monument being N. 9° W. 300 feet from the said monument, aforesaid, marking the southeast corner; that the shaft designated in the patent as 'Shaft No. 3,' bears S. 81° W. at a distance of 100 feet from said east end center monument."

In these findings, the court has found the location of the west end center, the southwest corner, and the southeast corner situate on the ground at the different points as claimed by the plaintiff, and has found that the monuments now marking those points are the ones that were erected upon the ground by the deputy mineral surveyor. These findings are fully supported by the evidence. The surveyor for the plaintiff testified that 300 feet from the east end center the southeast

corner monument was 35 feet N. 9° W. of the point claimed by the defendant's surveyors as the true southeast corner, and that, running from the southeast corner as found and designated by him 1,500 feet in a course S. 81° W. brought him 11 feet S. 9° E. of the southwest corner monument, which has been proved by all of the surveyors and found by the court to be 289 feet S. 9° E. from the west end center, being thus 11 feet short of the 300 feet intended, and for this reason the southeast corner monument is approximately N. 81° E. from said southwest corner, instead of being exactly in that course. This also is supported by the testimony of the two surveyors for the defendant that running 1,500 feet S. 81° W. from the point established by them as the corner which was 35½ feet south of the corner claimed by the plaintiff, brought Chilson 37, and Contzen 43, feet south of the aforesaid southwest corner monument, and therefore makes it plain that the point from which they start could not have been referred to by the court as the southeast corner.

The finding of the court relative to the monument at the east end center is not entirely clear. The court has found "that the monument erected on the ground by the United States mineral surveyor, who made the survey for patent of said 'Paterson' mine as marking the east end center, is situate upon the ground where the same was first erected," and then finds that the monument is "N. 9° W. 300 feet from the southeast corner," and that the shaft designated in the patent as "Shaft No. 3" bears S. 81° W., a distance of 100 feet from the east end center monument. If the court herein meant to designate the east end center, as claimed by the plaintiff, the finding is supported by the evidence so far as the distance is concerned, but there is no evidence in the record that the shaft bears from that monument in the course and at the distance named. It may, or it may not. The record presents no evidence on that point. There is evidence that there is a shaft that bears from the point claimed by defendant to be the east end center in that course and at that distance, but if this be taken as the point intended by the court in its findings, there is no evidence in the record to sustain the distance, but all of the evidence in regard to the distance contradicts the finding. The distance established by the testimony of all the witnesses is 265.5 feet to that point. The court likewise has found that "the monument erected upon the ground by the deputy mineral surveyor, who made the survey for patent, is situate upon the ground at the point where the same was first erected," and the testimony of the surveyors for the defendant, being the only evidence in the record on that subject, is to the effect that there was no monument at that place. One of them testified that it was a point where some old stones were found; another testified a pile of old stones, and in another place the remains of

an old monument, none of which support, but all of which contradict, the finding that the monument erected in 1884 is situate upon the ground at the point where the same was first erected.

The finding of the court, therefore, if intended to apply to the location as claimed by the defendant, being not only unsupported by, but directly contrary to, the evidence as to the distance from the southeast corner, and as to its being the monument first erected by the United States mineral surveyor, we are constrained to interpret it as referring to the point claimed by the plaintiff. By this location of the east end center, the next finding wherein the court found as a fact that "in the month of April, 1899, there existed at a point N. 9° W. from the east end center monument, at a distance of 300 feet, the monument marking the northeast corner of the 'Paterson' as called for in said patent and field notes aforesaid. \* \* \* That in April, 1899, said monument was destroyed and a new monument erected. \* \* \* That the point where said monument stood is still known and identified and is at the point now marking the southeast corner of said 'Iron Mountain' mining claim according to the survey for patent of said 'Iron Mountain' mining claim. \* \* \* That said point at which said northeast corner monument of said 'Paterson' mine was situate and located is identical with the southeast corner of the 'Iron Mountain' claim, as surveyed for patent by defendant, and is situate S. 9° E. 35.2 feet from the monument so erected in 1899, and now claimed by plaintiff as being the northeast corner of the said 'Paterson' mine." is unsupported by any evidence; in fact, is contrary to all of the evidence in the case. The testimony of the three surveyors constitutes all of the evidence in the record on that subject. The point thus designated by the court as the northeast corner of the "Paterson" instead of being as found by the court 300 feet N. 9° W. from the east end center monument has been testified to by the two surveyors for the defendant, Chilson and Contzen, as 300 feet N. 9° W. from "some old stones" at the point 35½ south of the point claimed by the plaintiff to be the true east end center, and therefore only 265.5 feet distant from the east end center monument referred to by the court in its findings. The testimony of Santee agrees with this by stating that the northeast corner 300 feet N. 9° W. from the east end center, was 35½ feet N. 9° W. from the corner erected by Chilson and Contzen. The finding, therefore, that "the point 300 feet N. 9° W. from the east end center, where the old northeast corner monument stood, is at the point now marking the southeast corner of the 'Iron Mountain' according to the survey for patent of said claim," besides being unsupported by any evidence, is inconsistent, self-contradictory, and mathematically impossible. The

finding of the court fixing the northwest corner of the "Paterson" is correct, theoretically, but, being dependent upon the finding as to the northeast corner, must fall with it.

The judgment of the lower court is reversed, and the case is remanded for a new trial.

KENT, C. J., and SLOAN, CAMPBELL, and NAVE, JJ., concur.

TURNER, Sheriff, et al. v. FRANKLIN.  
(Supreme Court of Arizona. March 31, 1906.)

# 1. WRIT OF ERROR—BOND—CODEFENDANTS—FILING—JURISDICTION.

Where, in an action against a sheriff and his surety, judgment was rendered against both, after which a writ of error was sued out and a bond filed on behalf of the surety, but no bond was filed by the sheriff on his behalf, the Supreme Court acquired no jurisdiction to determine any question relative to his rights or interest.

# 2. NAME—FINDINGS—EVIDENCE—OBJECTIONS IN TRIAL COURT—MOTION FOR NEW TRIAL—EXCEPTIONS.

The sufficiency of the evidence to sustain the findings will not be reviewed on a writ of error, unless a motion for a new trial has been made on that ground in the trial court and the overruling thereof was excepted to and assigned as error.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1727-1735, 1759-1764; vol. 3, Cent. Dig. Appeal and Error, §§ 2978, 2979.]

# 3. PRINCIPAL AND SURETY—SURETY COMPANIES—FOREIGN COMPANIES—PROCESS.

Rev. St. 1901, par. 1323, authorizes service generally on a corporation by serving its president, secretary, treasurer, and director or local agent representing the company in the county in which the suit was brought. Paragraph 414, being section 2 of title 8, relating to surety companies, makes the appointment of a citizen agent on whom process may be served a condition of the company's right to do business within the state. *Held* that, where defendant surety company had appointed a statutory agent within the state, a return showing service by delivering a true copy of the summons and complaint to such agent was sufficient to confer jurisdiction of the surety company, though the return did not designate the class or kind of agent on whom the process was served.

Error to District Court, Santa Cruz County; before Justice Eugene A. Tucker.

Action by O. K. Franklin against Thomas J. Turner, sheriff, and another. From a judgment in favor of plaintiff, defendants bring error. Affirmed.

Thomas Armstrong, Jr., for plaintiffs in error. Sellm M. Franklin and S. L. Kingan, for defendant in error.

DOAN, J. This cause is brought to this court on a writ of error from the district court of Santa Cruz county by the plaintiffs in error, who were the defendants in that court. An action was brought by the defendant in error, O. K. Franklin, against the plaintiffs in error, Thomas J. Turner, as sheriff of Santa Cruz county, and the United

States Fidelity & Guaranty Company, as surety on his official bond, to recover damages for the alleged loss sustained through the negligence of the deputy of the defendant sheriff in failing to properly levy a writ of attachment in a suit by the said Franklin against one John Dessart. Personal service of summons and complaint was had on Sheriff Turner, who appeared and answered. The summons for the guaranty company was served on J. J. Sweeney, its agent, and the sufficiency of the officer's return of that service is contested by the plaintiff in error. The guaranty company made no appearance, and judgment was taken against it by default.

It appeared upon the trial that the writ of attachment in Franklin's action against Dessart was duly issued on the 13th day of January, 1904, and was delivered by the clerk of the court to Franklin's attorney, who delivered the same to the sheriff's clerk, together with a copy of the said writ for filing in the recorder's office, and the directions as to the particular property upon which the plaintiff, Franklin, desired to have it levied, and was by the sheriff's clerk delivered to a deputy sheriff for levy. The writ was returned on the following day, January 14th, with the proper return of service indorsed thereon; but the copy of the writ that is required by our statute to be filed in the recorder's office, with a copy of the sheriff's return indorsed thereon, in order to constitute a valid levy, was found to have been filed in the recorder's office on the 14th of January without any copy of the sheriff's return of service indorsed thereon, but with a memorandum attached thereto giving simply the number of the lot and block of the real estate on which the levy was attempted, without any designation of the town or county where located. On the 15th of January, 1905, Dessart conveyed the property to a purchaser for value, and upon the trial of Franklin's case, judgment was rendered against Dessart, but the attempted levy of the attachment was found to be so defective as to create no lien on the real estate. Dessart, it appears, after the transfer of the property was insolvent, and has remained so until this time, and the plaintiff, Franklin, has failed thus far to recover anything by virtue of the judgment. Upon the trial of the cause against the plaintiff in error, the court rendered judgment on April 19, 1905, against the defendants for the full amount demanded, to wit, \$4,000, with interest and costs, making a total of \$4,455.65. A motion for a new trial was presented by the defendant Turner on April 22, 1905, and denied, but no appearance was entered for the guaranty company, and the motion for a new trial was made only on behalf of the defendant Turner. Notice of appeal was given by the defendant Turner on April 22, 1905, upon the denial of the motion for a new trial, but no appeal was

perfected. On the 20th of June a petition for a writ of error was filed by counsel for plaintiffs in error. Summons was issued thereon, and on the 26th day of June a supersedeas and cost bond was filed in the case by the guaranty company, conditioned upon the said guaranty company prosecuting its said writ of error with effect, and performing any judgment and paying any costs that might be awarded against it, together with the accruing costs, but no bond was filed by Turner or by any one on his behalf. By reason of there being no bond filed by Turner or on his behalf, this court does not obtain any jurisdiction over him or his interests in the case. The determination of this question will therefore be had relative to the rights and interests of the guaranty company alone.

The first assignment of error is based upon the overruling of the defendant Turner's general demurrer to the complaint. The next four assignments are based upon the insufficiency of the testimony to sustain the findings of the lower court. The insufficiency of the evidence to sustain the findings is a good ground for a new trial, and it has been invariably held by this court that no judgment will be reversed on the ground that it is not supported by the evidence unless a motion for a new trial had been made and overruled in the court where such judgment was rendered, and the overruling of such motion excepted to there and assigned here as error. This is only a reiteration of the general rule that a party will not be heard in an appellate court until he has exhausted his remedies in the lower court. *Putman v. Putman*, 3 Ariz. 182, 24 Pac. 320; *Greer v. Richards*, 3 Ariz. 227, 32 Pac. 266; *Tietjen v. Sneed*, 3 Ariz. 195, 24 Pac. 324; *Lemon v. Ward*, 3 Ariz. 219, 73 Pac. 443; *County of Maricopa v. Osborn*, 4 Ariz. 331, 40 Pac. 313.

The last assignment of error alleged that "the court erred in rendering judgment against the defendant the United States Fidelity & Guaranty Company at all, for the reason that there was no sufficient service of summons on said defendant, and no return of sufficient service to give the court jurisdiction." Upon examination we find the complaint sufficient to sustain the judgment. The general provisions for the service of process upon corporations in paragraph 1323, Rev. St. 1901, are as follows: "In suits against any incorporated company or joint-stock association, the summons may be served on the president, secretary, or treasurer, or any director of such company or association or upon the local agent representing such company or association in the county in which suit is brought \* \* \*." In its petition for writ of error, the guaranty company alleges that it "is a surety company authorized to become surety on bonds in the territory of Arizona, but incorporated under the laws of the state of Maryland, having its principal place of business in Baltimore in

said state of Maryland, but also having a duly authorized and appointed statutory agent, to wit, J. J. Sweeney, who resides at Phoenix, in the county of Maricopa and territory of Arizona." While our provisions for service upon corporations in general are as above cited, we have a special statute for surety or guaranty companies, being title 8 of the Revised Statutes of Arizona of 1901, and the plaintiff in error was doing business in Arizona under the provisions of this title at all times herein named. Paragraph 414, being section 2 of said title 8, provides: "That no company shall do business under the provisions of this act until it shall, by a written power of attorney, appoint some person residing within the territory of Arizona, who shall be a citizen of said territory as its agent, upon whom may be served all lawful processes against such company, and who shall be authorized to enter an appearance in its behalf. \* \* \* A judgment, decree, or order of court entered or made after service of process as aforesaid, shall be as valid and binding as if served with process in the county where suit is brought." We find on the summons in this case the return of the sheriff who served the same in these words: "I hereby certify that I received the within summons on the 22d day of August, A. D. 1904, at the hour of 11:50 a. m., and personally served the same on the 22d day of August, A. D. 1904, on the United States Fidelity & Guaranty Company by delivering to John J. Sweeney, agent of said United States Fidelity & Guaranty Company, a corporation, at the city of Phoenix, county of Maricopa, Arizona, a copy of said summons, to which was attached a true copy of the complaint mentioned in said summons. Dated this 22d day of August, A. D. 1904. W. W. Cook, Sheriff, by O. B. Roberts, Deputy Sheriff." The special provisions of title 8, applying to surety and guaranty companies, are sufficient for the determination of this question, and we are satisfied that, regardless of whether there is a necessity for the return of service designating the class or kind of agent on whom process has been served, under the provisions of paragraph 1323 in the case of other corporations generally, the service in the case now under consideration having been made upon the agent of a surety company, which is required to have but one agent in the territory for the service of such process, the return of service made by the sheriff, now under consideration, fully complied with the requirements of paragraph 414, in accordance with the provisions of which such service was made, and was sufficient to vest in the court jurisdiction over the defendant company.

No error appearing in the record, the judgment of the lower court is affirmed.

KENT, C. J., and SLOAN and CAMPBELL, JJ., concur.

# SANTA FE P. & P. RY. CO. v. FORD.

(Supreme Court of Arizona. May 12, 1906.)

## 1. TRIAL—NONSUIT—AUTHORITY OF COURT.

The trial court has no authority to direct an involuntary nonsuit.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 368.]

## 2. RAILROADS—CONSIGNEES OF FREIGHT—INJURIES—DUTY OF RAILROAD.

Plaintiff and his brother were consignees of ice, which was transported in the caboose of defendant's freight train, and being at the station to receive it, the conductor told them that they would have to unload it themselves, as he was short of help. Plaintiff and his brother boarded the train, and proceeded to unload the ice, and as they were doing so plaintiff was thrown from the car and injured by the jar of the train, caused by the negligent making of a coupling. *Held*, that plaintiff was not a mere licensee on the car, but was there at the invitation of the conductor, and was entitled to protection against negligence of defendant's servants.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 874, 879.]

## 3. SAME—AUTHORITY OF CONDUCTOR.

Defendant's conductor having apparent authority to authorize plaintiff to remove his freight from the train, whether the conductor had actual authority for that purpose was immaterial.

## 4. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In an action for injuries to a consignee of freight while removing the same, by the negligence of the railroad company's employes, an instruction on contributory negligence, declaring that such negligence would not defeat a recovery if it was shown that defendant might, with the exercise of reasonable care and prudence, have avoided the consequences thereof, was not misleading for failure to charge that such rule applied only on condition that the evidence showed that defendant actually knew that plaintiff was guilty of negligence, or had by his own act placed himself in a position of danger.

## 5. SAME—CARE REQUIRED—INSTRUCTIONS.

In an action for injuries to a consignee of freight while unloading the same, an instruction that notwithstanding the fact, if it be a fact, that plaintiff was guilty of contributory negligence, he would nevertheless be entitled to recover if it appeared from the evidence, not merely that defendant actually knew, but that defendant "might have known," or "had reason to know," or "reasonably would have known," of plaintiff's contributory negligence, or position and negligence, and could thereafter by the exercise of reasonable care have avoided the accident and injury, was erroneous as imposing too high a degree of care on defendant.

Doan, J., dissenting.

Appeal from District Court, Maricopa County; before Justice Edward Kent.

Action by George S. Ford against the Santa Fé, Prescott & Phoenix Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

George S. Ford recovered from the Santa Fé, Prescott & Phoenix Railway Company damages for personal injuries alleged to have been inflicted upon him through the defendant company's negligence. From the judgment the railway company has appealed. Reversed.

T. J. Norton, L. H. Chalmers, and U. T. Clotfelter, for appellant. Alfred Franklin and A. C. Baker, for appellee.

NAVE, J. George S. Ford, as plaintiff, brought suit against the Santa Fé, Prescott & Phoenix Railway Company, a corporation, as defendant, to recover damages suffered by him on account of personal injuries alleged to have been inflicted upon him as a result of defendant's negligence. The testimony in the case tends to establish the following facts: Plaintiff and his brother were the consignees of ice consigned to them at Wickenburg, Ariz., through the defendant company. The ice was conveyed to Wickenburg in the caboose of one of defendant's freight trains. When the train reached Wickenburg plaintiff and his brother were at the station to receive the ice. The conductor in charge of the train said to them: "Got lots of ice in here, but you boys will have to unload it yourselves. I am short of help this morning. One of my men is sick." A part of the freight train, including the caboose, was left on the main track opposite the railroad station while the engine with two or three cars cut loose from the train, and proceeded to take some cars from the side track, and couple them into the train. Plaintiff and his brother immediately set about unloading the ice from the caboose while the conductor, and a brakeman unloaded freight from another car in the train. The ice was in cakes weighing about 800 pounds each. The plaintiff, his face to the ice and his back to the door, dragged the cakes with a pair of ice tongs to the door of the caboose, and then slid them between his legs upon a truck standing beside the car where they were received by his brother. While plaintiff was in the doorway of the caboose with his back toward the truck in the act of sliding a cake between his legs, the cars from the sidetrack were coupled into the train. Plaintiff was jarred out of the door and fell against the station platform, striking his back and being seriously injured.

The first assignment of error is that "the court erred in denying the motion of the defendant for judgment for nonsuit against the plaintiff, made during the trial and at the close of plaintiff's evidence," upon several enumerated grounds. Under our statutes the court has not authority to direct an involuntary nonsuit. *Bryan v. Pinney*, 3 Ariz. 34, 21 Pac. 332; *Roberts v. Smith*, 5 Ariz. 368, 52 Pac. 1120. Therefore the court's denial of the motion was necessary, irrespective of the merits of the grounds urged had they been presented in support of the appropriate motion. Furthermore, the abstract of the record does not disclose that the motion in question was made.

The several grounds set forth in support of this assignment of error are each presented in support of the assignment which we shall next consider, and are as meritor-

ious in its support as they would have been in support of the appropriate motion for an instructed verdict at the close of plaintiff's case. This assignment is as follows: "The court erred in refusing to charge the jury as requested by the defendant as follows: 'You are instructed to find a verdict for the defendant,' because it appeared (among other grounds) that plaintiff was a licensee and suffered injury from a danger, the risk of which he assumed when he went on board of the caboose." Under the facts as stated, resolving conflicting testimony in favor of plaintiff, plaintiff was not a licensee; he was an invitee, the consignee of freight, interested in its removal from the caboose, engaged at the request of the agent in charge of the defendant's train, to wit, the conductor, in removing from the train merchandise consigned to him. As such he was entitled to protection against carelessness and negligence of the defendant through its servants whereby injury might result to him. *Railway Co. v. Bolton*, 43 Ohio St. 224, 1 N. E. 333, 54 Am. Rep. 803; *Mason v. Railway Co.*, 65 Tex. 577, 57 Am. Rep. 606; *Welch v. Maine Central Ry. Co. (Me.)* 30 Atl. 116, 25 L. R. A. 658; *Jacobson v. St. Paul Ry. Co.*, 41 Minn. 208, 42 N. W. 932; *Toledo, etc., Ry. Co. v. Hauck*, 8 Ind. App. 367, 35 N. E. 573; *I. C. R. Ry. Co. v. Hoffman*, 67 Ill. 287. In support of this assignment of error, however, it is urged that no testimony was given to show that the conductor of the train had authority to deliver freight directly to the consignee or to authorize the consignee to remove freight from his train. Whether the conductor had or had not such authority is immaterial. The plaintiff was present in his own interest seeking to obtain from the defendant freight to the delivery of which he was entitled. If the defendant's representative, in charge of that freight, requested plaintiff to remove the consignment from the car, plaintiff, acting in his own interest, was justified in removing it, and was entitled to protection from carelessness or negligence on behalf of defendant's employes. It was not incumbent upon him, before acting as his self-interest dictated, to ascertain the defendant's rules governing the conductor's authority. What would be the effect of knowledge by him or notice to him of a limitation upon the conductor's authority is a question which does not here arise; and the rule laid down by us must be limited by this fact. We are defining plaintiff's right where he has no knowledge or notice of a limitation upon the authority assumed by the defendant's representative.

A third assignment of error is based upon the fact that the court refused, except with a modification, to give two instructions requested by the defendant. Each of these was for the purpose of advising the jury concerning the law as to a defense interposed by the defendant that plaintiff was guilty of contributory negligence. Each instruction as

requested was given with the following proviso added thereto: "That the contributing negligence of the party injured will not defeat the action if it be shown that the defendant might, with the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence." The objection made to this proviso is as follows: "The jury were not told either in this or any other instruction given that the rule of law expressed in the proviso applied only upon condition that the evidence showed that the defendant actually knew that plaintiff was guilty of negligence, or had by his own act placed himself in a position of danger." We think the proviso would more exactly state the law if it were framed to meet the objection to it here made, but its language, used in precisely similar context, was approved by the Supreme Court of the United States in *Inland & Seaboard Coasting Company v. Tolson*, 139 U. S. 558, 11 Sup. Ct. 653, 35 L. Ed. 270. Both upon that authority, and because it appears to us that the instruction is not so inexact as to mislead the jury, we hold that attaching this proviso to the instructions in question was not error.

A fourth assignment of error is based upon the giving by the court of the following instruction: "Gentlemen, I charged you in connection with the law on the question of contributory negligence in this case, that if you should find that the plaintiff here was guilty of contributory negligence he could not recover in this case. I qualified that with this, that if the defendant company could, by the exercise of reasonable care and prudence have avoided the injury, then that question of contributory negligence of the plaintiff would not prevent his recovery. That, gentlemen, is the law, but there is still another and further modification to be made of that, which is this: That principle applies where the defendant, this company, knew that the plaintiff had been guilty of this negligence, then could have performed some act, or could, by exercising reasonable care and prudence, have prevented the accident, then that qualification would apply; but that only applies in a case where the defendant knew *or might have known* of the contributory negligence and then could have avoided it. If you should find in this case that that was not the fact, and that this was an accident which resulted from the negligence of both of the defendant and the contributory negligence of the plaintiff, and defendant didn't know *or reasonably would not be expected to know* of that negligence, then that principle would not apply; and if both the defendant was negligent and the plaintiff was guilty of contributory negligence then he should not recover. That is, gentlemen, that I may make it clear to you, after all this statement, the plaintiff must prove negligence on the part of the defendant. If the defendant proves that the plaintiff was guilty of contributory negligence, and that contributory negligence did contribute

to the injury, then he cannot recover in this case, unless the defendant knew, *or had reason to know*, of his position and his negligence, and could then, by the exercise of reasonable care, have avoided the accident." The vice of this instruction, it is contended, lies in the words which we have italicized. It advised the jury that notwithstanding the fact, if it be a fact, that plaintiff was guilty of contributory negligence he would nevertheless be entitled to recover if it appeared from the evidence not merely that the defendant actually knew but that defendant *might have known* or *had reason to know* or *reasonably would have known* of plaintiff's contributory negligence or position and negligence and could thereafter, by the exercise of reasonable care, have avoided the accident and injury. That this instruction would have been open to no criticism if the italicized words had been omitted is beyond question. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 429, 12 Sup. Ct. 679, 36 L. Ed. 485; *Inland & Seaboard Coasting Co. v. Tolson*, supra. We have found rulings of the Supreme Courts of several states in point as to the merits of this instruction. Under the decisions of the Supreme Court of Missouri the instruction as given is good. *Donohue v. St. Louis, I. M. & S. Ry.*, 91 Mo. 357, 2 S. W. 424, 3 S. W. 848. Under the decisions in the following cases this instruction is erroneous. *Johnson v. Stewart* (Ark.) 34 S. W. 889; *Herbert v. S. P. Co.*, 121 Cal. 227, 53 Pac. 651; *Georgia Pac. Ry. Co. v. Lee* (Ala.) 9 South. 231; *Krenzer v. Pittsburg & Ry. Co.* (Ind. Sup.) 52 N. E. 220, 68 Am. St. Rep. 252; *Tex. Pac. Ry. Co. v. Lively* (Tex. Civ. App.) 38 S. W. 370.

We have reached the opinion that the instruction is erroneous. It lays down too broad a rule of responsibility. Under the law it was incumbent upon the defendant to exercise reasonable care and prudence to protect the plaintiff. This was correctly explained to the jury. If, under the circumstances as they existed in this case, it was a reasonable act to make a coupling while the caboose was being unloaded, then that coupling to be lawfully made should have been made with reasonable care for the plaintiff's safety. If plaintiff was not already familiar with the fact that couplings might be made while cars were being unloaded, a proper part of defendant's care was so to advise him; and plaintiff's knowledge or want of knowledge is an element in the determination whether he was contributorily negligent. Plaintiff had the right to rely upon it that defendant would conduct all of its operations with a reasonable care for his safety; but the defendant had a corresponding right to rely upon it that plaintiff would not unreasonably or negligently expose himself to injury. To require that the defendant should have adopted means to observe whether plaintiff was violating his duty not to be negligent would have the effect to deprive the defendant of

this right. These are reciprocal rights upon which rests the doctrine of recovery for injuries caused by negligence and the defeat of such recovery through contributory negligence. The jury may have found that it was reasonable for defendant to make a coupling while plaintiff was unloading the ice, and that plaintiff ought to have anticipated a coupling; but that the coupling was made with unreasonable violence. Then what should have been determined was whether plaintiff acting in the light of the fact that defendant might reasonably make a coupling had taken a position unreasonable and negligent, a position in which he would be likely to be injured should the defendant make the coupling in a reasonable manner. If so, then even if the coupling had been made with reasonable care, plaintiff might have been injured; and if, despite defendant's negligence, plaintiff would have been uninjured had he been reasonably careful himself, he was equally culpable with the defendant. It would follow that the negligence of each having jointly operated to produce the injury the injured party should not have recovered. On the other hand, if the defendant actually knew that the plaintiff was in a position, though through his own carelessness and negligence, wherein he was in danger of injury, if then by the exercise of reasonable care and diligence defendant could have prevented the injury, and did not do so, the resulting injury verged upon a willful and malicious injury, and the defendant should compensate the plaintiff despite plaintiff's negligence; for under no circumstances whatever may the defendant willfully and maliciously injure the plaintiff.

What ought to have been known or observed or would have been known or observed by the exercise of reasonable care, is often a factor in determining the existence of negligence. It is conceivable that facts may have existed, in connection with other facts in this case, which would support an instruction that defendant was negligent, if defendant's servants reasonably could have known of plaintiff's position, and so knowing could, by the exercise of reasonable care, have prevented his injury. This would be applicable, for example, if it was not the custom at that station to couple cars into the train when it was being unloaded, or if plaintiff had possession of no facts which would reasonably lead him to anticipate such a coupling. Then plaintiff could rely upon having the car stable, and could act accordingly. It would be the duty of defendant, before making a coupling which would jar the car, to use reasonable care to ascertain plaintiff's position, warn him of the shock or use other means to protect him. A violation of this duty would be negligence. This we state without determining the applicability of such an instruction to the facts. The authorities cited *supra* under the second assignment of error discussed are illustrative.

But under all situations the defense of contributory negligence must be left intact. By reason of the fact that the instruction under consideration imposed upon the defendant a duty to use care to ascertain whether plaintiff was being negligent, it is erroneous.

We find no error in the other instructions complained of, and deem it unnecessary to discuss them at length.

By reason of the error in the instruction just considered, the judgment is reversed and the case remanded for new trial.

SLOAN and CAMPBELL, JJ., concur.  
DOAN, J., dissents.

# ROUSE v. PIMA COUNTY.

(Supreme Court of Arizona. May 12, 1906.)

## COUNTIES—OFFICERS—COMPENSATION.

Rev. St. 1901, par. 970, provides that the clerk of the county board of supervisors shall perform certain duties and "all other duties required by law or any rule or order of the board." Paragraph 2600 provides that county officers shall receive such compensation as is provided hereafter and none other. Paragraph 2628 provides that in counties of the first class the clerk of the board of supervisors shall receive a salary of \$1,500 per annum. Paragraph 3882 provides that, as soon as the board of supervisors of each county has "levied the taxes as provided in this title," they shall add up the columns of valuation and enter the total valuation of each description of property on a roll, and shall cause a true copy of the assessment roll to be made, to be styled a duplicate assessment roll, and shall give the county treasurer a statement thereof, which roll and also the plat or map book shall be delivered to the tax collector on or before the third Monday in September. *Held*, that the fact that a clerk of the board of a county of the first class, at the request of the board, but without a promise on their part to pay extra therefor, prepared a duplicate assessment roll outside of the official hours, did not entitle him to recover from the county on a quantum meruit for pay beyond his official salary, especially where it was not shown that there was not ample time for its preparation during the official office hours between the date when it was ordered and the date when it was required by statute to be completed and delivered to the tax collector.

Appeal from District Court, Pima County; before Justice George R. Davis.

Action by Charles O. Rouse against Pima county. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Owen T. Rouse, for appellant. E. S. Clark, Atty. Gen., for appellee.

DOAN, J. On May 23, 1903, the appellant, as plaintiff, filed a complaint against the appellee, as defendant, for \$250, the amount claimed by plaintiff to be due on a quantum meruit for services rendered the defendant by the plaintiff, while the clerk of the board of supervisors of the defendant, in making out the duplicate assessment roll for 1902. It was stipulated in the trial court: "That the plaintiff was the duly appointed and qual-

fied clerk of the board of supervisors of the defendant county during the years 1901 and 1902. The plaintiff, at the request of the board of supervisors of defendant county in the year 1902, made up the duplicate assessment roll for that year according to law, and said roll was accepted by the board of supervisors of said county and was used as such. That said assessment roll was made and prepared by plaintiff, and, in the making thereof, said plaintiff worked on it at hours before and after the commencement of the time fixed by law as the official hours of the office of the clerk of the board of supervisors, and also at nights and on legal holidays. That the defendant during all of the time mentioned was a county of the first class. That plaintiff has not been paid for the services herein claimed, or for any part thereof, and that he filed a verified demand therefor in due time from the 20th day of September, 1902, within six months after the making of said duplicate assessment roll, and that said demand was rejected by the said board of supervisors on the 7th day of February, 1903." The case was submitted to the trial court on the complaint and answer and the agreed statement of facts, and judgment was rendered that plaintiff recover nothing, and that the defendant recover its costs, from which judgment and the denial of a motion for a new trial the plaintiff has appealed to this court.

It is not claimed by the appellant that the services sued for were rendered under the terms of an express contract. We do not, therefore, need to determine whether a contract made by the board of supervisors with the clerk thereof for the rendition of such services would, if the same were rendered outside of office hours and on nights and legal holidays, be valid and binding on the county. The record in this case discloses: "That said plaintiff at the request of said board of supervisors of defendant county, made up the duplicate assessment roll according to law, and said roll was accepted by the board of supervisors of said Pima county, and was used as such." We held in *Santa Cruz County v. Barnes*, 76 Pac. 621, that, "as a rule, one who demands the payment of a claim against a county must show some statute authorizing it, or some contract express or implied, from which it arises, which itself finds authority of law." Our statutes provide: Paragraph 970, Rev. St. Ariz. 1901: "The clerk of the board must \* \* \* (9) perform all other duties required by law, or any rule or order of the board." Paragraph 2609: "County officers shall receive such compensation as is provided hereafter, and none other." Paragraph 2628: "In counties of the first class, the clerk of the board of supervisors shall receive a salary of fifteen hundred dollars per annum." Paragraph 3882: "As soon as the board of

supervisors of each county has so levied the taxes as provided in this title, they shall add up the columns of valuation, and enter the total valuation of each description of property on a roll, and shall cause a true copy of said assessment roll to be made, to be styled a duplicate assessment roll \* \* \* and shall give the county treasurer a statement thereof \* \* \* which said duplicate assessment roll and also the plat or map book shall be delivered to the tax collector on or before the third Monday in September." The suit was evidently brought by the appellant in the lower court upon the ground that he was entitled to pay for the services, because they were rendered outside of office hours. But he does not allege in his complaint, nor does the statement of facts bear out the presumption, that the board authorized such inference on his part. It is not alleged that they made any definite contract to pay him for the work, and there is nothing in the record to negative the inference that they directed or requested these services to be rendered as a part of the duties of his office. If he did not consider that the services requested of him were within the line of his official duty, he could have declined to perform them, but we find nothing in the statutes to authorize him to perform the services requested and then claim extra compensation therefor upon the ground that they were not a part of his official duty. The statutes provide plainly, in paragraphs 2609 and 2628 that "he shall receive as clerk of the board of supervisors a salary of fifteen hundred dollars per annum," and that "he shall receive such compensation for his services and none other." The fact that this roll was prepared outside of the official office hours does not entitle the officer who thus prepared it to pay beyond his official salary. Especially where, as in this case, there is no evidence that there was not ample time for its preparation during the official office hours between the date when it was ordered and the date when it was required by statute to be completed and delivered to the tax collector. No statute has been cited by the appellant authorizing the allowance of such a claim against the county. There is no evidence in the record indicating that the county, through the board of supervisors as its representative, secured the services upon any promise to pay extra compensation therefor, and the presumption would therefore naturally follow that the services were rendered by the appellant within the line of his official duty, and that the board properly rejected the demand presented for extra compensation therefor.

The judgment of the lower court is affirmed.

KENT, C. J., and SLOAN, CAMPBELL, and NAVE, JJ., concur.

BUCKEYE BUGGY CO. v. MONTANA STABLES.

(Supreme Court of Washington. July 10, 1906.)

1. SALES—ENTIRE CONTRACT—ACCEPTANCE OF PART OF GOODS.

Where two articles are sold by an entire contract, an acceptance of one of the articles amounts, in law, to an acceptance of both.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 172-174, 451-454.]

2. EVIDENCE—VARYING WRITTEN CONTRACT.

Where a written contract for the sale of two articles stated a single sum as the price of both, it was, nevertheless, competent to show by parol that a separate price was agreed upon for each of the articles so that the contract was severable.

3. SAME.

Where a written order for the sale of certain vehicles contained a detailed description of each, parol evidence was not admissible to prove that, at the time the contract was executed, certain agreements were made which were not included in the contract.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1778-1780.]

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by the Buckeye Buggy Company against the Montana Stables. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

G. M. Emory and John F. Murphy, for appellant. Emmons & Emmons and H. T. Granger, for respondent.

RUDKIN, J. On the 5th day of December, 1902, the defendant executed and delivered to the plaintiff the following written order:

This action was brought to recover the contract price of the two vehicles therein described and of certain extras ordered at the same time. The claim for extras was abandoned at the trial and will not be further considered. The complaint alleged the execution and delivery of the order, that in the month of April, 1903, the two vehicles were shipped and delivered to the defendant, and that no part of the purchase price of \$1,600 had been paid, except the sum of \$181.25. The amended answer put in issue the allegations of the complaint, except the existence of the corporation, the ordering of sundry articles, and the payment of \$181.25. The answer also contained an affirmative defense in which it was alleged that the contract between the plaintiff and the defendant was partly in writing and partly oral; that the written part of the contract was as set forth in the above order; and that at the time of the execution of the order, and as a part thereof, it was orally agreed as follows: That the style No. 265 in the written order was to be a brougham for use in the livery business in the city of Seattle which should accommodate four persons with comfort, and was not to be a three-quarter sized brougham, such as is commonly used by physicians and private families; that the brake should not be a stiff bar brake and should not be placed upon the front wheels of the vehicle; that the 15-inch extension should be measured from the edge of the front seat in the middle thereof to the nearest part of the cushion back of the front seat. It was further alleged that it was

BUCKEYE BUGGY CO., Columbus, Ohio:

Seattle, Wash., Dec. 5, 1902.

Routing

Please ship March 15, 1903, or as soon thereafter as possible, the following work, in accordance with description, etc. in your catalogue, boxed and aboard cars at Columbus, Ohio:

ALL ORDERS TAKEN SUBJECT TO APPROVAL OF HOME. No agreement or condition will be recognized unless written upon this blank. Our responsibility ceases upon delivery to R. R.

TERMS: \$300 Cash  
Balance, \$100 a mo. till paid

How Many	Style	Top	Track	Pole or Shafts	Wheels		Axle	Trimming	Mounting	Price of each	Painting	Remarks
					Size	Band or Patent						
1	265	Top	Reg.	Pole	Reg	B	Reg.	Gr. Lea		Plain		15 in. Extension Kelly tire. Wants regular white tree. Dont want stiff bar brake
1	278	Open	"	"	"	"	"	"	"			1600.00 N. Y. Red body to correspond Ice Chest Horn - Lead Bars.
Name Montana Stables		Phone Main 752										

Order No. ....

Everything must be written on this order, as no verbal agreements or promises will be recognized.

THIS ORDER NOT Subject to Countermand.

SIGN HERE (Signed) MONTANA STABLES, INC.  
By J. W. Coleman, Manager

SALESMAN Van Sant

understood and agreed that the figures "1600" appearing in the order were the totals of the separate sums agreed upon as the purchase price of the two vehicles, and that \$900 was the agreed price of the brougham, and \$700 the agreed price of the coach. It was further alleged that on or about April 10, 1903, the defendant was informed that the brougham being manufactured by the plaintiff was not according to contract, and the defendant thereupon wired the plaintiff countermanding the order as to the brougham and refusing to accept the same, because it was of three-fourths size, and because the 15-inch extension was not being constructed according to contract. It was further alleged that, notwithstanding the countermand of the order, the plaintiff shipped the brougham and coach in May, 1903, consigned to the order of the defendant at Seattle; that the defendant thereupon examined the vehicles, and, finding the coach according to order, accepted the same, but the brougham did not conform to the contract in the following particulars: It was three-fourths size and not full size, and would not accommodate four persons with comfort; it did not have the 15-inch extension, and the wheels did not have the regulation track; nor was it equipped with the stiff bar brake. For these reasons the defendant refused to accept the brougham and actually rejected the same, storing it in the city of Seattle subject to the order of the plaintiff, and immediately notified the plaintiff of such rejection. The reply denied the affirmative portions of the answer. The court granted a judgment in favor of the plaintiff on the pleadings for the full amount, and from this judgment the defendant appeals.

Two questions are naturally presented by the appeal: (1) Was the order in question so far an entire contract as to preclude the appellant from alleging and proving that a separate consideration was agreed upon for each of the vehicles? (2) In the absence of fraud or mistake, should the appellant be permitted to vary the terms of the written order by parol testimony tending to show a contemporaneous oral agreement? If the contract in suit was entire, and parol testimony incompetent to explain the consideration, the judgment must be affirmed, as an acceptance of one vehicle would in law be equivalent to the acceptance of both. If, on the other hand, it was competent for the appellant to show that the contract was in fact severable, the judgment must be reversed, as a sufficient deviation from the written contract was alleged to warrant the appellant in refusing to accept the brougham. We believe it to be a rule that, if several articles are sold for a single and entire consideration without any apportionment of the purchase price as between the several articles, the contract of sale is entire and cannot be severed, ex-

cept by agreement of the parties. On the other hand, if several articles are sold, and a separate price is agreed upon for each, although a single instrument of conveyance may be executed reciting a single consideration for the whole, yet for sufficient cause shown the contract may be rescinded as to a part and enforced as to the remainder. This is well illustrated by the case of *Miner v. Bradley*, 22 Pick (Mass.) 457. In that case the plaintiff bid off a cow and 400 pounds of hay at public auction, for the sum of \$17, without any apportionment of the purchase price. The court held the contract entire, but distinguished the contract from such a contract as we have suggested, in the following language: "Where a number of articles are bought at the same time, and a separate price agreed upon for each, although they are all included in one instrument of conveyance, yet the contract, for sufficient cause, may be rescinded as to part, and the price paid recovered back, and may be enforced as to the residue. But this cannot properly be said to be an exception to the rule, because, in effect, there is a separate contract for each separate article." Again: "Had the plaintiff bid off the cow at one price and the hay at another, although he had taken one bill of sale for both, it would have come within the principle of the above case. [Referring to *Johnson v. Johnson*, 3 Bos. & Pul. 162.] But such was not the fact." In *Aultman & Taylor Co. v. Lawson et al.* (Iowa) 69 N. W. 865, the court held that, although a threshing outfit was sold for "one lump sum," yet it was competent to show that a separate price was agreed upon for each of the several parts, saying: "True, the consideration is stated in 'one lump sum'; but the evidence shows that the sum was the aggregate of prices agreed upon as to the different parts. The contract does not show the prices on the different parts, but, being silent on that subject, it was competent to prove what the agreement was in that respect; such proof not being in contradiction of the contract." To the same effect, see *Field v. Austin et al.* (Cal.) 63 Pac. 693.

On the second question we are clearly of opinion that the order or contract cannot be modified or varied by parol testimony as to a contemporaneous oral agreement. The rights of the parties must therefore be determined by the written contract, except in so far as the appellant should be permitted to prove that a separate consideration was agreed upon for each vehicle, and that the brougham was not accepted by it and did not conform to the written order.

The judgment is therefore reversed, and the cause is remanded, for further proceedings not inconsistent with this opinion.

MOUNT, C. J., and HADLEY, DUNBAR, CROW, and ROOT, JJ., concur.

## DAVIS et al. v. DENNIS et al.

(Supreme Court of Washington. July 13, 1906.)

## 1. MINES AND MINERALS—RECOVERY OF POSSESSION—PLEADINGS.

Where prior possession was the sole question involved in an action to recover possession of unsurveyed government mineral lands, it was unnecessary for plaintiffs to allege that they had the necessary qualifications, such as being of lawful age, to enter government lands, in order to state a cause of action.

## 2. SAME—UNLAWFUL POSSESSION BY DEFENDANTS—EFFECT.

In an action to recover possession of unsurveyed government mineral lands the fact that defendants were in possession of the property through entry during the temporary absence of plaintiffs, who had been in possession for a number of years, did not require an allegation that plaintiffs had the necessary qualifications to enter government lands in order to state a cause of action.

## 3. SAME—POSSESSION—WHAT CONSTITUTES.

It is not necessary in order to constitute possession that parties entering on unsurveyed government mineral lands be actually on the property at the time of wrongful entry by strangers.

## 4. SAME—MINING CLAIM—ABANDONMENT.

Abandonment of a mining claim is where the locator goes away and leaves it without any intention of returning, having no regard to what becomes of the claim, or who may appropriate it, and the leaving of a claim with intent to return later is not abandonment.

## 5. SAME—RIGHT OF ENTRY—DEPRIVATION—JUDGMENT—CONSTRUCTION.

In an action to recover possession of unsurveyed government mineral lands whereon plaintiffs had entered a judgment allowing them to recover only such of the property of which they had been in the actual possession, such as their cabin, tunnels, and other improvements, together with a convenient space surrounding them and not the whole section of land, leaving defendants free to enter upon the mineral vein on the property at another place, did not deprive defendants of their right to contest plaintiffs' right of entry on the arising of the question before the land department.

## 6. SAME—ACTION — PLEADING — MISJOINDER OF PARTIES.

In an action to recover possession of unsurveyed public mineral lands whereon plaintiffs had entered, evidence that, during plaintiffs' absence, defendants took possession of the property and lived in one cabin on the immediate improvements of plaintiffs, although one of defendants was in possession of one portion of the property and another in possession of another part, authorized a finding of a joint possession, and there was no misjoinder of parties.

Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by Syrenus Davis and others against A. U. Dennis and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Frank A. Luse and Dennis & Burdick, for appellants. Frank D. Nash and Millet & Harmon, for respondents.

FULLERTON, J. The respondents, who were plaintiffs below, brought this action against the appellants to recover the possession of certain unsurveyed government lands on which they had discovered a coal vein. The lands are situated in the eastern portion

of Lewis county, some 16 miles from the nearest wagon road, some 100 miles from a railroad, and are reached by a trail over which it is possible to take pack animals only. The nearest corner on the government surveys is about 12 miles distant from the discovery claim. From this corner the respondents caused a private survey to be made, and found that the section of land they, as an association, desire to locate will be situate in sections 12, 13, 23, and 24, in township 14 N., of range 10 E. of the Willamette meridian when the government surveys are extended, if extended according to the system now in vogue. The coal vein was discovered by the respondents in the summer of 1895. At that time they entered into possession of the same, built a cabin on the claim, and partially opened the vein; and yearly since that time, down to the summer of 1903, they have returned to the property and worked the mines, opening tunnels thereon aggregating several hundred feet in length, one of which alone extends into the vein a distance of more than 150 feet; the proofs showing that they have expended on the mine in its care and development more than \$5,000. While the respondents did not stay upon the claim during the winter season, they maintained, at all times, a cabin thereon (in 1900 rebuilding the previous one that had been destroyed by fire) in which they kept their tools used in working the mine, their cooking utensils, and such nonperishable articles as they found useful and necessary in developing the mine. They also erected a cabin on the trail as a wayhouse in which to lodge while they were going to and returning from the property. In October, 1903, after the respondents had left the property for that season, the appellants entered, taking possession of the respondents' cabin and works, and the land surrounding the same, and refused to deliver up such possession on demand made therefor. This action was thereupon brought to recover such possession. In their complaint the respondents alleged their location, entry upon, and improvement of, the property; the entry of the defendants, that the same was wrongful, a demand for the possession, and prayed that they have judgment for possession, and for the costs of the action. The appellants demurred to the complaint, which demurrer the trial court overruled. The appellants thereupon answered separately, each denying the allegations of the complaint, and pleading affirmatively that he held a certain portion of the land described as coal lands for entry under the laws of the United States when the same should become subject to entry; denying, however, that the appellants held the same collectively or in common, but alleging that the tract each held and had improved was separate and distinct from that claimed by either of the others. A reply was interposed to these defenses, and a trial had before the court and jury, resulting in a judgment of

ouster against the appellants as to all that portion of the land claimed by the respondents on which their improvements had been made, "consisting of cabin or cabins and of tunnels, coal mine or mines situate on both sides of the creek running through the lands described in the complaint, and the lands adjacent and near the cabin or cabins and tunnels and mines, necessary for the development and working of the same." It is from this judgment that this appeal is taken.

The appellants first contend that the complaint fails to state facts sufficient to constitute a cause of action for the reason that it does not appear on the face thereof that the respondents are qualified under the laws of the United States to enter coal lands; the precise objection being that it is not alleged that respondents or any of them are of the age of 21 years. We are unable, however, to concur in this contention. It may be true that when this land becomes subject to entry as coal land, and the respondents apply to the government for leave to enter it as such, their qualifications as to age and citizenship to enter coal lands will be a material inquiry, and they will have to allege and prove that they are citizens of lawful age before they will be permitted to make such an entry. But this is not a material question as between them and the respondents where nothing but the question of prior possession is involved. In the absence of positive law forbidding it, any person, whether minor or adult, citizen or alien, may lawfully locate upon and take possession of a part of the unsurveyed public domain, and rest secure in that possession until the government calls it in question. No individual or person may lawfully interfere, and the courts may be invoked to restrain unlawful interferences. This right to maintain possession as against individuals who can acquire no higher right owes its present authority, if not its origin, to the necessity of preserving the peace of society, and of protecting the individual from arbitrary aggressions; and, this being its purpose, the argument in its favor is just as potent when applied to an alien or minor as it is when applied to a citizen of lawful age. The rule has its foundation in the necessities of the state; its duty for the sake of peace to protect all within its borders in all lawful avocations. In this case, therefore, since the land was not subject to entry and prior peaceable possession was the only inquiry, the respondents did not have to allege that they had the necessary qualifications to enter government lands in order to state a cause of action against the appellants. Nor is the rule changed by the fact that the appellants are in possession of the property and the respondents are seeking to oust them from such possession. The respondents allege that they were in possession, and had been in possession for a number of years, when the appellants came along, during their temporary absence, and took possession them-

selves. The gist of the action therefore is the wrongful entry of the appellants on the possession of the respondents, and it is the determination of that question that determines the right to the property. It is of no importance to inquire who may be technically plaintiff or defendant.

It is next contended that the evidence fails to show that the respondents had such a possession as would preclude the appellants from entering thereon. But we think the appellants are mistaken in this contention also. It is true that no one representing the respondents was actually on the property at the time the appellants entered, but this was not necessary to constitute possession as against a stranger entering without right. The respondents had not abandoned the property. Abandonment of a mining claim is where the locator goes away and leaves it without any intention of returning, having no regard for what becomes of the claim or who may appropriate it. But to leave a claim with the intent to return later is not to abandon it. Here the respondents had located the property nearly 10 years prior to the appellants' entry. They had returned to it year after year, and had spent a large sum of money in the work of development. Indeed, they had gone so far in that direction as to demonstrate that the property was of great value, and would become profitable as soon as title from the government could be obtained, and transportation facilities, which are promised, became available. They had caused lines to be run to it from the nearest government surveys, and thereby ascertained its exact location; and one of their number made a trip to Washington city, and there made such representations as to its location and worth as to have it exempted from a contemplated forest reserve. Under these circumstances it is idle to say that there was an abandonment, or anything more than a mere temporary absence from the property on the part of the respondents, and we think the jury rightfully found, and that the trial court rightfully adjudged, that the appellants' entry was wrongful. It must be remembered that this particular spot has no more attractions as a place on which to locate a mountain home, or abiding place, than thousands of others that could be found in the immediate vicinity which are vacant and open to the occupation of any one. Its particular attraction lies in the fact that the respondents have demonstrated that it contains a valuable coal mine, and it is for this reason that the appellants have entered upon it. They are seeking to take advantage of the respondents' labor and expenditures, and are beyond the pale of consideration in so far as there is any equity or justice in their claims. Their right must rest on the naked fact that the property was unoccupied when they entered upon it, and inasmuch as they failed to show this fact the judgment of ouster against them was rightfully entered.

They complain, however, that if they are ousted from their possession they will not be permitted to contest the respondents' right to enter when the question arises before the land department which alone has the right to finally decide who has the preference right of entry. It would seem that if they were wrongfully in possession, this question ought not greatly to concern the court, but the judgment entered by the court below does not deprive them of the right. That court allowed the respondents to recover only such of the property as they had been in the actual possession, the cabin, tunnels, and other improvements, together with a convenient space surrounding them, not the whole section of land claimed, leaving the appellants free to enter upon the vein at another place, although within the boundaries of the respondents' actual claim. This was as favorable to them as the facts warranted.

It is claimed, lastly, that there is a misjoinder of parties. This is based on the contention that the evidence showed there was no joint possession by the appellants; that one of them was in possession of one portion of the property, and another in possession of another, as alleged in their answers. Doubtless this is the way the appellants claimed the property, and intended to divide it among themselves, but the evidence showed they were living in one cabin on the immediate improvements of the respondents, and this being so, the jury were warranted in finding a joint possession.

The judgment is affirmed.

MOUNT, C. J., and HADLEY, CROW, and DUNBAR, JJ., concur.

(12 Idaho, 318)

## TRULL v. MODERN WOODMEN OF AMERICA.

(Supreme Court of Idaho. May 14, 1906.)

### 1. APPEAL—TIME TO APPEAL—ORDER DENYING NEW TRIAL—TIME OF WAIVER.

Where an appeal is taken from an order denying a motion for a new trial at a period of more than 60 days after the order is made and entered, such appeal is ineffectual, and will be dismissed on motion of the adverse party.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1888.]

### 2. SAME—REVIEW OF EVIDENCE.

Where the appeal from the judgment was not taken within 60 days after the rendition of the judgment, and no valid appeal has been taken from the order denying a motion for a new trial, the appellate court is without authority or jurisdiction to examine the evidence for the purpose of ascertaining whether or not it is sufficient to support the verdict and judgment.

### 3. WITNESSES—PRIVILEGED COMMUNICATIONS—WAIVER.

Where, in an application for life insurance the applicant stipulates and agrees that he waives all provisions of law preventing a physician from testifying as to any information acquired by him while attending his patient or rendering him incompetent as a witness as pro-

vided in section 5058, Rev. St. 1887, such waiver is valid and entitles the beneficiary named in the policy, as well as the insurer, in an action upon a policy issued on such application, to call and examine the physician who attended the insured during his last sickness, and have him answer questions which, but for such waiver would be regarded as privileged communications that the witness could not disclose.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 781, 782.]

### 4. SAME.

Since the statute (section 5058, subd. 4, Rev. St. 1887), authorizes the patient to waive the privilege of secrecy imposed on his physician, and does not fix any specific time at which such waiver can or must be made, no reason is discovered why the waiver may not equally as well be made by contract and in advance of the relation of physician and patient arising as at the time of the trial.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 781, 782.]

### 5. SAME.

As to whether or not the privilege of secrecy granted by statute is a personal privilege attaching only to the person of the patient or can be waived by his heir or legal representative—*quære*.

### 6. EVIDENCE—CROSS-EXAMINATION OF EXPERTS.

The courts will be liberal in allowing a broad range of inquiry on cross-examination, and this rule is especially and peculiarly applicable when it comes to the cross-examination of that class of witnesses commonly called "experts."

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2379.]

(Syllabus by the Court.)

Appeal from District Court, Latah County; Edgar C. Steele, Judge.

Action by W. R. Trull against the Modern Woodmen of America. Judgment for plaintiff, and defendant appeals. Affirmed.

Benj. D. Smith, T. W. Bartley, and S. S. Denning, for appellant. Forney & Moore, for respondent.

AHLSHIE, J. This is an appeal from a judgment and an order denying a motion for a new trial. The respondent has submitted a motion to dismiss the appeal from the order denying the defendant a new trial on the ground that the appeal was not taken within 60 days after the entry of the order as required by subdivision 3 of section 4807, Rev. St. 1887. The order denying a new trial was made and entered on the 9th day of October, 1905, and the appeal therefrom was not taken until the 13th day of March, 1906. Since the appeal from the order denying appellant's motion for a new trial was not taken within the time prescribed by the statute, it is ineffectual and must be dismissed, and it is so ordered. *Moe v. Harger*, 10 Idaho, 194, 77 Pac. 645; *Cunningham v. Stoner*, 10 Idaho, 556, 79 Pac. 228.

The judgment in this case was entered on the 26th day of May, 1905, but the appeal was not taken until March 13, 1906. The appeal from the judgment having been taken after a period of more than 60 days had elapsed from the rendition of the judgment,

and there being no appeal from the order overruling the motion for a new trial, we have no authority to examine the evidence for the purpose of determining its sufficiency to support the verdict nor for any other purpose except to determine whether or not errors of law were committed by the court in the course of the trial. Counsel for appellant have argued that since they moved for a new trial on the grounds that the verdict and judgment are both "against the law" this court should examine the evidence for the purpose of determining whether or not the jury brought in a verdict in accordance with the instructions given by the court. That contention is fully answered in *Young v. Tiner*, 4 Idaho, 269, 38 Pac. 697, where this court says: "It is also contended by respondent that the second error assigned, to wit, 'that the verdict is against law,' cannot be considered, for the reason that it is 'not in proper form.' The appellant specifies and avers, in his statement on motion for a new trial, 'that the verdict is against law, as applied to the facts proven in the case,' and proceeds to support that averment by undertaking to show that the verdict is not supported by all of the facts proved by the evidence. This is simply another manner (under a different name) of showing that the evidence is insufficient to sustain the verdict, which cannot be done on this appeal. This court has no authority on this appeal to review all of the evidence to ascertain the facts proved, in order to determine whether the verdict 'is against law' when applied to such facts. This would simply be reviewing the evidence to ascertain whether it was sufficient to sustain the verdict, which is not permissible on an appeal from the judgment, unless the appeal is taken within 60 days after the rendition thereof." As the case is here only on appeal from the judgment, we are bound to confine our inquiries to the alleged errors of law.

This action was instituted to recover the the sum of \$2,000 claimed to be due the respondent as the beneficiary named in a benefit certificate issued by the appellant, Modern Woodmen of America, to one John B. Trull, now deceased. The only issue that was involved in the case in the trial court was as to whether or not the insured died of smallpox. The application for insurance contained a specific and express waiver of the right of recovery in case the insured should die of smallpox or varioloid. The company alleged that the insured died of smallpox, while the respondent, on the other hand, who is the beneficiary named in the certificate, contended that death resulted from erythema and impetigo. The first and principal question presented is as to the ruling of the court in permitting Dr. Taylor, who attended the insured during his last sickness, to testify as to the condition of the patient and what he learned from the

patient in diagnosing the case. After the witness had testified at some length as to his visit and the condition in which he found the patient, he said: "I asked the man a question, what he had been taking, and he said he had been taking poison oak." Here counsel for appellant interposed: "We object to that, may it please the court, as not being competent testimony, conversation that he had." The court replied: "It is part of the diagnosis," to which counsel for respondent replied: "Something we have no way of disputing." Thereupon the witness continued: "To make my diagnosis clear, and to find out I asked this man what he had been taking, and he tells me he had been taking poison oak, and I asked him who prescribed this, and he told me a man by the name of Dr. Fry had prescribed this and gave it to him. I changed the prescription and that is all that was said or done, only prescribing to him." Section 5953, Rev. St. 1887, contains the following provision: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: \* \* \* 4. A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." This provision of our statute is to be found in the statutes of many of the states, and especially in California, New York, and Missouri. It has been quite uniformly held that such a statutory provision disqualifies a physician from testifying concerning any facts learned by him or disclosures made to him in the course of his professional treatment of or attendance on a patient. *Freel v. Market St. Ry. Co.*, 97 Cal. 40, 31 Pac. 730; *In re Flint*, 100 Cal. 394, 34 Pac. 863; *Streeter v. City of Breckenridge*, 23 Mo. App. 244; *Westover v. Aetna Life Ins. Co.*, 99 N. Y. 56, 1 N. E. 104, 52 Am. Rep. 1; *Renihan v. Dennin*, 108 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770. It has also been held that the privilege accorded the patient by such a statute is a personal privilege and cannot be waived for him by any other person, and that the death of the patient makes a waiver impossible, and that the physician can never thereafter be permitted to testify concerning any matter touching his professional employment during the life of the patient. *Westover v. Aetna Life Ins. Co.*, supra; *Freel v. Market St. Ry. Co.*, supra. On this point, however, there is great diversity of opinion. See *Thompson v. Ish (Mo.)* 12 S. W. 510, 17 Am. St. Rep. 552, and note on page 570 of 17 Am. St. Rep.

Counsel for respondent urge that since the statute specifically provides that this privilege of secrecy may be waived by the patient, and since the statute does not specify any particular time at which the waiver

shall be made, it may be as effectually done by reason of a specific stipulation in the contract as at the time of the trial. The insured in this case was required to sign a written agreement and application for insurance, in which the following clause is contained: "And I hereby expressly waive for myself and beneficiaries the privilege or benefits of any and all laws which are now or may be hereafter enforced, making incompetent the testimony of or disqualifying any physician from testifying concerning any information obtained by him in a professional capacity." Respondent relies on the effect of this stipulation for a justification of the admission of the evidence of the attending physician. The effect of such a stipulation or waiver appears to have been considered by some of the courts in states having statutes similar to ours relative to privileged communication. We will briefly revert to a few of these authorities: In *re Adreveno v. Mutual Reserve Fund Life Ass'n* (C. C.) 34 Fed. 870, the beneficiary had sued upon a life insurance policy, and it appeared that the application for the policy had contained a stipulation very similar to the stipulation in this case. The insurance company offered one of the attending physicians as a witness to prove that the insured had made false representations as to his physical condition and ailments, and upon the admission of such testimony, Judge Thayer said: "As the patient is at liberty to waive the privilege which the law affords him, it appears to me it is immaterial whether the patient waives the privilege by calling the physician to testify in his behalf, or whether he waives it, as in this case, by a clause contained in the contract on which the suit is brought; and if the patient himself waives the privilege by a clause contained in the contract, that waiver, in my judgment, is binding on anyone who claims under the contract, whether it be the patient himself or his representative. The result is that inasmuch as the assured by this application waived the privilege which the statute affords him, the father, for whose benefit the policy was issued, and who is now suing on the contract, is bound by that waiver. I therefore hold that the testimony is admissible." *Foley v. Royal Arcanum*, 45 N. E. 456, 151 N. Y. 196, 56 Am. St. Rep. 621, was an action on a mutual benefit certificate, where the application for the insurance had contained a stipulation waiving the privilege of secrecy imposed by statute on the attending physician. At the time the contract was made the New York Code of Civil Procedure, sections 834 and 836, appear to have been substantially the same as our statute, but after the making of the contract and prior to the commencement of the action on the benefit certificate, the Legislature so amended the statute as to require the waiver to be made at the time of the trial. The Su-

preme Court of New York in that case sustained the stipulation of waiver and permitted the witness to testify, quoting at length from the opinion of Judge Thayer in *Adreveno v. Ass'n*, supra. The court in concluding that opinion said: "It appears to us that these cases dispose of the question under consideration, that the waiver is not in controvention of any principle of public policy, and that the amendment to section 836 of the Code, made after the contract, has no application." In the *Matter of Coleman*, 111 N. Y. 220, 19 N. E. 71, a firm of attorneys, Hughs & Northup, had been employed to prepare a will. After it had been drafted and submitted to the testator, he requested both members of the firm to sign and attest the same as witnesses thereto. Upon the probate of the will the question arose as to the competency of the attorneys to testify concerning the mental capacity of the testator at the time he executed the will. In considering the effect of the New York statute (section 836, Code Civil Procedure) and the privilege granted thereby to communications made in the course of professional employment and the right of the client to waive the privilege, the court said: "There is nothing in this section requiring the waiver to be made in writing, or in any particular form or manner, or at any particular time or place; but it is required to be an express waiver, and made in such manner as to show that the testator intended to exempt the witness, in the particular instance, from the prohibition imposed by statute. \* \* \* It cannot be doubted that if a client in his lifetime should call his attorney as a witness in a legal proceeding to testify to transactions taking place between himself and his attorney, while occupying the relation of attorney and client, such an act would be held to constitute an express waiver of the seal of secrecy imposed by the statute, and can it be any less so when the client has left written and oral evidence of his desire that his attorney should testify to facts learned through their professional relations upon a judicial proceeding to take place after his death? We think not. *McKinney v. G. St., etc., R. R. Co.*, 104 N. Y. 352, 10 N. E. 544. The act of the testator, in requesting his attorneys to become witnesses to his will, leaves no doubt as to his intention thereby to exempt them from the operation of the statute, and leave them free to perform the duties of the office assigned them, unrestrained by any objection which he had power to remove." To the same effect see: *Alberti v. Railroad Co.*, 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765; *Posseau v. Bleau*, 131 N. Y. 177, 30 N. E. 52, 27 Am. St. Rep. 578. In the light of the foregoing authorities and with the understanding we gather as to the intention and purpose of the statute, we see no reason why the court should not give force and effect to

the clause in the contract making the attending physician competent to testify in all matters the same as other witnesses. In that view of the case there could be no question but that the testimony of Dr. Taylor was properly admitted. The benefits of the waiver are equally as available to the beneficiary as to the insurer.

Appellant's sixth assignment of error is that the court erred in sustaining plaintiff's objection to the following question asked Dr. Taylor: "Q. At the time you understood that, did you have any understanding as to whether Dr. Magee occupied any official position in Shoshone county?" It seems that Dr. Magee was the health officer of Shoshone county, and as such had established a quarantine over the house where Trull resided, and that Taylor knew of this fact. The defendant was, by the question propounded to the witness, endeavoring to show to the jury that the doctor knew of the quarantine having been established by the proper health officer, and that it had been established on account of the health officer believing the disease to be smallpox. The question was undoubtedly a proper one and should have been answered. But the refusal of the court to permit the answer evidently did not prejudice the defendant. It fully and clearly appears from the testimony of the witness Taylor that he did in fact know that Magee was the health officer of the county, and that he also knew of the quarantine, and the reasons that had been assigned for the same. That fact runs all through the record and is testified to by Dr. Magee. The jury had all the information on this point, and if the witness had answered the question it would only have amounted to at most a repetition of the evidence on that point.

Appellant's seventh assignment of error relates to the ruling of the court in permitting the witness, Dr. Adair, to answer the following question on cross-examination: "If a man died of the disease supposed to be smallpox, and the man who nursed him all that time had never been vaccinated, and did not take the smallpox at all from the patient, would you think it smallpox?" The principal objection urged by appellant to this hypothetical question is that it was not based upon the facts proven in the case. There was some evidence in the case that would justify a hypothetical question of the foregoing character, and bring it within the rule announced in *Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45, and *McLean v. City of Lewiston*, 8 Idaho, 472, 69 Pac. 478. The rule is quite liberal in allowing a broad range of inquiry on cross-examination, and this rule is especially and particularly applicable when it comes to the cross-examination of that class of witnesses commonly called experts.

The eighth assignment is without merit and requires no consideration here.

Appellant's last assignment of error is directed to the action of the court in permitting the witness Dr. Taylor to answer the following question: "Didn't he tell you that he wanted this to settle up the matter?" The witness at the time this question was asked was defendant's witness and the question was asked by plaintiff's attorney on cross-examination. He was testifying concerning a statement or proof which he had signed and delivered to the agent of the defendant company as a part of the death proof. This statement differed somewhat from the previous statement or certificate which the witness had signed as to the nature of the disease of which the insured died. The witness was testifying as to the statement made to him by defendant's agent and the facts and circumstances under which the additional certificate was signed, and the reasons therefor. Taking into consideration the other facts appearing from the record, we do not think there was any error in permitting the answer to this question.

As previously stated, we have no authority or jurisdiction to examine the evidence in this case for the purpose of determining whether or not, as a matter of fact, it was sufficient to justify the jury in concluding that the insured did not die of smallpox. As to the questions of law presented, we do not think any error has been committed that would justify this court in reversing the judgment.

The judgment is affirmed, with costs in favor of respondent.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

(12 Idaho, 94)

WESTERN LOAN & SAVINGS CO. v.  
SMITH et al.

(Supreme Court of Idaho. Feb. 26, 1906. On Rehearing, May 20, 1906.)

1. JUDGMENT—SETTING ASIDE—AFFIDAVIT—GROUNDS.

Affidavits on motion to set aside a default judgment under the provisions of section 4229, Rev. St. 1887, must show that the default occurred through mistake, inadvertence, surprise, or excusable neglect.

2. APPEAL—REVIEW—SETTING ASIDE DEFAULT JUDGMENT.

An application to set aside and vacate a default judgment is addressed to the sound discretion of the court to which the application is made, and unless it appear that such discretion has been abused, the order will not be disturbed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3823; vol. 30, Cent. Dig. Judgment, § 265.]

3. JUDGMENT—DEFAULT—SETTING ASIDE.

The showing made in this case reviewed, and held insufficient to authorize the setting aside a default judgment.

(Syllabus by the Court.)

Appeal from District Court, Bingham County; James M. Stevens, Judge.

Action by the Western Loan & Savings

Company against C. S. Smith and others. Judgment for defendants on default. Motion to set aside denied, and plaintiff appeals. Affirmed.

Hansbrough & Adamson, H. K. Linger, and James Ingebretsen, for appellant.

STOCKSLAGER, C. J. Plaintiff commenced this action in the district court of Bingham county against C. S. Smith and Nellie J. Smith to foreclose a mortgage it had against these defendants. The complaint alleges that on the 28th day of February, 1891, defendants Smith executed their promissory note for the sum of \$1,000, payable on or before five years after date with interest at the rate of 9 per cent. per annum payable monthly in advance, to the Western Building & Loan Association, a corporation, under the laws of Idaho. That on the same day defendants executed their mortgage to secure the payment of the note above referred to; that said mortgage was duly acknowledged, delivered to said corporation, and filed for record. That on the 10th day of October, 1894, said Western Building & Loan Association assigned, transferred, and delivered all its right, title, and interest in and to the note and mortgage to the Western Loan & Savings Company, which company is now the owner and holder of said note and mortgage. That on or about the 2d day of January, 1900, an accounting and settlement was had between plaintiff and C. S. Smith, and there was found to be a balance due on said note of \$1,104.80, which said amount Smith then and there agreed in writing to pay; that no part of said sum or interest has ever been paid since said date; that on or about the 21st day of August, 1894, Charles S. and Nellie J. Smith made and delivered to one Charles Bunting their certain promissory note for \$3,241.60, and to secure the payment thereof executed and delivered to said Bunting a certain mortgage of same date, duly acknowledged, recorded, etc. The property described in the mortgage is lots 1, 2, 3, 4, and 5, block 52, Danilson & Shilling's Addition to Blackfoot, Idaho; being the same property described in the mortgage marked plaintiff's Exhibit A, and made a part of the complaint. The ninth allegation of the complaint is that the said mortgage given to Bunting is subsequent and inferior to the mortgage given by the defendants C. S. Smith and Nellie J. Smith, to the Western Building & Loan Association. Then follows an allegation that plaintiff is informed and believes, and therefore alleges that the defendant John W. Givens is the assignee of the Bunting note and mortgage, and claims to have some interest or claim upon said premises or some part thereof by virtue of being the owner and holder of said mortgage, which is subsequent to the mortgage of plaintiffs. Then follows prayer "for the sum of \$1,404.80, with interest from January 2d,

1900, at 9 per cent. per annum \* \* \* that the defendants and all persons claiming under them subsequent to the execution of the mortgage given by C. S. Smith and Nellie J. Smith to the Western Building & Loan Association upon said premises \* \* \* may be barred and foreclosed of all rights, claims or equity of redemption in said premises," etc. To this complaint a demurrer was filed by counsel for defendant John W. Givens, to wit: "(1) That the complaint of the plaintiff herein does not state facts sufficient to constitute a cause of action against the defendant; (2) that said action is barred by the provisions of section 4052, Rev. St. Idaho 1887." If the court ever passed upon this demurrer the record fails to disclose the order. On the 25th day of April, 1905, defendant Givens filed what is termed "Answer and Cross-Complaint." In the answer alleging as a reason that he has not sufficient knowledge, information or belief to answer positively, he denies all the allegations from 1 to 7; admits the seventh allegation, which refers to the execution and delivery by the defendants Smith to Charles Bunting of the mortgage described in the complaint. Denies the eighth allegation, which is that the Bunting mortgage is inferior to the one sued on by plaintiff; admits the allegations of the Bunting mortgage with note to defendant Givens, and avers that he is now the lawful owner and holder thereof; that the principal sum has not been paid, and no interest with the exception of \$242.45 paid by C. S. Smith to defendant Givens on February 20, 1899, and another payment made on said interest by said Smith on the 30th day of April, 1903.

The fourth allegation of the answer is that the defendant is informed and believes, and upon such information and belief alleges, that the plaintiff's action herein is barred by the provisions of section 4052, Revised Statutes of Idaho, 1887. And further answering by way of cross-complaint against the plaintiff and each and all of the defendants hereto other than this cross-complainant, the said John Givens alleges as follows, to wit: First, sets up the execution and delivery of the note by defendants Smith to Bunting and a copy thereof; second, the execution and delivery of the mortgage to secure the note; third, the assignment of the note and mortgage to Givens; fourth, the payment of certain interest on the note by C. S. Smith and the amount he claims to be due on the note; fifth, that he is the lawful owner and holder and entitled to payment, etc.; sixth, that plaintiff has or claims to have interest in or claim upon said premises or some part thereof as mortgagee or otherwise and refers to some contract or claim held by Charles A. Warner, deceased, by virtue of a trust deed executed and delivered by defendants Smith to said Warner for the payment of certain debts, but said interest or claim of said Warner is subsequent to and subject to

the lien of cross-complainant's mortgage; seventh only refers to the power of sale and application of the proceeds in case of default in payment, etc., and then follows prayer that cross-complainant may have judgment for \$3,241.60, with interest at 1 per cent. per month from the 21st day of August, 1894, and usual prayer for general relief.

Counsel for plaintiffs demur to this answer and cross-complaint, to wit: "Comes now the plaintiff in the above-entitled action, and demurs to the answers filed by the defendants C. S. Smith, Nellie J. Smith, and John W. Givens, and for grounds of demurrer allege as follows: That neither of said answers state facts sufficient to constitute a defense or action against this plaintiff." If the court ever ruled upon this demurrer the record is silent as to the order.

The next step taken as shown by the record was what is termed "Reply to answer and pretended cross-complaint," which was filed July 3, 1905: the first paragraph is: "That as respects the allegations contained in paragraphs 7 and 9 of the answer of said defendant Givens, wherein said defendant alleges ownership of a certain note and mortgage executed by his codefendants, C. S. Smith and Nellie J. Smith to C. Bunting & Co., and alleges that said note and mortgage is superior to the note and mortgage of the plaintiff; the plaintiff answering upon information and belief that the note and mortgage referred to and described in said paragraph is barred by the provisions of section 4052, Revised Statutes of Idaho for 1889, and that the defendants' alleged cause of action thereon, as against this plaintiff, is barred by the provisions of section 4052, Revised Statutes of Idaho for 1887." The plaintiff denies that the plaintiff's action is barred by the provisions of section 4052, Rev. St. Idaho 1887. And, further, replying to the said answer and pretended cross-complaint of the said defendant, the plaintiff admits and alleges as follows:

Plaintiff has no knowledge, information, or belief sufficient to enable it to reply to the allegations of paragraph 2 of said pretended cross-complaint positively, and, basing its denial upon that ground, it denies each and all of the allegations contained in the said second paragraph, except as such allegations are admitted by the allegations of the complaint herein." Paragraphs 3, 4, 5, and 7, are denied on the same grounds for the same reasons and practically in the same language as is used in the denial of paragraph 1 and 2. Respecting the sixth paragraph in the cross-complaint plaintiff says: "Respecting the allegations of the sixth paragraph of the said pretended cross-complaint, the plaintiff admits that it claims to have some interest in, or claim upon, said premises described in the said pretended cross-complaint as mortgagee; but denies that said interest and claim is inferior to or subject to the lien

of the said cross-complainant's mortgage, but alleges: That it is superior to the cross-complainant's mortgage; and, further, alleges that the said claim and interest of the plaintiff is described and set forth in the plaintiff's complaint herein which is hereby referred to and made a part of this reply. That as regards the other matters and things alleged in said paragraph, the plaintiff has no knowledge, information, or belief concerning them, and basing its denial upon that ground, denies each and all of the other allegations in said paragraph contained." The eighth is: "Plaintiff alleges upon information and belief that the said pretended cause of action alleged by the cross-complainant against his said codefendants C. S. Smith and Nellie J. Smith, and particularly as against the said plaintiff, is barred by the provisions of section 4052, of the Revised Statutes of Idaho, for 1887." On the 8th day of May, 1905, the clerk made the following entry: "In this action, the plaintiff having been served with copy of the cross-complaint of defendant John W. Givens, and having failed to answer or demur to said cross-complaint, and the legal time for answer having expired, the default of the plaintiff in the premises is hereby entered according to law." On the 9th day of June, 1905, a judgment was rendered in favor of cross-complainant John W. Givens for amount prayed for in his cross-complaint, ordering the property described in the complaint to be sold by the sheriff of Blinnham county, and the proceeds arising therefrom to be applied on the judgment of defendant Givens, and further adjudging the claim of plaintiff barred by the statute of limitations as to the claim of cross-complainant Givens. On the same day the judgment was filed with the clerk of the court.

Counsel for plaintiff moved to set aside the default entered by the clerk, and to vacate and set aside the judgment of the court entered thereunder: "(1) That the purported cross-complaint is not actually or in effect a cross-complaint as against plaintiff in the following particulars, to wit: (a) That there is no demand or cause of action existing or shown to exist as appears from the alleged cross-complaint in favor of the said J. W. Givens and against the said Western Loan & Savings Co. (b) That the matters and things alleged in the said pretended cross-complaint as against this plaintiff constitute merely a denial of the allegations contained in the plaintiff's complaint; and, as such, amount merely to an answer to the complaint, and to such answer the plaintiff has made an appearance by demurrer. (c) That as respects the said plaintiff, the only claim made in the said pretended cross-complaint is that the mortgage of said Givens is superior to the mortgage of the plaintiff; and that this contention is made with equal force in the answer of said Givens to the complaint, and

that this question is the sole issue between the plaintiff and the said J. W. Givens, and the plaintiff is nowhere in default upon said issue, but denied under oath in its complaint; that said Givens holds a superior lien to the plaintiff's lien and has alleged under oath therein that its lien is superior; and the said Givens in his answer has denied said allegations of the complaint, and the said allegations substantially bring the parties to issue upon that point. (d) That said pretended cross-complaint states no grounds for affirmative relief against the said plaintiff upon which judgment against the plaintiff could be based, and the said cross-complaint does not pray for any relief against the said plaintiff, and is not entitled to any relief against the said plaintiff either upon default of the plaintiff or otherwise. (2) That the said Givens was not legally entitled to enter the default of the plaintiff on the said cross-complaint for the following reasons: (a) That the said pretended cross-complaint is contained in an instrument entitled, 'Answer and Cross-Complaint' and is therein set up by way of and as part of the answer as is shown by its first paragraph, and the said plaintiff has duly appeared and plead to said answer by filing a demurrer thereto. (b) That the plaintiff appeared in said action by filing the original complaint and by filing a demurrer to the answer of said Givens, notwithstanding which the default of the plaintiff was entered by the clerk without giving the plaintiff any notice as required by law. (3) That if said pretended cross-complaint is a valid and subsisting cross-complaint against the plaintiff; the plaintiff's failure to demur or answer to the same by express reference, is due to mistake, accident, surprise, inadvertence and excusable neglect, as follows, to wit: That as shown by the complaint the plaintiff holds the first and superior lien upon the premises described therein, and that the mortgage of J. W. Givens is inferior to that of plaintiff. That it was to determine this point only, that said J. W. Givens was made a party to this action. That the answer and pretended cross-complaint of said Givens alleges no facts which controverted this contention of plaintiff, and that it never was, and is not now, the intention of plaintiff to abandon this contention. That when the answer and cross-complaint of said Givens was served upon plaintiff's attorney, H. K. Linger, the said attorney, through mistake and accident, overlooked the fact that that cross-complaint was directed against the plaintiff. He supposed that the answer was directed against the plaintiff, and that the cross-complaint was directed against the defendant only, C. S. Smith and Nellie J. Smith. That on this account the plaintiff, through its attorney, interposed a pleading, to wit: A demurrer to the answer only, but intended by the said pleading to demur to all matters alleged by the said J. W. Givens against the plaintiff in the said answer and cross-complaint. (4)

That the said plaintiff has a substantial defense upon the merits to any claim made by the said defendant J. W. Givens, in the said cross-complaint."

This motion is supported by the affidavit of P. W. Madson, president and manager of plaintiff corporation, after stating that the plaintiff is the owner and holder of the note described in the complaint; that it is the first lien on the premises described in plaintiff's mortgage, and superior to the lien of defendant Givens's mortgage set up in his cross-complaint, and as a reason why the default of plaintiff should be vacated and the judgment entered in favor of Givens vacated, says "that the attorneys in the above entitled action were C. S. Price of Salt Lake and H. K. Linger of Idaho Falls, Idaho; that the answer and cross-complaint of the defendant J. W. Givens, was served upon H. K. Linger, who mailed the same to C. S. Price of Salt Lake City; that said C. S. Price directed H. K. Linger to file a demurrer to the said answer; that the said H. K. Linger, upon receipt of said letter, draughted a demurrer to the said answer and filed the same; that at said time he was under the impression that he was pleading to the whole of the pleadings filed by J. W. Givens; that he did not have the answer and cross-complaint before him at the time, and his recollection was that simply an answer was filed as to the said plaintiff, and for that reason his demurrer ran to the answer simply; that it was the proposed intention of said Price and said Linger and the said plaintiff to demur to both the answer and to said cross-complaint; and that it was by reason of the foregoing accident and mistake that the cross-complaint was not expressly mentioned in said demurrer."

In the order overruling this motion it was shown that H. K. Linger, G. H. Hansbrough, and James Ingebretsen appeared for the plaintiff in the argument of the motion. On the 1st day of July, 1905, the motion was overruled. This is practically a complete record of this case, and is given in order that the facts just as they were before the trial court may be understood. The application to vacate and set aside the default entered by the clerk, and also the judgment entered thereafter was within the sound, legal discretion of the trial court, and unless it is shown that there has been an unwarranted exercise of that discretion, this court will not disturb the order and judgment. It must be borne in mind that the trial court has so many opportunities in the proceedings in the lower court to know and understand the real situation of each case there pending. We know nothing of the conditions only as they may be made to appear upon paper, and many things transpire that furnishes the lower court light that cannot be brought to our attention. It is for this reason that the trial courts have been given large discretionary power over the proceeding in those courts.

and is the foundation for the almost, if not quite, universal rule that appellate courts will not interfere with the discretionary orders governing the proceedings and conduct of the business of the lower courts. It is urged by learned counsel for appellant that there is apparent from the record a clear abuse of discretion in refusing to vacate the order of the clerk in entering the default of plaintiff, and in ordering judgment for cross-complainant Givens for the amount found due on his note and mortgage as shown by his answer and cross-complaint. It is shown by the complaint that plaintiff recognized that Givens had or pretended to have some kind of a claim adverse to plaintiff's interest in the property in controversy; otherwise it would not have made him a defendant, and thereby required him to come in and set out by proper pleadings whatever claim he might have. After such service on Givens, it was necessary for him to plead his claim in this action or his right would be barred by the statute. He could not do so by answer, neither could he plead by counterclaim. He could only deny the superiority of plaintiff's claim by answer and plead priority of his by cross-complaint. The statute of this state makes a distinction between a counterclaim and a cross-complaint. If plaintiff had commenced its action against Givens alleging that he was indebted to it in a given amount of money due on a note and mortgage, he might meet the issue by answer alone, or if he desired to show that in the settlement of their differences there was money due him not shown by the complaint, then he could show that fact by counterclaim. If, as in the case at bar, Givens does not claim anything from the plaintiff, but does claim that the same property plaintiff is attempting to subject to its mortgage is subject to a prior lien by mortgage of which he is the assignee, then he must answer denying the superiority of plaintiff's lien, and set his out by way of cross-complaint. This being the law in this state, *Allen v. Breusing*, 32 Ill. 505, *Parker v. Cochrane*, 11 Colo. 363, 18 Pac. 209, *Rood v. Taft*, 94 Wis. 380, 69 N. W. 183, *Gunn v. Madigon*, 28 Wis. 158, *Cox v. Frazer* (Ky.) 52 S. W. 796, and *Aqua Pura Co. v. Mayor* (N. M.) 60 Pac. 208, 50 L. R. A. 224, do not apply, as they all deal with counterclaims, and correctly state the law as we understand applicable to counterclaims in the states referred to, and would be good authority in this state were we dealing with a counterclaim. For a further discussion of cross-complaint and counterclaim see *Hunter v. Porter* (Idaho) 77 Pac. 434. It is urged that the cross-complaint does not set out facts entitling Givens to affirmative relief, and that there was no prayer for specific relief. We cannot agree with this contention. It stated the facts leading up to the assignment of the note and mortgage to cross-complainant; that it is a superior lien to that of plaintiff as shown by the complaint, and the answer puts in issue

the bar of the statute of limitations. The prayer is specific as to amount, and asks that he may have such "other and further relief in the premises as to this court may seem meet and agreeable to equity." We think the cross-complaint fully apprised the plaintiff that Givens was seeking thereby to contest the superiority of his lien over that of the plaintiff, and that it became the duty of appellant to meet the issue by an answer to this cross-complaint. We also think the prayer of the cross-complaint was sufficient to authorize the court in rendering the judgment as shown by the record, unless the adjudication as shown by the judgment that the action of plaintiff was barred by the statute of limitations as to the claim of cross-complainant was unauthorized by the pleadings as they stood at the time of the rendition of the judgment.

Again, as to the discretion of the court, or its abuse thereof, as shown by the record, there is but one affidavit filed in support of the motion to set aside the default and judgment. Mr. P. W. Madson, the president and manager of plaintiff corporation, attempts to enlighten the court upon the course pursued by his counsel, Mr. Price of Salt Lake, and Mr. Linger of Idaho Falls, when they received the answer and cross-complaint filed by cross-complainant Givens. It is urged that from this affidavit, together with the facts shown by the record, the court should have granted the motion of appellant, and relieved it of the default entered by the clerk and the judgment on such default. We are of the opinion there is enough stated in the motion, if supported by sufficient affidavits or some good reason shown why they could not be procured, to have warranted this court in saying that a refusal to grant relief would have been an abuse of legal discretion. There is no showing why the affidavit of Attorney Price of Salt Lake, and Mr. Linger of Idaho Falls, were not filed in support of this motion; they were the parties of all others who could have enlightened the court upon the reasons why the demurrer did not run against the cross-complaint as well as the answer, and if there was any reasonable excuse for such inadvertence, mistake, or neglect, they could have so stated in an affidavit. If such showing had been made it is possible and even probable that the learned judge of the lower court would have granted the relief demanded by the motion. It was shown by the judgment or order overruling the motion that Mr. Linger was present and participated in the argument of the motion. We cannot understand why Mr. Linger did not supply the record with his affidavit stating the facts as stated in the affidavit of the president of plaintiff. He certainly knew the real facts so far as he is connected with them in the affidavit filed by Mr. Madson better than any one else, and hence was better prepared to convince the court by his affidavit that plaintiff

was entitled to relief on the grounds of mistake, inadvertence, surprise, and excusable neglect on his part or on the part of his associate Mr. Price, than anyone else. He might have supported his affidavit by one from Mr. Price. If either or both of their affidavits had been filed, it would perhaps have had more weight in the lower court and certainly in this court, than the affidavit upon which appellant relies.

This court in a very recent case, entitled "D. Holzman & Co. et al. v. Wm. Henneberry," 83 Pac. 497, discussed the discretion of the trial court in setting aside or refusing to set aside a default judgment. Mr. Justice Allshie said: "It is a well-established principle that the granting or refusing an order of this kind rests in the sound legal discretion of the court to which the application is made, and that unless it appears that such discretion has been abused, the order will not be disturbed on appeal"—citing *Bailey v. Taaffe*, 29 Cal. 422, 58 Am. Dec. 392, note, and *Holland Bank v. Lleuallen*, 6 Idaho, 127, 53 Pac. 398. As to the merits of the respective parties to this action, we express no opinion as plaintiff is entitled to a hearing on his complaint, and the answer filed by cross-complainant Givens. Neither do we express an opinion as to the bar of the statute of limitations which each of the contesting parties seeks to invoke against the other. We find no error in the record, and the judgment is affirmed. Costs to respondent.

**AILSHIE and SULLIVAN, JJ., concur.**

#### On Rehearing.

**SULLIVAN, J.** A petition for rehearing has been filed in this case, and one point of contention therein is that there was no cross-complaint filed in the case. We are unable to agree with their contention. The answer is entitled: "Answer and Cross-Complaint." While the answer and cross-complaint is contained in one instrument, we find the following in the tenth paragraph of the complaint: "And further answering by way of cross-complaint against the plaintiff and each and all of the defendants hereto, the said John W. Givens alleges as follows, to wit." Then follows a statement of a cause of action arising on a promissory note given by the other defendants, Smith and wife, for the sum of \$3,241.60, and secured by mortgage on at least a part of the real estate described in the complaint; and said defendant Givens in said cross-complaint prays for judgment against the defendants Smith and wife for said sum and the foreclosure of his mortgage, and that the defendants and all persons claiming under them or either of them may be barred and foreclosed of all rights or equity of redemption in said premises or any part thereof. While it may not be a good practice to embody in the same instrument an answer and a cross-complaint,

we know of no provision of the statute prohibiting that method of pleading, and it is clear to us that a cross-complaint is pleaded in this action which was not answered.

The next contention of counsel in the petition for a rehearing is that the judgment could not be sustained, for the reason that it was not properly entered, in that it was not a judgment rendered during the trial of the main cause, but a separate and distinct judgment rendered after the default of the plaintiff had been entered for not answering the cross-complaint. While it might have been better to have entered a judgment covering the entire case made by the complaint, answer, and cross-complaint, we know of no reason why a defendant who files a cross-complaint and asks therein distinct and separate relief, should not be entitled to a judgment in his favor on cross-complaint, provided the plaintiff fails to answer the cross-complaint. The plaintiff no doubt has a right to have a judgment entered in the main action, and the trial court has the authority to enter such judgment as may be right in the premises.

For the reasons above stated, a rehearing is denied.

**STOCKSLAGER, C. J., and AILSHIE, J., concur.**

(12 Idaho, 336)

#### STATE v. MCGINNIS

(Supreme Court of Idaho. May 31, 1906.)

##### 1. CRIMINAL LAW—ABSENCE OF ACCUSED DURING PART OF TRIAL.

While section 7782, Rev. St. 1887, which provides that: "If the indictment is for a felony, the defendant must be personally present at the trial; but if for misdemeanor, the trial may be had in the absence of the defendant," is mandatory; a brief temporary, and voluntary absence of the defendant from the courtroom during the argument by counsel and ruling by the court on a motion to have the jury view the place where the offense was committed, is not such a violation of the statute and invasion of such a substantial right of the accused as will cause a reversal of a judgment of conviction which is otherwise regular.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1466.]

##### 2. SAME—VIEW OF PLACE OF CRIME—PRESENCE OF ACCUSED.

In a case where the court orders the jury to view the place where it is alleged that the offense was committed, it is error for the court to deny the defendant the right to be present at such inspection if he requests in person or by counsel the privilege of being present.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1474.]

##### 3. SAME—CASE CRITICISED.

As to whether or not a defendant may waive the right of being present at a view of the place by the jury, *quære*. *State v. Reed*, 35 Pac. 706, 3 Idaho (Hasb.) 754, criticised, and soundness of rule questioned.

##### 4. HOMICIDE—EVIDENCE—SUFFICIENCY.

Evidence examined in this case, and held that it establishes such a state of culpable and criminal negligence or recklessness and dis-

regard for the safety of human life as to support a verdict of manslaughter.

**5. CRIMINAL LAW — TRIAL — INCOMPETENT STATEMENTS OF WITNESS—CURING OF ERROR.**

Certain incompetent and inadmissible statements made by the witness that are disallowed and ruled out by the court, and the jury is admonished not to consider and which are repeated by the witness and the same action taken thereon by the court, reviewed and *held*, that although reprehensible on the part of the witness, they are not sufficient grounds for a reversal of the judgment.

(Syllabus by the Court.)

Appeal from District Court, Ada County; George H. Stewart, Judge.

Thomas J. McGinnis was convicted of manslaughter, and appeals. *Affirmed*.

Appellant was prosecuted on information by the county attorney, charged with the crime of manslaughter, and was convicted as charged. He moved for a new trial and his motion was denied, and he thereafter appealed from the judgment and order. *Affirmed*.

T. D. Cahalan, Frank Martin, and C. F. Koelsch, for appellant. J. J. Guheen, Att'y. Gen., Edwin Snow, Philip Hindman, and James H. Hawley, Special Prosecutor, for the State.

**AILSHIE, J.** The defendant was charged by information of the public prosecutor with the crime of manslaughter in willfully and unlawfully shooting one C. A. Pakenham, at the county of Ada, state of Idaho, on the 25th day of November, 1903. The trial, which took place in February, 1905, resulted in a verdict of guilty, and the defendant was thereafter sentenced to imprisonment in the state penitentiary for a term of six years. This appeal is prosecuted from the judgment, and from an order denying defendant's motion for a new trial. The principal facts leading up to and surrounding the homicide are briefly as follows: The defendant left Boise City during the early afternoon of November 25, 1903, with a team, accompanied by James Kelley and Clarence Still, and went up, what is commonly known as, the "Highland Valley Road." The three of them were starting on a hunting trip, and the wagon was loaded with camp outfit, and they all had their guns. When they reached a point about three-quarters of a mile beyond the Kelley Hot Springs, and some five or six miles from Boise, while driving along the road, the defendant, McGinnis, remarked to his companions that he could hit a certain rock, pointing it out to the left of the road about 200 feet distant. Kelley advised him to save his ammunition as it was too close a shot. They drove on a distance of 1,100 or 1,200 feet and came to a slight ascent in the road where they stopped the team to rest, and Still appears to have gotten out of the wagon to fix something about the harness. The defendant turned round in the wagon seat and remarked to his companions, "I can hit that rock from here," and took aim and fired.

Kelley says he turned round about the same time and saw dust rising on a sandy knoll about 500 feet distant from the point of firing and in line between the point from which the defendant fired and the rock, and at the same time saw a man fall in the road about 200 feet from the rock at which the defendant had fired. Kelley remarked, "There is something wrong with that fellow back there, he is hurt or something;" to which the defendant replied, "I guess not, there is no man back there." After a few words were passed between them they told Still to get in the wagon and they turned and drove back and found the man lying in the road wounded by gun shot. The ball had entered the neck just above the collar bone, and ranging backward and downward had passed through the lungs and lodged in the third rib on the right side. They put him in their wagon and brought him to Boise, where they placed him in a hospital, and where he received medical treatment and attention until the 1st day of December, on which date he died. The defendant was taken into custody by the officers soon after the wounded man was placed in the hospital. Pakenham made an antemortem statement that was admitted in evidence, in which he said: "Above the Kelley Hot Springs on the road to Highland Valley as I was passing along on foot, the above-named men (referring to McGinnis, Kelley and Still) appeared behind me on the road in a buggy. I made a cut-off and while off the road they passed me, and after some little distance I came into the road behind them near the Bedell house. They stopped near the Bedell house, and one of them got out and was fooling around when a shot was fired. I felt the bullet strike me in the throat. I began to get dizzy and squatted down to keep from falling. I motioned to them. They stayed there awhile, and then got into the buggy and went on a piece; after awhile they turned and came back and stood around awhile, and then they put me in the wagon and brought me to town." The state has contended throughout the case that the killing was due to the criminal negligence of the defendant, or that if it was the result of the commission of a lawful act, that the same was done "without due caution and circumspection." On the other hand, the defendant claims that "the deceased met his death by accident and misfortune, through the unforeseen deflection of a bullet, which occurred in a manner which could not have been anticipated by any human foresight." The two principal errors assigned and relied on are: (1) That the trial was had in part during the absence of the defendant; and (2) that the evidence is insufficient to justify the verdict and judgment.

It appears that on the morning of the second day of the trial, and before the defendant had appeared in court, his counsel moved the court under section 7878, Rev. St. 1887,

for an order directing the sheriff to take the jury to examine and view the place where the offense was alleged to have been committed. Counsel for the state consented and agreed to this motion, and the order was immediately made by the trial judge and the sheriff was sworn to take charge of the jury and keep them together as required by the statute, and two competent persons were appointed by the court to show the jury the place to be viewed by them. It seems that the defendant arrived about the time the jury were ready to start for the inspection. Neither he nor his counsel appear to have manifested any desire that he should accompany the jury, nor was any request made to that effect. The defendant did not go, but his counsel, as well as the counsel for the state, and the trial judge, did go, in company with the jury, sheriff, and persons appointed to point out the place. A large number of affidavits have been filed in respect to the presence or absence of the defendant on this occasion. The minutes of the court, standing alone, show that the defendant was present at all times during the trial; but we think it has been successfully shown by the affidavits of defendant and his counsel, and others, that he was not in fact present in the courtroom when the foregoing proceedings were had. Section 7782, Rev. St. 1887, provides that: "If the indictment is for a felony, the defendant must be personally present at the trial; but if for misdemeanor, the trial may be had in the absence of the defendant." There is an irreconcilable conflict among the decisions and authorities as to whether any absence whatever can be permitted. A very respectable line of authorities hold that a voluntary absence during the argument or ruling on a motion or demurrer is not reversible error. 12 Cyc. 523 to 527, and notes. There is a very learned and exhaustive note on this question to be found in connection with the case of *People v. Thorn* (N. Y.) 50 N. E. 947, 42 L. R. A. 308, where a view and inspection by the jury in the absence of the defendant is considered and the authorities digested. It is clear to us that in the case at bar the defendant was not prejudiced and suffered no injury or wrong on account of his absence from the courtroom during the time his counsel was making the motion in question and the court was passing on the same and admonishing the jury. The absence appears to have been wholly voluntary and with the knowledge of his counsel who were present in court and representing him in the legal steps that were taken. While we regard section 7782, *supra*, as mandatory, still a brief, voluntary and temporary absence such as is shown here, where it is apparent that no harm has been done the defendant, should not cause a reversal of a conviction otherwise regular.

Counsel for appellant have suggested upon this appeal that it was error for the trial court to permit an examination and inspec-

tion by the jury of the place where the offense is charged to have been committed without having the defendant present on such examination. It does not appear, however, from the record that this ground of error was urged in the trial court at the time of the trial or on motion for a new trial; neither does it appear that any request was made by counsel for the defendant, or by the defendant himself, that he be present at such examination. On the other hand, counsel for defendant was present at all times. The record does not come to us in such condition that we would feel justified in this case in face of the decision on the same point in *State v. Reed*, 3 Idaho (Hasb.) 754, 35 Pac. 706, in passing upon the question as to whether or not it was error to cause a view and inspection by the jury in the absence of the defendant. The Attorney General has called our attention to *State v. Reed*, *supra*. In which this court held that it was not error to have a view of the premises by the jury in the absence of the defendant. We have very grave doubts, however, as to the correctness of that decision, and while we are not called upon in this case to either affirm or overrule the doctrine of that case, we are strongly impressed with the fallacy of the reasoning on which that line of authorities is founded. The position taken by the Attorney General in the present case amounts, upon the whole, to a quite conclusive argument against the theory on which those cases rest. It is held by that line of authorities that an inspection and examination of the place or premises where the offense is charged to have been committed, or some material fact occurred, is "not a part of the trial" and does not amount to "the taking of evidence in the case." Counsel for the state, however, in arguing the sufficiency of the evidence to support the verdict and judgment, point out the great importance of a personal inspection of the premises and surroundings by the jury and the impression the same must have formed on their minds and says: "We cannot imagine any evidence that could be given by witnesses upon a matter of this kind that would be as effective with a jury as such personal inspection of the premises. \* \* \* Look at this affair in any way we can, and we must come to the conclusion that the sufficiency of the evidence cannot be decided simply by reading the evidence given by the witnesses, when the more important evidence, the inspection of the premises, was in the hands of the jury." It would be a strange course of reasoning that would hold an inspection of the premises evidence in the case for the purpose of weighing the sufficiency of the evidence to support the verdict and judgment; and on the other hand, would contend and hold that it is not evidence, and not a part of the trial, but a mere "aid to understand and apply the evidence" when we come to consider the neces-

sity for the presence of the defendant at such inspection. If it was evidence in the one instance, it was evidence in the other; if it was a part of the trial in the one case, it was a part of the trial in the other, and all the ingenious theories that courts and counsel have drawn from time to time cannot change this palpable fact. We have no doubt of the right of a defendant to be present at such an examination and inspection in any and every case where he requests that privilege. We are not prepared, however, to say that he may not waive such right and privilege. Another thing which might enter into the consideration of such a question is as to whether or not the defendant was in custody of the officer at the time of the trial. That fact does not appear in this case. We are not informed by the record whether the defendant was on bail and permitted to come and go at pleasure, or whether he was in custody of the officer and taken back and forth to the jail during the recesses of the court.

The other principal contention made by counsel for defendant on this appeal is that the evidence in the case fails to show the defendant guilty of any offense whatever in connection with this homicide. We have examined the record and the various exhibits very minutely and carefully, and it seems to us that it has been quite clearly established that the defendant failed to exercise that care and consideration which the law requires when he was firing a deadly weapon along the public highway in the manner and under the circumstances shown in this case. While he testifies that he did not see any person in the direction in which he fired, still the physical facts and conditions that surrounded him, the nearness of Packenham to the object at which defendant claims he fired, the level and open nature of the grounds intervening and surrounding, are all silent, but very forceful evidence in contradiction of his story. The fact that defendant on the public highway fired a shot from a gun of carrying power of more than a mile at an object some 1,200 feet distant and itself only 200 feet from the highway, was an act of carelessness which becomes culpable where it results in the death of one traveling orderly and peacefully along on that same highway.

The only other assignment of error we deem it necessary to consider in this case is that urged against certain statements made by the witness Packenham, a brother of the deceased. It appears that he was with the wounded man almost continuously from soon after he was taken to the hospital until his death, and in testifying concerning the sickness and death of his brother, said: "He [referring to the deceased] said to me, 'Chester, they have done me up this time.'" This statement by the witness was objected to and the objection was sustained, and the court instructed the jury to disregard it.

Further on in the witness' testimony he said: "A little later in the evening and after he was put in his room, he said to me, 'Chester, what did those drunken fools want to kill me for.'" The court ordered this stricken from the evidence, and instructed the jury to disregard it. It seems that in the course of the witness' testimony he repeated these statements one or more times, and the court as often warned him against making them, and admonished the jury to disregard them. The appellant complains of these statements as prejudicial, and cites in support thereof *State v. Irwin*, 9 Idaho, 35, 71 Pac. 608, 60 L. R. A. 716. While it would not have been out of place to have punished the witness if it appeared to the trial judge that he repeated such statements intentionally and maliciously, still we do not think they prejudiced the defendant's case where the trial court was repeatedly admonishing the jury against considering such statements, and at the same time was cautioning the witness against repeating them. They are not of such a damaging character as to materially prejudice intelligent and fair-minded jurors against the accused. They do not fall within the rule announced in *State v. Irwin*, and do not constitute a ground of reversal.

We have examined the other assignments of error made by appellant, and find nothing in them that constitutes a cause of reversal or appears to require our further consideration here. The judgment should be affirmed, and it is so ordered.

STOCKSLAGER, C. J., concurs. SULLIVAN, J., concurs in the conclusion reached.

#### FLEMING v. BAKER et al.

(Supreme Court of Idaho. June 4, 1906.)

##### 1. FRAUDS, STATUTE OF—SALE OF LAND—PAROL CONTRACT—PART PERFORMANCE.

B. and W. entered into a contract to make a certain lane or highway the boundary between their lands, and each took possession of the lands falling to him under their agreement and inclosed and exercised acts of ownership over it for more than 15 years, and B. expended considerable money in preparing the tract falling to him for cultivation, and erected buildings thereon, and leased a portion thereof to others, who erected valuable buildings and other structures thereon without objection or protest from W., and W. died before deeds passed between them. *Held*, under those facts, that said agreement does not come within the statute of frauds in regard to oral sales or transfers of real estate.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 291.]

##### 2. SAME.

The part performance of said contract brings it within the provisions of section 6008 of the Revised Statutes of 1887, and takes it out of the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 291.]

(Syllabus by the Court.)

Appeal from District Court, Lemhi County; James M. Stevens, Judge.

Action by Julia Fleming against William R. Baker and others. Judgment for defendants, and plaintiff appeals. Affirmed.

John C. Sinclair and Jno. H. Padgham, for appellant. H. G. Redwine and F. J. Cowen, for respondents.

SULLIVAN, J. This is an action to quiet title to 8.4 acres of land situated in the S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 4, township 20 N., of range 23, in Lemhi county. Respondents answered separately, each pleading four separate defenses: (1) A denial of the allegations of the complaint. (2) The establishment of the boundary line by verbal agreement. (3) That in the year 1887 a mutual understanding was had between the defendants Baker and the predecessor in interest of plaintiff; that, as soon as patents were issued by the United States to the respective claimants for their several tracts of land, it would be to their mutual benefit to enter into a contract to exchange certain parts of their land, making a certain road or highway the boundary, and Baker to convey to the said Withington a tract containing 2.8 acres, and Withington to convey to Baker 8.4 acres of land, and a contract was entered into to that effect in the year 1890. (4) Adverse possession under claim of title. The prayer of the defendants is that the plaintiff be enjoined from setting up title and that defendant Baker be decreed to be the owner of said 8.4 acres of land. Respondent Bagley's answer shows that he is holding as tenant of respondent Baker. Trial was had before the court without a jury, and findings and judgment made and entered against the plaintiff. A motion for a new trial was overruled. The insufficiency of the evidence to support the findings of fact is assigned as error.

The following, among other facts, are clearly established by the evidence: That one L. P. Withington, now deceased, was the husband and predecessor in interest of the appellant, Julia Fleming, and the respondent Baker occupied adjoining lands for 30 years, which land was held by them several years prior to the extension of the government survey over them. Thereafter Withington entered the N. E.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 4, township 20, range 23, in Lemhi county, as a desert claim, and obtained a patent therefor from the United States on August 18, 1890. The 8.4 acres of land in dispute is a part of the land entered by Withington. Said Withington died in 1902, intestate, leaving as his heirs the appellant and several children, all of whom have conveyed their interests to the appellant and she is now the owner thereof. Respondent Baker entered adjoining land and received a patent from the United States to the same on February 12, 1887. In the year of 1884 or 1885 an understanding was had between said Withington and Baker that a

stage road and a lane which ran across said lands should be their dividing line when they received their patents from the United States, and that when they received their patents from the United States the respondent Baker would deed to said Withington all the land included in his said patent which lay south of said road, while said Withington would deed to Baker all of the land included in his patent that lay north of said road. And it was understood between them that the stage road and lane should be the boundary line between their respective lands. Such an agreement was orally entered into in 1890. In 1884 the 8.4 acres in controversy was in a very rough and uneven condition, requiring considerable work to prepare it for cultivation, while the 2.8-acre tract of the Baker land, lying north of said road, was in a good state of cultivation and had been cultivated for several years prior thereto; that during all the time these parties resided there they occupied and possessed said two tracts of land as per the terms of said agreement. Said tract of 8.4 acres was inclosed in a large field owned by Baker, and the 2.8-acre tract was in a large field owned by Withington, each exercising the acts of ownership and having possession of the said tracts according to said agreement. Said agreement to make said road the dividing line was recognized by said parties up to the time of Withington's death, but no deeds or monuments of title were passed between them. Said Withington made no claim to that part of his tract of land on the north side of said road and inclosed by Baker; and Baker made no claim to that part of his land south of said road, claimed by Withington. After Baker took possession of said 8.4-acre tract, he removed the rocks and ridges therefrom, and placed the same in cultivation, and constructed a building thereon of the value of \$200, and leased a part of same to respondent Bagley, who has erected a storeroom thereon of the value of \$700; and other parties have built a hotel, saloon, barn, cellar, icehouse, and hay corral upon said land. The first claim made to this land, after said agreement was entered into by Withington and Baker, was made after the death of Withington and after the marriage of his widow, the appellant, to another man.

It clearly appears, from the evidence in the case, that a part performance of said oral agreement in regard to making the stage road the dividing line between said tracts of land, was carried out, and in fact a complete performance of that contract, excepting the passing of deeds between the parties. For nearly 20 years the said agreement has been recognized and acted upon. Said 8.4 acres of land was taken possession of by the respondent Baker, who placed it in a good state of cultivation, and improvements in the way of building, etc., have been placed thereon, of the value of many hundreds of dollars, and, so far as appears from the

record, with the knowledge and consent of said Withington and his successor. It certainly would not be just and equitable to allow the appellant at this late day, under the facts of this case, to obtain a judgment as prayed for in her complaint. It clearly appears that the complete performance of said agreement was had between the parties, except the passing of deeds, and that clearly brings this case within the provisions of section 6008 of the Revised Statutes of 1887, which is as follows: "The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof." By reason of the part performance of said contract, it does not come within the statute of frauds prohibiting oral sales of real estate.

We have examined the other errors assigned and find no merit in them.

The judgment is affirmed, with cost in favor of the respondents.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

#### SPOTSWOOD et al. v. MORRIS et al.

(Supreme Court of Idaho. June 13, 1906.)

#### 1. JOINT STOCK COMPANIES—LEGALITY OF ORGANIZATION.

Under the provisions of sections 2 and 16, art. 11, of the Constitution of Idaho, an unincorporated association or joint stock company may be formed by individuals for the purchase of a single tract of real estate, the title to which may be taken in a trustee, and the articles of agreement of the association may provide that the death of a shareholder shall not result in the dissolution of the association, and may so limit the liability of the association, and may provide that either or any of the officers or shareholders shall not sell or dispose of any of the property of the association without the concurrence of the shareholders.

#### 2. SAME—POWERS OF CORPORATIONS.

Said association does not have or exercise any of the powers or privileges of corporations not possessed by individuals or partnerships.

#### 3. CORPORATIONS—ORGANIZATION.

To legally possess or exercise powers or privileges of corporations requires a sovereign grant.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 11, 1.]

#### 4. JOINT STOCK COMPANIES—POWERS.

Under the common law, joint stock companies are legal and are not prohibited by the Constitution and statutes of this state, provided they do not have or exercise any of the powers or privileges of corporations not possessed by individuals or partnerships.

#### 5. SAME—STATUTORY PROVISIONS.

As the Constitution of Idaho and the statutes of the state do not prohibit the organization of joint stock associations having transferable stock, and which do not usurp the functions of a corporation nor exercise any of

the powers or privileges of corporations not possessed by individuals or partnerships, the common-law rule as to their legality prevails in this state.

#### 6. SAME—DISSOLUTION—DEATH OF MEMBERS.

In the organization of said association there is the absence of the *delectus personae*, which characterizes ordinary partnerships from corporations; and the death of one of its members or the sale of the interest of one of the shareholders does not dissolve it.

#### 7. SAME—AGENCY OF MEMBERS.

The limitation of the agency of the members of the association is an incident of such associations, under the common law, resulting from the lack of the right of *delectus personae*, and not an incident of the corporation not possessed by a partnership.

#### 8. SAME—NATURE OF ORGANIZATION.

Such an association is a partnership, but not a general partnership wherein one of the partners has plenary power to sell and otherwise dispose of the property of the association or create indebtedness beyond that provided for in the articles of association.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Joint Stock Companies, § 1.]

#### 9. SAME.

While some of the principles of partnership may apply to such associations, they cannot, from the very nature of the organization thereof, be entirely controlled by the legal rules and principles that control ordinary partnerships.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Joint-Stock Companies, § 1.]

#### 10. SAME—AUTHORITY OF OFFICERS.

*Held*, under said articles of incorporation, the vice president or secretary have no authority to list the association's real estate with respondents' for sale.

#### 11. SAME—EVIDENCE.

*Held*, that the respondents failed to show that the shareholders of said association ever authorized the vice president or secretary to list said real estate for sale with the respondents' or ratified the same.

#### 12. BROKERS—PROCURING PURCHASER FOR LAND—EVIDENCE.

*Held*, under the evidence, that respondents did not procure a purchaser for said land.

Ailshie, J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by A. T. Spotswood and others against J. B. Morris, as administrator, and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

James E. Babb and Daniel Needham, for appellants. I. N. Smith, for respondents.

SULLIVAN, J. This is an action to recover \$2,350, and interest, for commission as real estate brokers, for the sale of certain land situated in Idaho county. The sufficiency of the complaint was sustained by this court on a former appeal (77 Pac. 216). After filing the remittitur in the court below, the administrator and administratrix of the Benjamin F. Morris estate answered, as did also the defendants, John P. Vollmer and Robert Schleicher. The other defendants were not served with summons and did not appear in the action.

It is alleged, among other things, in the

complaint, that the appellants were copartners engaged in general real estate brokerage and commission business at the town of Moscow, Latah county, and were engaged, among other things, in procuring purchasers for lands belonging to third persons, and buying and selling real estate for others; that Benjamin F. Morris was a resident and inhabitant of Lewiston, Idaho, and that on the 4th day of June, 1902, he died intestate, leaving surviving him certain heirs, and that the said J. B. Morris and Harry F. Morris were duly appointed administrator and administratrix of the estate of said deceased; that during the lifetime of said Morris, in the year 1895, he and the defendants, Dernham, Kauffman, Vollmer, Schleicher, and Scott, associated themselves together by an instrument in writing, dated September 18, 1895, in a syndicate, to purchase of and from said Morris, now deceased, certain real estate, describing it, consisting of 2,720.80 acres of land, situated in Idaho county, for the purpose of reselling the same and dividing the profits thereof, in which syndicate each of said persons, except said Morris, deceased, acquired and was the owner of and entitled to a one-eighth part of said land and the profits thereof, and that said Morris, deceased, acquired in said association a three-eighth interest and was entitled to three-eighth of the profits thereof; that by said articles of agreement the said Morris, now deceased, was required to, and did, deed in trust for said syndicate said lands to the said Robert Schleicher, and that, by the terms of said articles to facilitate the accomplishment and purpose of said syndicate, the said Schleicher was appointed secretary of said association under the following agreement, which was signed by each of said defendants:

"This Instrument, made this 18th day of September, 1895, Witnesseth, that whereas, Benjamin F. Morris was the owner of the following lands in Idaho county, Idaho, to-wit: [Here follows a description of said 2,720.80 acres] \* \* \* And he agreed with the following persons, to-wit: Henry Dernham and William Kauffman, of Moscow, Idaho, John P. Vollmer and Robert Schleicher, of Lewiston, Idaho, and Wallace Scott, of Mt. Idaho, Idaho, to join them in a syndicate to purchase said lands of him and resell the same and divide the profits thereof, in which syndicate each of said persons should take and pay for a one-eighth share and be the owner of and entitled to a like portion of the profits thereof, and said Benjamin F. Morris should take and pay for a three-eighth share, and be the owner of and entitled to a like portion of the profits thereof. \* \* \* And whereas, said Benjamin F. Morris has by deed of even date herewith conveyed to Robert Schleicher in trust for this syndicate according to these articles of agreement said 2,720.80 acres, all except the

160 acres last above described, subject to a mortgage on which there is due of principal nine thousand dollars besides interest, and to the payment by the syndicate, including Benjamin F. Morris, of 4,320.00 dollars of the purchase money, with interest thereon from the 1st day of May, 1895, at the rate of 10 per centum per annum until paid: Now therefore, in order to facilitate the accomplishment of the purposes of said syndicate, we, the said parties, hereby organize ourselves into an association and agree as follows: (1) That the name of said association shall be the Denver Townsite Company, and the principal office of said association shall be at Lewiston, Idaho. (2) That the members of the association and their executors, administrators, heirs and assigns, shall, in proportion to their interests therein, pay the obligations thereof, and share in the profits thereof. (3) That the title to said lands is to be subject to all the terms and provisions, powers and trusts of these articles of agreement and the amendments and alterations thereof which may be made from time to time. (4) That this association shall not be dissolved or any of the powers herein given, or which may be given, be revoked by any transfer at any time of the interest of any member thereof, or any part thereof, whether by act of the party or by operation of law, or by the death of any member or members thereof, or their successor or successors at any time. (5) That in order to maintain and continue this association, no member or members, or successor or successors thereof shall for five years from date hereof have any right or partition of said lands or any of them, but shall have such right thereafter. These articles of agreement shall be binding upon the parties, their assigns whether by act of party or operation of law, and their heirs, devisees, executors and administrators. (6) The interests of the members of this association in the property thereof shall be represented by eight certificates which shall be and are hereby agreed to be personal property. The members have only a right to the avails or proceeds of said property, the title thereto both legal and equitable remaining and being in said trustee, his successor or successors in trust. [Here follows a form of a shareholder's certificate.] \* \* \* (8) The certificate of shares in, and interests of members of this association in, its property can only be transferred in the manner prescribed in the form of certificate last above set forth, and not then unless all obligations of the assignor to the association are paid. No transfer shall be made for five days immediately before a meeting of the shareholders, or for five days immediately before the time when a dividend is payable. (9) That the annual meeting of the shareholders shall be held in Lewiston, Idaho, at the office of First National Bank, of Lewiston, Idaho, on the second Tuesday of

May each year, at 2 o'clock, p. m. That no meeting of shareholders shall be competent to transact business unless a majority in interest of the shareholders shall be represented, but less than a majority may adjourn from day to day or until such time as may be deemed proper. That at such annual meeting a president, vice president and secretary for the ensuing year shall be elected by ballot, to serve one year, until their successors are elected and qualified. Special meetings of the shareholders may be called by any three shareholders by notice in writing, by mail or otherwise, to meet at Lewiston, Idaho, at the office of the First National Bank of Lewiston, Idaho, at an hour to be designated in the notice, such notice to be mailed or served not less than five days prior to date of meeting. When all shareholders assemble and so agree, either in person or by proxy appointed in writing, a special meeting may be held without any notice. That at all meetings of the shareholders each shareholder shall be entitled to cast one vote for each certificate held by him. He may vote in person or by proxy appointed in writing. The president or presiding officer may vote his own share or shares, but shall not have power in addition as presiding officer to decide a tie vote. The secretary shall keep a record of each meeting. (10) That a majority in interest of the shareholders of this association, at any meeting thereof, shall have as full and ample power and authority to do or authorize to be done any and everything of every nature whatsoever, as an individual owner of said lands in fee simple would have, provided only that they cannot issue or authorize the issue of any negotiable instruments or borrow money, except to renew or extend or take up or pay off a mortgage or vendor's lien on said lands or some part thereof. That the only other manner in which they can raise money (except from income or sale of property) is by levy of assessments as hereinafter provided, upon the shareholders. That nothing except the consent of all the shareholders shall authorize the creation of any personal liability against the shareholders, and all contracts entered into shall be limited to creating a liability against the property of the association. (11) The officers of this association shall consist of a president, vice president and secretary, who shall be elected by the shareholders and shall perform the duties usually appertaining to their respective officers, except that the secretary shall perform also the duties usually appertaining to the office of treasurer. They shall hold office for one year and until their successors are elected and qualified. \* \* \* No person shall hold any of those offices unless he be a shareholder, and a transfer of his share as provided in these articles of agreement shall operate as a resignation by him. \* \* \* (12) The secre-

tary of this association is hereby required, authorized and empowered to sell, contract for sale of and convey, by such form of conveyance as he may deem best, all or any part of the lands or lots or blocks contained in the 2,720.80 acres above described for such price or prices, and upon such terms, at public or private sale, as he may deem best subject to the directions of the shareholders, and no purchaser need see to the application of the purchase money or to any such directions of the shareholders, or to the qualifications of the secretary as such officer. He shall have these articles of agreement and said deed to him recorded in Idaho county. The secretary shall also have power to sell all products which may be received from any of said lands when and for such prices and on such terms as he may deem best. He may, out of any money in his hands as secretary or treasurer, pay the taxes on said lands, insurance premiums on any property of the association, or any property on which it may have an incumbrance, and interest on any incumbrance or incumbrances on said lands or any part thereof, also all necessary repairs at the wells or of fences or other property on said lands, and all expenses incident to construction of fences made necessary by any changes in roads. He may take any action he may deem most for the interest of the association in the matter of any actions or proceedings of the county commissioners concerning roads. The secretary shall incur no obligations which shall altogether exceed five hundred dollars without additional authority. He may deposit any money on hand in his name as treasurer of Denver Townsite Company in any National Bank and check out the same. He may procure such record books and stationery and blanks, from time to time, as may be necessary. He shall keep an account and record of the affairs of the company and render accounts and reports at the annual meetings and record the same in the record book of such meetings, and whenever requested by vote at any meeting render accounts and pay over any money due the Denver Townsite Company."

It is also alleged that the said Deruham, about the year 1898, removed out of the state of Idaho, and since that time has been a nonresident; that about the month of May, 1902, said defendants acting by and through their vice president, Benjamin F. Morris, and acting by and through their secretary, Robert Schleicher, listed with the plaintiffs the said lands and premises for sale and employed plaintiffs to procure a purchaser for said lands at a sum sufficient to pay the plaintiffs 5 per cent. commission and net the defendants \$17.50 per acre, reserving to defendants the crops thereon for the year 1902, and that plaintiffs accepted said employment and entered upon the discharge of their duties thereunder immediate-

ly, and attempted to and did procure a purchaser for said lands who was ready, willing, and able to purchase the same and pay therefor, and introduced said purchaser to the defendants through their vice president; that thereafter, while plaintiffs were still negotiating with said purchaser for the sale of said lands on the terms above stated, the defendants concluded and perfected a sale of said lands to said purchaser so procured by plaintiffs, and sold the same to said purchaser for the sum of \$47,000 on August 15, 1902, the same being a smaller sum than the sum for which the defendants had listed the said lands with the defendants. It is further alleged that plaintiffs presented their said claim for the sum of \$2,350, with interest thereon, to the said administrator and administratrix of the estate of said Morris, deceased; that said claim has not been allowed by them; that said defendants have failed and refused to pay plaintiffs 5 per cent. commission on the said sum of \$47,000, and by way of alleging the same cause of action in a different form, and as a second count in said complaint, the plaintiffs reiterate, by way of reference, the first nine paragraphs of their first cause of action and allege their claim as upon a quantum meruit, alleging that the services so rendered for the defendants were reasonably worth 5 per cent. on the amount for which said lands were sold. And by way of alleging the same cause of action in a different form, and as a third count of the complaint, the plaintiffs reiterate the first nine paragraphs of the first cause of action, and allege that the transaction had between the defendants and said purchaser, after the introduction of the purchaser to the said defendants by the plaintiffs, are peculiarly within the knowledge of the said defendants, and that, by the various actions of the said defendants in so making said sale to said purchaser at a sum less than had been listed by the defendants with plaintiffs for sale, the plaintiffs became and were prevented from concluding the sale with such purchaser upon the terms and for the price at which such lands had been listed with them, and that the defendants so prevented plaintiffs from completing said sale to deprive them of their commission thereon, and that, by the various acts of the defendants as alleged, plaintiffs became and were damaged by a breach of the contract by defendants in the sum of said \$2,350 with interest. Judgment for that sum, with interest, was prayed for.

The answers are substantially the same, and put in issue the material allegations of the complaint, and set up two separate defenses. In the first defense, in the answer of appellant Vollmer, it is alleged that the only relation existing between the defendants was the relation arising out of, and constituted by, said articles of agreement, under the name and style of the Denver Townsite Company, and denies that in the month of

May, 1902, or at any other time or at all, the defendants or any of them, either acting by or through their vice president, Benjamin F. Morris, or by or through their secretary, Robert Schleicher, or by or through either of them, or by or through any one at all, or by themselves or any of them, direct or otherwise, or at all listed with the plaintiffs the lands and premises described in the complaint or any part thereof, for sale or for any purpose whatever, or employed said plaintiffs to procure a purchaser for said lands or any part thereof at any price whatever, or on any terms or conditions whatever, and denies that the plaintiffs did procure a purchaser for said lands or any part thereof; denies that they procured a purchaser who was ready or willing or able to purchase the same at any price. By said separate defense the issue is clearly made as to whether said real estate was listed with the plaintiffs for sale, and whether they procured a purchaser therefor, and the question whether said defendants Morris and Schleicher were empowered to represent the Denver Townsite Company or the members thereof other than as set forth in the said articles of agreement. It is also averred in said answer that said Denver Townsite Company never passed any resolutions or granted any authority to said Morris and Schleicher or either of them to list said lands with the plaintiffs for sale or to procure a purchaser therefor. The second separate and affirmative defense of Vollmer alleges that the purchaser mentioned in the complaint was never ready or willing to purchase the land described in the complaint and pay therefor \$17.50 per acre, reserving to the vendors the crops thereon, or to purchase or pay therefor any price or sum other than the sum of \$46,240 for said land, \$5,000 of which was cash, \$11,240 with interest from August 15, 1902, at 8 per cent. per annum, payable on March 1, 1903, the balance thereof, to wit, \$30,000, on or before three years from August 15, 1902, with interest at the rate of 8 per cent. per annum, payable annually, to be secured by mortgage on said land; that prior to the 15th of August, 1902, plaintiffs had had more than a reasonable time within which to negotiate with the said purchaser and to cause or induce him to become ready and willing to pay for said lands the sum of \$17.50 per acre, reserving to the vendors the crops thereon for the year 1902.

The case went to trial before a jury upon the issues thus made and resulted in a verdict in favor of the plaintiffs. A motion for a new trial was denied, and an appeal was taken both from the judgment and the order denying a new trial. That appeal was submitted to this court for decision at its October term, 1905, and a decision was rendered reversing the judgment of the lower court. A petition for a rehearing was granted upon one of the points raised in the case, to wit, whether, under the Constitution and

laws of Idaho, a joint-stock association, such as the Denver Townsite Company, could be legally organized or created. Oral argument was heard upon that point, and quite lengthy briefs filed. It is apparent from the allegations of the complaint that counsel for the respondents considered the Denver Townsite Company a joint-stock association, as it is so designated in the title of the complaint; and it further appears that this suit was brought upon the theory that said association was acting under the said articles of agreement. It further appears from the allegations of the complaint and said articles of agreement, as quoted therein, that said association was formed for the purpose of purchasing said 2,720.80 acres, and no other land, and selling the same for a profit; that said association was not organized to engage in the real estate business generally, and was organized solely for the purpose of purchasing and selling said single tract of land. It is nowhere intimated that the plaintiffs were misled into believing that said association was a general partnership, and that each member thereof had the power to bind said partnership as may be done in merchandising or other general commercial partnerships. It would not be contended that the manager of said association had the authority under said articles to purchase other real estate, or create an indebtedness, not provided for by said articles.

With those facts before us, the question is presented as to whether said association was, under our Constitution and statutes, a general partnership; each member thereof having the authority and power to sell said land and otherwise bind said association as a partner may do in a general merchandising or commercial partnership. Counsel for respondents contend that said association is a general partnership, and cites in support of that contention sections 2 and 16 of article 11 of the Constitution of Idaho, which are as follows:

"Sec. 2. No charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are or may be, under the control of the state; but the Legislature shall provide by general law for the organization of corporations hereafter to be created; provided, that any such general law shall be subject to future repeal or alteration by the Legislature."

"Sec. 16. The term 'corporation,' as used in this article, shall be held and construed to include all associations and joint stock companies having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships."

It is contended by counsel for respondents that said sections of our Constitution are peculiar to Idaho, but that is not true, as we find similar provisions in the Constitutions of many of the states. The definition

of a "corporation" given in section 16 is given in substantially the same language in the following cited state Constitutions: Section 3, art. 8, N. Y.; section 4, art. 12, Cal.; section 6, art. 12, Kan.; section 208, Ky.; section 11, art. 15, Mich.; section 1, art. 10, Minn.; section 199, art. 7, Miss.; section 11, art. 12, Mo.; section 18, art. 15, Mont.; section 114, art. 7, N. D.; section 13, art. 16, Pa.; section 19, art. 17, S. D.; section 12, art. 5, Wash.; section 13, art. 13, Ala.; section 3, art. 8, N. C.; section 1, art. 9, S. C.; article 268, La.; and section 1, art. 12, Va. From a reading of said section 16, art. 11, of the Constitution of Idaho, it will be observed that the word "corporation" does not include, as therein defined, all joint stock companies and associations, but only such as "have or exercise any of the powers or privileges of corporations not possessed by individuals or partnerships." The provisions of that section expressly affirm that there are joint-stock companies or associations that do not have or exercise any such powers or privileges, and to which the term "corporation," as used in section 16, does not apply. In said section 16, the term "corporation" is there defined only with reference to its use in said section. The definition of the term "corporation," as given in said section, would not apply to the Denver Townsite Company, unless it possessed or exercised some of the powers or privileges not possessed by an individual or partnerships. The constitutional definition of the term "corporation" has been held by some courts as not being a general definition, but only a definition of that term as it is used in that article of the Constitution. The Supreme Court of the United States, in the case of *Great Southern Fire Proof Hotel Co. v. Jones*, 20 Sup. Ct. 693, 44 L. Ed. 482, referring to the definition of the term "corporation" as used in section 13, art. 16, of the Pennsylvania state Constitution, said: "The only effect of that clause is to place the joint stock companies or associations referred to under the restrictions imposed by that article upon corporations, but not to invest them with all the attributes of corporations."

In *People v. Coleman* (Sup.) 5 N. Y. Supp. p. 394, affirmed in 31 N. E. 96, 16 L. R. A. 183, it was held that this provision in the Constitution of New York only applied to the term "corporation" as used in the article referred to in that Constitution, requiring that there should be entered after the word "corporation" at every place in that article the following: "All associations and joint stock companies having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships." That being the effect of this definition of the term "corporation," we will apply the various provisions of article 11 of the Idaho Constitution to the Denver Townsite Company and find wherein, if at all, the question before the court is affected thereby.

The only provision of the article which counsel contends has no effect upon the organization under discussion is section 2, art. 11, providing that: "No charter of incorporation shall be granted \* \* \* by special law, \* \* \* but the Legislature shall provide by general law for the organization of corporations hereafter to be created." Taking into consideration the term "corporation" as defined in said article, the language of this section would be: "No charter of incorporation of any corporation, association or joint stock company having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships shall be granted \* \* \* by special law, \* \* \* but the Legislature shall provide by general law for the organization of corporations and of associations and joint stock companies having or exercising any of the powers or privileges of the corporations not possessed by individuals or partnerships hereafter to be created." The association under consideration is not affected by the language of section 2, art. 11, for two reasons: (1) The association under consideration is not a corporation exercising any of the powers or privileges of corporations not possessed by individuals or partnerships. It is a voluntary association. To possess or exercise powers or privileges of corporations requires a sovereign grant, a franchise which said association has not and does not profess to possess. There are, however, associations and joint-stock companies that have and exercise, under grant of the sovereign, powers and privileges of corporations not possessed by individuals or partnerships to which the language of the Constitution is applicable. (2) Even if the association in question were an organization having and exercising, under grant of sovereign authority, powers and privileges of corporations not possessed by individuals or partnerships, there is nothing in section 2, art. 11, of the Constitution that is applicable to it, since it is not operating or claiming to operate under any special law, as inhibited in the first clause of that provision, and it is not violating such clause, since the command of that clause is directed exclusively to the Legislature to provide a general law for its organization. Such a general direction is not operative without legislative action. Cooley's Const. Lim. (7th Ed.) 118, says: "Sometimes the Constitution in terms requires the Legislature to enact laws on a particular subject, and here it is obvious that the requirement has only a moral force. The Legislature ought to obey it, but the right intended to be given is only assured when the legislation is voluntarily enacted."

Referring to this subject (of provisions of our Constitution requiring legislative action), in *Jack v. City of Grangeville*, 9 Idaho, 291, 74 Pac. 909, this court said: "Under the provisions of said section it is the duty of the Legislature to provide by law the method or

means by which rates or compensation for the use of water supplied to any city or town [may be fixed]—which it is conceded the Legislature has failed to do—unless it has been done by the provisions of section 2711. \* \* \* Therefore, until the Legislature provides a method for fixing rates, the contract between the parties will govern." The Legislature has provided by general law only for the organization of corporations, and has not enacted a general law as commanded by the Constitution for the organization of associations or companies exercising some of the powers or privileges of corporations not possessed by individuals or partnerships.

It is held in *New York, in People v. Coleman* (Sup.) 5 N. Y. Supp. 394, under a constitutional provision like our own, that individuals may voluntarily organize and incorporate partnership associations without being affected by the constitutional definition of a corporation; that said definition only refers to those associations and companies which, under grant of statutory authority, are exercising some of the powers and privileges of corporations not possessed by individuals or partnerships; that such an association or company cannot be formed without the consent of both the sovereign and individuals forming it; that, the sovereign of New York having granted such statutory authority for forming such associations, before such an association can come into existence it is necessary for some individuals to accept said grant by filing articles and otherwise complying with the statutory grant; that, until the grant has been accepted, no such association or company as is referred to in the Constitution has come into existence, and that the Constitution does not interfere with the right of individuals in New York to voluntarily associate themselves together as an unincorporated partnership association not having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships; and that, if they so associate and organize without complying with and accepting any grant of sovereignty, they are an unincorporated association only, not having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships, and are outside of the provisions of the constitutional definition of a corporation.

The correctness of the foregoing analysis, as given by the decision last cited, clearly appears from the growth of the law upon this subject. It is stated in *Cook on Corporations* (volume 2 [5th Ed.] § 1076) as follows: "The earlier cases declaring that joint stock companies were illegal were so decided largely because of the Bubble act which was in force from 1720 to 1826. Very high English authority, after a thorough review of the English cases, gives the opinion that at common law joint stock associations are legal"—citing *Lindley, Company Law* (5th Ed.), 130, and commenting in note 3 on *Lindley's*

discussion of the subject, as follows: "In a thorough and exhaustive note on this subject, the learned author refers to *Rex v. Dodd* (1808) 9 East, 516, holding that a company with a prospectus limiting the liability of subscribers is illegal, as a trap to ensnare the unwary; *Joseph v. Pebrer* (1825) 3 B. C. 639, holding that unincorporated companies with transferable shares are illegal; and *Buck v. Buck* (1808) 1 Campb. 547, and *Rex v. Stratton* (1809) 1 Campb. 549, note, to same effect." The author then cites a number of cases, and says those cases contain dicta only so far as they passed on the legality of these companies. Then the author cites a large number of later cases, and says that they finally establish the legality of joint-stock associations, and the learned jurist comes to this conclusion, and says: "The case of *Blundell v. Winsor*, always relied upon as an authority by those who contend that such a company is illegal, has never met with approbation from the bench, nor has it ever been followed. Upon the whole, therefore, it appears that there is no case deciding that a joint stock company with transferable shares, and not incorporated by charter or act of Parliament, is illegal at common law; that opinions have nevertheless differed upon this question; that the tendency of the courts was formerly to declare such companies illegal; that this tendency exists no longer; and that an unincorporated company with transferable shares will not be held illegal at common law, unless it can be shown to be of a dangerous and mischievous character, tending to the grievance of her majesty's subjects. The legality at common law of such companies may therefore be considered as finally established."

I think it is clearly established by the decided weight of authorities that such joint-stock associations as the one under consideration is clearly legal under the common law, and is not prohibited by the Constitution or statutes of this state. Theodore W. Dwight, Supreme Court commissioner of New York, in an article in the *Political Science Quarterly* (volume 3, pp. 610, 1888), in summing up the conclusions of an elaborate article on unincorporated associations, stated: "It is not a nuisance at common law for persons, no matter how many, to agree to form an unincorporated association and to issue certificates of shares representing property contributed, nor to make the certificates transferable either by written assignment or by delivery, nor to establish a committee having power to make rules for the government of the association. Persons doing these acts do not usurp the functions of a corporation, for the great and distinguishing feature of a corporation is the possession of such juristic qualities as to be a new, legal person, distinct from the individuals forming it. To usurp the functions of a corporation, there must be the usurpation of the qualities of a 'person,' as, for example, to sue or to be sued in an as-

sumed corporate name." In *Phillips v. Blatchford*, 137 Mass. 510, the court said: "It is too late to contend that partnerships with transferable shares are illegal. \* \* \* The grounds upon which they were fairly said to be illegal in England, apart from statute, have been abandoned in modern times."

As the Constitution of Idaho and the statutes of the state do not prohibit the organization of joint-stock associations having transferable stock, such as the one under consideration, the common-law rule as to their legality prevails in this state. Such conditions have existed in mining districts from the earliest periods in England and in the United States. *Lindley on Mines*, vol. 2, (2d Ed.) § 1430 et seq. The author refers to the distinctive features of such partnerships as follows: "The absence of the *delectus personæ*, which characterizes ordinary partnerships; that neither death nor bankruptcy of one of the members dissolves it; that the sale of a mining interest by a partner does not dissolve the partnership"—and says: "The origin of this species of limited partnerships may be traceable to the early periods of mining in the west, and, while it has been the subject of legislation in some of the states in recent years, such legislation is but little more than declaratory of the rules announced by the courts as governing the relations upon what may be termed the American common law of mining partnerships." See *Snyder on Mines*, vol. 2, pp. 11, 39, 40. In the Constitution of California (1849, article 4, § 33), the term "corporation" is defined substantially the same as in section 16 of our own Constitution, and in a number of cases in California the Supreme Court of that state has not considered that their constitutional provisions interfered with the organization of such unincorporated associations, as appears in its decisions from *Von Schmidt v. Huntington*, 1 Cal. 57, down to *Lowenberg v. Greenebaum*, 33 Pac. 794, 99 Cal. 162, 21 L. R. A. 399, 37 Am. St. Rep. 42. The history of the use of this form of association is given to some extent in *Warner v. Beers*, 23 Wend. (N. Y.) 151. Such associations as the one under consideration, not organized for engaging in the real estate business, but for the purpose of acquiring and holding title to a particular piece of real estate, is not a general business partnership. It is not a violation of the Constitution or statutes for a number of people to get together to acquire a particular piece of property and place the title to the same in a trustee, whose powers and authority are definitely limited and defined and subject to instructions from the shareholders, either directly or indirectly through a board elected by the shareholders at regularly constituted meetings of the shareholders. This constitutes simply a definition of the trusts and powers subject to which a particular piece of real estate is held. The articles of

association create a power of attorney to the trustee subject to the limitations upon the powers in respect to action required either of the shareholders or directors. It is a wholesome method of co-operation which assists in bringing together and organizing small funds into a large investment.

We will next consider the distinctive features between a corporation and a partnership. In this state there is no statute granting unincorporated associations any of the powers or privileges of corporations, and, without such grant, such associations cannot either possess or exercise any corporate franchises. Thompson on Corporations, vol. 7, § 8140, states: "The creation of a corporation is not within the power of the individuals who subscribe to its stock. It is exclusively the work of the law; \* \* \* nor is it altogether accurate to say that the creation of a corporation is exclusively the work of the law; \* \* \* the creation of private corporations is never exclusively the work of the law but is always the concurring work of the law and private adventurers \* \* \* by an organization, under a general enabling act already in existence." The Supreme Court of New York, in *People v. Coleman*, 31 N. E. 96, 16 L. R. A. 183, in referring to the difference between corporations and such associations, said: "The one derives its existence from the contract of individuals, the other from the sovereignty of the state." In New York they have a statute authorizing the organization of joint-stock associations, but it is held that such associations as do not possess or exercise powers and privileges not possessed by individuals or partnerships need not be organized under the provisions of said statute. In other words, the common-law right of individuals to make contracts not illegal or prohibited by law still remains, and has not been taken away by said provisions of the Constitution. In *Hoadley v. County Commissioners*, 105 Mass. 519, the court said: "This is a voluntary association of individuals, and its articles of agreement, although they adopt some of the forms of managing the business usual in corporations, constitute a copartnership. \* \* \* It has none of the special attributes which belong to a corporation duly organized under our laws. \* \* \* The provision that each member may sell and transfer his interest and thus introduce a new partner, though unusual, is not inconsistent with the contract of copartnership." In *Warner v. Beers*, 23 Wend. (N. Y.), at page 148, the court defines the different peculiar functions of these unincorporated associations, and designates the powers or privileges of corporations not possessed by individuals or partnerships. The court there held that transferability of shares is not one of the powers or privileges of a corporation not possessed by individuals or partnerships; that one of the natural incidents of a corporation is to sue or be sued in its corporate name

without the necessity of naming all or any of the individuals composing the aggregate body. Under the laws of this state the association under consideration has not the absolute right to be sued in its associate name, while in the complaint the Denver Townsite Company is named in the title, each and every of the members composing that association are also named therein, and the suit is against them in person. Such an association may use a common seal, and it may make by-laws by which it shall be governed. Those matters are not powers or privileges of corporations not possessed by individuals or partnerships. The court then holds that it is the settled law of England that it may be stipulated that death shall not dissolve the partnership. Under our law the partners may agree that death shall not dissolve the partnership, and such an agreement is legal and valid. In the case at bar the association has a descriptive name, but it is not used either for the purpose of suit or conveyancing. The title to said land was taken in the name of the trustee, and this suit is brought directly against the stockholders naming them, and not against the association in its associate name. Its articles of association do not state that it is a joint-stock company, but respondents have so alleged in their complaint. Its articles simply call it an association. In the *Warner-Beers Case*, supra, the court discusses the matter of an exemption from personal liability of the shareholders. The doctrine laid down in that case is in harmony with the doctrine settled by the United States Supreme Court in the case of *Great Southern Fireproof Hotel Company v. Jones*, 20 Sup. Ct. 690, 44 L. Ed. 482, holding that unincorporated associations, even though organized under the statutes giving them powers to use a company name, in which to sue and be sued, with limited liability and corporate seals, are not corporations but partnerships, within the federal statutes prescribing the jurisdiction of courts of the United States.

The only feature of the association under discussion that is material at this time, to determine whether it has powers or the privileges of a corporation not possessed by partnerships, is the feature of limitation of agency of the members of the association. This we have seen was an incident of associations under the common law resulting from the lack of the right of *delectus personæ*, and not an incident of a corporation not possessed by a partnership, and may be enforced. A corporation cannot be formed by private agreement between individuals. The franchise is possessed by the state, and even the state cannot compel people to accept its bounty. Joint-stock companies may be formed without regard to the statutes, and the promoters may choose to proceed solely upon their common-law rights and responsibilities. That doctrine is laid down in *People ex rel. Winchester v. Coleman*, and it is there said:

"There is in fact no statute of the state providing for the formation of joint-stock companies or limiting their organization. Such companies may be said to be recognized by the acts which have been referred to conferring privileges upon them. In that sense of recognition, they are authorized and sanctioned by these acts. It is, however, the common-law right of a private association which is thus organized, and, as no limitation is imposed upon that right or form prescribed for its legal exercise, it is treated as coextensive with the general right to contract lawfully. \* \* \* But the individuals so contracting may, if they see fit, ignore the statute and proceed strictly under the contract and its common-law conditions. \* \* \* The true test is whether the being is natural or artificial. It is artificial if created by statute or called into being by compliance with statutory provisions. It is natural when solely the creature of private contract."

Morawetz on Private Corporations, vol. 1 (2d Ed.) § 6, speaking of joint-stock companies, says: "Their situation varies greatly, and they may be found of every possible variety, from an ordinary copartnership to a corporation in the strictest sense of the word. Their real organization and character must, in each case, be determined by reference to the laws and articles of agreement under which they are formed." Such associations are styled "joint-stock companies." See 17 Am. & Eng. Enc. of Law (2d Ed.) 636; 4 Encyc. of Law & P. 309; 29 Century Digest, 1511, 1512. And are sometimes styled partnerships, and they are partnerships in some respects, but from partnerships they differ in some particulars. In ordinary partnership, unless there is an agreement to the contrary, the death or withdrawal of a member works a dissolution of the firm. In joint-stock companies, however, the death of a member or the withdrawal or transfer of its interest does not involve a dissolution of the company, in which company there is no *delectus personæ*. 17 Am. & Eng. Ency. of Law (2d Ed.) 637, 638. While a joint-stock company is a partnership, it is different and attended with different incidents and liabilities from a partnership formed between a few individuals to carry on a business jointly and with equal powers and without transferable shares. All who have dealings with a joint-stock company know that the authority to manage the business is conferred upon the directors, and that a shareholder, as such, has no power to contract for the company, and for this purpose it is wholly immaterial whether the company is incorporated or unincorporated. In 4 Cyc. 310, it is stated: "In the absence of authority specially conferred, a single member has no power to bind the association." And, at page 308, it is said: "The powers and authority of the officers of an association

are generally regulated by the constitution and by-laws. \* \* \* Where the officers act under special or limited powers, their action must be in strict conformity therewith, or the association will not be bound thereby." See *Sullivan v. Campbell*, 2 N. Y. Super. Ct. 295. In *McConnell v. Denver*, 35 Cal. 365, 95 Am. Dec. 107, it is held that an "unincorporated ditch company \* \* \* differs from ordinary commercial partnership, and that a manager of such company has no power or authority to bind the company with his contracts, unless duly authorized." In *Willis v. Greiner* (Tex. Civ. App.) 26 S. W. 858, it was held that, where an unincorporated joint-stock company, dealing in lands, vests the title in three directors and empowers them to make conveyances "subject to directions of the stockholders," the president or secretary have no power to contract with real estate agents for the sale of land, and the association is not bound thereby, unless it has authorized the contract or ratified the same. In that opinion it is said: "Joint stock companies are generally held to be no more than ordinary partnerships, but there are distinctions which must be observed. In ordinary partnerships any member may bind the firm by his acts in the course of his business, but in a joint-stock company the management of the affairs of the company may be intrusted to the officers or trustees. 11 Am. & Eng. Enc. of Law, p. 1038, note 1. \* \* \* The association, however, had the power to make the contract sued on and to confer the authority upon its president and secretary, but it is not shown that it ever did so." On rehearing the court said: "It was such as the president and secretary had no authority to make. There is no evidence to show that the contract was ratified by the directors." In the *Appeal of the Merchants' Fund Association* (Pa.) 20 Atl. 527, 9 L. R. A. 421, 20 Am. St. Rep. 894, Mr. Justice Williams, in setting forth some of the characteristics of such an association, said: "First, what is the legal status of the company? Second, what is the relation of the stockholders to the company? \* \* \* The relation of the stockholders to the company is also settled largely by the articles of agreement. They contribute the capital, select the trustees who are to use and invest it, and are entitled to a distributive share of the profits made in the business. \* \* \* They have, however, no power to use the money of the company, to interfere with its business, or to bind it in any manner. This power they have voluntarily surrendered and committed to the trustees selected by them as the agents and representatives of the company, so that the firm or company speaks not through its members as such, but through its trustees. \* \* \* The interest of each member was therefore an interest in the profits made. He had no title to the land bought

by the trustees of the company as a tenant in common or otherwise, and could neither convey nor incumber it. \* \* \* The company was not dissolved by Oliver's death, and has not yet been dissolved. \* \* \* The relation between it and the holders of its stock is therefore the same since Oliver's death as before." It is stated in 17 Am. & Eng. Ency. of Law (2d Ed.) 638, as follows: "All who have dealings with a joint stock company know that the authority to manage the business is conferred upon the directors, and that the shareholders, as such, have no power to contract for the company." In ordinary partnerships, every partner's power to contract is coextensive for the purpose of the company, but in joint-stock companies, where the interest of the members is represented by transferable shares, it is well settled that a shareholder is not necessarily an agent of the company, and that their official position in the company indicates such powers only as are defined and granted in the articles of association, or as may be given by resolution of the shareholders or directors.

Counsel for respondent have cited a large number of authorities upon the question of what constitutes a partnership. We do not take issue with counsel as to the doctrine of those authorities. There are varied degrees of authority of partners to bind the partnership in the various kinds of partnerships. In a commercial or trading partnership, such as engage in trading in merchandise or in financial operations, every partner has power to execute such negotiable paper as is used in such partnership. In a nontrading partnership, however, such as a law firm or real estate or mining partnership, the members have not generally the power to execute negotiable paper. In joint-stock companies the shareholders have no powers as agents, unless such powers are granted either expressly or by implication, or by acquiescence of such shareholders or association. In my view of this matter, said section 12 of the articles of association stands in no higher light as far as the extent of the power is concerned than a power of attorney defining the powers of the secretary. It is in fact a grant of power defining the authority of the secretary in making sales of said real estate. It seems to be a well-settled rule that the provisions of the articles granting such powers should be strictly construed. 1 Am. & Eng. Ency. of Law (2d Ed.) 999. In cases of this kind grants of power are not all the same, and, when it comes to a construction of them, each must be construed according to the language of the particular power granted, and, wherever the power granted is sufficiently broad to authorize the trustee or agent to appoint subagents, of course they may do so. In this case that power is reserved to the shareholders in meeting assembled, except in so far as they have in the articles of association granted specific authority to the secretary.

By the provisions of said section 12, they granted authority to the secretary, subject, however, to their direction to make sales; but there is no implication that he should have authority to delegate the power to make sales. It is provided in said section 12 that purchasers are relieved from inquiry concerning the application of the purchase money or to any directions of the shareholders or as to the qualifications of the secretary. This is equivalent to a declaration that all other persons must inquire as to his authority.

In volume 1 (2d Ed.) Warvelle on Vendors, § 63, the author, in discussing syndicates and joint-stock companies, among other things, says: "As a general proposition, such associations may be classed as partnerships, and to them any of the general principles of partnership are fully applicable. The articles of association will, of course, go far to determine the character which the members sustain both toward each other and to the public, but where, as is generally the case, the capital is contributed on the basis of a specific sum for each share in the enterprise, the lands purchased being held and managed for the joint account by the trustee, and the interest of the members of the shareholders is limited to a participation in whatever profits may be realized on the company's ventures, the shares are simply personal property. As a rule the holders of such shares have no estate in or title to the land purchased by the trustee, as tenants in common or otherwise, and they can neither convey nor incumber it." The Denver Townsite Company is such an association as the author there refers to, and the death of one of the shareholders (the vice president, Benjamin F. Morris) did not terminate the partnership or association. It is clearly recognized by the highest courts of many of the states and law text-writers that, while some of the principles of partnership may apply to such associations, they cannot, from the very nature of the organization of such associations, be entirely controlled by the legal rules and principles that control ordinary partnerships. I conclude, therefore, under the law and said articles of association, a shareholder or officer of said association has no power or authority in regard to the sale of the land belonging thereto, except that granted by the articles of association or by resolution of the shareholders. By the provisions of said section 12 of the articles of association, the secretary was prohibited from incurring any indebtedness which should exceed \$500. If he did in fact list said property with the respondents, and they procured a purchaser, he incurred an indebtedness of more than \$2,000. I therefore conclude that the Denver Townsite Company was a partnership governed and controlled, so far as the powers and rights of the shareholders are concerned, by its articles of association, and that the said Morris as vice president, or the

said Schleicher as secretary, had not the authority or power, under said articles, to list the association's lands for sale with the respondents.

The next question that we shall consider is whether the Denver Townsite Company listed said land with the respondents for sale. It is alleged in the complaint that about the month of May, 1902, the defendants, acting by and through their vice president, Benjamin F. Morris, in the absence of their president, Henry Dernham, and acting by and through their secretary, Robert Schleicher, listed with the plaintiffs said lands and premises for sale, and employed plaintiffs to procure a purchaser therefor at a sum sufficient to pay plaintiffs 5 per cent. commission, and net the defendants \$17.50 per acre, reserving the crops thereon, and that the plaintiffs accepted said employment and entered upon the discharge of their duties. It does not clearly appear from the evidence just what B. F. Morris did in attempting to list said land with the respondents. It appears that there had been some correspondence between the respondents and said Morris, but the same is not contained in the record. However, it appears that respondents wrote a letter to said Morris dated May 21, 1902, and that the appellant, Schleicher, answered that letter, which is as follows: "Lewiston, Idaho, May 25, 1902. Messrs. Spotswood & Veatch, Moscow—Gentlemen: In reply to yours of the 21st inst. to B. F. Morris, would state that we have some 2,100 acres of the land around Denver in cultivation, about equally divided between wheat and barley. A purchaser could not get possession before next fall, after harvest is removed, nor would we except to give him any part of the crop of this year. The terms would be \$17.50 per acre, net to us, including the part of which town lots have been, as a full 160 acres, or not taking that 160 at all, as purchaser might prefer. I am aware that Mr. M. let you understand that your 5 per cent. commission would come out of the \$17.50, which I also was willing to do, but Messrs. V. & S. are not anxious to let go at all, and state that unless they can get \$17.50 clear of commission, they will not consent to a sale. Terms of payment could be arranged to some extent to suit purchaser's convenience, but should require one-half of price down. Yours truly, R. Schleicher." It appears from that letter that Morris had let respondents understand that they should have 5 per cent. commission, provided they procured a purchaser at \$17.50 per acre, and that the secretary was agreeable thereto. But two of the respondents would not consent to that arrangement, and insisted on \$17.50 per acre net. Respondents did not reply to Schleicher's letter of May 25, 1902, and did not signify in any way their acceptance of the proposition stated in that letter, unless it be the letter of introduction of Mulhall to Morris dated May 31, 1902, hereinafter quoted. Conceding that said acts

of Morris and Schleicher amounted to a listing of said land for sale with respondents, the question arises whether they had the authority to list it. The minutes of the appellant association are contained in the record, and no resolution is found therein which authorizes Morris or Schleicher to so list said land. Then did the appellant association ratify such listing? We find no evidence whatever in the transcript even tending to show that they did so.

Counsel for respondents has taken two positions in this case: First, that said association is a general partnership; second, that it is a corporation exercising and possessing powers and privileges not possessed by partnership. It is clear to us, under our law, that it is a partnership, but not a general partnership wherein each of the partners has plenary power to sell and otherwise dispose of the property of the association or purchase other land, or create indebtedness beyond that provided for in the articles. Under the Constitution and laws of this state, there is nothing prohibiting individuals from entering into such a contract as said association entered into. While the Legislature, no doubt, has the power to prohibit such an agreement, it has not done so, and, as heretofore shown under the common law, individuals may legally enter into such a contract. Therefore such contracts are legal. I therefore hold that said contract of association was a valid and binding contract. It is nowhere alleged or shown that the plaintiffs were misled in any way in said matter. They knew of the agreement between the appellants, and that under the terms of said agreement the individual members of said association had no power or authority to list said land with them for sale. The complaint does not allege that respondents were misled or deceived into believing that said association was a general partnership, and that the shareholders had the powers of agency possessed by partners in a general partnership. This disposes of the case. But it is contended by counsel that respondents procured a purchaser, and I shall consider that question.

After Schleicher had written said letter of May 25th, nothing further was written, said, or done in regard to the matter, so far as the record shows, until May 31, 1902, when in the morning of that day William Mulhall of Sioux City, Iowa, went to the office of respondents in the city of Moscow, Idaho, and they gave him the following letter: "Moscow, Idaho, May 31, 1902. Hon. B. F. Morris, Lewistown, Idaho—Dear Sir: "This will introduce Mr. Wm. Mulhall, of Sioux City, Iowa, who is on his way to Denver for the purpose of examining the company's property with a view of purchasing and locating a colony. We have also given him a description of two other pieces of land, your No. 35 and No. 36. You know these lands better than we do, so you will please go into details with him, and tell him all about the

Camas Prairie country. If he is pleased with the country and price is satisfactory, he will want to buy considerable more land than that owned by the company. Show him everything you have. Any attention shown Mr. Mulhall shall be appreciated by yours truly, Spotswood & Veatch." It will be necessary to go back a little and show the facts and circumstances that caused Mulhall to come to Idaho and call on respondents at the time they gave him said letter. Mulhall was engaged in the real estate business at Sioux City, Iowa, and in April, 1902, he received a letter from said B. F. Morris that contained a printed list of 44 different tracts of land that said Morris was advertising for sale, which tracts were numbered from 1 to 44, inclusive. In said printed list sent to Mulhall the tracts numbered 34, 35, 36, and 37 were inclosed with ink pen marks. Number 34 was the 2,720.80 acres referred to in this suit, and No. 37 was 2,700 acres of land near Pomeroy, state of Washington. That advertisement No. 34 is as follows: "No. 34: 2,720.80 acres in compact body, fine black loam, bunch grass land, in center of Camas Prairie; town of 75 inhabitants, church, stores, roller mill, postoffice and shops; fine four room schoolhouse near center of the tract; \* \* \* it is ten miles from Grangeville and ten miles from Cottonwood on main stage road, 16 miles from terminus of railroad. \* \* \* Price \$20.00 per acre." The letter from Morris and said list first called Mulhall's attention to said land. William Mulhall testified as follows: "No, sir; I had no communication from Messrs. Spotswood & Veatch, either oral or written, at any time, calling my attention to this 2,720 acres of Denver Townsite property before I received that communication from B. F. Morris. I had not even seen any advertisement of this Denver Townsite property of any kind prior to the time I received this real estate circular from Benjamin F. Morris, deceased. The 2,720 and a fraction acres of land described in this B. F. Morris real estate circular answers the description of the Denver Townsite property which I bought. \* \* \* I left Sioux City, Iowa, and came west to look at this property on or about the first Tuesday in May, 1902. The main object of my trip west at that time was to see this land—the Denver land. I met Messrs. Spotswood & Veatch about the last of May, 1902, when I was coming to this part of the country to see these Camas Prairie lands, and on my road here I came by the way of Colfax and Moscow, and then here. After arriving at Colfax I found I had to wait there for several hours. That same evening I arrived at Moscow, stayed there all night, and on the following day I had to wait until noon or a little after to get a train here. While in Moscow I happened into their office, made some inquiry about the Denver land and the country in general, and

that is the first time that they have said a thing about those lands, and he suggested giving me a letter of introduction to Mr. Morris, and so I took the letter. That is the letter that has been referred to here as the letter of introduction of myself from Spotswood & Veatch to Mr. Morris. Q. And your main object in coming west was to see the lands here in Idaho was it? A. Yes, sir. Q. Why didn't you go out to see the 2,700 acres over close to Pomeroy? A. I could answer that by going into a little detail. \* \* \* When I arrived at Pendleton I visited a friend there, a farmer who had been in Camas Prairie shortly before that, and he encouraged me to go on to that country, and said it was the best country. The description of the soil is what gave me the preference."

The 2,700 acres of land close to Pomeroy above referred to was a tract of land advertised for sale as No. 37 of the circular sent to Mulhall by B. F. Morris. It seems that the said Morris had that tract of land listed with him for sale. Mulhall further testified that he had an uncle living near Moscow whom he had lost track of, and when he arrived there he endeavored to locate him, and his landlord at the hotel referred him to a gentleman sitting in the office by the name of McGowen. McGowen could give him no information in regard to his uncle, but informed Mulhall that the respondents, the firm of Spotswood & Veatch, were well acquainted there, and they probably could give him some information about his uncle. During that conversation he informed McGowen where he was from and where he was going, and talked to him in regard to the Camas Prairie country. McGowen informed witness that he would go with him the following morning to the office of respondents, and on the following forenoon, while witness was visiting with a party of acquaintances from Iowa who had just returned from a trip to the Camas Prairie country, McGowen came up and asked witness to go to the office of Spotswood & Veatch with him. He thereupon went and was introduced to Spotswood & Veatch, and they introduced witness to some old gentleman there who was an old timer with whom he talked about the country and about his uncle, and it appears that he also talked to Spotswood & Veatch in regard to the Camas Prairie country. Witness informed them of his mission there, and they stated to him that Mr. B. F. Morris was an old acquaintance of theirs, an old associate, and a very reliable man to deal with, and spoke very highly of him, and stated to Mulhall that they would give him a letter of introduction to Morris, and thereupon they prepared the letter, which is the letter above set forth, dated May 31, 1902. Mulhall on that day proceeded to Lewiston, and there met Mr. Morris and handed him the said letter of introduction. On cross-examination, the

witness testified as follows: "Q. \* \* \* Then why did you get a letter of introduction from Spotswood to Morris when you claim you didn't know Spotswood? A. Why, he volunteered the letter. Q. What was the conversation that led up to his giving you the letter of introduction? A. Inquiries which I made about the country. \* \* \* You understand I was coming out here to see the country and wanted to learn all I could. I might have asked a hundred questions or more. I couldn't recollect them at this time. Q. You don't deny that he didn't draw your attention to these lands? A. I think I drew his attention to the lands. Q. Then, Mr. Mulhall, if you were coming to Lewiston to see Mr. Morris, what did you ever deliver that letter to him for? A. Why, I delivered it as a matter of courtesy to Spotswood & Veatch. I would not intentionally promise a man to do a thing and not do it."

After Mulhall delivered said letter of introduction to Morris, he had an interview with him at which appellant Schleicher was present, and it appears at that interview Morris offered the said lands to Mulhall for \$17.50 per acre, reserving that year's crops. That interview with Morris occurred on the evening of the 31st of May, or 1st day of June, 1902, and Mulhall proceeded to Camas Prairie to examine said tract of land. It is also shown that B. F. Morris was taken suddenly sick and died on the 4th of June, 1902. After examining the land, Mulhall returned to Lewiston and had further negotiations with the respondent Schleicher, who was the secretary of the said association, and made him an offer of about \$40,000 for the land, which was declined. Thereafter Mulhall left Lewiston on his way home by the way of Portland, and when he arrived at The Dalles he called said Schleicher up by 'phone and inquired of him what their decision was in regard to his offer for the land. Schleicher replied that they declined it. Nothing further was done in regard to the matter until July 8th, when Mulhall wrote the following letter to the respondents: "Sioux City, Iowa, July 8, 1902. Spotswood & Veatch, Moscow, Idaho—Dear Sirs: In compliance with your request when at your office, I desire to say that I did not make a deal with Mr. Morris for the land at Denver. In fact, I had arranged with him to go and see the land, but he was suddenly taken sick, and died in a day or two. However, I saw the land during my stay in that neighborhood, and while there appears to be some very good lands in the tract, yet I fully believe there is three hundred acres practically worthless. If the same could be obtained at about \$12.50 per acre, I think I would purchase it. There are plenty of other lands in smaller tracts in that neighborhood that could be had at that price. I expect to return to Oregon some time during this month,

with a party of land customers, and after getting through with them, I hope to return by the way of Moscow, at which time I would like to purchase some land, therefore would be glad to receive description and prices of your best bargains. Yours very truly, William Mulhall." The respondents' reply to said letter is as follows: "Moscow, Idaho, July 14, 1902. William Mulhall, Esq., Sioux City, Iowa—Dear Sir: We are in receipt of your favor of the 8th inst. The 2,720 acres, including the Denver Townsite, cannot be bought for a less price than we made you when here. We are well acquainted with every acre of this land, and know you are way off when you think there are 300 acres of it practically worthless. 125 to 150 acres might be so classed, but that carries a stream of water which adds very much to the value of the balance of the land. We have very little low priced land in this county that is good. We have sold an enormous amount of land since you were here, and the prices are steadily advancing. If you come this way on your return from Oregon we will be glad to show you what we have. Yours truly, Spotswood & Veatch."

Mulhall returned to Idaho in the fore part of August, 1902, and again went out and examined the land. On his second trip he had another interview with Schleicher, and he priced said lands to him at that time at \$20 per acre, and after some negotiations he sold the lands to Mulhall for \$46,240; that being a little less than \$17 per acre. \$5,000 of the purchase price was paid in cash, and \$11,240 thereof was to be paid on the 1st day of March, 1903, and the balance of \$30,000 was to be paid on or before three years from August 15, 1902, with interest on deferred payments at the rate of 8 per cent. per annum. Mulhall had not seen either of the respondents from the time he met them in Moscow on May 31, 1902, until some time after the sale was made on the 15th of August, 1902. Mulhall testified that he was never ready or willing to pay \$17.50 per acre for said lands, and, as the evidence shows, that the appellants had not offered the land to him for less than \$17.50 per acre until the 15th of August, when he declined to give them to exceed \$17 per acre, and they accepted that offer. These facts show that the appellants received for said land every dollar that Mulhall would pay therefor—was ready and willing to pay therefor. It must be borne in mind here that it is alleged in the complaint and admitted that, if the land was listed at all with the respondents, it was listed as follows: The appellants were to receive a net of \$17.50 per acre for the land and reserve the crops growing on the lands in the year 1902. It is alleged in the complaint, and contended by counsel for respondents, that they had procured a purchaser for said land on the terms last stated, but the evidence is clearly against

that contention. The evidence shows that Mulhall was never ready or willing to pay to exceed \$17 per acre for said land. Conceding for the purposes of this case that said lands were listed for sale with the respondents by appellants, respondents failed to show that they had procured a purchaser who was ready and willing to pay the list price for said land. There is nothing in the record showing, or tending to show, that the appellants have in any manner attempted to overreach or beat the respondents out of any commissions that they were entitled to receive because of their procuring a purchaser for said lands. In fact, the evidence shows that B. F. Morris was a real estate agent himself; that he advertised largely and sent printed lists of the lands that he had for sale over the country; and that he sent one of these lists to Mulhall, the purchaser, and that that advertisement first called Mulhall's attention to the land. Mulhall did not know of Spottswood & Veatch until he had reached Moscow, Idaho, on his way to examine said lands, and there accidentally met them. On making inquiry for an uncle that he had lost trace of, he was referred to the respondents as old residents, and, having a wide acquaintance in and about Moscow, he informed them of the purpose of his visit to Idaho, and they gave him a letter of introduction to B. F. Morris. Under that state of facts it is clear that they did not call Mulhall's attention to this land, but that B. F. Morris did so.

It is contended by counsel for appellant that it was the letter of July 14th that made Mulhall "ready and willing" to pay for said land the list price, to wit, \$17.50 per acre, reserving that year's crops and 5 per cent. commission for the respondents. I cannot agree with counsel on that point. The difficulty is the uncontradicted evidence shows that he was not ready and willing to pay said price, or that they induced him to purchase said land. The record shows that the respondents are keen, shrewd business men, and that they procured the very largest price that it was possible to procure from said Mulhall for said lands. The respondents certainly had confidence in the business ability of the appellants, as they paid no attention whatever to Mulhall after giving him the letter of introduction to Morris dated May 31, 1902, until they received his letter of July 8th. To recapitulate, Mulhall, the purchaser, had, in April, 1902, received a letter from B. F. Morris containing a circular list of land, which list called the particular attention of Mulhall to the Denver Townsite Company land, and, in response thereto, he left his home in Sioux City, Iowa, and traveled about 2,000 miles on his way to inspect said land and went into the office of the respondents at Moscow, Idaho, to make inquiry in regard to an uncle whom he had not heard from for years, and, while there, informed the re-

spondents of his mission to see B. F. Morris and inspect said land. Respondents thereupon informed him that they were well acquainted with Morris and would give him a letter of introduction to him, which they did. Can it be contended with any reason, under that state of facts, that respondents procured Mulhall as a purchaser? He had concluded to go and inspect said land more than a month before he met respondents, having had his attention called to it by B. F. Morris and had proceeded about 2,000 miles on his way to see the land before he accidentally or incidentally met respondents. Those are the undisputed facts. Respondents were informed by Mulhall that he was on his way to see said land. The giving of said letter of introduction was a work of supererogation and for the evident purpose of laying the foundation for a commission. The respondents had no more right to appropriate as their own a purchaser found by appellants, than appellants had to appropriate one found by respondents, provided the land had been listed with them. There must be a little honor between real estate agents. If Mulhall's attention had been called to this land by respondents, no court would permit appellants to appropriate him as their own purchaser; neither will respondents be permitted to claim as their purchaser one procured by appellants, provided the sale was not brought about by the efforts of respondents. Mulhall evidently was a keen, shrewd man—a real estate agent—and his letter of July 8th indicates to me that he had concluded to purchase said land, and the letter of respondents of July 14th, to him, did not influence him to make the purchase. It is sufficient to say that Mulhall was a purchaser procured by Morris, now deceased, and not by respondents.

The judgment is reversed, and the cause remanded, with instructions to dismiss the action. Costs are awarded to appellants.

STOCKSLAGER, C. J., concurs.

ALLSHIE, J. (dissenting). I agree with my Associates in much that is said in the very exhaustive opinion by Mr. Justice SULLIVAN, and still I find much there said that I cannot agree with. This is the second hearing of this case, and the second opinion filed. I expressed my views on the original hearing as to the powers and authority of the secretary and trustee of this association, and also expressed doubts as to whether such an association can lawfully exist under our Constitution and enjoy any rights, privileges, or immunities other than or superior to those enjoyed by partnerships and individuals. I have had no occasion to change my mind on this matter since the first hearing. It is clear, however, to the merest layman that the majority of the court have given recognition to a hybrid business organization—half corporation, half partnership. For the pur-

pose of avoiding liability when creditors pursue it, we are assured that it enjoys such of the powers and privileges of a corporation that its partners are not liable for debts incurred by its officers and agents, unless specially authorized by a meeting of the shareholders, nor are they liable for debts incurred by partners, or "shareholders," as they please to call themselves. On the other hand, when confronted with the necessity of incorporating under the law before exercising or enjoying any of the privileges of functions of or common to a corporation, we are told they are merely a "limited or special partnership." Such an easy, elusive, and facile organization, without identity or conscience will render the much hated corporation a mere dwarf in the sight of such manifestations of power and immunity from liability. Aside from being entirely useless and unnecessary, it would be equally as tedious and laborious (far beyond the time at my disposal) for me to undertake to go through and point out wherein I agree, and where disagree, with the opinion of the majority. I will content myself by saying I concur in part and dissent in part.

(12 Idaho, 400)

**SPOTSWOOD et al. v. DERNHAM et al.**

(Supreme Court of Idaho. June 13, 1906.)

**1. JUDGMENT—SERVICE OF PROCESS—THEORY OF ACTION.**

Where an action is begun upon the theory that the defendants compose a voluntary unincorporated joint stock company, and that the service of summons must be made upon each and every of the defendants to give the court jurisdiction, the fact that the clerk of the court, through inadvertence or otherwise, enter judgment against the unserved defendants, on appeal, such judgment will be set aside.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 422.]

**2. APPEAL—PARTIES ENTITLED TO ALLEGE ERROR.**

In such a case, where the partners served with summons appeal, that appeal inures to the benefit of the unserved partners, provided the service of summons on one partner is sufficient service on all of them.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4508, 4415, 4416.]

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by A. T. Spotswood and others against Henry Dernham and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded with instructions to dismiss the action.

James E. Babb and Daniel Needham, for appellants. I. N. Smith, for respondents.

**SULLIVAN, J.** This is an appeal by the defendants, Dernham, Kauffman, and Scott,

from the judgment rendered by the trial court in the case of A. T. Spotswood et al. against John B. Morris, as administrator of the estate of Benjamin F. Morris, deceased, et al. This is the same case reported in 85 Pac. 1094, and reference is made to that case for the facts on this appeal. The title to the case is given in the complaint as follows: "A. T. Spotswood and Fred Veatch, Partners as Spotswood & Veatch, Plaintiffs, v. John B. Morris, as Administrator of the Estate of Benjamin F. Morris, Deceased, Harriet F. Morris, Administratrix of the Estate of Benjamin F. Morris, Deceased, Henry Dernham, William Kauffman, John P. Vollmer, Wallace Scott and Robert Schleicher, Trading and Doing Business as the Denver Townsite Company, a Voluntary Unincorporated Joint-Stock Company, Defendants." In the decision by this court on the appeal above referred to, the court held that the Denver Townsite Company was a limited partnership, regulated and controlled by its articles of association, and the plaintiffs refer to it in the title of the case as the "Denver Townsite Company," a voluntary unincorporated joint stock company. While it was contended finally by counsel for respondents that said association was only a general partnership, the case apparently was not tried upon that theory. Service of summons was never made upon the defendants Dernham, Kauffman, and Scott, and there was no appearance in the case for them; but, regardless of that fact, a judgment was entered against them, which would have been proper had they been general partners with the other defendants, and, in the determination of this matter, it may be considered that the service on one partner was a sufficient service on all of them. If that be true, the appeal of Vollmer, Schleicher, and the administrator of the Morris estate was an appeal for the entire partnership, and the judgment of the trial court against them must be set aside and the action dismissed on the same grounds, for the same reasons given in our decision in the former case. Taking the other view of the matter, that, in order to get jurisdiction of Dernham, Kauffman, and Scott, they should have been served with summons, and, as they were not, the court had no jurisdiction to enter judgment against them and for that reason the judgment must be set aside.

It seems clear to me, from the record in this case, that the clerk inadvertently entered judgment against all of the defendants, when the theory on which the case was commenced seems to have been that service of summons must be made on each of the defendants. The judgment, as entered, recites the fact that James E. Babb and Daniel Needham appeared as attorneys for the defendants, when, as a matter of fact, they did not appear for said Dernham, Kauffman, and Scott,

unless it be held that, by appearing for the administrator of the Morris estate and Vollmer and Schleicher, they thereby appeared for all the defendants. But, as above stated, I do not understand that the case was tried upon the theory that the Denver Town-site Company was a general partnership, and the papers show that Messrs. Babb and Needham only appeared for a part of the defendants. While the judgment itself does not name any of the defendants, it does recite as follows: "Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiffs have and recover from said defendants the sum of \$2,683.33," etc. If Messrs. Babb and Needham appeared for all the defendants, the judgment must be set aside as to all of the defendants, and, if they only appeared for the administrators of the Morris estate, Vollmer, and Schleicher, the court had no jurisdiction to enter judgment against the other defendants, and the judgment must be set aside, and it is so ordered. The case is remanded to the trial court with instructions to dismiss the action. Costs are awarded in favor of the appellants.

STOCKSLAGER, C. J. concurs.

AILSHIE, J. (concurring). I concur with the opinion of Mr. Justice SULLIVAN in this case. To my mind this opinion rests on the true and only legal basis on which it can be founded, and does not depend for its justification on the theory that a joint stock company or association is a peculiar organization that may exercise powers and enjoy privileges and immunities not exercised or enjoyed by individuals or partnerships. There is neither reason nor any sound law against a business association calling itself a joint stock company, but such organization is nothing more nor less than a partnership—special if formed in compliance with chapter 1, tit. 11, of the Civil Code (Rev. St. 1887), otherwise general, though limited to a specific business or transaction. I do not understand that counsel for respondent has ever contended otherwise. He does urge, however, that, while they were a partnership, he has so prosecuted his action against them as to hold both the partners as such, and also all the members personally on whom he secured personal service. If his position is correct, it would still be true that he could take no judgment against any individual not served, and, on the other hand, a reversal of his judgment against the partnership on the appeal of any member thereof must necessarily inure to the benefit of all the partners. His judgment against Dernham, Kauffman, and Scott must therefore fail, whether it be considered a judgment against them as individuals or against the partnership.

### Appeal of RICE.

(Supreme Court of Idaho. April 18, 1906.)

#### 1. EXECUTORS AND ADMINISTRATORS—PUBLIC ADMINISTRATOR—FEES AND COMPENSATION—OFFICIAL LIABILITY.

A county treasurer is, under the Constitution and laws of this state, ex officio public administrator, and all fees and compensation received by him in his official capacity and as public administrator must be accounted for and reported to his county and cannot be retained by him for his personal or individual use.

#### 2. SAME—ACCOUNTING.

By virtue of holding the office of county treasurer, the individual becomes ex officio public administrator, and is thereby and for that reason alone qualified to become an administrator of an estate under subdivision 9 of section 5351, and section 5682, Rev. St. 1887, and any and all fees and compensation received by him by reason of discharging such duties, belong to the county and must be accounted for to the county.

(Syllabus by the Court.)

Appeal from District Court, Shoshone County; Ralph T. Morgan, Judge.

Hans J. Rice, county treasurer of Shoshone county, and ex officio public administrator, appealed from the action of the Board of County Commissioners of Shoshone county in refusing to pay him a quarter's salary as county treasurer, which order and action of the board was based on the neglect and refusal of the treasurer to account for the fees and compensation collected by him as public administrator. The district court sustained and affirmed the action of the board of commissioners, and the treasurer appealed therefrom. Judgment affirmed.

Henry P. Knight, for appellant. James E. Gyde, Pros. Atty., for respondent county.

AILSHIE, J. The only question to be determined on this appeal is whether or not the fees collected by the public administrator, in administering upon estates under appointment, and in the capacity of public administrator, must be turned in to the county or may be retained by him for his personal and individual benefit. Section 6 of article 18 of the Constitution makes the county treasurer ex officio public administrator. Chapter 13 of title 10 of the Code of Civil Procedure of 1887 prescribes the duties of the public administrator. By the provisions of that chapter he is required to give a separate bond in a sum not less than \$2,000 conditioned as other official bonds; and section 5681 makes it his duty to take charge of certain estates therein enumerated without appointment, and to administer same forthwith (section 5682). Section 5351, Rev. St. 1887, prescribes the order in which various persons and classes of persons are entitled to administer upon estates of deceased persons and names the public administrator as ninth in order. An examination of the Constitution and the various statutory provisions makes it clear to us that the county treasurer has cer-

tain official duties to perform and discharge as public administrator, and it is equally as clear that any fees or compensation received or collected by him for the discharge of such duties are necessarily received in his official capacity and chargeable to him in the same capacity. The fifth amendment to the Constitution, being the amendment to section 7 of article 18, provides that all county officers and their deputies shall receive as "full compensation for their services fixed annual salaries to be paid quarterly out of the county treasury as other expenses are paid." The same section further provides that "all fees which may come into his hands from whatever source over and above his actual necessary expenses shall be turned into the county treasury at the end of each quarter. He shall, at the end of each quarter, file with the clerk of the board of county commissioners a sworn statement, accompanied by proper vouchers, showing all expenses incurred and all fees received, which must be audited by the board as other accounts." Section 9 of article 18, makes it a felony for any county officer to neglect or refuse to comply with the provisions and requirements of section 7. Section 1 of the salary act of 1899 (Sess. Laws 1899, p. 405) is a substantial reiteration of the constitutional requirements hereinbefore referred to, and especially provides that the salaries of the various county officials shall be full compensation for the discharge of all their official duties and services. We have no hesitancy, therefore, in holding that all fees and compensation received by the public administrator as such and in his official capacity must be accounted for by such officer and are chargeable against him by the county.

In the case at bar it is stipulated that the officer "collected various fees for services performed by him under appointments made by the probate court, which said appointments were made because he was public administrator, in administering upon divers estates of deceased persons by virtue of such appointments." It will be seen from the stipulation that the appellant admits in this case that he has received fees and compensation in his capacity as public administrator. It, therefore, becomes unnecessary for us to determine in this case as to whether or not the public administrator is in fact entitled to charge and collect fees for administering on estates. We do hold, however, that he must account to his county for any and all fees which he has collected as such officer. The same course of reasoning adopted by this court in *Hillard v. Shoshone County*, 3 Idaho (Hast.) 103, 27 Pac. 680, *Guheen v. Curtis*, 3 Idaho (Hast.) 443, 31 Pac. 805, *Ada County v. Gess*, 4 Idaho, 611, 43 Pac. 71, and *Ada County v. Ryals*, 4 Idaho, 365, 39 Pac. 556, is applicable in the case at bar. Counsel for appellant has placed considerable stress on the fact that one who is holding the office of county treasurer might, under section 5351,

Rev. St. 1887, become entitled to administer upon an estate by reason of the relation he sustained to the deceased person and in preference to his right as public administrator, and that in such event he could not be required to account for the fees and compensation received in the course of such administration. That question does not arise in this case, and we do not feel called upon to discuss it here. It is worthy of note that in every instance, except that of public administrator, it is necessary to petition the probate court for appointment, and give public notice, and have a time fixed for hearing on the application, and after appointment is made bond must be given. On the other hand, none of these things are necessary to entitle the public administrator as such to administer. It will be observed from section 5682, Rev. St. 1887, that letters may issue without notice, and that it is not even necessary for the public administrator to file an oath in each case.

The judgment must be affirmed, and it is so ordered. Costs awarded to respondent.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

#### CITY OF STILLWATER v. SWISHER. (Supreme Court of Oklahoma. Feb. 15, 1906.)

##### 1. APPEAL—REVIEW—QUESTIONS OF FACT.

Where a disputed question of fact is submitted to a jury in the trial court, under proper instructions, the finding of the jury on such question of fact, and the judgment of the court thereon, will not be disturbed by this court, where the record shows evidence reasonably tending to support such finding.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3928.]

##### 2. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS.

A municipal corporation is bound by law to use reasonable and ordinary care and diligence to keep its streets and sidewalks in a reasonably safe condition for public travel in the ordinary modes of traveling, and if it fails so to do it is liable for injuries sustained by reason of such negligence, provided the party injured, at the time of the injury, was exercising reasonable and ordinary care to avoid injury.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1587–1591, 1612.]

##### 3. SAME—RIGHTS OF TRAVELER.

A person traveling on a public street of a city which is in constant use by the public, while using the same with reasonable care and caution, has a right to presume that such street is in reasonably safe repair, and is reasonably safe for ordinary travel by night as well as by day throughout its entire width, and is free from all dangerous holes and obstructions.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1678.]

##### 4. TRIAL—SPECIAL FINDINGS OF FACT.

Where special findings of fact are asked by either party to be submitted to the jury, such facts must be material and pertinent to the matter in controversy, and the interrogatories must ask a response as to the existence of some particular fact, and not embrace a series of facts which are necessarily included in the determi-

nation by the general verdict. The questions must be such as involve legal consequences, and have some controlling force in reaching a conclusion. They must be material and pertinent, and relate to ultimate, rather than evidentiary, facts.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Trial, §§ 828-833.]

(Syllabus by the Court.)

Error to District Court, Payne County; before Justice Jno. H. Burford.

Action by Jacob Swisher against the city of Stillwater. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action begun in the district court of Payne county, by the defendant in error, Jacob Swisher, against the city of Stillwater, plaintiff in error, in which the plaintiff alleges that the defendant is a city of the first class, located in Payne county, Oklahoma Territory; that while traveling upon one of the public streets of said city, which was regularly platted, dedicated, and used by the city as a street, the plaintiff, while exercising reasonable care and caution, was injured and sustained damages in consequence of the dangerous and defective condition of said street, caused and permitted by the defendant city. The exact nature of the injuries and the exact conditions of said street and sidewalk are particularly set out in the petition of plaintiff, to which petition defendant filed an answer of general denial, and also alleging that, if any injury or damage had been sustained by the plaintiff, it was in consequence of his own negligence. To this answer a reply was filed, and at the September term of said court the case was tried to a jury, under instructions of the court. The jury returned a verdict in favor of the plaintiff for \$1,200. Motion for new trial was made in due time, overruled by the court, and exceptions saved. The case is brought here for review.

J. W. Reece, City Atty., and Geo. P. Uhl, for plaintiff in error. Lowry & Lowry, for defendant in error.

IRWIN, J. (after stating the facts). The first eight pages of the brief and argument of counsel for plaintiff in error are devoted to an extensive discussion of the evidence, in an attempt to show that the verdict of the jury was not authorized by the evidence; but we have examined the entire record in the case, and all the evidence therein contained, and under the oft-repeated and well-recognized rule of this court that findings of fact by a jury or the trial court would not be disturbed by this court where the evidence reasonably tends to support such finding, and as the evidence in this case, it seems to us, is clearly sufficient to support the finding of the jury, this portion of the brief and argument will not be considered by this court.

The second assignment of error is that the court committed error in refusing 11 spe-

cial instructions asked by the city, each of which the city claims should have been given. We have examined these 11 special instructions, and we think that the substance of all therein contained, and every principle of law therein enunciated was fully and completely covered by the general charge of the court, and hence the refusal of these instructions was not error. In this assignment of error it is also contended by plaintiff in error that the true rule of law in such case is: "A municipal corporation is bound by law to use ordinary care and diligence to keep its streets and sidewalks in a reasonably safe condition for public use in the ordinary modes of traveling, and if it fails so to do, it is liable for injuries sustained by reason of such negligence, provided, however, that the party injured exercises ordinary care to avoid the injury." Now, we think that no one would seriously contend that this was not a correct statement of the law, and for the purposes of this opinion we are willing to concede that in this particular the statement of counsel for plaintiff in error is absolutely correct; but counsel contend that the court gave to the jury a different rule of law in his general charge. We are unable to see how counsel could arrive at this conclusion if they have carefully read the instructions of the court. We think this is exactly the principle of law laid down by the court in his general charge, as a reference to the instructions will show. Instruction No. 3 of the general charge is as follows: "A municipal corporation is required to exercise ordinary care and diligence to keep its sidewalks in a reasonably safe condition for public use in the ordinary and usual modes of travel, and if it fails to do so it is liable for injuries sustained by reason of such negligence, provided, however, that the party injured was in the exercise of ordinary care and caution at the time the injury occurred." This instruction, which was given to the jury as the law in the case by the court, certainly does not violate the principle of law as contended for by counsel for plaintiff in error, but is a fair, clear, and correct statement of the law governing the case.

In the third assignment of error it is contended by counsel that "in the eleventh of which instructions, the court in the fore part of the instruction seems to give about what we think is the law; but the plaintiff, Swisher, does not complain of his eyesight, says it was good—he seems to use glasses, but they were not even broken in that fall—but in the latter part of this instruction knocks it all over and places Swisher on a level with persons of good eyesight, so as to actually contradict the fore part of the instruction, and thereby makes the instruction useless, and leaves the jury free to exercise their judgment and volition. In this we claim there was grave error." But we think a reference to the eleventh instruction in the general charge of the court will show that this criti-

claim is entirely unwarranted, and the strange part of it is how any lawyer with these instructions before him could make this comment, and expect it to be received with credence by any intelligent court. The eleventh instruction reads as follows: "It was the duty of the plaintiff while traveling on the sidewalk to exercise reasonable care and caution to avoid injury, and if he was old, infirm, and had poor eyesight, and the night was dark and the sidewalk not lighted, or poorly lighted, and he was unacquainted with the walk and its conditions, it was his duty to exercise a higher degree of care and caution commensurate with the increased risk or danger; and if he, under all the circumstances, did exercise such caution as an ordinarily prudent person would usually exercise under similar circumstances, then he is not chargeable with any negligence, and if the city negligently permitted the stairway to extend into the sidewalk and render it dangerous under such conditions, then your verdict should be for the plaintiff." Now it will be noticed that the latter part of these instructions, which is complained of by counsel, is modified and governed all the way through by the expression used in the instruction, "if he, under all the circumstances." Then follows the language, "did exercise such caution as an ordinarily prudent person would usually exercise under similar circumstances, then he is not chargeable with any negligence." And this instruction, when submitted to the ordinary rules of construing language, and taken as a whole, certainly states the proposition of law correctly, is in no way misleading to the jury, and gives them no unwarranted license in the exercise of judgment or volition, and is not subject to the criticism put upon it by counsel for plaintiff in error.

It is next complained that the court erred in instruction No. 4, in that it placed a higher obligation on the city than is required by the law as cited above, and counsel say that as instruction No. 4 states to the jury that "it is the duty of the city of Stillwater to keep its sidewalks in a reasonably safe condition for ordinary and customary travel," that this is error. We think it requires no citation of authorities, and no discussion to demonstrate that counsel is clearly in error, and that this instruction clearly and correctly states the law.

It is next complained that in the fifth instruction the court announces an incorrect principle of law, and in their brief, at page 11, counsel for plaintiff in error use the following language: "The court therein says, in substance, 'that a pedestrian, having no knowledge of the condition of a walk in the city, has a right to assume that the city has performed its duty and that the sidewalk is in reasonably safe condition. In other words, ignorance is bliss, and if he has no knowledge of conditions, he has a right to run helter-skelter as he pleases, and if

injury or loss results the city must make good the damages. Can such a doctrine be the law? If it is, then it is in direct antagonism with every human impulse, action, and thought.'" Now we are constrained to the belief that counsel in using this language, had more of a desire to indulge in reckless rhetoric, and rampant imagination, than to state the facts; that he has sacrificed sense for sound, and that he has built up a man of straw for the sole and only purpose of showing his skill in knocking him down, as instruction No. 5 is not at all subject to the criticism made, nor does it contain any language which any person of ordinary intelligence, using calm, deliberate, and unbiased judgment, could understand to mean any such thing as that stated in the brief of counsel for plaintiff in error. To prove this, we will quote herein instruction No. 5, which is as follows: "A pedestrian or traveler passing over and upon a sidewalk, who has no notice of any defects in the walk, has a right to assume that the city has performed its duty, and that the sidewalk is in a reasonably safe condition for public travel, and if, while using the sidewalk for the usual and ordinary purposes, an injury results to a person so using the sidewalk, the question as to whether the city was at the time negligent, is one of fact to be determined by the jury. If the city failed to exercise ordinary care and diligence to keep its sidewalks reasonably safe for travel then such failure constitutes such negligence and renders the city liable to one sustaining injuries while properly using the walk. And the question of contributory negligence of the injured person is one of fact to be determined by the jury. If the injured party was at the time of the accident exercising such care and caution as ordinarily prudent persons would exercise under similar circumstances, then no contributory negligence can be imputed to him. On the other hand, although the municipality may have been guilty of negligence, if at the time of receiving the injuries complained of the injured party was not in the exercise of ordinary prudence and caution, and by reason of his failure to exercise such prudence and caution he contributed to such accident, then he cannot recover; or, if he had notice or knew of the dangerous condition of the walk, and failed to exercise ordinary care and caution to avoid the injury, then such failure would constitute such negligence on his part as would prevent any recovery." Now, it will be observed by a reading of this instruction, that all the way through the court points out to the jury the necessity of the traveler on the street using and exercising care and diligence, and that unless he has exercised such care and diligence, or if he has been guilty of negligence on his part in the use of such street, that he could not recover. The principle of law enunciated in that instruction is that where a public street in a city is in constant

use by the public, and that a person using such street with reasonable care and caution, and without notice of any defect therein, or any circumstances to apprise him of danger, has a right to presume that the street is in reasonably safe repair, and reasonably safe for ordinary travel, in the usual and ordinary mode of travel, and that the city has performed its entire duty in regard thereto. That this is a correct principle of law, based upon the evidence in this case, we do not think can be successfully gained.

In the fifth assignment of error, counsel complain of the sixth instruction given by the court in his general charge, and on page 12 of their brief in reference to this instruction, they use this extraordinary language: "The sixth instruction apparently attempts to whitewash the dark spots in the fifth instruction. To place this in an extravagant view, it is like killing a man, and then plead in excuse to the murder, that you are sorry of it. We contend that courts are not mere automatons, but that they have a knowledge of public and general sentiments and prejudices, and no one can live in this country one month and be free from restraint and mingle with the public, but must know that the sentiment of the public and its prejudices is against cities and all other corporations; aside of this, a citizen of the city is an incompetent juror, thus throwing the matter entirely into the country population where the entire prejudice is against the cities. Now under such circumstances, to throw a bait, as contained in the fifth instruction, out to a jury, and then attempt to modify it by a little whitewash, in the sixth instruction, is like throwing a ton of poison into a pool of water and attempt to counteract its effect by a half ounce of antidote." Here, again, we think the writer of this brief must have given free rein to his disordered imagination, as this would seem more like the unwarranted utterances and irresponsible spoutings of a stock orator for an anarchist association, or a socialist convention, than the sober, careful, and candid argument that we would have a right to expect in a brief addressed to this court. We are unable to say, in examining this brief, whether it is the result of malice, or want of information on the subject, but whatever may be the cause, it certainly is far from being germane to the subject, or having anything to do with the argument of the case. A reading of the sixth instruction will show how radically wrong and infinitely foolish is the comment. The sixth instruction is as follows: "In determining whether the plaintiff at the time of the accident was exercising such care as a reasonably prudent person would exercise under similar circumstances, you may take into consideration his age, the condition of his eyesight, the time of night, the extent of the darkness, whether there was any lights on the streets

or sidewalks or in the buildings which lighted the place where the accident occurred; if there was any light, the character and extent of the light; the condition of the walk, the state of the walk as to obstructions or guards along the north side of the bank building, and any and every circumstance in evidence which would in any degree influence the action of a reasonably cautious person under usual and ordinary circumstances of a reasonably similar character." The slightest and most casual examination of this instruction will show that the court was extremely cautious in directing the attention of the jury to every material element, and every significant fact and circumstance necessary to be considered in determining the question of negligence or lack of negligence on the part of the plaintiff at the time of the injury, and this instruction is certainly as fair, full, and as complete a statement of the law as the defendant could ask for, and it seems to us was drawn and given to the jury for the express purpose of protecting all the rights of the defendant in the premises.

In the seventh paragraph of plaintiff in error's brief, counsel for plaintiff in error complain of instruction No. 9, and particularly complain of the closing part of the instruction, and quote from the instruction, as follows: "And unless he has something presented to his notice to suggest an inquiry as to the safety of such sidewalks, he is not required to look for defects or dangerous places in the walk, but may rely upon the assumption that the city authorities have performed their duty, and that the sidewalk is safe for travel." And then they draw a comparison between that and the language used by this court in the case of *Town of Norman v. Teel*, 12 Okl. 69, 69 Pac. 291; but we fail to see wherein the language of this instruction in any way conflicts with the doctrine laid down in that case, and we think it is entirely in consonance therewith. This instruction simply lays down the rule, which is undoubtedly a correct one, that every person traveling a public street in a city, in the ordinary and usual mode of travel, has the right to presume, and act upon the presumption that the city has performed its legal duty so far as keeping its streets in reasonably safe repair. Counsel for plaintiff in error cite in support of their contention the case of *Wallis v. Westport*, 82 Mo. App. 526. In that case the circuit court in giving the instructions for the plaintiff, declared it to be "the duty of the defendant to keep its sidewalks in repair, and that the plaintiff had a right to presume this duty had been done and that the sidewalk was in safe condition for the use of the public, and was safe for any person passing on the same, using ordinary care. This is an incorrect expression of the law." And it is upon this statement by the Court of Appeals that counsel for plaintiff in error hinge their entire argument, but his reading of this decision is like

many people's way of reading the Bible. They begin in the middle, and stop too quick. If he had read further in the opinion, he would have seen that it had no application to this case, because the court, in the very next sentence, uses this language: "It was not the duty of the city to keep its sidewalks in an absolutely safe condition. It was only required to keep them in a reasonably safe condition. This instruction omits that qualification, and in that it was wrong." It will be seen that what the Court of Appeals of Missouri said was that, as the circuit court had omitted from the instruction the word "reasonable" and said that it was the duty of the defendant to keep its sidewalks in repair, without qualifying it by the word "reasonable," that was error. A reference to this instruction will show that its language is, "has a right to assume that the sidewalks are reasonably safe for travel," thereby removing the only defect found by the Missouri Court of Appeals in the instruction given by the Missouri circuit court.

In the eighth paragraph of counsel for plaintiff in error's brief he says that it is difficult to say just what is meant by the tenth instruction, and professes to be ignorant of what the court meant by that instruction; but we will not, after the apparent lack of understanding and misconstruction that he has placed upon previous instructions, commented on in his brief, undertake the gigantic task of explaining to him what an instruction which is in plain and unequivocal English, means. Suffice it to say, that this tenth instruction is a plain, explicit statement of the law, and is not subject to the criticism made. The instruction is as follows, to wit: "If the plaintiff was going west on the sidewalk for the purpose of getting to a place where he could urinate without being observed by passersby, and when he reached the rear of the bank building, he voluntarily turned the corner to go into the backyard and stepped off the walk into the cellarway, then you must determine whether or not he was exercising such care and diligence as persons of ordinary prudence usually exercise under similar circumstances. If he was, then he is chargeable with no negligence, and if the city was guilty of negligence in permitting this stairway and entrance to remain unguarded, then your verdict should be in his favor."

The only remaining objection urged by counsel for plaintiff in error to the ruling of the court, is the refusal to give certain special interrogatories, or certain special findings, asked for by the defendant, numbered 1, 2, 3, 4, 5, and 11. We take the true rule of law in reference to special findings to be, that where special findings are asked for, they must be findings of fact which are material and pertinent to the matter in controversy, and the interrogatories must ask a response to some particular fact, and not embrace a series of facts which are necessarily includ-

ed in a determination by the general verdict. That is, the questions must be such as involve legal consequences and have some controlling force in reaching a conclusion, and must be such as are immaterial and pertinent, and in general, relate to ultimate, rather than evidentiary, facts. The first special finding asked for, was as follows: "Was the sidewalk over which the plaintiff was walking at the time and place of the injury in a reasonably safe condition for customary public travel, under all the circumstances attending the particular time and place, notwithstanding the cellarway and cellar steps." One objection to this special finding is, that it includes in the latter part an element which is unnecessary, and not germane to the ultimate decision of the case. If the interrogatory had simply been as to the question of the reasonably safe condition of the walk at the time and place of the accident, it would have been proper, and would no doubt have been given by the court, but with that, is coupled a condition. They ask what was the condition of the walk, as to being reasonably safe, notwithstanding the cellarway and cellar steps. Thereby they involve two interrogatories as to two distinct elements in the case. That is, the general condition of the sidewalk as to being reasonably safe, and the condition of the cellarway and the cellar steps. The general rule is that a special interrogatory is confined to a particular fact involved in the case, and not involve a series of facts in one interrogatory. However this may be, it is immaterial in our judgment, whether this was a correct or incorrect special finding, because if any error existed by virtue of this being refused, it is cured by the eighth special interrogatory asked for by the defendant and given by the court. The eighth interrogatory is as follows: "If you find that said sidewalk at the time and place of injury was in an unsafe condition, state what it was that caused it to be unsafe, and what the defect was." Now, all that special interrogatory No. 1 contains, in so much as is material or necessary to decide any issue in the case, or throw any light on the general verdict, is embodied in Interrogatory No. 8 asked by the defendant, and given by the court, and answered by the jury. Interrogatory No. 2, asked for by defendant, and refused by the court is as follows: "Was the sidewalk on the south side of Eighth avenue at time and place of injury, in such a condition that a person exercising the ordinary care, caution and diligence of a reasonably prudent person might safely walk along." This was refused because it was not limited to what would be the usual or ordinary result, but places the finding of the jury upon what might possibly happen. Now, however dangerous a sidewalk might be, it is within the range of possibilities that a person might pass along the sidewalk and avoid injury. That is not the question to be decided in this case. The question is: Was the particular

injury at the time and place mentioned in the petition, due to the unsafe condition of the sidewalk? But this special finding deals with possibilities, and not probabilities. The third and fourth special findings we think were fully covered by the special findings given by the court in lieu thereof. Complaint is also made of the refusal of the court to give the eleventh finding of fact asked for by defendant, which is as follows: "When plaintiff went west on the sidewalk, on south side of Eighth avenue, was it his purpose to leave the sidewalk and go into the alley?" This was properly refused, because it was entirely and wholly immaterial to the case whether it was, or was not, or what his purpose was. If he was using the sidewalk with reasonable care and caution, and was injured, it is immaterial what his secret purpose may have been in going on or along that sidewalk, or what his intentions were.

To that portion of the brief of plaintiff in error which indulges in reckless comment upon the habit and growing tendency of the courts and juries to unjustly mulct corporations in damages, and the fixing of cases by lawyers, and what he terms the reckless disregard of truth on the part of those claiming to be injured where he enjoins upon the courts the necessity of checking the tendency to oppress and persecute weak, innocent and unoffending corporations, and to protect such infant industries as great railroad corporations, and corporate cities, and as to the powerful influence of individuals as against corporations, we have no comment to make, but would simply say to him that if such is the case, he should address his argument to the Legislature, or the people, and remedy any such evil, if any such exists. It is sufficient for us to determine what the correct principles of law are in each particular case, and whether they have been correctly applied, and not to inquire into the truthfulness of 12 citizens in the jury box, except in so far as it may be made apparent by the record in the case. We think that the rights of all parties, private or corporate, may be safely trusted to the hands of 12 unprejudiced jurors, under the instructions of the court.

Having examined the entire record, and finding no error therein, the judgment of the lower court is affirmed, at the costs of plaintiff in error. All the Justices concurring, except BURFORD, C. J., who, having tried the case below, took no part in this decision.

#### GOODWIN v. GREENWOOD.

(Supreme Court of Oklahoma. Feb. 15, 1906.)

#### 1. TRIAL — SPECIAL FINDINGS — INCONSISTENCY.

Where it appeared, in an action against a restaurant keeper for an assault by his servant, that the servant was carrying out the instructions of the defendant, who knew that the servant was going to make the assault in time to have prevented it, and the assault was made in

defendant's presence, and he failed to exercise any authority over the servant to prevent it, special findings that the plaintiff had settled his bill and was leaving the restaurant when the servant accosted him, whereupon he turned and faced the interior of the building, when the assault was made, do not authorize a judgment for defendant notwithstanding a general verdict for plaintiff.

#### 2. MASTER AND SERVANT — TORTS OF SERVANT — LIABILITY OF MASTER.

A restaurant keeper is liable for an assault on a guest by a servant acting within the scope of his authority, and making the assault because of a failure of the guest to pay what the servant thought he ought to pay for what had been furnished him.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1221, 1231.]

#### 3. SAME — INSTRUCTION.

Where there was evidence tending to show that a servant of a restaurant keeper was acting within the scope of his authority in assaulting a guest, an instruction that he went without the scope of his authority was properly refused, as it would have invaded the province of the jury.

#### 4. SAME.

In an action against a restaurant keeper for an assault by his servant, it was proper to instruct that defendant was not liable, if the assault was made without his knowledge and consent, after the relation of landlord and guest terminated, unless the servant had express authority to eject persons, or the defendant, by reasonable diligence, could have prevented the assault.

Error from District Court, Oklahoma County; before Justice B. F. Burwell.

Action by Thomas M. Greenwood against Edward Goodwin. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

The defendant in error, a practicing physician of Oklahoma City, Okl. T., on July 15, 1901, about 5 o'clock p. m., entered plaintiff in error's café for the purpose of procuring a lunch. He purchased a sandwich and paid for the same, and at the solicitation of Frank New, an employé of the plaintiff in error, ordered a fish fry, upon condition that it could be served to the defendant in error within a limited time. Being assured by the waiter, New, that he could have the lunch ready within the required time, defendant in error seated himself at one of the tables and awaited the arrival of the lunch. Some altercation took place about the length of time required by the waiter to serve the lunch, and about the time the defendant in error began preparations to eat his fish the waiter, New, insulted defendant in error by saying that he lied if he said it required longer than 10 minutes to serve the fish. Unable to tolerate the abuse of the waiter, defendant in error started to leave the café. Plaintiff in error was present in the room during all this time and failed to interfere or restrain his servant, and afterwards, as defendant in error was leaving the café, after paying for the sandwich, he, New, asked plaintiff in error if he was going to let that "old guy" go out without paying. As defendant in error turned around upon hearing this remark, a salt cellar was thrown by the waiter, New, strik-

ing defendant in error, and causing the injuries complained of. Upon trial of the issues raised by the petition and answer, the jury returned its verdict in favor of the defendant in error, and at the request of plaintiff in error the jury found specially upon questions of fact submitted as follows: "Int. 1. Was the plaintiff intoxicated immediately before and at the time of the assault complained of was made? Ans. No. Int. 2. Was Frank New acting within the purposes for which he was employed by the defendant when he struck the plaintiff? Ans. Yes. Int. 3. Was Frank New carrying out the instructions that had been given him by his employer when he hit the plaintiff? Ans. 3. Yes. Int. 4. Did the defendant know that Frank New was going to make an assault upon the plaintiff in time to have prevented it? Ans. 4. Yes. Int. 5. Had the plaintiff started to leave the defendant's place of business before the assault complained of was made? Ans. 5. Yes. Int. 6. Had the plaintiff settled his bill with the defendant to the satisfaction of defendant, and manifested his intention to the defendant of leaving the restaurant before he received the assault complained? Ans. 6. Yes. Int. 7. Did the defendant think that the plaintiff was leaving his, defendant's, place of business just prior to the time the assault complained of was made by Frank New? Ans. 7. Yes. Int. 8. If the jury answer interrogatory No. 5 'Yes,' please state whether the plaintiff changed his course from that of going towards the outer door of the restaurant to that of facing back towards the interior of the building, and towards Frank New, before the assault complained of was made? Ans. 8. Yes."

The case comes to this court predicated upon error in refusing judgment for plaintiff in error upon special interrogatories 5, 6, 7, and 8, and upon error of law committed by the trial court in giving instructions Nos. 3 and 5, as follows: "(3) One by conducting a restaurant, or other business in which he depends upon public patronage, thereby invites persons into his place of business and to patronize him, and it is the duty of a restaurant keeper and his servants to treat those who patronize his business with civility, and to protect them from unwarranted assault by the employes of such place, and in this connection you are instructed that if you find that while plaintiff was lawfully in defendant's restaurant, and while he was eating his lunch one New, an employe of said place, used insulting language to the plaintiff by telling him that he lied to the proprietor about said New not getting his lunch as soon as he had promised, and continued to use abusive language to the plaintiff, then, and in that event, the plaintiff would be justified in law in leaving the defendant's place of business without paying for such lunch, because the plaintiff would have the right in law to eat his lunch without being

subjected to humiliation and abuse at the hands of such employe, and this would be true, even though the plaintiff may have taken two or three bites of his lunch, but the rule would be different had he finished his lunch, because, if he elected to finish his lunch under such conditions, he should pay for the same; and if you find that the plaintiff left the table before eating his lunch by reason of the abuse of said New, and that New followed him towards the door and indirectly called him a 'guy,' and before the plaintiff could have reasonably left the building assaulted him without justification therefor, and that defendant was present and used no effort to prevent the assault, when he could reasonably have expected it under all of the circumstances within his knowledge, then, and in that event, the plaintiff would be entitled to recover, even though he did not encourage the said New in making such assault, and even though a party may go into a restaurant and get a meal or lunch and then refuse to pay for it, this of itself will not justify the proprietor or his employes to assault him. The law has provided him with a remedy which he must follow."

"(5) The jury are instructed that a restaurant keeper owes no duty of protecting from injury one of his guests after the relation of restaurant keeper and guest is terminated, and after the guest has settled his bill and has manifested his intention of leaving the premises, and has had a length of time sufficient to have reasonably afforded him to depart from the premises, and he remains for the purpose of quarreling with the employes without justification, and if the jury find from the evidence that the plaintiff had settled his bill with the defendant for his meal, and had manifested his intention of leaving the premises of the defendant, and had actually started to leave, and had had sufficient length of time to have gone without the defendant's premises before the assault took place, but after he had started out, turned around and had come back into the restaurant to quarrel with New, and the relation of restaurant keeper and guest had been terminated, and the defendant owed the plaintiff no protection from any assault by reason of their business relations, unless you further find that New was acting for the proprietor, with his knowledge and consent; and if the defendant had knowledge that the said New was about to eject the plaintiff from the room, without just cause, it was his duty to protect the plaintiff from injury at the hands of his servant, and if he permitted his servant to assault the plaintiff without any justification therefor in his place of business, and he in any way aided and abetted therein, then the plaintiff may recover, and in determining this fact you should take into consideration all of the evidence in the case." And also upon refusal of instruction No. 2 asked by plaintiff in error, and giving instead thereof instruc-

tion No. 8 of the court's general instructions. These are set out in the opinion in the case; such other facts being also therein stated as are necessary to a complete understanding of the propositions involved.

W. F. Wilson, for plaintiff in error. Fulton & Paul, for defendant in error.

GILLETTE, J. (after stating the facts). The first contention of the plaintiff in error is that the trial court erred in refusing and overruling a motion for judgment upon the special findings of facts Nos. 5, 6, 7, and 8, and contends that these findings conclusively entitle him to judgment. Even if it be conceded that these isolated interrogatories contain a fair statement of the facts to which they refer, we cannot conclude therefrom that such facts as are thereby established would relieve the plaintiff in error from liability. The general verdict carries with it a presumption that all necessary facts authorizing it have been established upon the trial of the case. Notwithstanding this presumption, if the special questions of fact show that some controlling fact exists inconsistent with the general verdict, in such case the special verdict must control, and the proposition here submitted is whether or not the facts established by interrogatories 5, 6, 7, and 8 are sufficient to overthrow the general verdict. By these interrogatories it is established that the defendant in error had settled his bill in the restaurant, and had started to leave the same, when he was accosted by the servant Frank New, and, upon being so accosted, he turned his face back towards the interior of the building when the assault was made. Other answers to special interrogatories show that Frank New at the time was in the employ of the plaintiff in error, and was carrying out the instructions that had been given him by his employer, who at the time knew that he was going to make an assault upon the defendant in time to have prevented it; and the evidence shows that what was done by the servant was in the immediate presence of the employer, who at the time failed to exercise any authority over the servant to prevent a vicious assault upon a guest. Under these circumstances we think it cannot rightfully be said that the restaurant keeper, plaintiff in error, was exempted from liability because of the fact that his guest had settled his bill and was in the act of leaving the establishment and turned around before leaving because of derogatory remarks made by the servant to the master concerning him. We are of the opinion that he as a guest was under the protection of the master while going from, as well as while entering, the building, and specially where, as in this case, the act of the servant complained of was because of a fancied wrong to the master in not paying the master such a sum as the servant thought ought

to have been paid. It is, we think, a clearly settled proposition of law that the master is liable for the willful, belligerent, or even malicious acts of a servant, done in the course of his employment and within the scope of his authority. And that the act of the servant in this case was within the purposes for which he was employed is settled in the affirmative by the answer to special interrogatory 2, while special interrogatory 3 shows that he was carrying out the instruction which had been given him by his employer when he hit the plaintiff. With these facts established by the verdict of the jury, we think the trial court correctly held that the motion for judgment in favor of plaintiff in error upon special findings should be overruled. A leading case upon this subject is found in 46 L. R. A. 314, *Nelson Business College v. Lloyd*, 60 Ohio St. 448, 54 N. E. 471, 71 Am. St. Rep. 729.

The plaintiff in error complains of the procedure in the trial court by reason of the giving of instructions Nos. 3 and 5, and says: "These instructions proceed plainly upon the theory that there is a liability resting upon a restaurant keeper for torts of his servants committed upon the person of his guest, and proceed upon the presumption of such liability"—citing *Rahmel v. Lehnendorf* (Cal.) 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154. It is true that the instructions complained of proceed upon the theory that there is a liability on the part of one conducting a restaurant or other business dependent upon public patronage, because persons are invited into such place of business as patrons; and the jury were informed that it was the duty of one conducting such business to treat patrons with civility, and to protect them from unwarranted assaults by the employés of the place, and in this respect we think the law was correctly stated by the trial court. The instructions, as a whole, proceed upon the theory that, to fix a liability upon a restaurant keeper because of an assault upon a patron by an employé, the employé must be acting within the scope of his employment and the assault must be found to be unjustifiable. We are not able to distinguish the liability of a restaurant keeper from that of any other master for liability for the tortious act of his servants committed within the real or apparent scope of the duties intrusted to him, and to the extent that *Rahmel v. Lehnendorf* (Cal.) 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154, is at variance with this proposition we do not agree with that case. The facts in that case, however, are not shown to be analogous to the facts in the case at bar. In that case it appeared from the only statement of facts made that "the plaintiff was a guest in the defendant's hotel, and while seated at the dinner table was assaulted and beaten by a dining room waiter." There is nothing in that record to show how the difficulty

arose or what the provocation for the assault was, or who provoked it, and the court in that case states the general law of master and servant to be that the master is not liable for the malicious torts of the servant committed outside the scope of his employment. The facts in this case are much broader. Evidence was introduced touching the scope of the servant's authority, and it is plain from an examination of the testimony that the assault was made by the servant because of a failure of the guest to pay the master what the servant thought he ought to pay in consideration of what had been furnished for him. The instructions of the court complained of were given to the jury in view of this testimony, and under the circumstances we think correctly given. See *Rommel v. Schambacher*, 120 Pa. 579, 11 Atl. 779, 6 Am. St. Rep. 732.

There is one other error presented by the brief of plaintiff in error, to wit, the refusal on the part of the court to give the second instruction asked for by him, and giving in lieu thereof the eighth instruction, which instructions are as follows: "(2) The jury are instructed that the said Frank New, as shown by the evidence adduced in this case, went without the scope of his employment in inflicting the said injuries upon the plaintiff, and that therefore the defendant would not be liable to the plaintiff in damages for such injuries, unless he authorized, commanded, or assented to the action of the said Frank New in inflicting the injuries upon the plaintiff, and that before the jury can find a verdict for the plaintiff they must find that the defendant did authorize, command, or assent to the infliction of said injuries." The above-requested instruction was by the court refused, and in its stead the court gave its eighth instruction to the jury, which eighth instruction given by the court is as follows: "(8) You are instructed that the employment of one as an ordinary waiter of tables in a restaurant does not confer upon such waiter the implied authority to eject persons from such restaurant, where the owner and proprietor is present and personally managing and controlling such business, and, if the assault in this case was made by New without the knowledge and consent of the defendant, and after the relation of landlord and guest had terminated, and after the plaintiff had had ample time to leave the restaurant, then the plaintiff cannot recover, unless you further find from the evidence that he had the express authority from the defendant to eject persons, or that the defendant could by the exercise of reasonable diligence have prevented the assault and negligently failed to do so." In the instruction requested by plaintiff in error the court is required to say that as a matter of law from the facts adduced upon the trial the waiter was not acting within the scope of his employment. Such instruction was

properly refused. By giving it the court would have invaded the province of the jury in their determination that the waiter, New, in doing what he did, was acting without the scope of his authority and employment. If the court had arrived at such a conclusion from the testimony, there was no question left to be determined by the jury, and the cause should have been determined by the court. The court, instead, gave its eighth instruction, above set out, which informed the jury of the conditions under which the plaintiff might not recover, unless the jury further found that the servant was acting under express authority to eject persons from the room, or that the plaintiff in error, by the exercise of reasonable diligence, might have prevented the assault. In this we are unable to find reversible error.

The judgment of the court below is affirmed, with costs. All the Justices concurring except BURWELL, J., who presided in the court below, not sitting.

#### In re McCASLAND & LEFTWICH.

(Supreme Court of Oklahoma. Feb. 15, 1906.)  
BANKRUPTCY—APPEALS.

An appeal from the district court in the territory, in a matter in bankruptcy, will lie to the territorial Supreme Court only: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt of \$500 or over.

(Syllabus by the Court.)

Appeal from District Court, Comanche County; before Justice F. E. Gillette.

In the matter of the bankruptcy of McCasland & Leftwich. From the decision of the district court, Tapp-Leathers Company appeal. Dismissed.

R. N. McConnell, for appellant. A. C. King, F. E. Riddle, and Sims & Wolverton, for appellee.

PANCOAST, J. This is an appeal from the decision of the district court of Comanche county, in an action in bankruptcy. The decision appealed from was upon a matter decided by the referee in bankruptcy and referred to the court for review, under section 1262 of the rules, forms and orders in bankruptcy, promulgated by the Supreme Court of the United States.

The appeal is not from a judgment adjudging or refusing to adjudge the defendants bankrupts, nor from a judgment denying or granting a discharge, nor from a judgment allowing or rejecting a claim of \$500 or over. Therefore the matters involved are not such as can be reviewed by this court on appeal. This court has held, in *Ex parte Stumppff*, 9 Okl. 639, 60 Pac. 96: "An appeal from the district court in the territory, in a matter in bankruptcy, will lie to the territorial Su-

preme Court only: (1) From a judgment adjudging or refusing to adjudge the defendant bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt of \$500 or over."

There being no question submitted to this court of which it can take cognizance, it follows that the appeal must be dismissed.

It is so ordered. All the Justices concurring, except GILLETTE, J., who tried the case below, not sitting.

### BEST v. FRAZIER.

(Supreme Court of Oklahoma. Feb. 15, 1906.)

#### 1. FORCIBLE ENTRY AND DETAINER—NOTICE.

A notice to quit, in an action of forcible entry and detainer, should show clearly who claims to be entitled to the possession of the premises, and who makes the demand therefor, and then no one but the person who thus claims the premises and makes the demand can maintain the action under such notice.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forcible Entry and Detainer, § 53.]

#### 2. PUBLIC LANDS—DETERMINATION OF ADVERSE CLAIMS—TIME OF SERVICE.

Where it appears the order of the Secretary of the Interior finally disposing of a contest between the parties is dated prior to the service of notice, in an action of forcible entry and detainer, such notice is not premature, although the fact of such decision is not known to the parties at the time of service thereof.

#### 3. FORCIBLE ENTRY AND DETAINER — DELAY IN COMMENCEMENT OF ACTION.

A delay from the 30th of June to the 27th of July of the same year, before instituting an action of forcible entry and detainer, after notice, is not such an unreasonable delay as to prevent the action being based on the notice then served.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forcible Entry and Detainer, § 83.]

#### 4. SAME—AMENDMENT.

Where, in an action of forcible entry and detainer, the complaint is founded upon a notice which fails at the trial, it is not error to permit the plaintiff to amend his pleadings to conform to the proof, and base his case upon another and sufficient notice served more than three days prior to the commencement of the action.

#### 5. PUBLIC LANDS—DETERMINATION OF ADVERSE CLAIMS—CONTEST PENDING.

Rule laid down in *Hebeisen v. Hatchell*, 69 Pac. 888, 12 Okl. 29, followed and approved.

#### 6. SAME—CONTEST—FINDINGS OF SECRETARY OF INTERIOR.

A finding by the Secretary of the Interior that a subsequent contest is not a separate action, but merely a proceeding supplemental to the original case, will, in a collateral action, be adopted and approved by this court.

#### 7. FORCIBLE ENTRY AND DETAINER—STATUTE OF LIMITATIONS.

An action of forcible entry and detainer is not barred by the statute of limitations, where brought immediately following the final disposition of a contest between the parties.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forcible Entry and Detainer, § 83.]

(Syllabus by the Court.)

Error from District Court, Kay County; before Justice Bayard T. Halner.

Action by George W. Best against William L. Frazier. Judgment for defendant, and plaintiff brings error. Affirmed.

C. W. Ransom, for plaintiff in error.  
Green & Martin, for defendant in error.

PANCOAST, J. This was an action of forcible entry and detainer, brought by George W. Best against William L. Frazier. A contest between the parties was, on May 9, 1898, terminated adversely to Best. On July 1, 1898, Best instituted further proceedings, charging Frazier with noncompliance with the law as to residence since the former hearing. This action, on appeal, was held, by a departmental decision, to be not an independent contest, but a supplemental proceeding in the original action, and was finally closed in Frazier's favor by a decision of the Secretary of the Interior, dated June 19, 1903. On June 30th of that year, Frazier gave Best notice to quit, but based his complaint upon a subsequent unsigned notice, dated July 27th. Upon the trial, however, the unsigned notice being held an insufficient compliance with the requirements of the statute, Frazier, upon application, was permitted, over the objections of Best, to amend his petition to conform to the proof, and revert to the notice of the 30th of June for the basis of his action. The position of plaintiff in error is this: That the unsigned notice, lacking the essential element of certainty as to him making the demand, is for that reason not a sufficient notice upon which to found the suit; and, further, that as the contest was still pending and the possessory rights of the parties yet undetermined, as he asserts, at the time of the prior notice, unlawful detainer would not at that time lie to remove him from the tract of land involved, and no such action could be predicated upon a notice so prematurely given. It is also claimed that the first notice was served so long before the commencement of the action that its aid cannot now be invoked in this case, and that it was, in effect, waived by the attempted service of the notice attached to the complaint below. Error is also sought to be based upon the refusal of the trial court to hold with the defendant below upon the question of the running of the statute of limitations.

It would seem, from an examination of the two principal contentions of plaintiff in error, that he is urging propositions entirely inconsistent with each other. He cannot in one breath attack the notice of the 30th of June as premature, and, later, ask a reversal of the case for the reason the statute of limitations had run before the notice was served. The first, depending as it does upon the proposition that the contest was still pending at the time of the service of the first notice, entirely negatives the second proposition that the statute of limitations had run since the accrual of the cause of

action to plaintiff below. If the plaintiff seriously contends for the proposition that the contest was undetermined at the date of the first notice, he cannot be allowed to say, in support of his second proposition, that the contest was finally disposed of so long before that the statute of limitations had run. However this may be, and whichever ground plaintiff in error may desire to rely upon in this case, neither contention appeals to us with much force. It may be conceded that the second or unsigned notice was not a sufficient foundation upon which to base the action, as it is lacking in the essential of certainty as to who claimed the premises, and was making the demand therefor. A notice to quit, in an action of forcible entry and detainer, should show clearly who claims to be entitled to the possession of the premises, and who makes the demand therefor, and, while this fact need not appear in the body of the notice or demand, it must either appear there or be shown by the signature at the end, and then no one but the person who thus claims the premises and makes the demand can maintain the action under such notice. *Nason v. Best*, 17 Kan. 408. We cannot, however, see that the second notice is of much, if any, importance in this case. It was proved on the trial, and, indeed, the defendant himself admitted when on the witness stand, that a written notice, identical with the one unsigned except that it bore the signature of Frazier, the plaintiff below, had been served upon him on the 30th of June, more than three days prior to the commencement of the action, and, from an examination of the admitted copy in the record, we cannot see wherein the notice fails. It was in writing, it properly described the premises of which possession was demanded, it is definite as to who was claiming the right to possession, there was no uncertainty as to who intended to bring the action, and it leaves no doubt in the mind of the reader either of the relief sought or by whom it was applied for.

But it is urged there are two reasons why the action should not be founded upon this prior notice: First, because it was served so long before the commencement of the action that its aid cannot now be invoked therein, that it was waived, in effect, by attempting to serve the notice attached to the complaint below; and, second, that, even if the action was commenced within a reasonable time after the service of such notice, still it cannot be maintained, because there was a contest still pending between the parties, involving the tract of land in controversy. It would appear, however, as to the first of these reasons, that a delay from the 30th of June, the date of the service of the first notice, to the 27th of July, when the action was commenced, could not be held such an unreasonable delay as to prevent plaintiff below from basing his action on the

notice then served. What is a reasonable time after notice in which to bring an action of this kind depends, of course, upon the circumstances of the particular case. This question has frequently occupied the attention of the courts, and, upon facts similar to those here, has been decided in harmony with the view herein expressed. And, taking into consideration the situation of the parties, the fact of the attempt to serve the second notice, that all the facts were fully known to the defendant at the time, and that he was in no wise misled or deceived, we cannot see wherein he was harmed by the trial court permitting the plaintiff below to amend his pleadings to conform to the proof, and revert to the notice of the 30th of June.

As to the second reason, that the action was prematurely brought, inasmuch as a contest between the parties was still pending and undetermined at the time of the service of the notice, it may be conceded that the rule is plain and well settled that unlawful detainer will not lie, so long as the rights of the parties are in dispute, and a contest undetermined; and this is the disposition early indicated by our courts, and their settled practice in those cases wherein such matters are involved. *Hebelsen v. Hatchell*, 12 Okl. 29, 69 Pac. 888. But that question is not before us, for, from the record, it is apparent that the contest instituted by Best July 1, 1898, was finally terminated in the Interior Department adversely to him on the 19th of June, 1903; and it is from and after the date of this order that Frazier was authorized to serve his notice and proceed with his action, and his right thereto in no wise depended upon the letter of July 22d, from the acting secretary to the officials of the local land office, giving notice of the prior decision of the Secretary of the Interior. for, as a matter of law, his right to prosecute his action became fixed upon the final disposition of the case on June 19th, upon the refusal of the secretary to proceed further with the contest, and, for that reason, the notice served on the 30th, following, cannot be considered as having been prematurely given.

As to the assignment of error that the statute of limitations had run prior to the institution of this action, we are unable to agree with counsel for plaintiff in error in the conclusion he has reached. By a ruling of the Interior Department, the contest instituted by Best on July 1, 1898, was held to be not a separate action, but merely a proceeding supplemental to the original case. Findings such as these will not be ignored by this court, but, on the contrary, in a collateral action will be accepted and approved, where they pertain to such matters as are properly within the province of the Secretary of the Interior to decide. Frazier's cause of action accrued only at the time the controversy between the parties was finally terminated in the Interior Department, and this, as disclosed by the record, was by the order dated

June 19, 1903. The notice to quit and the institution of the suit having immediately followed such final disposition of the contest, the plaintiff in error cannot be held to have forfeited his right of action by neglect.

For the reasons given, the judgment of the court below is affirmed. All the Justices concurring, except HAINER, J., who tried the case below, not sitting.

### TOBIN v. O'BRIETER.

(Supreme Court of Oklahoma. Feb. 15, 1906.)

#### 1. EQUITY—SUBMISSION TO JURY—CONCLUSIVENESS OF FINDINGS.

When a jury trial is not a matter of right, and the court submits to the jury special questions of fact, the answers returned thereto are merely advisory, and the court may decide for itself all questions of fact, and the law in the case, notwithstanding the findings of the jury.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 815, 816.]

#### 2. SAME.

In a case of equitable cognizance, while the judge may call in a jury, or consent to one for the purpose of advising him upon the questions of fact, he may adopt or reject their conclusions as he sees fit, and the whole matter must eventually be left to him to determine. It is not only the right, but the duty of the court to determine all questions of fact, as well as of law.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 815, 816.]

#### 3. APPEAL—REVIEW—RULINGS ON EVIDENCE.

In the trial of a case, the question of admitting or rejecting testimony is one trusted largely to the sound discretion of the trial court; and where the matter submitted by the issues in the case is not one where the parties are entitled to a jury as a matter of right, and the ultimate decision of the case is with the court, and not the jury, great latitude is allowed in the exercise of discretion by the court in admitting or rejecting testimony, and the case will not be reversed in this court for error in this particular, unless such an abuse of discretion is shown as deprives the objecting party of some substantial right.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4185.]

(Syllabus by the Court.)

Error from District Court, Oklahoma County; before Justice B. F. Burwell.

Action by L. O'Brieter against James A. Tobin. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action begun in the district court of Oklahoma county, and tried at the September term, 1903. In the petition, the plaintiff asks to have set aside certain deeds executed by the plaintiff to the defendant, on the grounds of fraud and want of mental capacity. To this petition the defendant files an answer which is practically a general denial. On the trial a jury was called by the court, and questions of fact were submitted to the jury. The evidence was heard and the jury returned answers to the special findings, to which answers the defendant objected and moved the court to set aside, which objection the court overruled, and re-

fused to set aside the findings of the jury. The court rendered a decision in favor of the plaintiff annulling the deeds, and ordered a reconveyance by the defendant to plaintiff, to all of which the defendant excepted. Motion for new trial was made and overruled by the court, and the court pronounced judgment in favor of the plaintiff and against defendant for a cancellation of the deeds, and ordered a reconveyance of the property, and taxed the costs to the defendant, to all of which the defendant excepted, and brings the case here for review.

Shartel, Keaton & Wells, for plaintiff in error. Fulton & Paul and J. L. Brown, for defendant in error.

IRWIN, J. (after stating the facts). In this case there are five reasons assigned by plaintiff in error for a reversal of this case. All except one are based upon erroneous findings of the jury. The first assignment of error is: "The answer of the jury to interrogatory No. 16 is not supported by the evidence. (2) The answer to special interrogatory No. 19 is not supported by the evidence. (3) The special findings of the jury, approved by the court, are inconsistent and contradictory. (4) The trial court erred in admitting certain incompetent and immaterial testimony on behalf of plaintiff, over the objection of defendant. (5) The trial court erred in approving the answer of the jury to special interrogatory numbered 1, and in not setting same aside as being unsupported by the evidence.

It will be borne in mind that it is clearly shown by the pleadings in this case that this is purely an equitable proceeding, being an action which asks for no other relief than the setting aside of a deed on the grounds of fraud and want of mental capacity in the grantors, except that in the petition the plaintiff asks for damages. But, in the ultimate decision of the case, no damages were awarded by the court, consequently no interest of the defendant has been affected by this allegation in the petition. No jury seems to have been demanded by the defendant to try this issue, and no finding on this issue having been found against the defendant, he has no cause for complaint. Now, we take it that the law is well established that in an action in equity, where a jury is not a matter of right to either party, that the court has the right, either on the request of either party, or of his own motion, to empanel a jury to determine any question or questions of fact that may arise in the case; but in such case, the finding of the jury is merely advisory to the court, who sits only as chancellor, and the findings of the jury are in no way binding upon the court; and where the court has heard all of the evidence in the case, he may disregard any or all of the findings of the jury, and decide the case upon the evidence as taken before him, and

whether the court does, or does not set aside the findings of the jury, the ultimate decision of the case is the decision of the court, and in determining the issues in the case the court will be governed entirely by the evidence in the case, regardless of the findings of the jury, or he may take the findings of the jury in connection with the evidence in the case, and from both these sources derive the knowledge upon which he bases his decision, and, in such case, mere erroneous findings of fact by the jury will not of themselves be a cause for reversal; and, if the findings of the court are based upon evidence which reasonably tends to support such findings, the decision will not be reversed on the grounds that the evidence does not support the finding of the jury or the court.

In the case of Jonathan Hunt et al. v. W. B. Spencer, reported in 20 Kan., at page 126, the Supreme Court of that state say: "Trial in Equity Cases—Submitting Questions to Jury—Findings of Court. In a case in which a jury is not a matter of right, the court may submit certain questions of fact to a jury, and itself thereafter, from the same testimony, make special findings upon matters not submitted to the jury, and base its decree upon both the answers of the jury and its own special findings." And in the case of Moors v. Sanford et al., 41 Pac. 1064, the Kansas Court of Appeals say: "When the issues submitted to a jury are not such as entitle the parties to a jury trial as a matter of right, the court may consider the answers which the jury returns to special questions of fact submitted to as merely advisory, and it is not error for the court in such case to set aside a finding which is contrary to the evidence, and substitute a finding of its own." In Caldwell v. Brown et al., 44 Pac. 10, the Kansas Supreme Court say: "When issues submitted to a jury are not such as entitle the parties to a jury trial, as a matter of right, the court may consider the answers as merely advisory, and may disregard any finding not supported by the evidence." In the case of Missouri Valley Lumber Company v. Reid et al., 45 Pac. 722, the Kansas Court of Appeals says: "When a jury trial is not a matter of right, and the court submits to a jury certain special questions of fact, the answers returned thereto are merely advisory; and the court may decide for itself all questions of fact and of law in the case, notwithstanding the findings of the jury." In the case of Barnes et al. v. Lynch, reported in 9 Okl. 156, 59 Pac. 995, this court says: "In cases of equitable cognizance, while the judge may call in a jury, or consent to one, for the purpose of advising him upon the questions of fact, he may adopt or reject their conclusions as he sees fit, and the whole matter must eventually be left to him to determine, and instructions to the jury furnish no ground of error upon appeal. It

was not only the right, but the duty of the court to have determined all questions of fact as well as of law." Now, in the case at bar, the court heard the testimony the same as the jury, and the fact that he overruled the motion to set aside certain findings of the jury, would not warrant us in saying that he was not governed in his decision by the evidence; and as he had the undoubted right in a case of this kind to entirely disregard the findings of the jury, and to determine the question for himself regardless of the findings of the jury, and as on an examination of the entire record we are not prepared to say that there was no evidence that reasonably tends to support the finding of the court, we do not think that for this reason the judgment and decision of the court should be reversed.

The only remaining assignment of error, and the only one argued by plaintiff in error that is not based upon the verdict of the jury, is the fourth assignment of error, to wit: "The trial court erred in admitting certain incompetent and immaterial testimony on behalf of plaintiff, over the objection of defendant." Now, we think that, considering this assignment of error literally, it contains its own answer, and must fall from its own weight. If the statement of counsel, that the testimony was immaterial, is true, then the admission or rejection of it would not be sufficient ground for a reversal of the case. If it was immaterial, it could not have much, if any, weight or effect in determining any issue in the case. But, we take it, from the fact that counsel have argued this proposition, that they do not mean that it was immaterial, but that it was incompetent and improper, and that it was material as affecting some issue in the case. Counsel in their brief point out particular testimony that they claim was improperly received. The first that our attention is called to is the question asked of plaintiff: "Who is this W. H. Ryan? Is he a witness in this case, the one that you spoke of being in partnership with?" This was objected to, and overruled by the court, and the witness answered: "Yes, sir." The next question is: "Mr. O'Briener, I will get you to state to the jury the circumstances of your going into partnership with W. H. Ryan?" This was objected to as incompetent, irrelevant, and immaterial, and not within the issues. The court, after examining the issues, overruled the objection. Now, in this case it was apparent that W. H. Ryan was a partner of the plaintiff, and was to some extent instrumental in consummating the deal out of which this deed arose, and we think it was not error for the court to ascertain what, if any, connection Ryan had with the transaction, and under what circumstances the said Ryan and the plaintiff went into partnership. This might be material, not only to show Ryan's connection with the transaction,

but also upon the issue of the mental capacity of the plaintiff. The next question was: "Have you, since or before the commencement of this suit, or now, have you any suits pending, or have you had any pending, in favor of yourself, anything of the kind, here or anywhere else?" This was objected to, and overruled. This question might be material as touching the mental capacity of the plaintiff. The next question objected to, and the admission of which is complained of, is the testimony of the plaintiff in regard to the improvements on the Illinois farm, which was a consideration for the deed in question. This might be very material as showing the relative values of the properties exchanged, as touching the question of mental capacity of the grantor. The next testimony admitted which is complained of by the plaintiff in error was as to certain statements having been made by a physician four years prior to that time, while in attendance upon the plaintiff during sickness. The claim is made here that the want of mental capacity of the plaintiff was largely due to a stroke of paralysis, had some four years prior to the making of the deed. Now we take it, that the statements of a physician while examining a patient as to his condition, are proper as tending to show the mental capacity of the patient, and where it is apparent that the testimony of the physician himself is not obtainable, that these statements may be proven by any disinterested party who heard them. In *Mutual Life Insurance Co. v. Tillman*, 84 Tex. 36, 19 S. W. 294, it is held: "Declarations of a physician made while examining a patient are admissible as *res gestæ*." And that same doctrine is laid down in 1 Wharton on Evidence, § 262. Now the inquiry as to the mental unsoundness of the plaintiff is proper to prove at any time prior to the making of the deed in question, the effect of such testimony depending to a large extent upon the condition of the unsoundness up to or near the date of the execution of the instrument. We think this was a proper subject of inquiry, and something the court had a right to know in determining these issues, and it was not error to admit these statements; but even conceding, for the sake of argument, that it was error, we do not think it was such error as would reverse the case, as the record shows that this was only one of the issues upon which it was asked to have the deed set aside, and even upon this issue, the decision of the court does not rest alone upon this testimony, but is amply supported by other evidence in the case.

Having examined the entire record, and finding no error therein, the judgment of the district court is hereby affirmed, at the costs of the plaintiff in error. All the Justices concurring, except BURWELL, J., who, having tried the case below, took no part in this decision.

DEANER v. O'HARA et al.

(Supreme Court of Colorado. May 7, 1906.)

1. TRIAL — FINDINGS — NONCONFORMITY TO PLEADINGS AND PROOF—EFFECT.

A finding at variance with and outside of the issues and unsupported by the proof is unwarranted, and will be treated as a nullity.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 935.]

2. JUDGMENT—CONSTRUCTIONS—FINDINGS.

The court, by rendering judgment in favor of a partner against a copartner for his interest in property acquired by the copartner by the use of the partnership property, must have found that the copartner acquired the property with partnership property and denied the right of the partner to share therein.

3. APPEAL—FINDINGS—PRESUMPTIONS.

In the absence of a specific finding of fact to the contrary, it must be assumed that the trial court found those facts which are responsive to the issues and essential to the judgment rendered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3764.]

4. PARTNERSHIP — ACQUISITION BY PARTNER OF PROPERTY ACQUIRED BY USE OF FIRM PROPERTY—RIGHT OF COPARTNER TO SHARE THEREIN.

Where a partner, having possession of partnership property, uses the same to acquire property in his own name, the property acquired inures to the benefit of the copartner, who may demand an interest therein corresponding in extent to his interest in the original partnership property.

[Ed. Note.—For cases in point, see vol 38, Cent. Dig. Partnership, §§ 149, 150.]

5. TRUSTS—RESULTING TRUSTS—BREACH OF DUTY OF PARTNER—RIGHT OF COPARTNER.

The interest which a partner has in property acquired by a copartner having possession of partnership property and using the same in the acquisition of such property is a resulting trust, which, to be enforceable, must be established by clear, certain and convincing evidence.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 137.]

Appeal from District Court, Lake County; Frank W. Owens, Judge.

Action by Hugh O'Hara and another against William F. Deaner. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Charles Cavender and George F. Burtch, for appellant. A. S. Blake and P. M. Wall, for appellees.

GODDARD, J. The appellant and appellees were the owners of and engaged in working a mining lease, known as the "McAllister Lease," from June 28th until the latter part of September, A. D. 1900. The lease by its terms expired the 1st day of January, A. D. 1901. It covered that portion of the workings between the second and third levels of the Maid of Erin, Henriette, and Adams mining claims situate in Lake county, Colo. It was worked at a loss up to September 18, 1900, when a settlement was had between the parties, and appellees paid to appellant their proportion of the balance of assess-

ments then due. Appellant then informed appellees that he proposed to do a little more work to determine whether a small streak of ore continued, and, if it did not turn out favorably, he was through, and should quit the lease. He returned to the property and commenced doing some underhand stoping from the third level, which was included in the lease known as the "Baker Lease," following a small streak of ore down into the McAllister ground which soon pinched out, and afterwards, and about the 24th of September, 1900, he went to work upon another piece of ground on the third level, covered by the Baker lease, about 700 or 800 feet south of the point where he did the underhand stoping, where, after driving a drift some 30 feet and an upraise some 15 feet from the back of the drift, he found a body of ore from which he realized a net profit of \$3,836.96. This work was done by appellant and two men employed by him, at an expense of about \$1,000.

The controlling and only controverted question presented by the pleadings is whether appellant acquired the right to work this portion of the ground included in the Baker lease, in consideration of his granting to the owners of the Baker lease the privilege of using the drift and upraise included in, and covered by, the McAllister lease. In other words, did appellant purchase this portion of the Baker lease with the property belonging to the partnership? The court below rendered judgment for appellees. There was no request for special findings of fact; but the court below, of its own motion, made several findings, one of which was to the effect that the appellees were excluded from all participation in the McAllister lease, and in the proceeds and profits resulting therefrom. This finding is not only at variance with, but outside of, any issue made by the pleading, and finds no support in the evidence. It was therefore unwarranted, and must be treated as a nullity. *Newby v. Myers*, 44 Kan. 477, 24 Pac. 971; *Marks v. Sayward*, 50 Cal. 58; *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 348.

Upon the particular issue presented by the pleadings, the lower court made no finding, except as indicated by the judgment rendered. By rendering judgment for the appellees, the court must have found the issue in their favor, and that appellant did purchase and acquire the interest in the Baker lease with the partnership property, and denied the right of appellees to share in the profits derived therefrom. In the absence of a specific finding of fact to the contrary, we must assume that the lower court intended to find those facts which are responsive to the issues made by the pleadings, and essential to the judgment rendered. *Fanny Rawlings M. Co. v. Tribe*, 29 Colo. 302, 68 Pac. 284; *Persse v. Gaffney*, 5 Colo. App. 374, 38 Pac. 837; *Drake v. Justice G. M. Co.*, 32 Colo. 259, 75 Pac. 912. It is a well-settled rule of law that

where one partner having possession and control of partnership property uses the same to acquire property in his own name, the property so acquired inures to the benefit of his copartner, and his copartner may demand an interest in the property obtained corresponding in extent to his interest in the original partnership property. The interest so acquired that inures to the benefit of the copartner is a resulting trust, and in order to enforce such a trust the contract or transaction out of which it arises must be established by clear, certain, and convincing evidence. *McClure v. La Plata County*, 19 Colo. 122, 34 Pac. 763; 2 *Pomeroy's Equity Jurisp.* § 1058; *Perry on Trusts*, § 137.

The testimony as to whether the appellant obtained the privilege of working that portion of the Baker lease from which the ore was taken in consideration of the use of the workings on the McAllister lease, is conflicting, and, when tested by the foregoing rule, is insufficient to sustain appellees' contention. It does not satisfactorily appear from *Hanifen's* testimony, who is the only witness on behalf of appellees as to the agreement alleged to have been made with Deaner, what portion of the Baker lease the agreement did cover, or that he (Deaner) acquired the right to work thereunder at the point where the ore was mined.

Our former opinion is withdrawn, and for the foregoing reasons the judgment will be reversed, and the cause remanded for a new trial.

Reversed.

GABBERT, C. J., and BAILEY, J., concur.

## BEST v. ROCKY MOUNTAIN NAT. BANK OF CENTRAL CITY.

(Supreme Court of Colorado. May 7, 1906.)

### 1. PARTIES—PLAINTIFFS—REAL PARTY IN INTEREST—BILLS AND NOTES.

Under Code Civ. Proc. § 3, providing that every action "shall" be prosecuted by the real party in interest except as otherwise provided, an action may be brought by a bank on a note, by mistake made payable to its president, but owned by it and at all times in its possession, and given as a renewal of a note payable to it, though section 5 provides that one in whose name a contract is made for the benefit of another "may" sue without joining the person beneficially interested.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, §§ 7, 9, 11, 20.]

### 2. SAME—CONSIDERATION—BURDEN OF PROOF.

Where, in an action by the payee of a note against the maker, there is evidence both pro and con, in addition to the note itself, as to whether defendant was a mere accommodation signer, the burden of showing a consideration is on the plaintiff.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1654.]

### 3. TRIAL—INSTRUCTIONS—CURING ERROR.

An instruction, in an action on a note, erroneously casting on the maker the burden

of showing that the note was without consideration, is not cured by a second contradictory instruction.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 705, 718.]

Error to District Court, Gilpin County; A. H. De France, Judge.

Action by the Rocky Mountain National Bank of Central City, Colo., against John Best and others. From a judgment in favor of plaintiff, defendant Best brings error. Reversed.

Clinton Reed, L. M. Goddard, S. C. Warner, and H. A. Hicks, for plaintiff in error. Wolcott, Vaile & Waterman, Chase Withrow, A. B. Seaman, and W. W. Field, for defendant in error.

GUNTER, J. This was an action against Byron J. Smith, Joseph H. Smith, and plaintiff in error, John Best, to recover upon a promissory note executed by them. There was a judgment by default against Byron J. Smith, and a verdict and judgment against Joseph H. Smith and plaintiff in error, John Best. Two points are principally relied upon for a reversal.

1. That plaintiff had no right to maintain the action; that is, that it was not the real party in interest, under section 3, Mills' Ann. Code. The facts pertinent to this contention were these: In October, 1889, Joseph H. Smith and Byron J. Smith were interested in developing a mine, their bank account was overdrawn, and further funds were necessary for continuing the operation of the mine. Defendant in error, through its then cashier, its now president, Thomas H. Potter, loaned to Byron J. Smith and Joseph H. Smith \$2,200, and a note was executed payable to it signed by Joseph H. Smith and John Best. As will appear hereinafter, there was evidence for plaintiff in error that he signed this note at the request of the bank as an accommodation maker, and that the object in his signing the note, and the purpose of the bank in requesting him to do so, was to enable it to negotiate the note. There was testimony for defendant in error that John Best was a joint and several maker of the note with reference to it, and that it accepted the note upon faith of the signature of plaintiff in error. The note that was taken in 1889 was a number of times renewed. The original note and all subsequent renewals thereafter down to March, 1893, were signed only by Joseph H. Smith and John Best, but subsequent to March, 1893, the renewal notes were signed by Byron J. Smith as well as by the two original makers above named. Upon such renewal the old note was held until the new one was fully executed and delivered, whereupon the preceding note was surrendered to the makers. As to the renewal note here sued on, being that of date December, 1898, an original draft of the note was sent to Joseph H. Smith

at Denver to execute. This copy of the note was misplaced, and another note was prepared in Denver, executed by Joseph H. Smith, and returned to the defendant in error, in which note the name of Thomas H. Potter appeared as payee instead of the name of the defendant in error, which had appeared in all of the preceding notes. Substituting the name of the bank by that of Potter was simply an oversight of Joseph H. Smith in redrafting the note. The consideration for the original note, and all the subsequent renewals was paid by the defendant in error. When the note sued on returned from Denver Mr. Potter noticed that it ran to himself instead of defendant in error. The note was delivered to the bank as its property, and it has ever since been its property, and in its possession. To repeat, the undisputed testimony is that the note at the date of its execution was and ever since has been the property of defendant in error, and has, at all times, been in its possession as it was so at the time of the institution of this action.

Plaintiff in error contends that this suit should have been brought in the name of the payee of the note, Thomas H. Potter, and that it could not be brought or maintained in the name of defendant in error. Defendant in error contends that under section 3, supra, it was the real party in interest, and that the action was properly brought in its name. The determination of this question rests upon the construction to be given the following sections of our Code. Section 3 reads: "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act." Section 5 prescribes: "An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person or persons for whose benefit the action is prosecuted. A trustee of an express trust within the meaning of this section shall be construed to include a person with whom or in whose name the contract is made for the benefit of another." It will be observed that section 3 provides that the action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the act, while section 5 prescribes that the trustee of an express trust, which includes a person in whose name a contract is made for the benefit of another, may sue without joining with him the person or persons for whose benefit the action is prosecuted.

Whatever conflict of authority there may be in other jurisdictions upon the right of the plaintiff to maintain this action, we think the question practically settled here in favor of the contention of the defendant in error. The undisputed facts here are: Defendant in error is, and at all times has been, the sole owner of the note sued upon, and the note is, and has been at all times, in its possession.

The note immediately upon its execution was delivered to defendant in error as its property, and ever since such date, in such right, it has held the note. There was no indorsement made upon the note transferring it from Potter to defendant in error. In *Davis v. Johnson*, 4 Colo. App. 545, 547, 36 Pac. 887, among other questions, the validity of a decree was involved which provided for the foreclosure of two trust deeds securing notes. The decree was in favor of the owner of these notes, the notes had not been indorsed, they were transferred only by delivery. It was contended that under our statute they could not be transferred by delivery so as to pass title to the purchaser. It was contended that such a transfer did not invest the purchaser with title to the notes. The court held that such manner of transfer did pass title, and that such holder of the note was the real party in interest, and that an action could be maintained in her name. *Inter alia* it said: "But it is not true that such transfer of a note does not invest the purchaser with title. At common law he took the equitable title, and at law could sue only in the name of the last holder of the legal title; but this distinction has been abrogated by the requirement of the Code that actions shall be prosecuted in the name of the real parties in interest; \* \* \*." *Guanier v. Sowers*, 31 Colo. 164, 167, 71 Pac. 1103, 1104, was an action by the indorsee against the makers of promissory notes. The only evidence at the trial consisted in the production by plaintiff of the promissory notes, upon the back of each of which was what purported to be a written transfer by the payee to the plaintiff. The court, after holding that there was sufficient evidence through the indorsements and possession to establish the right in the plaintiff to maintain the action said: "If such was not the law, still, under the doctrine of *Davis v. Johnson*, 4 Colo. App. 545, 36 Pac. 887, the judgment in this case was right. For it was there held that under our law, and Code of Procedure, a note payable to order may be transferred by delivery only, and without indorsement, so as to vest in the purchaser a complete title, subject, of course, to defenses in favor of the maker existing at the time of notice of the transfer. It is also held that such purchaser can sue in his own name. This case meets with our approval." The holding of the Court of Appeals in the case cited was that an indorsement was not necessary to transfer the title to a promissory note, that the title passed by delivery, and that a title so passed was sufficient to permit the holder thereof to institute a suit in his own name, he was the real party in interest for the purpose of instituting and maintaining the action. This doctrine was expressly approved in the case we have just cited from the Supreme Court. *Wescott v. Patton*, 10 Colo. App. 544, 546, 51 Pac. 1021, 1022, was an action by the as-

signee against the maker on certain promissory notes. The court said: "The only questions to be determined, therefore, are: Did the answer present an issue which required a trial? Did it put in issue any fact necessary to be proven by plaintiff before she could recover judgment? We think it did not. The answer, it is true, put in issue the alleged assignment by the payee to plaintiff, but this was not essential to the plaintiff's recovery. The answer did not attempt to put in issue the allegation that plaintiff had become and was the legal owner and holder of the note for value. This was the material part of plaintiff's allegation. If she were the legal owner and holder of the note for value, and had possession of it, she was entitled to recover even though the payee may not have made any formal assignment to her. The answer expressly admitted the execution and nonpayment of the notes, and did not set up as a defense any matter which would, if admitted, defeat a recovery."

In *Maxwell on Code Pleading* (4th Ed.) p. 22, it is said: "It may be stated as a general proposition that where the thing in action is assigned absolutely, so that the assignee becomes in fact the owner thereof, he is the real party in interest, and it is not material whether his title is legal or equitable, he may sue in his own name." *Mr. Pomeroy*, in *Remedies and Remedial Rights* (2d Ed., at section 138), says: "It is no longer, consistently with the provisions of the Codes, possible for one person to sue 'to the use of' another, as was common in some states. The parties beneficially interested must themselves bring the action. There are cases which hold that when there is a trustee of an express trust, he must bring the action, and that the beneficiary can, in no such case, sue in his own name, at least alone. The correctness of this ruling may well be doubted. The section relative to the real party in interest is, in all the Codes, imperative; while that in relation to the trustee of an express trust is permissive." And at section 140: "Upon the same principle, the equitable owner of a promissory note is the real party in interest within the statute, and is the proper person to sue upon it, although there may be no indorsement, and possession of the instrument is *prima facie* evidence of such ownership. In fact wherever the spirit of the reformed system is carried out, and this is now very generally, if not universally, the case, the equity rule as to parties is freely applied to all legal actions; and this one principle will easily solve all particular cases of difficulty or doubt." *Prof. Bliss* says: "By the law merchant, the legal title to commercial paper payable to order, can pass only by indorsement, and a purchaser who would sue as a holder, must show his right as indorsee; but one may become the equitable owner without indorsement, and as being the real party

in interest, is required to sue in his own name. No particular mode of transfer is required. A written indorsement or assignment upon the back of the paper, evidencing the debt, is to be desired as matter of evidence; but so far as concerns the right of a holder to become plaintiff, the transfer may be shown by other evidence. Thus, it may be made upon a separate paper, or a verbal sale is sufficient." Bliss on Code Pleading, § 50. The same principle is announced in the following Colorado cases: Walker v. Steel, 9 Colo. 389, 12 Pac. 423; Jackson v. Hamm, 14 Colo. 58, 23 Pac. 88; Moulton v. McLean, 5 Colo. App. 454, 462-464, 39 Pac. 78; Austin v. Snider, 17 Colo. App. 176, 182, 68 Pac. 128. Many other authorities might be cited in support of our conclusion that defendant in error was the real party in interest, and that suit is maintainable in his name, among them Eaton v. Alger, 57 Barb. (N. Y.) 189, in which there is a valuable discussion of this question.

Plaintiff in error has cited many cases as contra the conclusion we have reached, we will confine our consideration of them to those cited from this state. First National Bank v. Harnamel, 14 Colo. 259, 28 Pac. 986, 8 L. R. A. 788, 20 Am. St. Rep. 257, was an action by the First National Bank of Central City to collect certain money which it had been expressly authorized to collect by Raddon, to whom the money was owing. It was contended that the suit should have been brought in the name of the beneficial owner, Raddon. The court held that the suit could be maintained in the name of the plaintiff, the trustee. The holding is entirely consistent with the conclusion we have reached in this case. Bassett v. Inman, 7 Colo. 270, 3 Pac. 383, was an action before a justice of the peace upon a promissory note alleged to have been executed and delivered by the defendant to a third party, and by the latter assigned to the plaintiff. Also upon an account due to a third party and assigned to the plaintiff. The principal ground of reversal relied upon was the dissolution of the attachment, but it seems to have been further contended, that the suit was not properly brought in the name of the assignee of the note and the account. The court said the suit was properly brought in the name of the assignee, "even though the consideration of the assignment may have been a payment to the assignor after the recovery in the suit by the assignee." The holding simply is that the trustee of an express trust could sue. There is nothing in the opinion in conflict with our conclusion herein. In Gomer v. Stockdale, 5 Colo. App. 489, 39 Pac. 355, Stockdale, the owner of lands and timber, entered into a contract with one Jackson, a mill owner, engaged in making lumber. The contract provided that Jackson might locate his mill of machinery, and such temporary structures as were essential to his milling operations, on certain

parts of Stockdale's land. Stockdale sold to Jackson by the contract the right to fell trees and reduce them to lumber. As a consideration Jackson gave certain promissory notes maturing monthly, and to secure payment Jackson agreed to give a mortgage on the mill machinery. Jackson assigned the contract to Gomer, who brought suit upon this contract. The court held that as the legal title to rights created by the contract was in Gomer an action would lie in his name. The court said: "It has accordingly been decided that it is no infraction of this statute to bring the suit in the name of the person to whom the claim has been assigned, whether it is an open account or otherwise, although there may be annexed to the transfer the condition that when the sum is collected the whole or some part of it must be paid over to the assignor. \* \* \* Since this doctrine prevails in Colorado, it is clear that Gomer had the right to bring the suit on the transferred claim. The agreement between Gomer and Jackson concerning the disposition of the proceeds did not affect the recovery." We see nothing in this holding contrary to our conclusion in the present case. Gomer was simply the trustee of an express trust, and under section 5 of the Code, the action would lie in his name. In Walsh v. Allen, 6 Colo. App. 303, 40 Pac. 473, Allen sued Walsh upon a promissory note; defendant insisted that on account of some understanding between Allen and Gordon the original payee of the note, that a portion of the avails of the note when collected were to be paid to Gordon, and that plaintiff was not the real party in interest, and, therefore, not entitled to maintain the suit. The court held that as the legal title to the note was in Allen by reason of the assignment, the action would lie in his name.

These are all the cases cited from this jurisdiction as in conflict with the conclusion we have reached. We think no one of the cases to be contra such conclusion. Cases are cited from other jurisdictions, and cases can be found supporting the contention of plaintiff in error, but they conflict with the weight of authority, and conflict with the rule laid down in this state. It would serve no useful purpose to extend this opinion by reviewing them.

2. It is contended that the court committed reversible error in the giving of the instruction No. 3, whereby it placed upon defendant John Best the burden of showing that the note sued on was without consideration. The facts pertinent to this instruction were these. Plaintiff introduced the note signed by the defendant, John Best, Byron J. Smith, and Joseph H. Smith. The defendant Best then introduced evidence tending to show that he was only an accommodation signer of the original note, and all renewal notes, including the note sued on, that he signed such note at the request of the payee, the plaintiff

in error for its accommodation, and solely to enable it to negotiate the note. There was evidence for the plaintiff that defendant, Best, was not an accommodation maker, but a joint and several maker, and that his signature to the note was the security upon which plaintiff relied in making the loan. An issue of fact was thus presented to the jury for determination. Who should prevail thereon depended largely upon whether credit should be given to the testimony of Potter or to that of Best. It is important for the jury to know upon whom was the burden of proof as to this issue. The court thus charged the jury at plaintiff's request: "The jury are instructed that under the law in this case, the chief matters for them to consider, between the plaintiff and the defendant Best, are whether or not the defendant John Best signed the said note sued upon in this case, without consideration, and solely at the request, and for the benefit of, and for the accommodation of either the said Potter, or the plaintiff herein. And the jury are further instructed that the said promissory note itself is prima facie evidence that the said John Best signed the same as maker thereof for a valuable consideration, and the jury are further instructed that the burden is upon the defendant John Best to show by a preponderance of evidence, that he signed the said note sued upon in this action, solely at the request of the said Potter, and solely for the accommodation of the said Potter, or the said plaintiff, and wholly without consideration, and unless the jury believe from the evidence, that the said defendant John Best did so sign the said promissory note sued upon in this action, solely at the request of, and for the accommodation of the said Potter, or the said plaintiff, and without any consideration whatever, then their verdict must be for the plaintiff and against the defendant John Best. \* \* \*" It will be seen that the burden of the proof that the note was without consideration was thus placed upon the defendant below.

The weight of authority is clearly against the correctness in this particular of this instruction. Daniel's Negotiable Instruments (5th Ed.) § 164, says: "Weight of Evidence. While a bill, or negotiable note, imports in itself a consideration, yet when evidence has been introduced to rebut the presumption which it raises the burden is upon the plaintiff to satisfy the jury upon all the evidence, and by the preponderance of the evidence, that there was a consideration, and the mere production of the instrument does not shift upon the defendant the burden of proving that there was no consideration. The production of the note, as has been said, is prima facie evidence of a consideration sufficient, if not rebutted, to maintain plaintiff's case. But to hold that such an admission in the note of a consideration therefor as the words 'value received' changes the bur-

den of proof and compels defendant to assume it, would be to hold that such an admission when made orally and when not contained in the instrument would have the same effect." In *Black River Savings Bank v. Edwards*, 10 Gray (Mass.) 387, the following instruction was approved: "The burden of proof is on the plaintiffs to establish a consideration, and the burden does not shift from them to the defendant. A note containing the words 'value received,' in law imports a consideration and upon the evidence of the note itself the plaintiffs are entitled to a verdict, unless there is some other evidence to affect it. The note being produced is prima facie evidence of a consideration, yet the burden is upon the plaintiffs to satisfy the jury upon all the evidence, and by a preponderance of the evidence, that there was a consideration." In *Huntington v. Shute* (Mass.) 62 N. E. 380, decided in 1902, the court said: "The rule is well settled in this commonwealth that in an action on a promissory note, the burden of proof is on the plaintiff to establish the fact that it is given for a valuable consideration. While the production of the note with the admission or proof of the signature, makes a prima facie case, yet if the defendant puts in evidence of a want of consideration, the burden of proof does not shift, but remains upon the plaintiff. He must satisfy the jury by a fair preponderance of the evidence that the note was for a valid consideration." In *Small v. Clewley*, 62 Me. 155 and 156, 16 Am. Rep. 410, the court said: "The effect of the instruction was to impose the burden of proof upon the defendant to show that there was a want of consideration for the notes, and in this respect the instruction was erroneous." See, also, *Delano v. Bartlett*, 6 Cush. (Mass.) 364; *Search v. Miller*, 9 Neb. 26, 30, 1 N. W. 975; *Campbell v. McCormac*, 90 N. C. 491; *Bogle v. Nolan*, 96 Mo. 85, 9 S. W. 14; *Manistee Nat. Bank v. Seymour*, 64 Mich. 59, 31 N. W. 140; *Solomon v. Huey*, 1 Posey, Unrep. Cas. (Tex.) 265; *Stevenson v. Gunning's Estate*, 64 Vt. 601, 614, 25 Atl. 697; *Connery v. Macfarlane*, 97 Pa. 361.

The weight of authority is clearly in support of the contention of plaintiff in error, defendant below; that is, that the burden of proof was upon the plaintiff to show that the note was without consideration. We can see no reason for not following the prevailing doctrine. Cases are cited by defendant in error as contra this conclusion, some of them can be explained and reconciled, some cannot. There is no sufficient reason for taking them up and discussing them. We will confine our consideration to the two Colorado cases which are cited against our conclusion. They are not in conflict with our conclusion, and do not touch the point before us. *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 254, was an action by plaintiff upon certain promissory notes given by

one Isaac Cooper against his administratrix. Payment was the principal defense relied upon. All that is said in the opinion, in the most remote degree, bearing upon the question of consideration is this: "The execution and delivery of the notes being admitted, the presumption would be, in the absence of proof that they were founded upon a sufficient consideration to sustain the plaintiff's cause of action, and in addition to this, a full consideration for the notes was expressly admitted on the trial." This language is not inconsistent with our conclusion, it simply is that the execution and delivery of the notes being admitted, the presumption is that they were founded upon a sufficient consideration. It does not say that when rebutting proof going to show that there was no consideration has been introduced that the burden is not on the plaintiff to show that a valuable consideration existed for the notes. The case does not rule the question before us. *Welch v. Mayer*, 4 Colo. App. 440, 36 Pac. 613. *Groth & Company*, to whom Welch was indebted, drew an order upon Welch payable to Mayer, which order Welch accepted. There was an attempt by the debtor, Welch, to show that Mayer gave no consideration for the order. The court held that the want of consideration between Mayer and the drawer, *Groth & Co.*, was not a defense to an action on the bill or order against Welch, the drawee. The case does not go in to or decide upon whom rests the burden of proof for want of consideration in a case like the one before us. *Murphy v. Gumaer*, 12 Colo. App. 472, 55 Pac. 951, is not cited by appellee as sustaining its contention that the burden of proof as to want of consideration was upon the defendant, appellant. It is well, however, to distinguish that case. In the case we are deciding the action was brought by the payee against the maker. In such case the burden was upon the payee, the plaintiff, to show that a valuable consideration existed for the note. In *Murphy v. Gumaer*, the action was by an indorsee before maturity against the maker. In such case the burden as to want of consideration is upon the maker. A different rule obtains in this particular when the suit is by the indorsee from that which applies when the suit is by the payee. There the suit was by the indorsee, here by the payee. The distinction between the rule as to the burden of proof in the one case from that obtaining in the other developed in sections 164, 165, vol. 1, *Daniel on Negotiable Instruments* (5th Ed.)

It has been suggested that instruction No. 6, asked by defendant Best, and given, lays down the law as defendant, Best, contends it to be, and as we have here held it to be as to the burden of proof of consideration. If we assume that this instruction declares the law properly as to the burden of proof in the matter of consideration, which we do only for the purpose of this ruling, it is in direct conflict with instruction 3 given at the

request of plaintiff, and as we cannot say such conflict did not work a prejudice, we must declare that instruction 3, given at the request of plaintiff, was erroneous, was not cured by instruction 6, and worked reversible error. *Grant v. Varney*, 21 Colo. 329, 334, 40 Pac. 771.

The judgment will be reversed as to defendant Best.

Reversed.

The CHIEF JUSTICE and MAXWELL, J., concur.

# PEOPLE v. KOENIG et al.

(Supreme Court of Colorado. May 7, 1906.)

## 1. TAXATION—INHERITANCE TAXES—NATURE—CONSTRUCTION.

An inheritance tax is a special and not a general tax, and a statute imposing it is construed strictly against the government and in favor of the taxpayer.

## 2. SAME.

The inheritance tax law, imposing a tax on "property" passing by will or by the intestate laws, for which heirs, legatees, and devisees, etc., shall be liable, and declaring that when the beneficial interests to any "property" shall pass to any father, etc., the rate of taxes shall be a specified sum on every \$100 of the market value of the "property" received by each person," provided that \$10,000 of any "such estate" shall not be subject to taxes, lays a tax on the receipt of property by each person, and the exemption applies to the separate distributive shares and legacies, and not to the aggregate value of the property of decedent; the words "such estate" referring to the words "property received by each person."

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1689.]

En Banc. Error to Weld County Court; Chas. E. Southard, Judge.

Proceedings by the people against Emma Koenig, administratrix, and others, for the imposition of inheritance taxes. There was a judgment of the county court in favor of defendants, and the people bring error. Affirmed.

N. C. Miller, Atty. Gen., and W. R. Ramsay, Asst. Atty. Gen., for the People. Charles F. Tew, for defendants in error. Jas. W. McCreery, amicus curiæ.

CAMPBELL, J. The application of an exemption clause in a section of our inheritance or succession tax law is the only question for determination. Omitting parts not material to the present discussion, the section reads: "All property \* \* \* which shall pass by will or by the intestate laws of this state from any person \* \* \* to any person or persons \* \* \* shall be and is, subject to a tax at the rate hereinafter specified \* \* \* and all heirs, legatees, and devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. When the beneficial interests to any property or income therefrom shall pass to or

for the use of any father, mother, husband, etc. \* \* \* in every such case the rate of tax shall be two dollars on every hundred dollars of the clear market value of such property received by each person. \* \* \* Provided, that the sum of ten thousand dollars of any such estate shall not be subject to any such duty or taxes, and that only the amount in excess of ten thousand dollars shall be subject to the above duty or tax." A succession or inheritance tax, excise or duty is a special, not a general, tax. Whatever may be the rule of construction as to the ordinary recurring annual tax laid directly upon property and based upon a precedent valuation, it is the general doctrine that a succession tax is construed strictly against the government and in favor of the taxpayer. In *Matter of McPherson*, 104 N. Y. 306, 317, 10 N. E. 685, 58 Am. Rep. 502, a succession tax was held to be a special tax. In *Matter of Harbeck*, 161 N. Y. 211, 55 N. E. 850, Parker, C. J., said that in a succession tax where the question is involved in doubt, the doubt should be resolved in favor of the taxpayer and against the taxing power. In *Eldman v. Martinez*, 184 U. S. 578, 22 Sup. Ct. 515, 46 L. Ed. 697, the court, speaking by Mr. Justice Brown, said: "It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of exception confining the operation of duty, \* \* \* though the rule regarding exemptions from general laws imposing taxes may be different." See, also, 27 Eng. & Am. Enc. Law (2d Ed.) 340 et seq. Let us, then, examine this statute in the light of this rule, which seems to be recognized by all the authorities.

From the foregoing summary of the section, it is apparent that thereby the tax or duty imposed is upon the receipt of some beneficial interest in property which passes by will or under the intestate laws of the state. Each heir, devisee, or legatee must pay in proportion to the amount which he actually receives. While all heirs, devisees, and legatees, etc., are liable for such taxes, certainly each beneficiary can be held only for the tax on what he receives, and not on the whole estate, unless he receives the same. The term "such estate" to which the exemption applies, presupposes that that estate or property has been described or mentioned in some previous part of the section or statute. The word "property," but not "estate," is earlier employed several times in the same section. Naturally, "such estate" in the proviso relates to the next antecedent similar expression. Observing this usual rule of construction, the term "such estate," we think, refers to "such property received by each person," because that is the first preceding similar term found in the same sentence, and in the same grammatical connection. As the tax is laid upon the

receipt of "such property by each person," naturally the exemption should, and we hold does, apply to the separate distributive shares and legacies, and not to the aggregate value of the property of the decedent. "Property" and "estate" are often used synonymously, and are so used in this section. Our statute in the main is copied from the Illinois law, and the language quoted is an exact reproduction of the corresponding section therein. The Illinois statute, however, contains, in addition, the following clause: "And the tax is to be levied in above cases only upon the excess of twenty thousand dollars received by each person." The addition of this clause to our statute would not change its present obvious meaning. Its presence in the Illinois law merely serves to remove all doubt as to whether the exemption clause applies to the whole estate or to the separate distributive shares. The entire framework of the two sections, as enacted in Illinois and in Colorado, is in harmony with the general intent to make the exemption or limitation apply to the separate estates actually received.

We have been able to find and our attention has been called to no statute which, in all respects, is identical in language with ours, but the conclusion which we have reached is abundantly sustained by four cases, which we now proceed to consider, and in only one case, where the statute is materially different, do we find any ruling apparently to the contrary. In *Howell's Estate*, 147 Pa. 164, 23 Atl. 408, it was held that, under the Pennsylvania statute, the liability to the tax is to be ascertained not by the amount of the individual legacy, but by the aggregate value of the decedent's estate. The statute, however, reads: "All estates \* \* \* of every kind \* \* \* passing from any person \* \* \* either by will, or under the intestate laws of this state, \* \* \* other than to or for the use of father, mother, \* \* \* shall be and they are hereby made subject to a tax of \$5 on every hundred dollars of the clear value of such estate or estates." The word "estates" in the limitation clause was held to refer to the estates of decedents, and not to the separate legacies or devises carved out of such estates. There is no language in this act, like that in ours, in which it is specifically said that the rate of tax is upon the market value of the property received by each person. Other provisions in the Pennsylvania statute, as will be seen from an examination of the opinion in the case, fortify the construction there adopted.

A statute more nearly like ours is the collateral inheritance tax act of 1885 of New York, which was before the Court of Appeals in *Matter of Cager*, 111 N. Y. 343, 18 N. E. 866. The statute reads: "After the passage of this act all property which shall pass by will \* \* \* to any person \* \* \* other than the father," or other excepted persons, "shall be subject to a tax of \$5 of every hundred dollars of the clear, market

value of such property, provided that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax." The court held that the act was intended to authorize the imposition of taxes upon devises to collateral relatives and strangers only when the estate devised to them, individually, exceeded in value the sum of five hundred dollars. Again, in *Matter of Howe*, 112 N. Y. 100, 19 N. E. 513, 2 L. R. A. 825, the same statute was before the court, and the court said: "The remaining inquiry is as to its meaning as respects the \$500 limitation. We think that applies to the portion of property passing to the legatee or devisee, and not to the whole estate left by the testatrix." The court therein held that the tax was not upon the whole estate, but only upon so much of it as passes to certain persons, and although the executor was compelled to pay it, he was required to deduct it from the particular legacy or legacies, and no beneficiary was liable except on the share he actually received. Afterwards by the act of 1892 the Legislature of New York, for the purpose, as the courts held, of compelling a different construction of the act from that theretofore adhered to by them, expressly provided that the word "estate" and "property" when used in the succession tax law shall be taken to mean the property or interest therein of the testator, intestate, grantor, etc., and not as the property or interest therein passing or transferred to individual legatees, devisees, etc. In obedience to the legislative mandate, the courts thereafter, and so long as the statute was in force, have construed the exemption clause of the statute as applicable to the aggregate value of the whole estate. *Matter of Hoffman*, 143 N. Y. 327, 38 N. E. 311; *Matter of Corbett*, 171 N. Y. 516, 64 N. E. 209. In *State v. Hamlin*, 36 Me. 495, 30 Atl. 76, 25 L. R. A. 632, 41 Am. St. Rep. 569, under a statute providing that "All property \* \* \* which shall pass by will or by the intestate laws of this state, \* \* \* other than to or for the use of the father, mother, \* \* \* shall be liable to a tax of two and a half per cent. of its value, above the sum of five hundred dollars." It was held that the exemption of \$500 is not an exemption from the corpus of the estate, but a several exemption of that sum from each portion of the estate passing by will or descent to persons outside of the exempted classes.

In *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, the elaborate and learned opinion was written by Mr. Justice White. It construed the act of Congress of June 13, 1898, c. 448, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307], relating to inheritance or succession taxes, section 29 of which reads: "That any person or persons having in charge or trust as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where

the whole amount of such personal property as aforesaid shall exceed the sum of \$10,000 in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, \* \* \* to any person or persons \* \* \* shall be, and hereby are, made subject to a duty or tax, to be paid to the United States as follows, that is to say: Where the whole amount of said personal property shall exceed in value \$10,000, and shall not exceed in value the sum of \$25,000, the tax shall be," etc. The meaning of the exemption clause of the section was an important question in the case. The learned justice said that the statute must mean one of three things: "(1) The tax which it imposes is on the passing of the whole amount of the personal estate, with a progressive rate depending upon the sum of the whole personal estate; or (2) the tax which it levies is placed on the passing of legacies or distributive shares of personal property at a progressive rate, the amount of such rate being determined, not by the separate sum of each legacy or distributive share, but by the volume of the whole personal estate. This is the mode in which the tax was computed by the assessor, and which was sustained by the court below; or (3) the tax is on the passing of legacies or distributive shares of personalty, with a progressive rate on each, separately determined by the sum of each of such legacies or distributive shares." The court rejected both the first and second constructions, and adhered to the third, and therefore held that a separate legacy not exceeding \$10,000 was not subject to the tax, and that the limitation applied not to the aggregate amount of the personal property of the estate passing, out of which the distributive shares and legacies arise, but to those separate shares and legacies themselves. The reasoning in the opinion is instructive and helpful in the interpretation of our act. We forbear much quotation, as the argument should be read in its entirety, and is too lengthy for reproduction here.

A comparison of the act of Congress with the section of our act under consideration will show that the language of the latter manifests a clearer intention to impose the tax and apply the exemption to the separate legacies or distributive shares than does the corresponding language of the former. We regard it as entirely safe to follow the precedent established by the Supreme Court of the United States and apply the exemption clause of our section to the separate distributive shares. The learned justice, in rejecting one of the constructions strenuously contended for, showed that gross inequalities would inevitably result from the admission of the theory, and said: "It would thus come to pass that the same person, occupying the same relation, and taking in the same

character, two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel tables are found which show how inevitable and profound are the inequalities which the construction must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given. We are therefore bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

Having reached the conclusion that the obvious and most reasonable construction of our statute confines the limitation to the separate legacies or distributive shares, we are relieved of the necessity of determining whether, if the construction contended for by the state should be adopted, the act would be in harmony with the fourteenth amendment to the federal Constitution. That question is considered in *Black v. State*, 113 Wis. 205, 89 N. W. 522, 90 Am. St. Rep. 853; *Drew v. Tift*, 79 Minn. 175, 81 N. W. 839, 47 L. R. A. 525, 79 Am. St. Rep. 446; *State ex rel. v. Switzler*, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653. Reference to a similar point is made in the *Knowlton Case*, but concerning it the court did not even intimate an opinion, as no occasion for doing so existed. Following the example set by that august tribunal, we express no opinion upon this important question, since we are clearly of the opinion that the act before us does not sustain the construction claimed for it by the Attorney General.

The county court having applied the exemption clause in question to the separate estates received by each person, its ruling was in harmony with our view of the statute, and its judgment is affirmed.

Affirmed.

(86 Colo. 481)

#### MOYNAHAN v. PERKINS.

(Supreme Court of Colorado. May 7, 1906.)

#### 1. APPEAL—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

An objection to evidence, which specifies no grounds nor suggests to the court any reasons why it is inadmissible, will be disregarded on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1141; vol. 46, Cent. Dig. Trial, §§ 194-209.]

#### 2. WITNESSES—EXAMINATION—REFRESHING MEMORY—USE OF ACCOUNT BOOKS.

Where a sufficient foundation was laid for the admission of books of account, it was not error to allow a witness to refer to them to refresh his memory or to read the entries therein.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 881.]

#### 3. EVIDENCE—JUDICIAL—ADMISSIONS—EFFECT IN SUBSEQUENT TRIAL.

Where, on a trial of an action for services, the attorney for defendant admitted that, if the services were performed without a specific contract, the charges made were reasonable, the admission, if general and without limitation, conclusively settled the value of the services on a subsequent trial, while if the admission was for the purpose of that trial only, and was so understood, it was not binding on the subsequent trial.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 727, 728.]

#### 4. APPEAL—HARMLESS ERROR—ERROR—ADMISSION OF EVIDENCE.

Where, in an action for services, plaintiff testified to the value of the services, without objection to his qualification, and defendant offered no evidence in reference thereto, the admission of evidence that the attorney for defendant at a former trial admitted that the charges for the services were reasonable was not a ground for reversal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4161.]

Appeal from District Court, Teller County; John T. Shumate, Judge.

Action by Charles J. Perkins against T. J. Moynahan. From a judgment for plaintiff, defendant appeals. Affirmed.

M. B. Carpenter, for appellant. W. O. Temple and S. D. Crump, for appellee.

GODDARD, J. This is an appeal from a judgment obtained by appellee, plaintiff below, against appellant, defendant below, for services as attorney at law. Several errors are assigned, but the only ones argued by appellant are: First, allowing plaintiff, in testifying to the items and charges sued for, to refer to, and read from, his books of account; second, allowing proof of an admission made by the then attorney for defendant upon a former trial of this cause.

1. The plaintiff, who was a witness on his own behalf, sufficiently laid the foundation for the admission of his books of account in evidence, but his counsel, electing not to offer them in evidence, examined him in regard to the items they contained, and, over a general objection, the witness was permitted to refer to the books to refresh his memory, and read the entries therein. This objection might be disregarded because it specified no grounds, or in any manner suggested to the court any reasons, why the testimony was inadmissible. *Ward v. Wilms*, 16 Colo. 86, 27 Pac. 247; *Hindry v. McPhee*, 11 Colo. App. 398, 53 Pac. 389. The only reason advanced here in support of this objection is that the witness recollected the greater part of the transactions, independent of the books, and there was no necessity to refer to them. As we have stated, the foundation was sufficiently laid for the introduction of the books themselves, and we are unable to perceive any material difference between admitting them directly in evidence, and allowing the witness to refer to them to refresh his memory, or to read the entries

therein to the jury. That "the original entries, if shown to have been correctly made, might have been read in evidence," is decided in *Bonnet v. Glatfeldt*, 120 Ill. 166, 11 N. E. 250, cited by appellant.

2. If C. Hollister, who took in shorthand the testimony upon the former trial, and Mr. Perkins, and Mr. Crump testified that at the inception of the former trial Mr. Perkins, while testifying, was asked the question: "State whether or not the charges for services rendered as shown on your books of account are just and correct." To which Mr. Perkins answered: "They are." That Mr. Vanatta, who was the attorney of record for the defendant and conducted the defense at that trial, admitted "that, if the services were performed, and there was no special contract, and the different items in the bill of particulars furnished are correct, then the charges made for such services are fair and reasonable." This admission was made with reference to the bill of particulars, or statement of account, containing the items sued for. Defendant objected to the admission of this statement upon the grounds, to wit: "(1) That other services were proved in this trial in addition to these covered by the admission on the former trial; and (2) that Vanatta, who made the admission, is not now attorney of record in this case." The objection was overruled, with instructions to eliminate all new matters concerning services rendered, and charges made therefor, that were not brought into the former trial. Upon the right to prove admissions made by counsel upon a former trial, Mr. Jones, in his work on Evidence (section 261), says: "Where an absolute and unqualified admission is made in a pending cause, whether by written stipulation of the attorney or as matter of proof on the hearing, it may be used on a subsequent trial and cannot be retracted, unless by leave of the court on a proper showing of mistake, imposition, or surprise. But mere informal admissions made by counsel on one trial are not admissible on a second trial." In 1 Greenleaf on Evidence, § 186, the author thus states the rule: "The admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the cause. But to this end they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial." In *Holley v. Young*, 68 Me. 215, 28 Am. Rep. 40, it was held that "an admission made at the first trial, if reduced to writing or incorporated into a record of the case, will be binding at another trial of the case, unless the presiding justice, in the exercise of his discretion, thinks proper to relieve the party from it." In *Railway Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163, it is said in the syllabus: "An

oral admission of a fact by an attorney during the trial of a cause binds his client, and such admission may be proved on a subsequent trial of the case. If from the language used at the time or the surrounding circumstances it appears that such admission was intended as a mere waiver of proof for the purposes of that trial only, that will be the whole scope of its force; but, if it appears to have been intended as a general admission of the fact, it will be as binding as though made upon such subsequent trial, and, where it is uncertain what was the scope and intent of the admission, the matter must be left to the jury for its determination."

The court below, in respect to this admission, instructed the jury as follows: "It is claimed by the plaintiff in this case that upon a former trial Vanatta, as attorney for the defendant, \* \* \* admitted that, if the services were performed and there was no special contract, and if the different items in the bill of particulars are correct, then the charges made for such services are fair and reasonable. You are further advised that, if this was a general admission of the facts referred to and without limitation, the defendant became bound thereby in this trial, and, if you find from the testimony that such admission was so made and without qualifications, then as to all items of service contained in the paper called the 'bill of particulars,' the question of the value of such services is settled, in accordance with the charges therein made, \* \* \* provided that such services were actually performed and if such items were otherwise correct. But if it was an admission for the purpose of that trial only, and was so understood at the time by the parties, it would not be binding upon the defendant now. And you are further instructed that, if you believe from the evidence that, at the former trial, it was understood or agreed between plaintiff and the defendant, by their counsel or otherwise, that the paper called a bill of particulars, and marked Exhibit J, was to be considered as a bill of particulars proper, that is to say, that it stated all the items of account against defendant by plaintiff and being the only items sued on, then all the items testified to by plaintiff as having been discovered subsequent to the former trial of this cause are not to be considered or allowed for if you find the other issues hereinbefore spoken of in favor of the plaintiff." We think the rule announced by the district court in these instructions is correct, and properly left to the jury the question as to what weight, if any, was to be given to the admission, in view of the circumstances under which it was made. But, however this may be, its admission in any event would not have constituted prejudicial error, since the plaintiff testified to the value of his services without any objection

to his qualification, and the defendant offered no evidence in reference thereto, and the admission was merely cumulative testimony as to the value of plaintiff's services, established by undisputed testimony, and, if improperly admitted, would not be grounds for a reversal.

We think the rulings of the court presented were correct, and the judgment will be affirmed.

**Affirmed**

**GABBERT, C. J., and CAMPBELL, J.,**  
concur.

## MEMORANDUM DECISIONS.

**SCHUERMAN et al., County Sup'rs, v. TERRITORY ex rel. CLARK.** (Supreme Court of Arizona. May 12, 1906.) Appeal from District Court, Yavapai County; before Justice Richard E. Sloan. Proceeding by the territory of Arizona, upon the relation of E. S. Clark, against George H. Schuerman and others, as supervisors of the county of Yavapai. From a judgment for relator, defendants appeal. Affirmed by a divided court. Herndon & Norris and E. E. Ellinwood, for appellants. E. S. Clark, Atty. Gen., for appellee.

**PER CURIAM.** Upon the question of the affirmance or reversal by this court of the judgment of the district court in this action the members of this court qualified to participate in the determination of the appeal are equally divided in opinion, and the judgment of the district court must therefore stand affirmed. As any opinion as to the merits of the case would be but the expression of the views of a minority of the court, none will be given.

**BOWMAN v. PITSENBERGER.** (Supreme Court of Kansas. June 9, 1906.) Error from District Court, Morris County; O. L. Moore, Judge. Action between M. G. Bowman and A. N. Pitsenberger. From the judgment, Bowman brings error. Affirmed. John Maloy, for plaintiff in error. Nicholson & Pirtle, for defendant in error.

**PER CURIAM.** The only question presented in this case is that the verdict is not sustained by the evidence. No objections are made to the admission or rejection of evidence, and none to the instructions given to the jury. This court cannot weigh or reconcile evidence. The conclusion reached by the jury was reasonable and fully justified by the testimony given. There is nothing to indicate mistake, passion, or prejudice. The judgment is affirmed.

**CHICAGO, R. I. & P. RY. CO. v. WILLIS.** (Supreme Court of Kansas. June 9, 1906.) Error from District Court, Thomas County; Chas. W. Smith, Judge. Action by A. H. Willis against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed. M. A. Low, W. F. Evans, and Paul E. Walker, for plaintiff in error. E. H. Benson, Clement L. Wilson, and John Hartzler, for defendant in error.

**PER CURIAM.** The controversies involved in this case all seem ultimately to be involved in the findings of the jury as to the facts. The court instructed the jury that before the plaintiff below could recover he must prove by a

preponderance of evidence that defendant's train set out the fire; that if the fire was started before the train arrived where the fire first occurred, the defendant was not responsible, but if the fire started immediately after the train passed, they might infer that the train set the fire; that if the jury found that the train set the fire, it was prima facie evidence of negligence in the management of the train, but this presumption of negligence might be overcome and disproved, if the evidence showed that the locomotive was at the time provided with proper appliances to prevent the escape of fire and that these appliances were in good repair and that the locomotive was carefully and efficiently handled; that it was for the jury to determine whether there was negligence on the part of the defendant, either in using defective appliances or in the management of the locomotive, and if there was no negligence there could be no recovery against the defendant. In short, the court seems to have correctly instructed the jury upon every question of law involved, and to have covered every request for instruction asked by the defendant, so far as it was a correct statement of the law. If the evidence of the witnesses for the defendant below is given full credence, it made a very strong showing that the locomotive had the best appliances to prevent the escape of fire which it is practicable to use and that the locomotive was handled with the utmost care. Given full credit, their evidence showed that the fire was burning before the locomotive arrived at the point where the fire started, and that the appliances and management of the locomotive were such as to render the escape of fire from it next to impossible; and none of these witnesses were impeached nor was any of their evidence directly contradicted, unless it be as to the time of the starting of the fire. The evidence of plaintiff's witnesses tended to show that the fire started, not before, but after, the locomotive passed the point of its starting. The jury believed from the evidence that the locomotive started the fire, and so found, and hence could not well have given full credence to the accuracy of the evidence relating to the perfection of the appliances and the management of the locomotive. Were it the province of this court to weigh the evidence, we might come to a different conclusion than did the jury; but it is not. We cannot say that the verdict and judgment are not supported by evidence. The judgment of the district court is affirmed.

**MANDEVILLE v. CUDEBEC.** (Supreme Court of Kansas. June 9, 1906.) Error from District Court, Franklin County; C. A. Smart, Judge. Action by F. M. Cudebec against George J. Mandeville. Judgment for plaintiff. Defendant brings error. Affirmed. C. B. Mason, for plaintiff in error. H. A. Richards, for defendant in error.

**PER CURIAM.** This was an action to recover upon a judgment obtained by the plaintiff against the defendant in the state of Nebraska. The defense in the answer was payment, and the facts upon which defendant relied as payment were specifically set out in two separate defenses. One was an attempt to plead payment by a transfer of certain property to the plaintiff in satisfaction of the judgment. The other was an attempt to plead payment by way of a novation of a debt owing to him from one Myron Tuttle. The facts pleaded in the first defense show that the property delivered to plaintiff was delivered to him as security for the judgment, and in the second defense it is not stated that plaintiff agreed to accept Tuttle as his debtor and release the defendant. The agreement between Tuttle and the defendant that Tuttle would pay plaintiff's judgment is in writing and is set out in the pleading; but the plaintiff was not a party to this agreement, and there is no

allegation that he at any time agreed to release his judgment against the defendant and in lieu thereof accept Tuttle as his debtor. The court sustained a demurrer to this answer, and this is the only error complained of. The demurrer was properly sustained, and the judgment is affirmed.

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**ROBBINS v. BARTON BROS.** (Supreme Court of Kansas. June 9, 1906.) Error from District Court, Sedgwick County; Thos. C. Wilson, Judge. Action by Barton Bros. against W. W. Robbins. Judgment for plaintiffs, and defendant brings error. Affirmed. Henry C. Sluss, for plaintiff in error. Stanley, Vermilion & Evans and Geo. W. Cooper, for defendants in error.

**PER CURIAM.** Action for deceit, which has been threetimes tried. The two former judgments in favor of Barton Bros. were reversed for trial errors (*Robbins v. Barton Bros.*, 50 Kan. 120, 31 Pac. 686; *Robbins v. Barton Bros.*, 9 Kan. App. 558, 58 Pac. 279), and complaint is made of the third judgment rendered in their favor. The point that the evidence does not support the verdict is not good. The proof, direct and circumstantial, fairly tends to show that Robbins made statements as to Gorton's financial condition which were known by him to be untrue; that they were made to procure credit for Gorton from Barton Bros., and did deceive them; and that Barton Bros. sold goods to Gorton in reliance upon the statement, and thereby sufered loss. Robbins complains that the testimony against him is not as "solid and persuasive" on some phases of the case as is necessary to an adverse verdict; but it appears to the court to warrant the construction which the jury and trial court placed upon it, and as the disputed questions of fact have been passed upon by three juries, and the same result reached by each of them, the third verdict should not be set aside if there is substantial supporting testimony. The instructions are not open to the objections that they were inapplicable to the facts involved and did not state the issues in the case. No material error was committed in instructing the jury, and we see nothing in the other rulings complained of which prejudiced the substantial rights of the plaintiff in error. Judgment affirmed.

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**STATE v. HAMPTON.** (Supreme Court of Kansas. July 6, 1906.) Appeal from Court of Common Pleas, Wyandotte County; Wm. G. Holt Judge. L. D. Hampton was convicted of selling intoxicating liquors, and appeals. Affirmed. Hale & Maher, for appellant. C. C. Coleman, Atty. Gen., for the State.

**PER CURIAM.** The appellant was convicted of selling intoxicating liquors in violation of law. He appeals to this court, and the only error of which he complains is the giving of an instruction. This instruction pertained to the duty of the jurors in weighing evidence in determining the credibility of any particular witness. Some things are said in this instruction which, if taken independently of its accompanying language in the instruction, would be objectionable, but, read with the other parts of the same instruction and in connection with the general instruction upon the credibility of witnesses and the weight to be given to the evidence and the province and duty of the jury in respect thereto, renders that part harmless which might otherwise be objectionable. In determining the meaning and effect of any particular instruction, it should be considered in its entirety, and read in connection with all other related instructions. When thus interpreted the instruction objected to was not prejudicial. The judgment is affirmed.

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**WICHITA R. & LIGHT CO. v. LIPPINCOTT.** (Supreme Court of Kansas. June 9, 1906.) Error from District Court, Sedgwick County; Thos. C. Wilson, Judge. Action by William Lippincott against the Wichita Railroad & Light Company. Judgment for plaintiff. Defendant brings error. Affirmed. Kos Harris and V. Harris, for plaintiff in error. Adams & Adams, for defendant in error.

**PER CURIAM.** We have considered the errors assigned in the introduction of the evidence and in giving and refusing instructions in this case, and find no substantial error therein. The evidence is conflicting, and the jury in special findings found the facts upon which the plaintiff below predicated negligence in favor of the plaintiff, and in response to special questions by which the defendant sought to elicit findings of fact which would establish the contributory negligence of the plaintiff the jury answered, "We don't know." This is equivalent to finding that the evidence is not sufficient to establish the facts sought to be elicited, the burden of proving which rested upon the defendant. No motion was filed to set aside these negative findings, but a motion was filed for judgment in favor of the defendant on the general findings notwithstanding the general verdict. This was properly overruled. A motion was then filed for a new trial, on the ground, with others, that the verdict was not supported by the evidence. As before said, the evidence was conflicting, and we think there was sufficient, regarded in a light favorable to plaintiff, to sustain the verdict. Certainly the unattacked special findings of the jury are sufficient to sustain the verdict and judgment. The judgment of the district court it affirmed.









